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(2022) 10 ILRA 6
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.10.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 4493 of 2022

Lal Bihari Yadav ...Petitioner
Versus
Chairman/Sabhapati, U.P. Legislative Council & Anr. ...Respondents

Counsel for the Petitioner:
Krishan Kanhaya Pal, Pooja Pal

Counsel for the Respondents:
Gaurav Mehrotra

Constitution of India, 1950 - Article 226 & 212 – Scope of Judicial Review by this Court under Article 226 of the Constitution of India in a case of recognition/derecognition of leader of opposition - Courts cannot inquire into the validity of any proceedings in the Legislature of a St. based on alleged procedural irregularities - High court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure" - However, if there is any allegation of gross illegality or violation of constitutional provisions, the power of Judiciary is not barred by Article 212 of the Constitution of India - An ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity.

Constitution of India, 1950 - Article 208 - U.P. St. Legislature in exercise of the powers conferred by Article 208 of the Constitution of India has framed rules - U.P. Rajya Vidhan Mandal (Neta Virodhi Ki Suvidhayan) Niyamvali, 1981 –

Civil Law - Uttar Pradesh St. Legislature (Members, Emoluments and Pension) Act, 1980 - Section 2(h) - Leader of Opposition - Procedure for recognising the leader of the opposition - Uttar Pradesh St. Legislature (Members' Emoluments and Pension) Act, 1980 does not prescribes any mechanism for recognising a leader of opposition - Chairman of the Vidhan Parishad is not bound to be guided only with the criteria of recognising the leader of an opposition party, which has the greatest numerical strength - Rules provides for discretion of the Respondent no.1 to recognize and/or de-recognise a Leader of Opposition (Para 42)

Civil Law - Uttar Pradesh Legislative Council's Procedure and conduct of Business rules, 1956 - Rule 234 – By notification dated 07.07.2022 the recognition of the petitioner as the leader of the opposition in Uttar Pradesh Legislative Council was withdrawn, due to change in the number of members of the Samajwadi party from 12 to 9– No infirmity or violation of constitutional provisions in the impugned order dated 07.07.2022, by which the recognition of the petitioner as the leader of the opposition in Uttar Pradesh Legislative Council has been withdrawn (Para 6)

whenever the Speaker recognises any person as a leader of opposition he does so on the basis of precedent or practice of the Legislature in question, keeping in view at the same time, the definition in the Act - If the basis of recognition is not the Act in question but the practice prevailing then he has to follow the practice of recognising the leader of an opposition party which has not only the greatest numerical strength as required by the definition in the Act, but has also one-tenth of the total membership of the House –

Dismissed. (E-5)

List of Cases cited:

1. Karpoori Thakur Vs St. of Bihar & anr. 1982 SCC OnLine Pat 136

2. Kailash Nath Singh Yadav Vs Speaker, Vidhan Sabha, Lucknow & anr., 1992 SCC Online All 117

3. St.of Kerala Vs K. Ajith & ors., 2021 SCC Online SC 510

4. Ashish Shelar & ors. Vs Maharashtra Legislative Assembely & anr., 2021 SCC OnLine SC 312

5. Kihoto Hollohan Vs Zachillhu & ors, 1992 Supp(2) SCC 651

6. N. Mani Vs Sangeetha Theatre & ors., (2004) 12 SCC 278

7. Raja Ram Pal Vs Hon'ble Speaker, Lok Sabha & ors., (2007) 3 SCC 184

8. Amarinder Singh Vs Special Committee, Punjab Vidhan Sabha & ors., (2010) 6 SCC 113

9. K. Lakshminarayan Vs U.O.I. & anr. (2020) 14 SCC 664

10. Bradlaugh Vs Gossett reported in (1884) 12 QBD 271

11. Raja Ram Pal Vs Hon'ble Speaker, Lok Sabha & ors., (2007) 3 SCC 184

12. Imran Ali Vs U.O.I. & ors. reported in 2015 SCC Online Del 6707

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel assisted by Sri K.K. Pal for the petitioner and Sri Gaurav Mehrotra, learned counsel for the respondents.

2. This proceeding has been initiated under Article 226 of the Constitution of India by the petitioner seeking two fold reliefs, (i) A direction has been sought in the nature of mandamus commanding the respondents to stay the operation of the impugned notification dated 07.07.2022 by which the recognition of the petitioner as the leader of the opposition in Uttar Pradesh Legislative Council has been withdrawn; and (ii) A direction has also been sought in the nature of Certiorari, seeking quashing of the said impugned notification dated 07.07.2022 by which the recognition of the petitioner as the leader of the opposition in Uttar Pradesh Legislative Council has been withdrawn.

FACTS

3. Article 168 of the constitution of India provides for a Legislature in every state of the country. The same article mentions that where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council (Vidhan Parishad in Hindi) and the other as the Legislative Assembly (Vidhan Sabha in Hindi), popularly known as the upper house and lower house respectively. While all the states of India and even some union territory have Legislative Assembly, however the presence of Legislative Council is restricted to only few larger states, including the state of Uttar Pradesh. As of now, there are six states which have legislative council namely the state of Andhra Pradesh, Bihar, Karnataka, Maharashtra, Telangana and the State of Uttar Pradesh.

4. This court is concerned with the legislative Council/ Vidhan Parishad/ Upper house of the state of Uttar Pradesh which is a permanent House, consisting of 100 Members, (90 elected + 10 nominated). (Annexure-2 of the writ) and the issue relating to the validity of the impugned notification dated 07.07.2022 by which the recognition of the petitioner as the leader of

the opposition in Uttar Pradesh Legislative Council has been withdrawn.

5. The petitioner Lal Bihari Yadav is an elected member of the Uttar Pradesh Legislative Council since 2020 (Annexure-3 of the writ) and also a candidate of the political party, the Samajwadi party. The petitioner was recognized as a leader of the opposition in the Legislative Council (Vidhan Parishad) under section 2(h) of the Uttar Pradesh State Legislature (Members, Emoluments and Pension) Act, 1980 vide a letter dated 27.05.2022 (Annexure-4 of the Writ) issued by the Principal Secretary, Vidhan Parishad, Uttar Pradesh. Apparently, no reason or any criteria have been mentioned in the said letter relating to the appointment of the petitioner as the "Leader of the Opposition" and the only reference made in the said letter is that the petitioner is being appointed as "Leader of Opposition" in terms of section 2(h) of the Act, mentioned supra.

6. It is the case of the petitioner that as on 05.07.2022, the number of members of Samajwadi Party in Uttar Pradesh Vidhan parishad was 12 (Twelve) and it was decreased on 06.07.2022/07.07.2022 to 9 (Nine) and as such the petitioner's recognition as leader of opposition was withdrawn, which according to the petitioner was illegal, unconstitutional and in an arbitrary manner, without affording any opportunity of hearing. Thus, the petitioner has approached this court under the present writ petition.

CONTENTIONS

7. Heard Shri Mohd. Arif Khan, Senior Advocate assisted by Shri K.K. Pal for the petitioner, ld. Counsel appearing for the Petitioner while explaining the definition of "Leader of Opposition" as found in section 2(h) of the Uttar Pradesh Legislative Council, 1980, sought to draw pari-materia reference to the meaning of a leader of opposition in the houses of Indian Parliament. According to him, the leader of opposition is a statutory post and is defined in the salaries and allowances of leaders of opposition in parliament Act, 1977 as the leader of numerically biggest party in opposition to the government and as such recognised by the Speaker/Chairman. The Ld. Counsel has also drawn reference of definition of leader of opposition as defined in section 2(b) of the Gujarat Assembly (Leader of Opposition) salary and allowances Act, 1979 to contend that even in the said Act, the leader of the opposition has been defined to mean the member of the assembly who is for the time being the leader in the assembly of the party in opposition to the state government having the greatest numerical strength in the assembly.

8. The learned counsel in order to further buttress his point has also drawn reference to section 2 of the salary and allowances of the leader of opposition in the Assam Legislative Assembly Act, 1979 and section 2 of the leader of opposition in Maharashtra Legislature Salaries and Allowances Act, 1978. The crux of the argument of the petitioner by drawing inferences from these Act is the leader of the opposition ought to be the person, who is the leader of the opposition in the house, having the greatest numerical strength. It has been argued that the procedure for recognising the leader of the opposition is well laid down and on a request being made by the numerically largest party in opposition that its designated leader be recognised as the leader of the opposition, the speaker is bound to examine his or her

request and recognise the said person as leader of the opposition.

9. According to the learned counsel for the petitioner, there is no power of discretion vested with the speaker in the matter of recognising the leader of opposition as the discretion vested with the speaker is neither political nor arithmetical but a statutory decision. Thus, as per the petitioner, the speaker has to merely ascertain whether the party claiming the post of leader of opposition is the largest party only and therefore to say that the party cannot claim the post of leader of opposition because it does not have at last 10% of the membership of the house is devoid of any merits. Thus, the learned counsel in order to vindicate his stand has given illustration of the Delhi Assembly, wherein the opposition party got the post of leader of opposition although it has only three members in an assembly of 70 members.

10. The petitioner has painstakingly pointed out that the impugned notification dated 07.07.2022, issued by the office of principal secretary, Uttar Pradesh relating to his de-recognition as the leader of the opposition in the Uttar Pradesh Legislative Council due to change in the number of members of the Samajwadi party from 12 to 9 by referring to rule 234 of the Uttar Pradesh Legislative Council's Procedure and conduct of Business rules, 1956 is illegal and unconstitutional.

11. Mr. Gaurav Mehrotra, learned counsel appearing for the respondents has vehemently opposed the writ petition and filed a Convenience Compilation/ primary point of Arguments. Mr. Mehrotra has resisted the writ filed by the petitioner on several grounds. However, the fulcrum of his argument was basically on four points namely (i) Jurisdiction/power and authority of the Chairman of the Uttar Pradesh Legislative Council to recognize/ derecognize the Leader of Opposition; (ii)The writ petition being not maintainable against the impugned order dated 07.07.2022; (iii) Merits of the Impugned order dated 07.07.2022; (iv) Petitioner cannot claim the position of leader of opposition as a matter of right and opportunity of hearing.

12. It has also been argued by the learned counsel for the respondents that the petitioner has failed to point out any constitutional provisions or any statutory provisions in the statute applicable on U.P Legislative whereby any right to be appointed or to continue as leader of opposition has been conferred upon the petitioner. According to the Ld. Counsel, it was the discretion of the respondent No.1 to recognize the petitioner as leader of opposition vide order dated 27.05.2022 and discretion to de-recognize him vide the impugned order dated 07.07.2022 has been exercised judiciously when his party lost the minimum number of members required to transact business in the Council as per Rules of Procedure and Conduct of Business Rules, 1956.

13. Both the sides have referred to various Judgments to espouse their contentions, which included:

(i) Karpoori Thakur Vs State of Bihar & Anr. 1982 SCC OnLine Pat 136

(ii) Kailash Nath Singh Yadav Vs Speaker, Vidhan Sabha, Lucknow & Another, 1992 SCC OnLine ALL 117

(iii) State of Kerala Vs K. Ajith & Otehrs, 2021 SCC Online SC 510

(iv) Ashish Shelar and Otehrs Vs Maharashtra Legislative Assembely & Anr., 2021 SCC OnLine SC 312

(v) Kihoto Hollohan Vs Zachillhu & Ors, 1992 Supp(2) SCC 651

(vi) N. Mani Vs Sangeetha Theatre and Others, (2004) 12 SCC 278

(vii) Raja Ram Pal Vs Hon'ble Speaker, Lok Sabha & Ors., (2007) 3 SCC 184

(viii) Amarinder Singh Vs. Special Committee, Punjab Vidhan Sabha and Others, (2010) 6 SCC 113

(ix) K. Lakshminarayan Vs Union of India & Anr. (2020) 14 SCC 664

DISCUSSION & ANALYSIS

14. Having heard learned counsels for the parties at considerable length, the following question falls for this court consideration:

A. What is the scope of interference by this Court under Article 226 of the Constitution of India in a case of recognition/derecognition of leader of opposition?

B. Whether the chairman of the Legislative Council has power to de-cognize and/or recognize the Leader of Opposition.

C. Whether the petitioner has a right to be appointed as a Leader of Opposition merely as being the leader of the numerically largest party in opposition in the Legislative council.

15. The learned counsel for the respondents has submitted that the instant writ petition challenging the order dated 07/07/2022 vide which the Chairman of the Legislative Council has derecognized the petitioner as the Leader of Opposition in the Legislative Council is not maintainable as the same is barred by the provision contained in Article 212 of the Constitution of India and has referred to the judgments delivered by a coordinate bench of this Court in the case of ***Kailash Nath Singh Yadav v/s Speaker, Vidhan Sabha, Lucknow, and Anr., 1992 SCC Online All 117*** and a judgment delivered by the Patna High Court in ***Karpoori Thakur v/s State of Bihar reported in 1982 SCC Online Pat 136***. It was also submitted that in the classic case of ***Bradlaugh v/s Gossett reported in (1884) 12 QBD 271***, it has been held that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statue-law which has relation to its own internal proceedings. Thus, it was emphasized that what is said or done within the walls of the legislature with respect to conduct of business of the House, cannot be called in question in a court of law. The learned Counsel exuberantly also referred to the Commentary on the Constitution of India by D.D. Basu, wherein on page no, 10245, while discussing Article 212 of the Constitution of India, the Author has stated inter-alia "When the Speaker recognizes a member as leader of opposition, he exercises that power with respect to conduct of business of the House and cannot be called in question in a court of Law." Thus, it was submitted that the present writ petition is not maintainable.

16. This Court has given a thoughtful consideration to the arguments addressed by the learned counsel for the respondent at the Bar as well as the Convenience Compilation/ primary point of Arguments filed by him. In the understanding of this Court, our Constitution while defining "State" in Article 12 of the Constitution has included not only the Government but also the Parliament of India and Legislature of each of the States. The mention of the phrase "Parliament of India and Legislature of the state" has special significance. From

time-to-time controversy has arisen as to whether the Legislature while exercising its functions under the Constitution is subject to judicial scrutiny by courts. On behalf of the Legislature, it has been always asserted that it has inherent right to conduct its affairs without interference from any court of law and it is the sole Judge of its own procedure as being sovereign in its own sphere. However, now in view of series of judgments of the Apex Court it is almost established that Legislature in India is not a sovereign body uncontrolled and with unlimited powers and in many respects their actions can be matter of judicial scrutiny. The first judgment on the said aspect could be found in re. Article 143, Constitution of India and Delhi Laws Act (1912) etc. ***(AIR 1951 SC 332),*** wherein it was observed as follows:

".....the principal point of distinction between the British Parliament and the Indian Parliament remains and that is that the Indian Parliament is the creature of the Constitution of India and its powers, rights, privileges and obligations have to be found in the relevant Articles of the Constitution of India. It is not a sovereign body, uncontrolled with unlimited powers."

(Emphasis supplied)

17. The Constitution Bench of the Apex Court has consistently expounded that the judicial scrutiny regarding exercise of legislative privileges is constricted but not altogether barred. Although, there is complete immunity from judicial review in matters of irregularity of procedure, however the same is not correct for issues relating to allegation of gross illegality or violation of constitutional provisions. The Constitution Bench of the Apex Court in the case of ***Raja Ram Pal Vs Hon'ble Speaker, Lok Sabha & Ors., (2007) 3 SCC 184***, enumerated the principles based on a catena of decisions and noted in the said decision as follows:

"Summary of the principles relating to parameters of judicial review in relation to exercise of parliamentary provisions:

431. We may summarise the principles that can be culled out from the above discussion. They are:

(a) Parliament is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny;

(b) The constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere coordinate constitutional status, or even the status of an exalted constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of actions which partake the character of judicial or quasi judicial decision;

(c) The expediency and necessity of exercise of power or privilege by the legislature are for the determination of the legislative authority and not for determination by the courts;

(d) The judicial review of the manner of exercise of power of contempt or privilege does not mean the said jurisdiction is being usurped by the judicature;

(e) Having regard to the importance of the functions discharged by the legislature under the Constitution and the majesty and grandeur of its task, there would always be an initial presumption that the powers, privileges, etc. have been regularly and reasonably exercised, not

violating the law or the constitutional provisions, this presumption being a rebuttable one;

(f) The fact that Parliament is an august body of coordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power;

(g) While the area of powers, privileges and immunities of the legislature being exceptional and extraordinary its acts, particularly relating to exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested, and the Court would confine itself to the acknowledged parameters of judicial review and within the judicially discoverable and manageable standards, there is no foundation to the plea that a legislative body cannot be attributed jurisdictional error;

(h) The judicature is not prevented from scrutinising the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens;

(i) The broad contention that the exercise of privileges by legislatures cannot be decided against the touchstone of fundamental rights or the constitutional provisions is not correct;

(j) If a citizen, whether a non-member or a member of the legislature, complains that his fundamental rights under Article 20 or 21 had been contravened, it is the duty of this Court to examine the merits of the said contention, especially when the impugned action entails civil consequences;

(k) There is no basis to the claim of bar of exclusive cognizance or absolute immunity to the parliamentary proceedings in Article 105(3) of the Constitution;

(l) The manner of enforcement of privilege by the legislature can result in judicial scrutiny, though subject to the restrictions contained in the other constitutional provisions, for example Article 122 or 212;

(m) Article 122(1) and Article 212(1) displace the broad doctrine of exclusive cognizance of the legislature in England of exclusive cognizance of internal proceedings of the House rendering irrelevant the case law that emanated from courts in that jurisdiction; inasmuch as the same has no application to the system of governance provided by the Constitution of India;

(n) Article 122(1) and Article 212(1) prohibit the validity of any proceedings in legislature from being called in question in a court merely on the ground of irregularity of procedure;

(o) The truth or correctness of the material will not be questioned by the court nor will it go into the adequacy of the material or substitute its opinion for that of the legislature;

(p) Ordinarily, the legislature, as a body, cannot be accused of having acted for an extraneous purpose or being actuated by caprice or mala fide intention, and the court will not lightly presume abuse or misuse, giving allowance for the fact that the legislature is the best judge of such matters, but if in a given case, the allegations to such effect are made, the court may examine the validity of the said contention, the onus on the person alleging being extremely heavy;

(q) The rules which the legislature has to make for regulating its procedure and the conduct of its business

have to be subject to the provisions of the Constitution;

(r) Mere availability of the Rules of Procedure and Conduct of Business, as made by the legislature in exercise of enabling powers under the Constitution, is never a guarantee that they have been duly followed;

(s) The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny;

(t) Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;

(u) An ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity."

18. Further, even on a plain reading of Article 212 of the Constitution brings us to the forth that framers of our Constitution have barred an enquiry in respect of any proceeding in the Legislature on the ground of any alleged irregularity of procedure. However, if the procedure followed is unconstitutional or illegal then the jurisdiction of the court to examine the validity of a proceeding based on such procedure has not been ousted. Thus, there is no absolute bar of the jurisdiction of any courts as is wrongly understood under Article 212 of the constitution of India. This aspect of the matter has also been examined by the Hon'ble Supreme Court in the well-known reference under Article 143 of the Constitution of India and the opinion is reported in ***AIR 1965 SC 745***; where while considering the scope of Article 212 it was pointed as follows (at p. 768):

"Article 212 (1) seems to make it possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the Legislative Chamber if his case is that the said proceedings suffer not from mere irregularity of procedure, but from any illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that the procedure was irregular."

19. From the aforesaid pronouncements as also the Constitutional provisions, it is crystal clear that the exercise of any power or privilege by the Legislative council is immune only to the extent as indicated in Article 212(1), that is to say this court will decline to interfere if the grievance brought before it is restricted to allegations of "irregularity of procedure". However, in case there is any allegation of gross illegality or violation of constitutional provisions, the power of Judicial will not be barred by Article 212 of the Constitution of India.

20. Thus, the question would be, whether the petitioner by filing the present petition has questioned any "irregularity of procedure" or has alleged any violation of constitutional provisions. Apparently, the petitioner has challenged the impugned notification dated 07.07.2022 not only on the grounds of irregularity but also on the ground of violation of principle of natural justice and Jurisdiction of the Chairman/Speaker of the Legislative Council i.e., the Respondent no.1 to

derecognize a leader of opposition in the Council.

Whether the chairman of the Legislative Council has power to de-cognize and/or recognize the Leader of Opposition.

21. On behalf of the petitioner, it was submitted that the Chairman of the Legislative Council has no power to derecognize a Leader of Opposition. Although, the term or post of the "Leader of Opposition' has neither been defined nor finds any reference in the Constitution of India, however as commonly understood through past practise & precedence, a Leader of the Opposition is considered as the official spokesperson of the minority party in a parliament as has been commonly understood in the legislative jargon. It owes its existence to parliamentary convention according to which he is leader of the largest recognised opposition party in the House. In British Parliament, he can be regarded as the shadow Prime Minister; that is, in case the government falls or resigns, the Leader of the Opposition can lay claim to forming the next government. A Leader of opposition is usually the leader of the political party with the second largest number of seats in the House of Commons. Sometimes, he is also the overall Leader of the Opposition, viz., the leader of the opposition for both the houses of parliament taken together, which is, the House of Lords and the House of Commons. He or she receives a statutory salary and perquisites equal to those of a cabinet minister. Under the Ministerial and Other Salaries Act, 1975, the Speaker's decision on the identity of the Leader of the Opposition is final.

22. As far as the Indian Parliament is concerned, post-independence, the concept of the opposition took root in 1969, after the split of the Indian National Congress, and Ram Subhag Singh, the leader of the Indian National Congress (Organisation), was regarded as the Leader of the Opposition Party. However, it was only in 1977, with the passage of The Salary and Allowances of Leaders of Opposition in Parliament Act, 1977, that the position of the Leader of opposition came to be formally recognised along with certain emoluments and perks. Having said so, it is to be noted that neither the Constitution of India nor the Rules of Procedure and Conduct of Business in the Lok Sabha or the Rajya Sabha make any provision or provides for any procedure for appointment of a Leader of the Opposition. Even the Act providing for the salary and allowances of leader of opposition in parliament enacted in the year 1977 does not provide for any procedure and merely defines a leader of opposition for the purposes of that act only. Thus, section 2 inter-alia states:

*"**2. Definition**: In this Act, "Leader of the Opposition", in relation to either House of Parliament, means that member of the Council of States or the House of the People, as the case may be, who is, for the time being, the Leader in that House of the party in opposition to the Government having the greatest numerical strength and recognised as such by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.*

Explanation. --Where there are two or more parties in opposition to the Government, in the Council of States or in the House of the People having the same numerical strength, the Chairman of the Council of States or the Speaker of the House of the People, as the case may be, shall, having regard to the status of the

parties, recognise any one of the Leaders of such parties as the Leader of the Opposition for the purposes of this section and such recognition shall be final and conclusive.

23. Apparently, the aforesaid Act does not provide for any mechanism or procedure for appointment of a leader of opposition. Thus, one has to search for other collateral law enabling the speaker for recognition of a leader of opposition. This brings us immediately to Article 118 of the constitution of India, which inter-alia provides for making of rules for regulating each house of parliament, its procedure and the conduct of its business, wherein the "Rules of Procedure and conduct of business in Lok Sabha" have been framed. Rule 389 of the said Rues provides residuary powers to the Speaker to regulate all matters not specifically provided for in these rules and all questions relating to the detailed working of these rules. Since, no specific rule has been provided for the said purposes, time and again the speaker while recognising a leader of opposition has relied on Directions issued under Rule 389. It is in terms of this rules that Direction 121 of the Directions by the Speaker of the Lok Sabha has been provided, which inter-alia provides that in recognising a parliamentary party or group, the Speaker shall take into consideration the following principles:

"(1) An association of members who propose to form a Parliamentary Party--(a) shall have announced at the time of the general elections a distinct ideology and programme of Parliamentary work on which they have been returned to the House;

(b) Shall have an organisation both inside and outside the House; and

(c) shall have at least a strength equal to the quorum fixed to constitute a sitting of the House, that is one-tenth of the total number of members of the House.

(2) An association of members to form a Parliamentary Group shall satisfy the conditions specified in parts (a) and (b) of clause (1) and shall have at least a strength of 30 members."

24. Thus, in exercise of Rule 389 of the Rules and Procedures and Conduct of Business in the House of People, the aforesaid directions were issued by the First Speaker of Lok Sabha i.e., G.V. Mavlankar which are popularly known as "Mavlankar rule'. Direction 121 (c) of the aforesaid directions states that party having at least 10% of the strength of the House be recognized as a Parliamentary Party and leader of the largest such Parliamentary party in opposition is designated as Leader of Opposition.

25. Further, this court cannot be oblivious of the fact that Section 2 Salaries and Allowances of the Leader of Opposition in Parliament Act, 1977, defines "Leader of Opposition' as leader of the party in opposition to the government having the greatest numerical strength and recognized by the Chairman of Council of States or Speaker of House of People. However, due to the above 10% rule {Direction 121(c)} currently there is no leader of opposition in the 17th Lok Sabha as the strength of the party in opposition is less than 10% of the total strength of the House of People. As rightly pointed by the Ld. Counsel for the respondent, it was for this reason that the 1st, 2nd, 3rd, 5th,7th, 8th, and 16th Lok Sabha as well as 1st, 2nd, 3rd, 5th,7th and 8th Rajya Sabha had no leader of opposition recognized by the Speaker/ Chairman, due to the applicability

of 10% rule in all these years, since no single opposition party had more than 10% of the total membership of house. It may be pertinent to mention herein that the present Lok Sabha also does not have any leader in opposition and in fact as reported in the news, an application of the numerically largest party to be appointed as a leader of opposition was rejected by the speaker of the Lok Sabha by stating inter-alia that "After consideration of applicable provisions of relevant statutes, Directions by the Speaker, Lok Sabha (Directions 120 and 121) and several past precedents repeatedly followed for the last nearly 60 years which have been based upon decision taken by many eminent Speakers in the past, it has not been found possible to accede to your request."

26. Now, coming back to the issue on hand. As far as the state of Uttar Pradesh is concerned, the said state has also enacted The Uttar Pradesh State Legislature (Members' Emoluments and Pensions) Act, 1980, wherein Section 2(h) of the Act reads as under:

"2(h): "Leader of Opposition' as the member of the Assembly or the Council who is for the time being recognized as such by the Speaker, or the Chairman, Deputy Chairman or Parliamentary Secretary."

27. The phrase "greatest numerical strength" is conspicuously missing from the aforesaid definition, which bestows a discretion power on the speaker/ chairman of the assembly/council in choosing a Leader of Opposition. Further, Article 208 of the Constitution of India makes a provision with respect to Rules of Procedure for State Legislature and Article 208(1) of the Constitution of India confers power upon the concerned House of the Legislature of a State to make rules for regulating procedure and conduct of its business.

28. The U.P. State Legislature in exercise of the powers conferred by Article 208 of the Constitution of India has framed rules viz. U.P. Rajya Vidhan Mandal (Neta Virodhi Ki Suvidhayan) Niyamvali, 1981, wherein rule 3 of U.P. Rajya Vidhan Mandal (Neta Virodhi Ki Suvidhayan) Niyamvali, 1981 makes a provision with respect to payment of salary to the members of the opposition party. Rule 3(2) of the aforesaid rules, 1981 specifically provides that if the Chairman of the Legislative Council derecognizes a leader of opposition or if the aforesaid statutory posts otherwise falls vacant, the salary would be payable on the very next day. Thus, the seat of the leader of opposition falling vacant and the salary being payable immediately on the very next date has been envisaged by the Act, which also brings us to the fore that de-recognition is not something which is foreign to the said Act as the seat of leader of opposition may fall vacant due to various reasons, including the reason of decrease in the numerical strength of the members of the opposition party.

29. Further, there is another aspect of the matter. It cannot be lost sight of the fact that Section 2(h) of the Uttar Pradesh State Legislature (Members' Emoluments and Pensions) Act, 1980 enables but does not make it incumbent upon the Speaker or Chairman to recognize a member as Leader of Opposition. However, a perusal of Rule 3(2) of the U.P. Rajya Vidhan Mandal (Neta Virodhi Ki Suvidhayan) Niyamvali, 1981, makes it evident that the Chairman or the Speaker as the case may be has been

given the power and authority to derecognize a Leader of Opposition. Hence, it is not correct on the part of the petitioner to submit that the Chairman of the U.P. Legislative Council i.e. the Respondent no.1 has exceeded jurisdiction or has exercised authority not vested in him to derecognize the petitioner.

30. The power conferred by Section 2(h) is a discretionary power and is like any other statutory power to be exercised bona fide and in reasonable manner. In the absence of any statutory guideline, it would be a reasonable exercise of power under Section 2(h) if recognition is given to a Member as Leader of Opposition in conformity with the well-established Parliamentary conventions which are not in conflict with and do not contravene the provisions of the Constitution or any other law for the time being in force. A provision analogous to that of Section 2(h) contained in Bihar Legislature (Leaders of the Opposition Salary and Allowances) Act, 1978 came up for consideration before the Patna High Court in ***Karpoori Thakur v. State, AIR 1983 Pat 86***, wherein the learned Judge held that the basis of recognition is not the Act in question but the prevailing practice and convention and, therefore, if the Speaker recognizes any person as Leader of Opposition, he has to follow the requirements of such practice and convention also.

31. Further, Rule 234 of the Rules of Procedure and Conduct of Business Rules, 1956 has been made, wherein although Rule 234 does not talk about de-recognition of the Leader of Opposition, but it defines the "quorum' to run and conduct business in the House. That Rules 234 of the Rules of the Procedure and Conduct of Business Rules, 1956 entails inter-alia:

"Rule 234: When the attention of the Chairman is drawn by a member to a fact that less than ten members present in the Council, he shall cause a warning bell to be rung for two minutes. If the required number of members is still not present, the Chairman shall adjourn the Council to a later hour on the same day or to a future date to be named by him."

32. Thus, Rule 234 provides for the quorum for conducting business in the Council and provides that in case the number of members in the House is less than 10 members then no business can be transacted as the quorum would be incomplete. Pertinently, the Mavlankar rule, also gives great significance to the concept of Quorum in choosing a Leader of Opposition. As a corollary, in case the leader of opposition when does not enjoy even the strength of forming a quorum, obviously there cannot be any business transacted in the House and thus would be merely a ceremonial leader, without any relevance. Thus, there is no infirmity in placing reliance on Rule 234 of the Procedure and Conduct of Business Rules, 1956 as has been done in the impugned order dated 07/07/2022 since the rational is that the Leader of Opposition along with his opposition party should be capable of transacting business in the Council even in absence of the remaining members. Relevant to the context, as has been rightly pointed out by the learned Counsel for the respondent that in the Commentary on the Constitution of India, 9th Edition Volume 8 by D.D. Basu, page no. 7933 it has been stated by the great Author as follows:

"The Leader of Opposition in each house is recognized as the leader of the opposition provided that the party has the strength which would enable it to keep

the house i.e., the number should not be less than the quorum fixed to constitute a sitting of the house which is one-tenth of the total membership of the house."

33. Similar views have been expressed by other constitutional experts like Subhash C. Kashyap, who in his Book titled Parliamentary Procedure, The Law, Privileges, Practice and Precedents, (Volume 2, Chapter 2) has stated that the leader of the opposition in each house is recognized as the leader of the opposition provided that the party has a strength which would enable it to keep the house, i.e., the number should not be less than the quorum fixed to constitute a sitting of the house which is one-tenth of the total membership of the house.

34. Thus, from the aforesaid, it is evident that the impugned order dated 07/07/2022 wherein reliance has been placed on Rule 234 of the Rules of Procedure and Conduct of Business Rules, 1956 does not suffers from any legal infirmity since the quorum to transact business in the U.P. Legislative Council is 10 and apparently the strength of the opposition party has fallen to 09 therefore, such an opposition party alone would not be able to transact any business in the Legislative Council. In the present case, as soon as the Respondent no. 1 was satisfied that the strength of the opposition party in the Council has fallen below 10 i.e., the minimum number required to complete the quorum to enable the opposition party alone to transact business in the Council, the Petitioner was de-recognized by the impugned order.

Whether the petitioner has a right to be appointed as a Leader of Opposition merely as being the leader of the numerically largest party in opposition in the Legislative council.

35. It has been argued by the learned Counsel for the petitioner that the petitioner is entitled to be appointed as the leader of the opposition by placing reliance on the Rules of various other State Legislative Assemblies and Councils like Assam, Maharashtra and Gujarat, wherein the leader of the numerically largest party in opposition is chosen as the leader of Opposition. It is the submission of the learned counsel that the petitioner may be treated in the similar manner for the UP legislative assembly as he continues to be the leader of the numerically largest party in opposition.

36. Since, Article 208 of Constitution of India, provides that every state legislature is empowered to frame its own rules for conduct of its business, therefore, Rules of Assam, Maharashtra and Gujarat Assemblies and Councils have got no relevance as far as the state of Uttar Pradesh is concerned, especially when as far as the U.P. State Legislative Council is concerned, the U.P. Rajya Vidhan Mandal (Neta Virodhi Ki Suvidhyan) Niyamvali, 1981 has been enacted and it is this rules, which are applicable to the case of the petitioner.

37. Further, their does not exists any mandate under the constitution for appointment of leader of opposition. Merely because the petitioner is the leader of the numerically largest party in opposition in the legislative council does not gives him an inalienable right to be recognized as a leader of opposition and the onus is on the Petitioner to make a case for himself. Reliance in the aforesaid regard may be placed on the dictum of the Hon'ble

Delhi High Court in the case of **Imran Ali v/s Union of India and others reported in 2015 SCC Online Del 6707**, wherein, one of the arguments of the Assistant Solicitor General before the Hon'ble Delhi High Court was that the speaker is not bound to recognize anyone as a leader of opposition and ultimately the Hon'ble Delhi High Court was pleased to dismiss the petition vide its Judgement and order dated 14/01/2015.

38. The Hon'ble Apex court in the case of **Kihoto Hollohan vs Zachillhu and Others, 1992 SCC Supl. (2) 651**, although answering to the adjudicatory functions vested in the speaker/ chairman under the anti-defection law, held that the speaker/chairman holds a pivotal position in the scheme of parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far-reaching decisions in the functioning of parliamentary democracy. The Hon'ble Apex court went on to observe at paragraph 116 and 117 as follows:

"116. Mavalankar, who was himself a distinguished occupant of that high office, says:

"In parliamentary democracy, the office of the Speaker is held in very high esteem and respect. There are many reasons for this. Some of them are purely historical and some are inherent in the concept of parliamentary democracy and the powers and duties of the Speaker. Once a person is elected Speaker, he is expected to be above parties, above politics. In other words, he belongs to all the members or belongs to none. He holds the scales of justice evenly irrespective of party or person, though no one expects that he will do absolute justice in all matters; because, as a human being he has his human drawbacks and shortcomings. However, everybody knows that he will intentionally do no injustice or show partiality. "Such a person is naturally held in respect by all."

[See : G. V. Mavalankar : The Office of Speaker, Journal of Parliamentary Information, April 1956, Vol. 2, No. 1, p.33]

117. Pandit Nehru referring to the office of the Speaker said:

"....The speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the nation's freedom and liberty. Therefore, it is right that that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality. [See: HOP. Deb. Vol.IX (1954), CC 3447-48]

Referring to the Speaker, Erskine may say:

"The Chief characteristics attaching to the office of Speaker in the House of Commons are authority and impartiality. As a symbol of his authority he is accompanied by the Royal Mace which is borne before him when entering and leaving the chamber and upon state occasions by the Sergeant at Arms attending the House of Commons, and is placed upon the table when he is in the chair. In debate all speeches are addressed to him and he calls upon Members to speak - a choice which is not open to dispute. When he rises to preserve order or to give a ruling on a doubtful point he must always be heard in silence and no Member may stand when the Speaker is on his feet. Reflections upon the character or actions of the Speaker may be punished as breaches of privilege. His action cannot be criticized incidentally in debate or upon any form of proceeding except a

substantive motion. His authority in the chair is fortified by many special powers which are referred to below. Confidence in the impartiality of the Speaker is an indispensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality of the Speaker but also to ensure that his impartiality is generally recognised....."

[See: Erskine May - Parliamentary Practice - 20th edition p. 234 and 235]

M.N. Kaul and S.L. Shakdher in `Practice and procedure of Parliament' 4th Edition, says:

"The all-important conventional and ceremonial head of Lok Sabha is the Speaker. Within the walls of the House his authority is supreme. This authority is based on the Speaker's absolute and unvarying impartiality - the main feature of the office, the law of its life. The obligation of impartiality appears in the constitutional provision which ordains that the Speaker is entitled to vote only in the case of equality of votes. Moreover, his impartiality within the House is secured by the fact that he remains above all considerations of party or political career, and to that effect he may also resign from the party to which he belonged."

39. In the present facts & circumstances, apparently Section 2(h) of the Uttar Pradesh State Legislature (Members' Emoluments and Pension) Act, 1980 defines "Leader of Opposition' as the member of the Assembly or the Council who is for the time being recognized as such by the Speaker, or the Chairman, Deputy Chairman or Parliamentary Secretary. What is the scope of the power of Speaker while recognising a person as the leader of opposition? In the Act there is no indication as to what factors have to be taken into consideration by the Speaker or the chairman for purpose of recognition. In fact, none of the sections of the Act in terms imposes any duty on the Speaker or the chairman to recognise any Leader of Opposition. This court has already referred to the different provisions of the Act. Its sole object is to make provisions for payment of salary, allowances and certain other benefits to leader of opposition. With that object in view, the Act gives the definition of leader of opposition. There is no provision in the Act which enjoins any mechanism or mandates the Speaker to recognise the leader of a party having the greatest numerical strength, to be the leader of opposition. The power of recognition of any such leader by the Speaker is not to be exercised under this Act. If the Speaker recognises any person who is the leader of a party in opposition having greatest numerical strength as the leader of opposition, he is doing so on the basis of the practice prevailing and, therefore, has to follow the other requirements of such practice and convention.

40. Thus, in the considered view of this court, whenever the Speaker recognises any person as a leader of opposition he does so on the basis of precedent or practice of the Legislature in question, keeping in view at the same time, the definition in the Act, If the basis of recognition is not the Act in question but the practice prevailing then he has to follow the practice of recognising the leader of an opposition party which has not only the greatest numerical strength as required by the definition in the Act, but has also one-tenth of the total membership of the House. In that event, it is difficult to hold that the impugned decision is illegal or unconstitutional. It would be pertinent to

quote the concluding paragraph of the judgement passed by a co-ordinate division bench of this Court, wherein the Ld. Division Bench was called upon to answer a similar question as has been raised in the present case. The Ld. Division Bench in the case of **Kailash Nath Singh Yadav Vs Speaker, Vidhan Sabha, Lucknow & Another, 1992 SCC OnLine ALL 117** at paragraph 23 held as follows:

"23. The leader or opposition in a Parliament any functionary inextricably connected with the business of the House and its functioning. According recognition to a member of the House as Leader of Opposition is a function which relates to the conduct of business of the House. Whatever is done by the Speaker who is an Officer of the Assembly is done by him for carrying on the business of the House as understood in the wider sense, except in regard to those functions which he has to perform under the Constitution, in his own right as Speaker or as a statutory authority under any law for the time being in force. It has already been noticed that the statutory recognition given to the Leader of Opposition has not made any substantial changes as to the manner in which recognition may be given to him by the Speaker. Thus, when the Speaker accords recognition to a member of the House as Leader of Opposition, he exercises power with respect to conduct of business of the House. That being so, he shall not be subject to the jurisdiction of any court in respect of the exercise by him of that power in view of the mandatory provisions of clause (2) of Art. 212. If a member of the House has any grievance against the action of the Speaker in exercise of the powers vested, in him, it is open to such member to ventilate his grievance and seek redress in some other appropriate forum according to law. In view of the aforesaid discussion, we have come to the conclusion that the petitioner has failed to make out a case for our interference in the exercise of jurisdiction under Art. 226 of the Constitution."

41. Thus the petitioner cannot, as a matter of right, claim any continuation as leader of opposition of the Council as even in Section 2(h) of the Uttar Pradesh State Legislature (Members' Emoluments and Pension) Act, 1980, no such right has been conferred upon the petitioner.

CONCLUSION

42. In view of the discussion and the prevailing law, the petitioner do not have an inalienable right to be appointed or to continue as Leader of Opposition. The Uttar Pradesh State Legislature (Members' Emoluments and Pension) Act, 1980 does not prescribes any mechanism for recognising a leader of opposition. The Chairman of the Vidhan Parishad was not bound to be guided only with the criteria of recognising the leader of an opposition party, which has the greatest numerical strength. The rules provides for discretion of the Respondent no.1 to recognize and/or de-recognise a Leader of Opposition. The reliance of the Respondent No.1 on rule 234 of the Rules of Procedure and Conduct of Business Rules, 1956 is a fair & judicious exercise of discretion in derecognising the petitioner as leader of opposition and is also in conformity to the precedent and practise of the legislative council.

43. Accordingly, for all the aforesaid reasons, we do not find any infirmity or violation of constitutional provisions in the impugned order dated 07.07.2022. Thus,

this writ application as being devoid of any merits is dismissed, but, in the circumstances, there will be no order as to costs.

(2022) 10 ILRA 22
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 3369 of 2022

Sonu Maurya ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sri Bairister Singh

Counsel for the Opposite Parties:
G.A., Sri Dinesh Chandra Yadav, Sri Kshitiswar Nath Yadav

Criminal Law - Juvenile Justice (Care and Protection of Child) Act, 2015 - Sections 12, 12(1) & 102 - Protection of Children From Sexual Offences Act,2012 - Sections 7 & 8 - Indian Penal Code, 1860 - Sections 323, 376, 354-A, 504 & 506 - Criminal Procedure Code,1973 - Sections 161 & 216:- Validity of order impugned - by which the court below has rejected the application of the applicant in which he requested not to proceed trial unless and until contradictions regarding age of the victim has to be decided first - FIR - informant alleged that, accused applicant misbehaved and by using abusing languages threatened to kill when she went to tube-well for washing clothes - objected - being perusal of material available on record prima facie, court below has not committed any illegality in rejecting the application in question - held, if such a course to be adopted by the parties, then it will be well nigh impossible for the court to conclude the trial and concept of speedy trial will get jeopardized - application dismissed. **(**Para - 5, 6)

Application (u/s 482) dismissed. (E-11)

List of Cases cited:

P. Kartikalakshmi Vs Sri Ganesh & anr. (2017 vol. 3 SCC 347.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Bairister Singh, learned counsel for the applicant, Mr. Dinesh Chandra Yadav, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA for the State as well as perused the entire records.

2. This application has been filed by the applicant with a prayer to quash the order dated 30.11.2021 passed by Additional District and Sessions Judge/Special Judge, POCSO Act, Court no.2, Varanasi in S.S.T. No.30/2018 (State vs. Sonu Maurya and Others) arising out of Case Crime No.686/2017, under Sections 354A, 504, 506 IPC and Section 7/8 of POCSO Act, P.S.-Phoolpur, District-Varanasi, pending before the Additional District and Sessions Judge/Special Judge, POCSO Act, Court no.2, Varanasi.

3. Brief facts of the case are that an FIR was lodged on 14.09.2017 against the applicant under Sections 354A, 504, 506 IPC with the allegations that when the daughter of opposite party no.2 went to tube-well for washing clothes, the applicant misbehaved with her and when the opposite party no.2 went to house of applicant, he, after using abusive language, threatened to kill. After investigation charge sheet was submitted and the charges were framed under Sections 354A, 504, 506 IPC as well

as section 7/8 of POCSO Act. Subsequently, the court below proceeded with the trial and the victim has been examined as P.W.-1. The chief-examination of the victim, P.W.-1 has been recorded on 30.11.2021 by Additional District and Sessions Judge/Special Judge, POCSO Act, Court no.2, Varanasi. During course of examination of the victim, P.W.-1, the counsel for the accused-applicant found contradictions regarding age of the victim, therefore, an application was filed being Paper No.15Kha, 16Kha and 17Kha on 04.03.2021 requesting the court below to proceed with the trial only after taking evidence regarding the age of the victim and deciding the same. However, the aforesaid application has been rejected vide order dated 30.11.2021 on the ground that the question regarding age of the victim cannot be decided at this stage and the same can be done only after the entire evidences is collected.

4. Learned counsel for the applicant submits that in an earlier case, which was registered by the victim in the year 2015 being Case Crime No.345/2015, Under Sections 323, 376 IPC, Police Station-Phoolpur, District-Varanasi, the age of the victim as determined by the Doctor was said to be 19 and a half years. In the aforesaid case, the statement of the victim was recorded wherein she stated that she was studying in Class-Xth at Sant Azayab Singh Maharaj Public School, Karikhiyava, Varanasi and also accepted that she was 19 years old. However, in the present case, the educational certificate has been produced in which date of birth of the victim is mentioned as 24.04.2001. Therefore, without deciding the issue regarding age of the victim, the court below cannot proceed with the trial and has rejected the application in a mechanical manner. He further submits that the concerned court below has illegally passed the impugned order dated 30.11.2021 rejecting the application of the applicant without considering the grievance of the applicant, hence, the same is liable to be quashed by this Court.

5. Per contra, learned A.G.A. has opposed the contention raised by the learned counsel for the applicant by submitting that though section 216 Cr.P.C. provides power to the court concerned to alter or add any charge at any time before judgment is pronounced, but no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C. If such a course to be adopted by the parties is allowed, then it will be well nigh impossible for the Criminal Court to conclude its proceedings and the concept of speedy trial will get jeopardized. The aforesaid has been held by the Apex Court in the case of ***P. Kartikalakshmi v. Sri Ganesh and Another reported in (2017) 3 SCC 347***. Learned AGA further submits that there is no illegality or infirmity in the impugned order dated 30.11.2021 and the concerned court below has rightly considered the application of the applicant and rejected the same.

6. Having regard to the facts and circumstances of the case and having considered the submissions made by the learned counsel for the parties as well as material available on record prima-facie, the concerned court below has not committed any illegality in rejecting the application of the applicant. There is no illegality or infirmity in the impugned order dated 30.11.2021 passed by the concerned

court below. Therefore, no interference is required at this stage.

7. In view of the above, the application is, accordingly, dismissed.

(2022) 10 ILRA 24
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 4662 of 2022

Rakesh Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shivendu Ojha, Sri Prathamesh Upadhyay, Sri R.K. Ojha (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava

A. Service Law – Forfeiture of Pension – Punishment - U.P. Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020: Regulation 11; Bihar Electricity Act: Section 3(1) – Alternative Remedy - When a right is created by the statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy u/Article 226 of the Constitution. This Rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion. **In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition.** (Para 11)

In present case, the punishment order has been challenged not only on grounds of violation of Principle of Natural Justice but also on merits by saying that the Inquiry Report on which such punishment order is based is completely non-speaking and has tried to convince this Court on the merits of the claim of the petitioner that he is in no way responsible for the alleged misconduct which led to the passing of the impugned order. **Disputed questions of fact have been tried to be raised in this petition by means of filing affidavits including supplementary affidavit showing that the respondents themselves have acted upon the noting made on the file by the petitioner.** This Court in Writ jurisdiction finds itself unable to appreciate disputed questions of fact only on the basis of affidavit. (Para 12, 13)

Writ petition dismissed. (E-4)

Precedent followed:

1. Smt. Shaheen Badar Vs U.P. Power Corporation Ltd. & ors., Special Appeal No. 566 of 2022 (Para 3)

2. M/s Magadh Sugar & Energy Ltd. Vs The State of Bihar & ors., Civil Appeal No 5728 of 2021 (Para 4)

3. UPPCL Vs Anil Kumar Sharma, Special Appeal Defective No. 646 of 2021, decided on 23.10.2021 (Para 8)

4. N.P. Ponnuswami Vs Returning Officer, 1952 SCR 218 (Para 11)

Present petition assails order dated 10.01.2022, passed by Chairman, U.P. Power Corporation Limited, Lucknow.

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

(Oral)

1. Heard Sri R. K. Ojha, learned Senior Advocate assited by Sri Prathamesh Upadhyay, learned counsel for the petitioner and Sri Abhishek Srivastava, learned counsel for the respondent no. 2.

2. This petition has been filed challenging the Order dated 10.01.2022 passed by the respondent no. 2 forfeiting the entire pension of the petitioner as punishment for alleged misconduct when the petitioner was an employee of the Respondent Corporation.

3. Learned counsel for the respondent has raised a preliminary objection regarding the maintainability of the petition saying that against the punishment order passed by the respondent no. 2, the petitioner has remedy for filing an appeal under Regulation 11 of the U.P. Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020. Learned counsel for the respondent has placed before this Court a Division Bench judgement in Special Appeal No. 566 of 2022, ***Smt. Shaheen Badar Vs. U.P. Power Corporation Limited and others*** where the Writ Court had rejected, the writ petition by its order dated 02.09.2022 on the ground of statutory remedy being available, under the Regulations of 2020. The Division Bench observed that if a punishment order is passed in Disciplinary Proceedings by the Chairman, against such an order statutory remedy of filing an Appeal under Regulation 11 is provided to the Board of Directors of the Corporation.

4. It has been argued by the learned counsel appearing on behalf of the petitioner that the order impugned was passed without jurisdiction and in violation of Principles of Natural Justice and in view of the law settled by a recent judgement of the Supreme Court by a three Judges Bench rendered on 24.09.2021 in Civil Appeal No. 5728 of 2021**,** ***'M/s Magadh Sugar & Energy Ltd. vs. The State of Bihar & Others',*** the existence of a statutory remedy would not be a bar for the High Court for exercising extraordinary jurisdiction under Article 226 of the Constitution.

5. It has been argued by the learned counsel for the petitioner that the petitioner was engaged initially as an Assistant Engineer, and thereafter, promoted as Executive Engineer, and Superintending Engineer, and then promoted as a Chief Engineer before he retired on 31.03.2021. After his retirement charge sheet was issued to him on 17.11.2021 by an Inquiry Committee constituted by the Respondent No.2 without jurisdiction, as there is no provision in the Employees Regulations which gives power to the Respondents to initiate Disciplinary Proceedings against a retired employee without sanction of the Competent Authority.

6. It has further been submitted that the punishment order has been passed on the basis of an Inquiry Report submitted in complete violations of Principles of Natural Justice as no date time and place of hearing were fixed by the Inquiry Officer after the petitioner submitted his reply to the charge sheet. Moreover the Inquiry report is non-speaking in nature.

7. Sri Abhishek Srivastava, has placed reliance upon the mention made in the impugned order of punishment that looking into grave charges of misconduct, the Chairman of the Corporation had in his capacity as the Competent Authority given sanction for initiation of Disciplinary Proceedings under Article 351-A of the Civil Services Regulations on 17.11.2021.

8. Learned counsel for the respondent has placed reliance upon a Division Bench judgement of this Court in Special Appeal Defective No. 646 of 2021 decided on 23.10.2021, ***'UPPCL vs. Anil Kumar***

Sharma', where this Court has considered the applicability of Article 351-A of the Civil Services Regulations to Employees of Statutory Corporations such as the UPPCL, and after placing reliance upon Supreme Court Judgements has observed that the language of Article 351-A of the Civil Services Regulations shall mutatis mutandis apply in such cases and Competent Authority would mean the Chairman of the Corporation who can grant sanction, but such sanction has to be granted by a reasoned and speaking order for initiation of proceedings for a retired employee, in case, the alleged misconduct is of a time when the employee was working and within four years of his date of retirement.

9. I have considered the arguments raised by the learned counsel for the parties and have carefully gone through the judgement rendered in *M/s Magadh Sugar & Energy Ltd. vs. The State of Bihar & Others (Supra)* where the appellant had invoked the writ jurisdiction of the High Court to challenge the imposition of Electricity Duty and penalty on the electricity that it was supplying to Bihar State Electricity Board. The appellant being a Sugar Mill Company was producing electricity out of waste of sugarcane, which it was supplying to Bihar State Electricity Board since March, 2008, under the Bihar Electricity Duty Act, 1948 as amended in 2002, which also provided that the State of Bihar could levy tax on the basis of value of units of energy consumed or sold at the rate specified by it in its notification. The appellant had challenged the notifications issued regarding rates notified by the State Government before the High Court. The High Court struck down the notifications on the ground that there were no guideline in the Statute for the notifications for construing the expression "value of energy". The State of Bihar being aggrieved filed a Special Leave Petition before the Supreme Court where the matter is pending. The State of Bihar amended the Bihar Electricity Act and defined the term "value of energy". Such amendment was challenged by the Bihar Sugar Mills Association in writ jurisdiction before the Patna High Court and the Writ Petition was pending. In the meanwhile, the fourth respondent issued notice to the appellant for failure to file returns with regard to levy of taxes and duties. The Assistant Commissioner, Commercial Tax rejected the arguments raised by the appellant that it was supplying energy to the State of Bihar. In the mean while, the National Thermal Power Corporation Limited had also filed a Writ Petition challenging the imposition of Electricity Duty on its supply of Electricity to various Electricity Boards including the Bihar State Electricity Board. The High Court held that Electricity Duty cannot be included under Section 3 (1) of the Bihar Electricity Act on a power generation company supplying Electricity to a Licensee Electricity Board. The Respondents filed Special Leave Petitions which were dismissed by the Supreme Court.

10. The High Court by its judgement dated 18.09.2018 dismissed the Writ Petition instituted by the appellant holding the liability of the appellant to file returns would require a factual determination on the nature of the supply of electricity made to Bihar State Electricity Board, and observed that the appellant should invoke statutory remedy provided in the Act. The appellant approached the Supreme Court against such order the Supreme Court in Paragraph 19 of the Judgement has observed as under:-

"19. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in **Whirpool Corporation v. Registrar of Trademarks, Mumbai** and **Harbanslal Sahni v. Indian Oil Corporation Ltd.** Recently, in **Radha Krishan Industries v. State of Himachal Pradesh & Ors** a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

"28. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) ***the order or proceedings are wholly without jurisdiction; or*** *(d) the vires of a legislation is challenged*

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinanly, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(emphasis supplied)"

The principle of altemate remedies and its exceptions was also reiterated recently in the decision in **Assistant Commissioner of State Tax v. M/s Commercial Steel Limited.** In **State of HP v. Gujarat Ambuja Cement Ltd** this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

"23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the

jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO [(1970) 2 SCC 355: AIR 1971 SC 33] that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies: unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition".

11. This Court finds that the Supreme Court has reiterated the long settled law as propounded by the Constitution Bench judgement in the case of ***N. P. Ponnuswami vs. Returning Officer 1952 SCR 218;*** and has observed that when a right is created by the statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This Rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition.

12. In the case of the petitioner, he has challenged the punishment order not only on grounds of violation of Principle of Natural Justice but also on merits by saying that the Inquiry Report on which such punishment order is based is completely non-speaking and has tried to convince this Court on the merits of the claim of the petitioner that he is in no way responsible for the alleged misconduct which led to the passing of the impugned order. Disputed questions of fact have been tried to be raised in this petition by means of filing affidavits including supplementary affidavit showing that the respondents themselves have acted upon the noting made on the file by the petitioner.

13. This Court in Writ jurisdiction finds itself unable to appreciate disputed questions of fact only on the basis of affidavit, more so when the matter is so technical as that of the petitioner where the charge sheet itself shows imputation malafide intention on the part of the petitioner to help M/s Gaur Sons Realty Pvt. Ltd., Gaur Sundaram Greater Noida, Gautam Budh Nagar, by giving new electricity load of 5200 KV from under Construction 220/132 KV Sub-Station, Sector 123, Noida through 33 KV independent "bay" and refers in detail to the Technical Feasibility Report and the Electricity Audit conducted, thereafter.

14. This Writ Petition is ***dismissed*** as not maintainable on account of statutory remedy of filing an appeal before the Board of Directors and the Regulation 11 of the Regulations of 2020.

15. If such an appeal is filed within three weeks from today, the Board of Directors shall not reject it on ground of delay, but shall consider and decide the same on merits.

(2022) 10 ILRA 28
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.09.2022

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No.6006 of 2002
Along with other cases

Shesh Ram & Ors. ...Petitioners
Versus
State of U.P. ...Respendent

Counsel for the Petitioner:
Prashant Chandra, Ajay Madhavan, Anurag Verma, Mata Prasad Yadav, Neeraj K Srivastava, Romit Seth, Tung Nath Tiwari

Counsel for the Respondent:
C.S.C., Shishir Jain

Civil Law- the Constitution of India- Article 162 - U.P. State Universities Act, 1973- Section 60-E- The condition incorporated in Government Order dated 31.08.1999 and consequent order dated 22.03.2001, by which a rider has been imposed in payment of salary to teachers and other employees against 64 sanctioned posts- No government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. The petitioners were selected by the Selection Committee having fulfilled requisite eligibility criteria by following procedure prescribed in the Act of 1973. When the recommendation made by the Selection Committee was not approved by respondent No.3 within stipulated time, they joined duty on their respective posts, however, they have not been paid even a single penny so far. Even a scheme issued under Article 162 of the Constitution of India, would not prevail over statutory rules. Any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules, would not be legally sustainable. The sanction granted with rider has adversely affected the employees of the colleges. Once the posts have been sanctioned, the rider imposed under the Government Order dated 31.08.1999 and 22.03.2001 are erroneous in nature and contrary to the statutory provisions of law provided under Section 60-E of U.P. State Universities Act, 1973 and the liability for payment of salary lies upon the State Government.

Where Section 60-E of the Act, 1973 mandates that the state government shall be liable for payment of salaries of teachers and employees of every college due in respect of any period after March 31, 1975, then no rider or condition by way of any executive instructions, can be imposed in violation of the said statutory mandate and any such rider is liable to be struck down as being legally unsustainable. (Para 19, 25, 26, 27, 28, 30)

Writ Petitions allowed. (E-3)

Judgements/Case law relied upon:-

1. Dr. Rajinder Singh Vs St. of Punj. & ors.; (2001) 5 SCC 482.

2. Commissioner of Central Excise, Bolpur Vs Ratan Melting & Wire Industries; (2008) 13 SCC 1.

3. T.N. Housing Board Vs N. Balasubramaniun & ors.;(2004) 6 SCC 85.

4. Laxman Dundappa Dhamanekar & anr. Vs Management of Vishwa Bharata Seva Samiti & anr(2001) 8 SCC 378

5. Punj. Water Supply and Sewerage & ors. Vs Ranjodh Singh & ors.;(2007) 2 SCC 491.

6. Mahadeo Bhau Khilare (MANE) & ors. Vs St. of Maha. & ors.;(2007) 5 SCC 524.

7. Sandur Micro Circuits Limited Vs Commissioner of Central Excise, Belgaum;(2008) 14 SCC 336.

8. Ajaya Kumar Das Vs St. of Orissa & ors.;(2011) 11 SCC 136.

9. St. of U.P. & ors. Vs C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur & ors.; [2015 (33) LCD 1398]. (cited)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Prashant Chandra, learned Senior Counsel assisted by Ms. Radhika Singh and Sri Satish Chandra Sitapuri, learned counsel for the petitioners, Sri Alok Sharma, learned Additional C.S.C. for respondent - State and Sri Shishir Jain,

learned counsel for respondent - Committee of Management.

2. This bunch of writ petitions is being decided by means of a common judgment and order treating WRIT-A No.-6006 of 2002 to be leading writ petition.

3. Brief facts of the writ petitions, separately, are as under:

Writ-A No.6006 of 2002:

a) On 22.04.1999, an order was passed by this Court in Writ Petition No.17179 of 1999, whereby direction was issued to the respondents to decide the representation of the Committee of Management taking into consideration the norms fixed by the Government as well as the recommendations of Director Higher Education.

b) On 31.08.1999, a High Power Committee decided the representation of Committee of Management and sanctioned 64 posts of non teaching staffs in D.A.V. College, Kanpur and D.B.S. College, Kanpur by sanctioning one post of Animal Catcher, one post of Glass Blower, one post of Gas Man and one post of Peon by imposing condition that the State shall not bear any liabilities with regard to payment of salary and the management would have to bear the burden.

c) In pursuance to aforesaid sanction, name of petitioner Nos.1 to 4 were called from employment exchange and the meeting of selection committee was held on 27.02.2000 and selection of the petitioners was made.

d) The petitioners were appointed by the committee of management on the respective posts and when no action was taken by respondent No.3 on the communication dated 02.03.2000, they joined the duties on 13.12.2000.

e) Since then, the petitioners are discharging duty on their respective posts to the satisfaction of concerned authorities, however, they have not been paid salary, as the Committee of Management of the college has taken a stand that they do not have funds to pay in as much as, 80% of the fee collection is being deposited with the State Government, however, the respondents are not releasing the salary of the petitioners in view of condition imposed in the order dated 31.08.1999.

f) For the payment of salary to the petitioners, the committee of management has made several representations, but no heed has been paid to the same.

g) Petitioner No.3 -Rajendra Kumar died in the year 2008 and on his place, his wife has been granted appointment, who is getting regular salary month by month.

Writ-A No.6004 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the high power committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein six posts were sanctioned for Book Lifters (Pustakalaya Parichar), a selection committee was constituted, who appointed the petitioners on the post of Book Lifter on 13.12.2000 calling their name from employment exchange. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

Writ - A No. - 2586 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to

recommendation made by the high power committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein one post of Cataloguer in each; D.A.V. College, Kanpur and D.B.S. College, Kanpur was sanctioned, a selection committee was constituted, who appointed the petitioner on the post of Cataloguer on 26.03.2001. Since then, the petitioner is discharging his duties but no salary has been paid to him in view of condition levelled in order dated 22.03.2001.

Writ - A No. - 4574 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the high power committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein one post of Library Clerk was sanctioned. In pursuance thereof, an advertisement was issued in two newspapers on 01.09.1999 and the petitioner applied in pursuance thereof. In the meeting held of Selection Committee on 26.03.2000, name of the petitioner was recommended and the Committee of Management approved the recommendation made by the Selection Committee on 27.03.2000 and on 28.03.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 18.07.2000, the petitioner was appointed on the post of Library Clerk. Since then, the petitioner is discharging his duties but no salary has been paid to him in view of condition levelled in order dated 31.08.1999.

WRIT - A No.-5164 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the high power committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Routine Clerks were sanctioned. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioners applied in pursuance thereof. In the meeting held of Selection Committee on 09.04.2000, name of the petitioners were recommended and the Committee of Management approved the recommendation made by the Selection Committee on 25.05.2000 and on 31.05.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 04.12.2000, the petitioners were appointed on the post of Routine Clerks. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

Writ - A No. - 5177 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the high power committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein one post of Animal Catcher, one post of Glass Blower and one post of Gas Man was sanctioned. A meeting of the Selection Committee was held on 27.02.2000, who appointed the petitioners on their respective posts 13.12.2000 calling their name from employment exchange. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

Writ - A No. - 5642 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the High Power Committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Library Clerks were sanctioned. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioners applied in pursuance thereof. In the meeting held of Selection Committee on 09.04.2000, name of the petitioners were recommended and the Committee of Management approved the recommendation made by the Selection Committee on 25.05.2000 and on 31.05.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 04.12.2000, the petitioners were appointed on the post of Library Clerks. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

WRIT - A No. - 5643 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the High Power Committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Routine Clerks were sanctioned in D.A.V. College, Kanpur and 7+2 posts in D.B.S. College, Kanpur. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioners applied in pursuance thereof. In the meeting held of Selection Committee on 26.03.2000, name of the petitioners were recommended and the Committee of Management approved the recommendation made by the Selection Committee on 27.03.2000 and on 28.03.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 18.07.2000, the petitioners were appointed on the post of Routine Clerks. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

WRIT - A No. - 5645 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the High Power Committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Routine Clerks were sanctioned. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioners applied in pursuance thereof. In the meeting held of Selection Committee on 09.04.2000, name of the petitioners were recommended and the Committee of Management approved the recommendation made by the Selection Committee on 25.05.2000 and on 31.05.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 04.12.2000, the petitioners were appointed on the post of Routine Clerks. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

WRIT - A No. - 5646 of 2002:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the High Power Committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Routine Clerks were sanctioned. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioners applied in pursuance thereof. In the meeting held of Selection Committee on 09.04.2000, name of the petitioners were recommended and the Committee of Management approved the recommendation made by the Selection Committee on 25.05.2000 and on 31.05.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 04.12.2000, the petitioners were appointed on the post of Routine Clerks. Since then, the petitioners are discharging their duties but no salary has been paid to them in view of condition levelled in order dated 31.08.1999.

WRIT - A No. - 611 of 2004:

In pursuance to order passed by this Court in Writ Petition No.17179 of 1999 on 22.04.1999 and in pursuance to recommendation made by the High Power Committee on 31.08.1999 for sanction of 64 posts of non-teaching staff, wherein 32 posts of Routine Clerks were sanctioned. In pursuance thereof, advertisements were issued in two newspapers on 31.08.1999 & 01.09.1999 and the petitioner applied in pursuance thereof. In the meeting held of Selection Committee on 09.04.2000, name of the petitioner was recommended and the Committee of Management approved the recommendation made by the Selection Committee on 25.05.2000 and on 31.05.2000, the Committee of Management forwarded the recommendations of Selection Committee to respondent No.3, however, no action has been taken by respondent No.3 till date. On 04.12.2000, the petitioner was appointed on the post of Routine Clerk. Since then, the petitioners is discharging his duties but no salary has been paid to him in view of condition levelled in order dated 31.08.1999.

4. By means of the present bunch of writ petitions, the petitioners have prayed for quashing the condition incorporated in Government Order dated 31.08.1999 and consequent order dated 22.03.2001, by which a rider has been imposed in payment of salary to teachers and other employees against 64 santioned posts.

5. The Government Order dated 31.08.1999 was issued in compliance of direction issued by this Court in Writ Petition No.30819 of 1998 & Writ Petition No.17179 of 1999 on 24.09.1998 & 22.04.1999, respectively.

6. Section 60-E of U.P. State Universities Act, 1973 provides that it is responsibility of the State Government to pay the salary of teachers and other employees of the colleges.

7. In bunch of writ petitions with leading Writ Petition No.2586 (S/S) of 2002, an interim order was granted by this Court on 26.08.2002, which reads as under:

"..... .....

All the three petitions have been filed by the non-teaching personnel. Petitioner of Writ Petition No.2586 (SS) of 2002 is working in D.B.S. College, Kanpur, whereas the petitioners of Writ Petition

Nos.3126 (SS) of 2002 and 4574 (SS) of 2002 are working in D.A.V. College, Kanpur. The petitioners' contention is that they have not been paid their salary or any allowances for the last two years because of a condition levied by the Government while sanctioning creation of 64 posts. A perusal of the Sanctioned Order dated August 31, 1999 (Annexure 1) would reveal that as many as 64 posts were sanctioned by the Government for D.A.V. College and D.B.S. College, Kanpur, however, with the condition that the expenditures on account of salary and other allowances pertaining to these 64 posts will be borne by the Management of the Colleges. Learned Counsel appearing on behalf of the petitioners has placed reliance upon a citation reported in [(2001) 8 SCC 378] Laxman Dundappa Dhamanekar and another Vs. Management of Vishwa Bharata Seva Samiti and another and the provisions of Section 60-E of the U.P. State Universities Act, 1973. As a matter of fact, under the state Universities Act, it is the liability of the State Government to pay salaries to the teachers and employees of every college. The terms of Section - 60-E are mandatory which make it obligatory for the State Government to bear the financial load so far as the payment of salary to the teachers and employees is concerned. In its counter - affidavit filed in writ petition no. 3126 (SS) of 2002, the State Government has conceded that the condition regarding payment of salaries to the 64 posts sanctioned for D.A.V. College and D.B.S. College, Kanpur was incorporated in the Order referred to above as the Government had financial constraints. However, the fact remains that the mandatory provision of Section 60-E of the Universities Act cannot be subjugated to the factum of the poor economy of the State. In other words, financial constraints of the Government cannot override the provisions of Section 60-E of the Universities Act. Learned Counsel appearing on behalf of the Colleges had not at the relevant time of the sanction being granted submitted any undertaking conceding its liability to make payment of the salary to the 64 employees, who might be appointed.

Subject to any assurance or undertaking, if any, submitted by the Managements of the Colleges, it is provided -- that if the petitioners are in continuous services of the Colleges, the State Government is directed to pay the petitioners' salary while discharging its obligation under Section 60-E of the Universities Act."

8. Learned Senior Counsel for the petitioners submitted that the Government Order dated 31.08.1999 and consequent order dated 22.03.2001 are ultra vires to the provisions of Section 60-B&E of U.P. State Universities Act, 1973 (hereinafter referred to as, 'Act of 1973') as it seeks to supplant and render otiose the provisions of the said section by an executive order.

9. He further submitted that under the provisions of Section 60-E of Act of 1973, the State Government has been held liable for payment of salary of teachers and other employees of every college due in respect of any period after 31st March, 1975.

10. He next submitted that the manner of appointment of non teaching staff is regulated by the provisions contained under Chapter 20 of the Ist Statute of Kanpur University, whereas Statute 21.01, which is in reference to Section 49(e) of Act of 1973, defines a salaried employee not being a teacher of a college and Statute 21.02(1) confers power upon the management to make appointments of non teaching staffs.

Under Statute 21.03 (4), the appointments made by the Committee of Management and the Principal are required to be submitted for approval before the Director, Higher Education and in case the same is not approved within two months from the date of its receipt, the appointments shall be deemed to have been approved.

11. He further submitted that in view of Section 60-E of Act of 1973, any action or order contrary to any authority or committee being per se illegal and arbitrary is liable to be quashed.

12. He next submitted that appointment of the petitioners has been made strictly in accordance with Act of 1973, therefore, payment of salary to them from State Government cannot be denied.

13. He next submitted that one Purushottam Singh, who has been appointed on the post of Cataloguer in DAV College, Kanpur vide order dated 22.12.1999 is being paid salary from the State Government, as there has been no embargo levied while sanctioning his post, therefore, discrimination between the petitioners while sanctioning the post by imposing rider to not pay salary from the State Government is in breach of provisions of Articles 14 & 16 of the Constitution of India.

14. Learned Senior Counsel for the petitioners further submitted that salary is the property of the employees and it cannot be denied by levelling a rider in contravention to statutes of Act of 1973 and the same is in contravention to provisions of Article 300-A of the Constitution of India.

15. He further submitted that the State Government cannot impose conditions through executive fiat, which are inconsistent with the statutory provisions. In support of his submissions, he placed reliance upon certain judgments, which are as under:

a) Dr. Rajinder Singh Vs. State of Punjab and others; [(2001) 5 SCC 482].

b) Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries; [(2008) 13 SCC 1].

c) T.N. Housing Board Vs. N. Balasubramaniun and others; [(2004) 6 SCC 85].

d) Punjab Water Supply and Sewerage and others Vs. Ranjodh Singh and others; [(2007) 2 SCC 491].

e) Mahadeo Bhau Khilare (MANE) and others Vs. State of Maharashtra and others; [(2007) 5 SCC 524].

f) Sandur Micro Circuits Limited Vs. Commissioner of Central Excise, Belgaum; [(2008) 14 SCC 336].

g) Ajaya Kumar Das Vs. State of Orissa and others; [(2011) 11 SCC 136].

16. On the other hand, learned A.C.S.C. submitted that it is the Committee of Management, who is aggrieved party due to non providing of funds to ensure payment of salary to the petitioners. He further submitted that against non sanctioned posts, liability of payment of salary lies upon the Committee of Management and not upon the State Government. In support of his submissions, he placed reliance upon a full bench judgment in the case of **State of U.P. and others Vs. C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur and others; [2015 (33) LCD 1398].**

17. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

18. To resolve the controversy involved in the present writ petition, the judgments relied upon by learned counsel for the parties are being quoted below:

Judgments cited by learned senior counsel for the petitioners:

a) Dr. Rajinder Singh Vs. State of Punjab and others (Supra):

"7. The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law."

b) Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries (Supra):

"7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

c) Laxman Dundappa Dhamanekar and another Vs. Management of Vishwa Bahrata Seva Samiti and another (Supra):

"11. The aforesaid non-statutory rule was substituted in the Code by government order dated 17.6.67 and whereas the statutory Rules governing the method of appointment of teacher came to be published in the gazette on 31.1.78. It is, therefore, manifest that non-statutory Rule 16 was never intended to supplement the statutory Rules and, therefore, not applicable in the case of appointment of teacher in private government aided institutions. Yet, there is another reason why the non-statutory Rule 16 is not applicable in the case of appointment of teachers in the institution. The administrative instructions pertaining to grant-in-aid for secondary schools have been issued with the object of extending and improving institutions, and for that purpose a sum of money is annually allocated by the government for distribution as grant-in-aid to schools subject to observance to the conditions specified therein. The conditions embodies in Rule 16 of the grant-in-aid code provide for the conditions under which financial assistance would be made available to the Management of the institution by the government. If there is a breach of the conditions of the grants-in-aid, it is open to the government either to suspend or cancel the financial grant to the institution. But, such breach of conditions of the grant-in-aid code would not make the appointment of a teacher in the institutions invalid when the method of appointment of teachers in the institution is fully covered by the Act and the statutory rules. It is, however, true that for breach of administrative instructions which have no statutory force, a public servant or the person guilty of such a breach can be subjected to disciplinary action; but the same cannot be pressed into service for action which has the effect of modifying the statutory rules. We are, therefore, of the view, that breach of non- statutory Rule 16 would not render the appointments of appellant invalid.

12. So far the second question that arises for consideration is whether the appellants having been appointed on probation they would be deemed to have

become regular teachers on expiry of probationary period, we are not inclined to go into that question in view of the fact that even though the appellants were probationers, their services could not be ceased to have effect either by non approval by the Head of the Department or by their remaining absent from their respective duties. There is no provision either in the Act or the Rules providing for automatic termination of services of a teacher on account of being absent without leave. If any teacher remains absent without any leave, it is open to the Management to terminate the services of such teachers only after complying with the provisions of the Act and the rules or principles of natural justice. In the present case, we do not find any provision either in the Act or Rules providing for automatic termination of service of a teacher in the event of a teacher remaining absent without leave. In the absence of such a provision in the Act or Rules, the alleged deemed termination of services of the appellants without giving any opportunity to the appellants was unlawful and deserves to be set aside."

d) T.N. Housing Board Vs. N. Balasubramanium and others (Supra):

"6. .... It is not in dispute that the said eligibility criteria are mandatory in nature and the validity thereof had not been questioned. If a Draftsman is to be promoted to the post of Assistant Executive Engineer, he must complete 15 years of service in the said capacity, whereas the Junior Engineer may have to complete only 10 years in the said post. Once the eligibility criteria are considered to be a prerequisite for giving effect to the statutory Regulations, the purported executive instructions would not be applicable. Once it is held that relying on the basis of executive instructions in terms of Regulation 28(a), the Draftsman who have been getting higher salary are given preference over the diploma-holder Junior Engineers, the eligibility criteria contained in the statutory Regulations would become otiose; the logical corollary thereof would be that the executive instructions would prevail over the statutory Regulations. Such a consequence would lead to an absurdity and in that view of the matter, it must be held that the executive instructions cannot be given effect to."

e) Punjab Water Supply and Sewerage Board Vs. Ranjodh Singh and others (Supra):

"10. ..... Neither can the statutory bodies refuse to fulfil such constitutional duty, nor can the State issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Articles 14 and 16 of the Constitution of India. The purported directions of the State were otherwise bad in law insofar as thereby the statutory rules were sought to be superseded. A circular letter furthermore is not a statutory instrument. It was not even issued by the State in exercise of the power under Article 162 of the Constitution of India. Even a scheme issued under Article 162 of the Constitution of India, would not prevail over statutory rules.

14. Once it is held that the terms and conditions of service including the recruitment of employees were to be governed either by the statutory rules or rules framed under the proviso to Article 309 of the Constitution of India, it must necessarily be held that any policy decision adopted by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be illegal and without jurisdiction.

16. ..... To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

19. ..... It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed hereinbefore, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires.

20. This Court, recently in Indian Drugs & Pharmaceuticals Ltd. v. Workman opined that rules of recruitment cannot be relaxed and the courts/tribunals cannot direct regularisation of temporary appointees dehors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual, ad hoc or daily - rate employee) or payment of regular salaries to them."

f) Mahadeo Bhau Khilare (MANE) and others Vs. State of Maharashtra and others (Supra):

"7. Indisputably, the State of Maharashtra has framed recruitment rules. Any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules would not be legally sustainable.

11. Appointments made without following the statutory rules by the State and that too without any remuneration whatsoever was itself unconstitutional."

g) Sandur Micro Circuits Limited Vs. Commissioner of Central Excise, Belgaum (Supra):

"6. The issue relating to effectiveness of a circular contrary to a notification statutorily issued has been examined by this Court in several cases. A circular cannot take away the effect of notifications statutorily issued. In fact in certain cases it has been held that the circular cannot whittle down the exemption notificatino and restrict the scope of the exemption notification or hit it down. In other words, it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature."

h) Ajaya Kumar Das Vs. State of Orissa and others (Supra):

"14. Neither the Circular dated 18-6-1982 nor the subsequent Circular dated 18-6-1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars.

15. Seen thus, upon promotion of the appellant to the rank of Assistant Engineer from SER, his pay in the timescale of Assistant Engineer has to be fixed as per statutory Rule 74(b), more particularly, in a situation such as the present one because by relying upon the

Government Circulars dated 18-6-1982 or 19-3-1983 or 16-4-1971, the appellant's scale of pay gets reduced. The State Government has not challenged the applicability of Rule 74(b) of the Code in the matter. That being the position, the appellant's pay has to be fixed in accordance with Rule 74(b) of the Code and not otehrwise."

Judgments relied upon by learned Additional C.S.C.:

State of U.P. and others Vs. C/M Sri Sukhpal Intermediate College (Supra):

"11. In our view, the field of dispute in the present case is governed by the judgment of the Full Bench in Gopal Dubey (Supra). The judgment in Gopal Dubey clearly holds that the Act of 1971 operates in a field which is distinct from the Act of 1921. The mere fact that recognition has been granted to an institution or, for that matter, for conducting a new course or subject or for an additional section, would not give rise to a presumption of a financial sanction having been granted to the creation of a post. A financial liability cannot be foisted on the State to reimburse the salary payable to the employee or the teacher on the basis of such a presumption. For the purpose of creating a new post of a teacher or other employee, the management has to obtain the prior approval of the Director as required under Section 9 of the Act 1971. Without the prior approval of the Director, a new post cannot be sanctioned or created. Section 9 is mandatory. This principle in Gopal Dubey's case follows specifically the judgment of the Supreme Court in Gajadhar Prasad Verma's case which was rendered while interpreting the provisions of Section 9 of the Act of 1971. The High Court cannot issue a direction contrary to the mandate of Section 9. Orders under Article 226 must conform to law and cannot be contrary to the mandate of law. No mandamus can issue-interim or final-for the payment of salary by the State in the absence of the prior approval of the Director."

19. On perusal of afore-quoted judgments, it is evident that settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law.

20. Here, in the present case, On 22.04.1999, an order was passed by this Court in Writ Petition No.17179 of 1999, whereby direction was issued to the respondents to decide the representation of the Committee of Management taking into consideration the norms fixed by the Government as well as the recommendations of Director Higher Education and in pursuance thereof, a High Power Committee decided the representation of Committee of Management on 31.08.1999 and sanctioned 64 posts of non teaching staffs in D.A.V. College, Kanpur and D.B.S. College, Kanpur by imposing condition that the State shall not bear any liabilities with regard to payment of salary and the management would have to bear the burden.

21. In pursuance thereof, name of petitioners were called from employment exchange / advertisement was issued in the news papers and petitioners applied in pursuance thereof and on the recommendation of Selection Committee, the petitioners were appointed by the Committee of Management on their respective posts when no action was taken by respondent No.3 on the communication

made by Selection Committee and since then, the petitioners are discharging duty on their respective posts to the satisfaction of concerned authorities, however, they have not been paid salary in view of condition imposed in the order dated 31.08.1999. For the payment of salary to the petitioners, the Committee of Management has made several representations, but no heed has been paid to the same.

22. Meaning thereby, the petitioners were selected by the Selection Committee having fulfilled requisite eligibility criteria by following procedure prescribed in the Act of 1973. When the recommendation made by the Selection Committee was not approved by respondent No.3 within stipulated time, they joined duty on their respective posts, however, they have not been paid even a single penny so far.

23. It is also relevant that one Purushottam Singh, who has been appointed on the post of Cataloguer in DAV College, Kanpur vide order dated 22.12.1999 is being paid salary from the State Government, as there has been no embargo levied while sanctioning his post, therefore, discrimination has been caused between the petitioners while sanctioning the post by imposing rider to not pay salary from the State Government, which is in breach of provisions of Articles 14 & 16 of the Constitution of India.

24. Section 60-E of U.P. Universities Act, 1973 reads as under:

"60E- Liability in respect of salary - (1) the state government shall be liable for payment of salaries of teachers and employees of every college due in respect of any period after March 31, 1975.

(2) the state government may recover any amount in respect of which any liabilities incurred by it under sub-section (1) by attachment of the income from the property belonging to or vested in the college as if that amount were in arrears of land revenue due from such college.

(3) nothing in this section shall be deemed to derogate from the liability of the college for any such dues to the teacher or employee."

25. On its perusal, it is evident that the State Government is liable for payment of salaries of teachers and other employees of colleges due in respect of any period after 31.03.1975.

26. In the case of **Dr. Rajinder Singh (Supra),** it has been held that the settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Likewise, in the case of **Commissioner of Central Excise, Bolpur (Supra),** it has been observed that so far as the clarifications/circulars issued by the Central Government and of the State Government are concerned, they represent merely their understanding of the statutory provisions and they are not binding upon the Court. It is for the Court to declare what the particular provision of statute says and it is not for the executive and even if it is looked from another angle, a circular, which is contrary to the statutory provisions, has really no existence in law. Similar view has been adopted in the case of **Punjab Water Supply and Sewerage Board (Supra),** by saying that neither can the statutory bodies refuse to fulfil such constitutional duty, nor can the State issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Articles 14 and 16 of the Constitution of India. The purported directions of the State were otherwise bad

in law insofar as thereby the statutory rules were sought to be superseded. A circular letter furthermore is not a statutory instrument. It was not even issued by the State in exercise of the power under Article 162 of the Constitution of India. Even a scheme issued under Article 162 of the Constitution of India, would not prevail over statutory rules. In the case of **Mahadeo Bhau Khilare (Supra),** the Court has observed that any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules, would not be legally sustainable. Similarly, in the case of **Sandur Micro Circuits Limited (Supra),** it has been held that a circular cannot take away the effect of notifications statutorily issued.

27. On overall consideration of facts and circumstances of the case and law reports cited by learned counsel for the parties, the arguments advanced by learned Additional C.S.C. are not found acceptable in view of the fact that the sanction granted with rider has adversely affected the employees of the colleges. Once the posts have been sanctioned, the rider imposed under the Government Order dated 31.08.1999 and 22.03.2001 are erroneous in nature and contrary to the statutory provisions of law provided under Section 60-E of U.P. State Universities Act, 1973 and the liability for payment of salary lies upon the State Government.

28. In view of reasons recorded above, the condition incorporated in Government Order dated 31.08.1999 and the consequent order dated 22.03.2001, by which the rider has been imposed in payment of salary to teachers and other employees against 64 sanctioned posts in D.A.V. College, Kanpur and D.B.S. College, Kanpur are not found in consonance with Article 162 of Constitution of India, therefore, are liable to be quashed.

29. The writ petitions succeed and are **allowed**.

30. The condition incorporated in Government Order dated 31.08.1999 so far as it imposes the rider in payment of salary to teachers and other employees against 64 sanctioned posts in D.A.V. College, Kanpur and D.B.S. College, Kanpur and the consequent order dated 22.03.2001, are hereby quashed.

31. The respondents are directed to make payment of regular monthly salary month by month to the petitioners in as much as arrears of salary from the date of their joining in the respective institutions. The aforesaid exercise shall be completed within a period of three months from the date of production of a certified copy of this order.

(2022) 10 ILRA 41
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 7181 of 2022

Vibha Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Himanshu Singh, Sri Ashok Khare (Senior Counsel)

Counsel for the Respondents:

C.S.C.

A. Service Law – Selection/Appointment - Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015: Rule 15(f) - The post which has to be filled up by way of compassionate appointment cannot be kept vacant if there is a deserving candidate. No purpose would be served to keep the post vacant in a case where there are number of candidates who scored same marks. (Para 10, 12)

The very purpose of providing facility for compassionate appointment is that the dependents of the deceased employee are provided an immediate relief as the main bread earner of their family is no more. In present case, the petitioner has secured the same marks as those of last three selected candidates in the list of 183 which has been prepared on the basis of merit, i.e. written examination etc. Learned Standing Counsel also could not demonstrate as to what purpose would be served to keep a post vacant which is earmarked to be filled by way of compassionate appointment if there is a candidate available who has secured the same marks in the written examination as those three last candidates in the select list. (Para 11, 12)

The writ petition is disposed of with a direction to UP Police Recruitment & Promotion Board (respondent No. 3) to consider the case of the petitioner for appointment on compassionate ground on the post of Sub Inspector of Civil Police along with other five candidates who have secured the identical marks against one post lying vacant due to withdrawal of one selected candidate, in accordance with law… (Para 13)

Writ petition disposed off. (E-4)

Precedent followed:

1. State of U.P. & ors. Vs Vatsyayan Shukla & anr., Special Appeal Defective No. 452 of 2020 (Para 9)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard Mr. Siddharth Khare, learned Senior Advocate for the petitioner and learned Standing Counsel for the State.

2. By means of this writ petition, the petitioner has prayed for a direction to respondents to grant appointment on the post of Sub Inspector in Civil Police on the basis of select list published on 12.11.2021 against the post remaining vacant on account of non-joining of Atul Kumar son of Surendra Singh within a stipulated period of time, with a further direction to respondents to permit the petitioner to function as Sub Inspector in Civil Police and pay her regular monthly salary of the said post.

3. Learned counsel for the petitioner submits that the petitioner applied for the post of Sub Inspector of Civil Police in 2020 against 183 posts under Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2015 (in short 2015 Rules). Subsequently, it transpired that the candidates in excess of 183 posts have qualified the physical efficiency test and therefore, even though, they have qualified physical efficiency test, a written examination was notified as per the Government Order dated 18.9.2015, read with Rule 5(i) of 2015 Rules.

4. Admit cards were issued. The petitioner participated in the written examination. Result of the aforesaid examination was declared on 12.11.2021.

5. The select list was published in two parts. The first part of the list includes the names of 183 candidates selected for appointment. The second part of the select list comprises of 79 such candidates who have not been selected. It is submitted that in the non-selected candidates, name of the

petitioner figures at Serial No.1. In the remark column against her name, it is mentioned as not selected in Tie-breaker.

6. It is further submitted that a total of nine candidates, viz Mahesh Mishra, Chakravarti Vishal Maurya, Vikash Kumar Dube, Vivek Kumar Bharti, Vivek Kumar Singh, Vibha Yadav (the petitioner), Sahiba Ali, Amod Kumar and Vipin Kumar secured same marks, i.e. 171.0692. Out of nine candidates, first three were selected against 183 posts in List-1. The name of the petitioner who has also secured the same marks in the tie breaker figures at Serial No.1 in the left out candidates. It is submitted that tie breaker test was conducted in accordance with Note provided under Rule 15 (f) of Rules of 2015 which is extracted below :

"NOTE- If two or more than two candidates obtain equal marks then their seniority shall be decided by the procedure laid in following order

(1) If two or more candidates obtain equal marks then such candidate will be given preference who possesses preferential qualification, if any (in the same order as stated in Rule 9). Candidate having more than one preferential qualification shall get the benefit of only one preferential qualification.

(2) Even then if two or more candidates have equal marks then candidate older in age shall be given preference.

(3) If despite the aforementioned more than one candidates are equal, then preference to such candidate shall be determined according to the order in English Alphabets of their names mentioned in High School Certificate. "

7. It is further submitted that one Atul Kumar son of Surendra Singh and whose name figures at Serial No.67 in the first list has relinquished his claim by filing an affidavit to the extent that he is not desirous of joining of service and does not claim appointment. A communication in this regard has been sent by the Superintendent of Police, Karmic dated 31.3.2022 which is annexed as Annexure No.5 to the petition. It is thus submitted that appointment on one post remains unfilled on account of refusal of Atul Kumar.

8. The written examination and the entire selection process has already been completed. The petitioner has also secured similar marks as other candidates selected at Serial Nos. 181, 182 and 183. In the so called waiting list (second list), the name of the petitioner finds place at serial No.1. It is further submitted that since it is a compassionate appointment against 5% of vacant posts to be filled by direct recruitment as against the vacancies arising in the previously sanctioned posts of Sub Inspector of Police, as provided in Rule 5(i) of 2015 Rules, carry forward rule for the vacant posts does not apply in this case. Rule 5(i) of 2015 Rules is extracted below :

"5. Recruitment to the various categories of post in the service shall be made from the following sources :

(1) Sub Inspector

(i) Fifty percent by direct recruitment through the Board.

Note : Dependents of personnel of police department deceased during service who apply for the post of Sub Inspector of police in the dependents of deceased category shall be recruited by the Board as per the policy decided by the Government. Restriction being that every year such posts shall not be more than five per cent of the posts to be filled by direct recruitment as against the vacancies arising

in the previously sanctioned posts of Sub Inspector of Police.

9. Learned Standing Counsel has opposed the petition and has submitted that admittedly, the petitioner has not been selected in the first list and therefore, she has no claim to be appointed on compassionate ground. In support of his contention, learned counsel for the petitioner has relied on judgment dated 8.2.2021 passed by a Division Bench of this Court in Special Appeal Defective No.452 of 2020 State of UP. and others versus Vatsyayan Shukla and another. Relevant part of the judgment is extracted below :

"We have considered the rival submissions and find case in hand to be peculiar. It is in view of the fact that on the cut off marks of open category, there were 73 candidates out of which 21 were given appointments based on the age as none of them were having preferential qualification. If we strictly go as per rules 15 (4), there is no illegality in the action of the appellant, as the result was declared to the size of vacancy. The fact however remains that out of the total candidates offered appointment based on the list sent to the department, 81 open category candidates did not join the post. In absence of waiting list, the candidates scored same marks could have been given appointment as for that list of candidates next in the merit was not required to be called. It is considered to be calling of name from wait list. There would be no purpose to keep post vacant in a case where there are number of candidates scored same marks. It is not a case where the department was not having the list of the candidates who can be offered appointment which otherwise remain in the shape of waiting list and to be called. In fact the list of candidates obtained same marks was lying with the State thus State was not required to indulge in the exercise to call for the name of the candidates below the cut off."

10. The judgment provides that no purpose would be served to keep the post vacant in a case where there are number of candidates who scored same marks.

11. Learned Standing Counsel could not demonstrate as to what purpose would be served to keep a post vacant which is earmarked to be filled by way of compassionate appointment if there is a candidate available who has secured the same marks in the written examination as those three last candidates in the select list.

12. On due consideration to the argument advanced by learned counsel for the petitioner, perusal of the record as also judgment quoted above, I am of the view that the contention of the State that the petitioner has no claim on the vacant post to be appointed on compassionate ground is mis-conceived. The very purpose of providing facility for compassionate appointment is that the dependents of the deceased employee are provided an immediate relief as the main bread earner of their family is no more. The post which has to be filled up by way of compassionate appointment cannot be kept vacant if there is a deserving candidate. In this case, the petitioner has secured the same marks as those of last three selected candidates in the list of 183 which has been prepared on the basis of merit, i.e. written examination etc.

13. In view of the above, the writ petition is disposed of with a direction to respondent No.3 to consider the case of the petitioner for appointment on

compassionate ground on the post of Sub Inspector of Civil Police along with other five candidates who have secured the identical marks against one post lying vacant due to withdrawal of one selected candidate Atul Kumar, in accordance with law, within a period of three months from the date of production of a certified copy of this order.

14. Needless to say that while considering such claim of the petitioner, the competent authority shall take note of that the petitioner is placed at Serial No.1 in the second list of 79 candidates and she is also older in age than five candidates who have secured equal marks as the petitioner, in the light of Note provided under Rule 15.

(2022) 10 ILRA 45
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 7917 of 2022

Umesh Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Atipriya Gautam, Sri Devesh Mishra, Sri Rishabh Kesarwani, Sri Vijay Gautam (Sr. Advocate)

Counsel for the Respondents:
C.S.C.

A. Service Law – Promotion - Mere pendency of a criminal case, prima-facie, cannot be taken as a ground to deny promotion. The Competent Authority cannot withhold the claim indefinitely on the ground of having adopted Sealed Cover Procedure, due to the pendency of criminal case. (Para 12)

Facts of the case are undisputed. Petitioner was appointed on the post of Sub-Inspector in Civil Police Department in the year 1990 and chargesheet was submitted against him in the year 1999. Thereafter, he was promoted on the post of Inspector in the year 2006 and first DPC for promotion on the post of DSP was also held on 01.01.2018, in which name of petitioner was considered, but due to pendency of criminal proceeding, his name was kept in a sealed cover envelop and juniors to him have been granted promotion. Further, as per comments of ADGP, Administration dated 20.08.2020, several excellent entries were given to the petitioner in last ten years of his service coupled with this fact that no punishment, either minor or major was awarded to the petitioner and after promotion, he has never misused his post in any way. (Para 10, 12)

Mere pendency of a criminal case coupled with this fact that petitioner has been permitted to continue in service and also granted promotion, cannot be a ground for denying promotion. Further, additional fact may be taken into consideration i.e. subsequent service record of petitioner while opening the sealed cover envelop and in case subsequent service record of petitioner is found excellent, unblemished, without any punishment, the same should have been an additional ground to grant him promotion. (Para 13)

Impugned order dated 12.8.2021 is contrary to the provisions of GOs dated 28.05.1997 & 09.01.2018 as well as law laid down by this Court in the matter of *Neeraj Kumar Pandey* (*infra*), which is not sustainable and hereby set aside.

Writ petition allowed. (E-4)

Precedent followed:

1. Neeraj Kumar Pandey Vs The St. of U.P. & ors. (Writ-A No. 8151 of 2022) (Para 7)

Present petition assails order dated 12.08.2021, passed by Addl.

Chief/Principal Secretary, Home, Uttar Pradesh Shasan, Secretariat, Lucknow.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Vijay Gautam, learned Senior Counsel assisted by Ms. Atipriya Gautam, learned counsel for petitioner and learned standing counsel for State-respondents.

2. Pleadings have been exchanged between the parties, with the consent of the parties, the instant writ petition is being finally decided at the admission stage.

3. By way of present petition, petitioner is seeking following reliefs:-

"(ii) issue, a writ order or direction, in the nature of certiorari, quashing the impugned order dated 12.08.2021, passed by respondent No. 1, enclosed as Annexure-1, to the writ petition.

(iii) issue, a writ, order or direction, in the nature of mandamus, commanding the Respondent Authorities, to open the Seal Cover Envelop and promote the petitioner on the post of Dy.S.P. in pursuance of the Government Order No. 13/21/89-Ka-1-1997, dated 28/05/1997, & Government Order No. 1/2018-13(6)/2017/Ka-1-2018, dated 09/01/2018, with all consequential benefits.

(v) issue, a writ, order or direction, in the nature of mandamus, commanding the Respondent Authorities, to consider the claim of the petitioner for Ad-hoc promotion on the post of Dy.S.P., in pursuance of the Government Order No. 13/21/89-Ka-1-1997, dated 28/05/1997, & Government Order No. 1/2018-13(6)/2017/Ka-1-2018, dated 09/01/2018, with all consequential benefits."

4. Learned Senior Counsel appearing for petitioner submitted that petitioner was appointed on the post of Sub-Inspector in Civil Police Department on 17.09.1990. While petitioner was posted at Jaunpur, an F.I.R. has been lodged by one Chhedi Lal against three persons namely Jagarnath Chaudhary, Asha Devi and mother of Asha Devi namely Babana Devi, which was registered as Case Crime No. 172 of 1999 u/s 302, 201, 506 IPC at Police Station Jaunpur, District Jaunpur on 05.06.1999, in which petitioner was not named. Ultimately, charge sheet was submitted in the year 1999, in which petitioner was also charge sheeted under section 217, 218, 201 & 120-B IPC whereas against other accused, charge sheet has been submitted under sections 302, 201, 506, 217, 218 IPC. Feeling aggrieved by the said charge sheet, petitioner has filed Criminal Misc. Application No. 6323/2003 (U/s 482 Cr.P.C.), in which this Court vide order dated 10.09.2003 was pleased to stay the further proceedings, which continued upto year 2020.

5. It is further submitted that during the pendency of the said criminal proceeding, petitioner was given out of turn promotion on 14.09.2006 on the post of Inspector, till then he is performing his duty to the full satisfaction of the authorities and no other disciplinary or criminal proceeding has ever been initiated against him. It is next submitted that meeting of Departmental Promotion Committee (in short, "DPC') was held on 01.01.2018 for promotion on the post of Deputy Superintendent of Police, in which case of petitioner was also considered, but due to pendency of criminal proceeding, his name was kept in a sealed cover envelop and juniors to petitioner were granted promotion. Thereafter, meeting of DPC

was also held in the years 2020 & 2021 and other juniors to petitioner have also been promoted.

6. It is next submitted that when the name of petitioner was kept in a sealed cover envelop, petitioner has filed Writ Petition No. 7758 of 2019, which was disposed of by this Court vide order dated 07.02.2020 directing respondent No. 1 to decide the representation of petitioner. Thereafter, comments were called from the Additional Director General of Police, Administration (hereinafter referred to as "ADGP, Administration") and vide communication dated 20.08.2020, comments were sent to Secretary Home (Police Services), Secretariat U.P., Lucknow and in the comments, it is mentioned that since last ten years, petitioner was awarded excellent entries and never been penalized either major or minor penalty. It was also stated in the comments that character role of petitioner is excellent and after promotion on the post of Inspector, upto 17 years, petitioner has never misused his post, but without considering the comments, impugned order has been passed rejecting the claim of petitioner on two grounds; first of all, petitioner has helped the accused and secondly, offence against the petitioner is serious in nature. It is also stated in the impugned order that petitioner was chargesheeted in Case Crime No. 172 of 1999, under Sections 217, 218 & 120-B IPC.

7. He firmly submitted that comments so given by ADGP, Administration had not been considered while passing the impugned order. He further submitted that trial of main accused has been concluded and ultimately, they have been convicted vide order dated 02.09.2014 passed by Additional Session Judge, Court No. 2, Jaunpur under section 304 IPC, which itself shows that petitioner is not guilty for any charges coupled with this fact that petitioner has excellent service record and also he has been promoted on the post of Inspector during the pendency of criminal proceeding. He further placed reliance upon the Government Order No. 13/21/89-Ka-1-1997, dated 28.05.1997 and submitted that para-10 is having specific provision that after considering the promotion of first time charged employee and keeping his name in a sealed cover envelop, after completion of one year, the same shall be considered for ad hoc promotion. Again in Government Order No. 1/2018-13(6)/2017/Ka-1-2018, dated 09.01.2018, it is stated that in case of pendency of criminal case in different courts, cases has to be examined for further proceeding subject to final decision of the cases pending before the Court. After examination, if it is found proper, further proceeding should have been ensured. In support of his contention, he has placed reliance upon the judgment of this Court passed in ***Neeraj Kumar Pandey vs. The State of U.P. and 5 others (Writ-A No. 8151 of 2022)*** and submitted that on the similar set of facts where the name of petitioner was kept in a sealed cover envelop, Court after considering the Government Orders dated 28.5.1997 & 9.1.2018 directed to open the same to grant promotion. Therefore, under such facts of the case, Court may please to quash the impugned order and issue necessary direction for promotion of petitioner.

8. Learned standing counsel, on the basis of counter affidavit, has vehemently opposed the submissions made by learned counsel for petitioner, but could not dispute the factual as well as legal submissions

made by learned Senior Counsel appearing on behalf of petitioner.

9. I have considered rival submissions advanced by learned counsels for parties and perused the records.

10. Facts of the case are undisputed. Petitioner was appointed on the post of Sub-Inspector in Civil Police Department in the year1990 and chargesheet was submitted against him in the year 1999. Thereafter, he was promoted on the post of Inspector in the year 2006 and first DPC for promotion on the post of Deputy Superintendent of Police was also held on 01.01.2018, in which name of petitioner was considered, but due to pendency of criminal proceeding, his name was kept in a sealed cover envelop and juniors to him have been granted promotion. Further, as per comments of ADGP, Administration dated 20.08.2020, several excellent entries were given to the petitioner in last ten years of his service coupled with this fact that no punishment, either minor or major was awarded to the petitioner and after promotion, he has never misused his post in any way.

11. I have also perused the judgment of this Court passed in **Neeraj Kumar Pandey (Supra)**. In the said judgment, after DPC, name of petitioner was kept in sealed cover envelop denying the promotion. Court has considered this fact that even after pendency of criminal proceeding, petitioner has continued in service, directed the State to open the envelop to grant promotion. While allowing the petition, Court has also considered the Government Orders dated 28.5.1997 & 9.1.2018.

12. So far as case of petitioner is concerned, it is on better footing than the case of ***Neeraj Kumar Pandey (Supra).*** Undisputedly, even after initiation of criminal proceeding, petitioner was granted promotion on the post of Inspector on 14.09.2006 upon which he is still working without any misuse of post. Further, petitioner was granted excellent entries for last 10 years as mentioned in the comments of ADGP, Administration dated 20.08.2020. Not only this, even the criminal proceeding so initiated against the petitioner along with other co-accused, trial of co-accused was completed and Additional Session Judge vide order dated 2.9.2014 awarded the punishment under Section 304 IPC for seven years only, which also shows that petitioner was not at fault in the said criminal proceeding so initiated against him. Relevant paragraphs of judgment passed in ***Neeraj Kumar Pandey (Supra)*** is quoted below:-

"17. Having heard the learned counsel for petitioner, the learned standing counsel for State-respondents and upon perusal of record, the Court finds that it is an undisputed fact that irrespective of pendency of criminal case, petitioner has been allowed to continue. Therefore, mere pendency of a criminal case, prima-facie, cannot be taken as a ground to deny promotion of petitioner. The Competent Authority cannot withhold the claim of petitioner indefinitely on the ground of having adopted Sealed Cover Procedure, due to the pendency of criminal case.

18. In view of the discussion made above this writ petition is disposed of finally with a direction to the Competent Authority to consider the claim of petitioner for opening the Sealed Cover within a period of two months from the date of production of a certified copy of this order in the light of observations made herein-above."

13. After considering the entire facts of the case as well as law laid down by this

Court in ***Neeraj Kumar Pandey (Supra),*** this Court is of the firm view that mere pendency of a criminal case coupled with this fact that petitioner has been permitted to continue in service and also granted promotion, cannot be a ground for denying promotion. Further, additional fact may be taken into consideration i.e. subsequent service record of petitioner while opening the sealed cover envelop and in case subsequent service record of petitioner is found excellent, unblemished, without any punishment, the same should have been an additional ground to grant him promotion.

14. Therefore, under such facts and circumstances, impugned order dated 12.8.2021 passed by respondent No. 1 is contrary to the provisions of Government Orders dated 28.05.1997 & 09.01.2018 as well as law laid down by this Court in the matter of ***Neeraj Kumar Pandey (Supra),*** which is not sustainable and hereby set aside.

15. Accordingly, the writ petition is **allowed**. No order as to costs.

16. Respondent No. 1 is directed to take necessary action to open the sealed cover envelop and grant promotion to the petitioner maximum within six weeks from the date of production of certified copy of this order with all consequential benefits.

(2022) 10 ILRA 49
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.10.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 10156 of 2020

Virendra Kumar Srivastava ...Petitioner

Versus

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

Counsel for the Petitioner:
Mohd. Ghayasuddin Khan

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension and Gratuity – Civil Services Regulations - Article 351-A, Regulation 919A - During the pendency of disciplinary proceedings the government servant is not entitled to gratuity but is entitled only to provisional pension. Pendency of departmental/judicial proceedings or any inquiry or enquiry to be instituted after retirement would not empower the state government to withhold pension, but Government servant maybe sanctioned provisional pension, computed as per rules. It follows that the full pension has to be computed on conclusion of proceedings/inquiry as the case may be. (Para 13, 15, 16)

Article 351-A empowers the governor to withhold or withdraw pension or a part of it permanently off a specified period and order recovery from pension for pecuniary loss caused to the government because of the pensioner in departmental proceedings or Judicial proceedings where he has been found (i) guilty of grave misconduct or (ii) do of course back in early loss to the government by misconduct or negligence during his service period. The proviso to the article spells out the circumstances/conditions in which the departmental proceedings/Judicial proceedings are required to be instituted for the purpose of withholding/withdrawing pension. (Para 11)

The State Governments/Governor reserves to itself the power and right to withhold or withdraw pension or part thereof, whether permanently or for specified period or to order recovery from pension or part thereof, whether permanently or for a specified. Or to order recovery from pension of the whole or part of any pecuniary loss caused to the government upon conclusion of the disciplinary/judicial proceedings. (Para 12)

In the present case the criminal proceedings are pending against the petitioner where the FIR was lodged on 16.07.1998 and the charge sheet was filed on 29.01.2000 and the trial is underway. And it is only because of the pendency of the criminal proceedings against the petitioner that his post retiral dues including pension have been withheld. The case of the petitioner is covered by the judgment of the full bench in the case of *Shiv Gopal* (*infra*) and according to regulation 919A, the petitioner is not entitled for gratuity till the criminal proceedings are pending, but he is entitled to provisional pension and other post retiral dues for which there is no legal embargo. (Para 18, 20)

Writ petition dismissed. (E-4)

Precedent followed:

1. Shivagopal Vs St. of U.P. & ors., Special Appeal No. 40 of 2017, decided on 08.05.2019 (Para 7)

Precedent distinguished:

1. Udai Naraian Ojha Vs State of U.P. & ors. Writ-A No. 27391 of 2012 delivered on 02.11.2020 (Para 5)

2. St. of Jharkhand & ors. Vs Jitendra Kumar Srivastava passed in Civil Appeal No. 6770 of 2013 (Para 17)

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

1. The question which falls for consideration before this court in the present is whether the government servant is entitled for full pension and gratuity where criminal proceedings are pending against him?

2. It has been submitted by learned counsel for the petitioner that the petitioner was appointed as Assistant Wireless Operator in the Department of the Wireless, Police, Mahanagar, Lucknow on 16.6.1979 and has superannuated from the post of Principal/Head Wireless Operator one 31.3.2019. During his service a first information report was lodged against him in Case Crime No.249/1998 under sections - 417/467/468/471/218 IPC at Police Station, Mahanagar, Lucknow. The chargesheet has been filed in the said case on 29.01.2000 and the trial is in progress.

3. Subsequent to the lodging of the first information report the petitioner was suspended from service and disciplinary proceedings were also initiated against him which were concluded in favour of the petitioner where he was exonerated, and the order of suspension was revoked on 10.09.2004.

4. That subsequent to his retirement it has been submitted that no disciplinary proceeding are pending against him, but by means of the impugned orders the respondents have withheld the regular pension and gratuity on account of the fact that the criminal case is pending against him.

5. In support of his submissions the counsel for the petitioner has relied upon the judgement of this court rendered by coordinate bench of this court in the case of ***Udai Naraian Ojha vs State of U.P and others Writ A no. 27391 of 2012*** delivered on 02.11.2020.

6. It was submitted that in the case of ***Udai Narayan Ojha (supra),*** the petitioner therein had superannuated on 31.12.2011 from the post of Assistant Sub Inspector in U.P Police and a criminal case was lodged against him in 2007 under section 409 IPC which was pending investigation. Subsequently the charge sheet was filed on 20.4.2013 subsequent to his superannuation and the opposite parties had withheld his

gratuity. The court had considered the question:-

"whether the amount of gratuity payable to retired employee of state could be withheld merely on account of pendency of criminal investigation against him at the time of retirement. The connected issue is whether the charge sheet filed against the petitioner, subsequently, would justify withholding of gratuity even if the charges relate to a period which date back to more than 4 years from the date of superannuation?"

7. The SingleJudge after considering the Full Bench of this court in Special Appeal no. 40 of 2017 ***(Shivagopal versus state of U.P and four others)*** decided on 08.05.2019, as well as provisions of Article 351/351A and the Civil Services Regulations and allowed the writ petition after recording the following :-

"8. The power of State to withhold pension and gratuity, therefore, must be exercised strictly as per the applicable law and if the State action is not found to be in consonance with it, the withholding of gratuity would violate Article 300-A of the Constitution of India. The denial of such constitutional right, therefore, would be liable to be interfered with by this Court under Article 226 of the Constitution of India.

9. Even otherwise, the period of 4 years is a reasonable period from the date of the event, leading to submission of charge-sheet and the employee cannot be made to suffer for any un-explained or undue delay on the part of the State or the investigating agency. It is, otherwise, not shown by the respondents that such delay was attributed to any act or omission on part of the petitioner. The right 9 of State to proceed in accordance with law, is otherwise available by virtue of Article 351 of Civil Services Regulations if the charges are found proved in judicial proceedings and the public interest also would not be adversely affected, if the gratuity due is paid to the government servant. In view of the above discussions, this Court has no hesitation in holding that action of respondents in withholding payment of gratuity to petitioner is wholly illegal, arbitrary and cannot be sustained. 10. Writ petition succeeds and is allowed. The order dated 28.1.2012 passed by the respondent no. 3, so far as it relates withholding of gratuity payable to petitioner is concerned, is set aside. A writ of mandamus is issued to the respondents to forthwith release the withheld amount of gratuity together with 6% interest. In case the amount is not paid within four months from today, the petitioner shall be entitled to enhanced rate of interest at the rate of 8% per annum, and it shall be open for the authorities of the State to realise the additional interest from the salary of the officer found responsible for not ensuring release of gratuity to petitioner in terms of this order."

8. It has been submitted by the counsel for the petitioner the facts of the case in the case of ***Udai Narain Ojha*** are quite similar. In the case of Udai Narain Ojha the decision to withhold gratuity was taken subsequent to filing of the charge sheet against him when the criminal trial/ Judicial proceedings were pending against him, and accordingly prayed that his petition may be allowed in similar terms.

9. Per contra, the learned Standing counsel has opposed the prayer made in the writ petition and submitted that the controversy involved in the present case is fully covered by the judgement of the full

bench in the case of ***Shivagopal vs state of U.P Special appeal no.40 of 2017*** decided on 08.05.2019. It has been submitted that before the Full Bench the question which was considered as stated in para 3 of the Judgment was:-

"3. In the batch of writ petitions the controversy involved is with regard to the entitlement of the government servant to receive death come retirement gratuity on superannuation or otherwise pending judicial proceedings."

10. While answering the aforesaid question the Full Bench considered that the civil servants' claim to pension and gratuity is regulated by regulations/rules in force at the time when the officer demits office on attaining the age of superannuation or otherwise from the service of the government. The Full Bench concurred with the judgement of the division bench in the case of ***Sri Pal Vaish vs U.P Power corporation limited and another*** and Jayprakash and disagreed with the judgement in the case of ***Bhagwati Prasad Verma Vs state of U. P and others*** to hold that "pension includes gratuity" under the civil services regulations In a reference to article 351-A.

11. The Full bench considered that article 351-A empowers the governor to withhold or withdraw pension or a part of it permanently off a specified period and order recovery from pension for pecuniary loss caused to the government of the pensioner in departmental proceedings or Judicial proceedings where he has been found (i) guilty of grave misconduct or (ii) do of course back in early loss to the government by misconduct or negligence during his service period. The proviso to the article spells out the circumstances/ conditions in which the departmental proceedings/ Judicial proceedings are required to be instituted for the purpose of withholding/withdrawing pension.

12. It was also observed that the State Governments/Governor reserves to itself the power and right to withhold or withdraw pension or part thereof, whether permanently or for specified period or to order recovery from pension or part thereof, whether permanently or for a specified. Or to order recovery from pension of the whole or part of any pecuniary loss caused to the government upon conclusion of the disciplinary/judicial proceedings.

13. The Full Bench also considered the provisions applicable where the departmental or judicial proceedings are pending on the date of retirement. It considered the provisions of article 351AA inserted vide notification rated 24th October 1980, according to which where the proceedings or inquiry are pending against the government servant on date of superannuation, the government servant shall be entitled to provisional pension. In other words, pendency of departmental/judicial proceedings or any inquiry or enquiry to be instituted after retirement would not empower the state government to withhold pension, but Government servant maybe sanctioned provisional pension, computed as per rules. It follows that the full pension has to be computed on conclusion of proceedings/inquiry as the case may be.

14. The full bench further noticed the provisions of article 919A of the civil services regulation and held that:-

"56. Sub-Clause (3) to Article 919-A is negatively worded, it categorically mandates that gratuity shall not be paid to

the government servant until conclusion of the departmental/or judicial proceedings or enquiry by the Administrative Tribunal. On plain reading, it is clear that in the event of pending proceedings/enquiry there is an embargo mandating that government servant shall not be entitled to gratuity until conclusion of the pending proceedings and final orders being issued thereon by the competent authority. That what was subservient/inert in the definition of pension that "pension includes gratuity" (Article 41) was made explicit and in contradiction to pension that gratuity is not payable to government servant pending disciplinary proceedings/or judicial proceedings, but the provision {Sub Clause (1)} is positively worded entitling the government servant provisional pension equal to maximum pension, admissible to the government servant on the basis of the qualifying service up to the date of retirement or suspension as the case may be. The provision (Sub-clause (3)) employs the word 'shall' thus making it mandatory. Article 351-AA uses the word 'may', thus leaving it to the competent authority to sanction provisional pension. We have not come across any provision in the Civil Service Regulations that prohibits or imposes restriction on sanction of provisional pension. The government servant in our opinion is entitled to provisional pension pending proceedings/enquiry.

57. Article 351-AA and 919-A get invoked in the event of pending departmental/judicial proceedings or an enquiry by Administrative Tribunal against the government servant. As against Article 351 and 351-A invoked upon the outcome of the disciplinary/judicial proceedings. It follows that where the government servant retires on attaining the age of superannuation or otherwise and against whom any departmental/judicial proceedings or any enquiry by the Administrative Tribunal is pending on the date of retirement or to be instituted after retirement, the following consequences flow: (i) government servant is entitled to provisional pension equal to maximum pension; (ii) no gratuity is payable pending departmental/judicial proceedings or the enquiry; (iii) full pension (commutation of pension) and gratuity is payable upon conclusion of the pending departmental/judicial proceedings/enquiry and final order being passed thereon by the competent authority."

15. After the above discussion it was held that during the pendency of disciplinary proceedings the government servant is not entitled to gratuity but are entitled only to provisional pension, in the following terms:-

"64. In view of the specific provision viz. Article 351-AA and 919-A, a government servant against whom disciplinary/judicial proceedings is pending on retirement or to be instituted, the government servant is not entitled to gratuity, but to provisional pension subject to the outcome of the proceedings/enquiry. It is not open to the government servant at that stage/or during pendency of the disciplinary/judicial proceedings to contend that since allegations of 'grave misconduct' or pecuniary loss to the Government, prima facie, is not made out from the charge(s), therefore, he is entitled to full pension and gratuity. The stage to entertain such a plea has not arisen yet.

64. We are in agreement with and approve the ratio of Sri Pal Vaish and Jai Prakash on the proposition of law that government servant is not entitled to gratuity but to provisional pension during pendency of proceedings/enquiry.

65. We accordingly hold that during pendency of proceedings/enquiry

government servant shall be sanctioned provisional pension and no gratuity is payable for the period upto conclusion of the proceedings/enquiry and orders being passed thereon by the competent authority.

66. The question that arises is whether the government servant/pensioner can seek intervention at a stage before the competent authority has had the occasion to pass appropriate order upon conclusion of the disciplinary/judicial proceedings/or enquiry by Administrative Tribunal. We are of the opinion that such a course is not available to the pensioner and if allowed would entail serious consequences, otherwise not mandated by the Regulations. It is not open to the government servant/pensioner, in view of the conjoint reading of the Articles to pre-empt the pending proceedings/enquiry by walking away with pension/gratuity without awaiting the outcome/conclusion of the disciplinary/judicial proceedings/enquiry. The competent authority upon conclusion of the proceedings would be in a position to apply its mind on the outcome of the proceedings/enquiry and pass order thereon either withholding/withdrawing/reduction of pension or directing recovery of pecuniary loss from pension under Articles 351/351-A of the Civil Service Regulations."

16. The full bench in the case of ***Shivagopal (supra)*** has considered the provisions of article 919A of the civil services regulations it has in unequivocal terms held that during pendency of disciplinary or judicial proceedings gratuity cannot be paid.

17. The counsel for the petitioner has relied upon the judgment of the Supreme Court in the case of state of ***Jharkhand and others versus jitendra Kumar Srivastava*** passed in civil appeal number 6770 off 2013 while interpreting provisions of rule 43(b) of the Bihar pension held that :-

"11. Reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension etc. ONLY when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the rules for withholding of the pension/ gratuity when such departmental proceedings or judicial proceedings are still pending."

18. In the present case the criminal proceedings are pending against the petitioner where the First Information report was lodged on 16.07.1998 and the charge sheet was filed on 29.01.2000 and the trial is underway. And it is only because of the pendency of the criminal proceedings against the petitioner that is post retiral dues including pension have been withheld. The case of the petitioner is covered by the judgment of the full bench in the case of Shiv Gopal (supra) and according to regulation 919A of the Civil Service Regulation, the petitioner is not entitled for payment of gratuity during pendency of criminal case.

19. The judgement of the Supreme Court in the case of ***State of Jharkhand versus jitendra Kumar Srivastav*** is not applicable in the present case as the Supreme Court therein has interpreted the provisions of Rule 43(b) of Bihar pension rules which lay down a very different procedure and criteria for grant of pension and post retiral dues and hence the benefit

of the same cannot be claimed by the petitioner. The benefit of the judgment in the case of ***Uday Narayan Ojha*** is also not applicable in case of the practitioner as it is seen that the charge sheet was filed prior to his retirement and within 4 years of lodging of the first information report, enhanced the criminal proceedings are also not hit by the provisions of article 351A of the CSR.

20. Considering the aforesaid, this Court is of the considered view that the petitioner is not entitled for gratuity till the criminal proceedings are pending, but he is entitled to provisional pension and other post retiral dues for which there is no legal embargo.

21. In light of the above, subject to the observations made above, the writ petition is bereft of merits and is accordingly **dismissed**.

(2022) 10 ILRA 55
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 12615 of 2022

Smt. Kiran Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Deepak Kumar Verma, Smt. Akansha Verma

Counsel for the Respondents:
C.S.C.

A. Service Law – Maternity leave - Maternity Benefit Act, 1961 - Section 2, 3(e) r/w Section 2(1) - Fundamental Rules - Rule 153 - In view of the 3rd Proviso to Rule 153 of the Fundamental Rules, no maternity leave shall be admissible to a government servant until for the period of 2 years from the date of expiry of the last maternity leave granted under the Rules. (Para 7, 8, 10)

B. Applicability of Maternity Benefit Act, 1961 – Provisions of grant of maternity leave under the Maternity Benefit Act, 1961 are applicable to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition or equestrian, acrobatic and other performances. It also applies to **establishment within the meaning of any law for the time being in force** in relation to shops and establishments in a State, in which ten or more person are employed, or were employed, on any day of the preceding twelve months. (Para 12)

It is not disputed that **petitioner is a government servant** and it is also not disputed that she is an employee of the State Government and the Fundamental Rules 153 applies for service of Government employees as also for the grant of maternity leave. **Petitioner is not an employee under an establishment as defined in Section 3(e) of the Maternity Benefit Act, 1961**, r/w Section 2(1), i.e., petitioner is not an employee in the department, mine or plantation in a establishment so as to exhibit of equestrian, acrobatic and other performance etc. Hence it is evident that petitioner is not an employee of establishment. (Para 14, 15)

Petitioner's second application for maternity leave (from 05.07.2022 to 31.12.2022) is within two years from the date of expiry of the first maternity leave (which was sanctioned till 27.12.2021) and in view of 3rd proviso to Rule 153 of the Fundamental Rules, the maternity leave could not be granted to the petitioner. (Para 11, 16)

Writ petition dismissed. (E-4)

Precedent followed:

1. Renu Chaudhary Vs State of U.P. & ors., 2022 (2) ADJ 14 (Para 15)

Present petition assails order dated 16.07.2022, passed by District Panchayat Raj Officer, Fatehpur.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the petitioner and learned Additional Chief Standing Counsel for respondents no. 1 to 3.

2. By means of this writ petition, the petitioner has prayed to quash the impugned order dated 16.07.2022 passed by respondent no.3 District Panchayat Raj Officer, Fatehpur by which the maternity leave of the petitioner has been rejected.

3. Further a writ of mandamus directing respondent no.2 Deputy Director (Panchayat) Prayagraj Division Prayagraj to sanction the maternity leave and pay salary in accordance with rule has also been prayed to be issued.

4. Admitted facts between the parties are as under:-

5. Petitioner was appointed on the post of Assistant District Panchayat Raj Officer (Pravi) on 18.06.2014. She joined in the month of June, 2014. After the marriage, she became pregnant and consequently she moved a representation before respondent no.2 praying for sanction of maternity leave from 01.07.2021 to 27.12.2021 which was sanctioned by order dated 30.06.2021. After one year, the petitioner again moved an application on 24.06.2022 for maternity leave for second issue before the respondent no.3 with a prayer to sanction maternity leave from 05.07.2022 to 31.12.2022 under the Maternity Benefit Act, 1961. The aforesaid application remained pending, however on a reminder dated 12.07.2022 given by the petitioner, impugned order dated 16.07.2022 has been passed, rejecting the maternity leave application given by the petitioner.

6. Learned counsel for the petitioner submits that in view of provisions of the Maternity Benefit Act, 1961, she is entitled for maternity leave. The provisions of the Act have been violated while rejecting her maternity leave. It is also submitted that the impugned order has been passed by non application of mind.

7. Sri Pramod Kumar Srivastava, learned Additional Chief Standing Counsel for the respondents submits that under the provisions of the Maternity Benefit Act, 1961, aforesaid benefit is not applicable in the case of the petitioner, who is government employee.

8. Second submission of the learned Additional Chief Standing Counsel is that in view of of the 3rd Proviso to Rule 153 of the Fundamental Rules, no maternity leave shall be admissible to the said employee until for the period of 2 years from the date of expiry of the last maternity leave granted under the Rules. He further submitted that first maternity leave lapsed on 21.12.2021 and therefore, the second application for maternity leave can be considered after expiry of two years from 27.12.2021, that is 27.12.2023, and not prior to that.

9. Rule 153 of the Fundamental Rules provides for grant of maternity leave to female government servant whether permanent or temporary provided that no such leave shall be admissible unless a

period of 2 years have elapsed from the date of expiry of the last maternity leave granted under this rules.

10. **Rule 153 of Financial Handbook is extracted as under:-**

153. Maternity leave on full pay which a female Government servant, whether permanent or temporary, may be drawing on the date or proceeding on such leave may be granted to her by the head of the department or by a lower authority to whom power may be delegated to this behalf subject to the following:

(1) In cases of confinement the period of maternity leave may extend up to the end of three months from the date of the commencement of leave:

Provided that such leave shall not be granted for more than three times during entire service including temporary service;

Provided also that if any female Government servant has two or more living children. she shall not be granted maternity leave even though such leave may otherwise be admissible to her. If. However. either of the two living children of the female Government servant is Suffering from incurable disease or is disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, she may. as an exception. Be granted maternity leave till one more child is born to her subject to the overall restriction that maternity leave shall not be granted for more than three times during the entire service:

Provided further that no such leave shall be admissible until a period of at least two years has elapsed from the date of expiry of the last maternity leave granted under this rule.

(2) In cases of miscarriage. including abortion, the period of maternity leave may extend up to a total period of six weeks on each occasion, irrespective of the number of surviving children of the female Government servant concerned. provided that the application for leave is supported by a certificate from the Authorised Medical Atterndant.

11. It is not disputed between the parties that first maternity leave was sanctioned on 27.12.2021 and therefore, second maternity leave which was sought by the petitioner within two years, is not admissible under Rule 153.

12. So far as grant of maternity leave under the Maternity Benefit Act, 1961 is concerned, the same are applicable to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition or equestrian, acrobatic and other performances. It also applies to establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more person are employed, or were employed, on any day of the preceding twelve months.

13. **Section 2 of the Maternity Benefit Act, 1961 is extracted below**

2. Application of Act.-[(1) It applies, in the first instance,

(a) to every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performance;

(b) to every shop or establishment within the meaning of any law for time being in force in relation to shops and establishment in a State in which ten or more persons are employed, or were employed, on any day of the preceding twelve months:

Provided that the State Government may, with the approval of the Central Government, after giving not less than two month's notice of its intention of so doing. by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

(2) Save as otherwise provided in sections 5-A and 5-B, nothing contained in this Act shall apply to any factory or other establishment to which the provisions of the
Employees' State Insurance Act, 1948 (34 of 1948), apply for the time being.

14. It is not disputed that petitioner is a government servant and it is also not disputed that she is an employee of the State Government and the Fundamental Rules 153 applies for service of Government employees as also for the grant of maternity leave. Petitioner is not an employee under an establishment as defined in Section 3 of sub-section (e) of the Maternity Benefit Act, 1961, read with Section 2 of sub-section (i).

15. Obviously, the petitioner is not an employee in the department, mine or plantation in a establishment so as to exhibit of equestrian, acrobatic and other performance etc. as provided under Act, 1961. Hence it is evident that petitioner is not an employee of establishment. This question has been considered and decided by this Court in ***Renu Chaudhary Versus State of U.P. and others 2022 (2) ADJ 14.***

16. From the aforesaid, it is clear that second application for maternity leave of the petitioner is within two years from the date of expiry of the first maternity leave and in view of 3rd proviso to Rule 153 of the Fundamental Rules, the maternity leave could not be granted to the petitioner. The petitioner is a government employee and not an employee as provided in Section 3 (e) of the Maternity Benefit Act,1961 read with section 2 (1) thereof.

17. In view of the above, the writ petition is **dismissed**.

(2022) 10 ILRA 58
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 14003 of 2022

Smt. Vimla Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rama Yadav, Sri Tripurari Pal

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - Pension – Dying in Harness Rules, 1974 - Civil Service Regulations and the U.P. Retirement Benefit Rules, 1961 - Rule 6, Rule 7 of part-III; The Hindu Marriage Act, 1956 - Sections 4, 5, 11 & 29 - U.P. Government Servant Conduct Rules, 1956 - Rule 29 - Mere nomination of a stranger, who is not a family member of

the deceased employee is not be entitled to family person. (Para 28)

In the case of two wives, the nomination in favour of the second wife cannot defeat the claim of the legally wedded wife, only legally wedded wife is entitled to retrial benefits, provident fund and appointment under Dying-in-Harness Rules. (Para 24)

Civil Service Regulations and the U.P. Retirement Benefit Rules, 1961: Rule 7 - A bare perusal of the Rules, 1961, is indicative that **the definition of "family' does not include the second wife, it only refers to 'wife', and family pension, as per Rule 7(1), is granted to the member of the 'family' of an officer.** Sub-rule 3(e) of Rule 7 provides that pension is not payable to a person who is not a member of the deceased/officer's family. Sub-rule 4(a)(i) provides that pension shall be sanctioned under Part III to the eldest surviving widow and the note appended to the rule clarifies the expression "eldest surviving widow" should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows. (Para 15)

The scheme of the Rules provide that in case the Government Servant leaves behind two wives, **the second wife, not being a member of the family, is not eligible to family pension, as long as, the first wife survives.** Further, **there could not have been any nomination in favour of the second wife as she was ineligible to have been nominated under sub-rule (5), being not a member of the family of the employee, thus, ineligible to receive pension under sub- rule (3) of Rule 7**. (Para 16)

In the present case, since the first wife is alive on the date on which the family pension became due, **the second wife cannot set up a claim for family pension even on the consent of the first wife**, further, nomination in favour of second wife would be invalid as she being not a member of the government servant's family. (Para 17)

The second wife does not fall within the definition of 'Family' and cannot be entitled to the terminal dues of the deceased Manoj Kumar. The petitioner cannot be a regarded as a family member of the deceased Manoj Kumar by virtue of her being the real sister of the first wife of Manoj Kumar. The **petitioner cannot be entitled to compassionate appointment** on the demise of Manoj Kumar in harness. (Para 28, 29)

B. Where the Government servant being a Hindu having two wives died while in service, the second marriage being void under the Hindu law, hence, the second wife having no status of widow is not entitled to anything, however, children from the second wife would equally share the benefits of gratuity and family pension as per law. (Para 25)

The Hindu Marriage Act, 1956: Ss. 11, 29 - As per the scheme of the Hindu Marriage Act, marriage between two Hindus solemnized before the commencement of the Hindu Marriage Act, which was otherwise legal and valid, would be saved u/s 29 of the Act and would not be void u/s 11. (Para 22)

U.P. Government Servant Conduct Rules, 1956: Rule 29 - Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act, if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules, therefore, it follows that the "second wife" as referred to under the Rules, 1961 would only include second wife whose marriage was otherwise permissible under the personal law or law prevalent at the time of marriage, but in the case of Hindus the second wife will have no right, whatsoever, as the law prohibits second marriage, as long as, the government servant has a spouse who is alive. Thus for harmonious construction of the Rules governing pension, wherever, the rule provides for ''wives', it has to be interpreted as per the law governing marriage as applicable to the government servant and **in cases where the second marriage is void under the law, second wife will have no status of a widow of the government servant. In the present case, admittedly the second marriage is stated to have been contracted after enforcement of the Hindu Marriage Act,**

therefore, the marriage is void. The petitioner would have no right in law to claim family pension, nor can she claim the status of widow of the deceased employee. (Para 26, 27)

C. Recovery of the amount of terminal dues and family pension already disbursed to the petitioner - There is no allegation that the amount received towards the terminal dues of late Manoj Kumar and the family pension has been usurped/misappropriated by the petitioner. In such circumstances, the Court is of the opinion that the amount already disbursed to the petitioner shall not be recovered from her. Petitioner has been looking after her elder sister Smt. Pushpa Devi the lawfully wedded wife of deceased Manoj Kumar as also the children begotten from the marriage of Pushpa Devi and Manoj Kumar. However, in future the family pension shall be drawn up in the name of Smt. Pushpa Devi, the legally wedded wife of deceased and the dependent children as per law instead of the petitioner. (Para 30)

D. Words and Phrases – *'void'* - The appellation 'void' in relation to a juristic act, means without legal force, effect or consequence; not binding; invalid; null; worthless; cipher; useless; and ineffectual etc. (Para 23)

Writ petition is partly allowed. The impugned order dated 25.03.2022 and the consequential order dated 29.03.2022, so far as they direct for stoppage of family pension and recovery against the petitioner are set aside. The order dated 25.03.2022, is modified to the extent that the family pension shall now be drawn in the name of Smt. Pushpa Devi. (Para 31) (E-4)

Precedent followed:

1. Nutan Kumar Vs IInd A.D.J., Banda & ors., AIR 1994 Alld. 298 (Para 23)

2. Shakuntala Devi (Smt.) Vs Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad & anr., 2001 (1) UPLBEC 869 (Para 24)

3. Rameshwari Devi Vs St. of Bihar & ors., 2000 (1) ESC 577 (SC) (Para 25)

Present petition assails order dated 25.03.2022, passed by District Basic Education Officer, Kaushambi and also order dated 29.03.2022, passed by Finance & Account Officer, Basic Education, Kaushambi.

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

1. Heard Sri Tripurari Pal, learned counsel for the petitioner and learned Standing Counsel for the State-Respondents.

2. Considering the nature of the order that is proposed to be passed the notice upon the Respondent No.5 is being dispensed with.

3. The writ petition has been filed assailing the order dated 25.03.2022 passed by the Respondent No.3, District Basic Education Officer, Kaushambi, whereby and whereunder a direction has been issued to the Respondent No.4, the Finance & Account Officer, Basic Education District Kaushambi, to stop the payment of family pension to the petitioner and calculate the payment of Fund, Group Insurance and other benefits already paid for its recovery from the petitioner as also the consequential order dated 29.03.2022 passed by the Respondent No.4, Finance & Account Officer, Basic Education, Kaushambi, whereby the payment of the family pension has been stopped.

4. Learned counsel for the petitioner submits that in view of the admitted facts as set out in the writ petition and in the impugned order the writ petition may be decided on merits. Learned Standing

Counsel does not dispute the above proposition, accordingly the Court proceeds to decide the writ petition at the admission stage without calling for a counter affidavit.

5. The facts shorn of necessary details necessary for the adjudication of the controversy involved in the instant writ petition briefly stated are that the writ petitioner claims to be the second wife of late Manoj Kumar, who was working as Assistant Teacher in Janta Junior High School, Faridpur (Audhan) Newada District Kaushambi, The institution is an aided institution run by a private management. The said Manoj Kumar is stated to have died-in-harness on 29.09.2017 leaving behind his wife Smt. Pushpa Devi, two daughters and two sons as well as old age parents. It is the admitted case of the petitioner that the first wife of the late Manoj Kumar namely Smt. Pushpa Devi is insane since last more than 17 years and the petitioner who happens to be the real younger sister of Smt. Pushpa Devi was got married to the said Manoj Kumar by the father of the petitioner who is stated to have consented to the marriage. It is also the case of the petitioner that in the service book of late Manoj Kumar the name of the petitioner and four children have been mentioned as nominee and after the death of Manoj Kumar the family pension was being paid to the petitioner since July, 2019. It is also the case of the petitioner that she is well educated with qualification of M.A. and B. Ed. to her credit and has also qualified TET Examination. The petitioner is stated to have claimed compassionate appointment on the death of Manoj Kumar the deceased Assistant Teacher under the Dying-in-Harness Rules 1974, as a dependent of the said Manoj Kumar. When no orders were being passed on the said application the petitioner is stated to have approached this Court by means of Writ (A) No.3854 of 2021 (Smt. Vimla Devi Vs. State of U.P. & others) which writ petition was disposed of vide order dated 21.06.2021 with a direction to the District Basic Education Officer, Kaushambi to consider the claim of the petitioner and take a decision thereon within four months. The Respondent No.3, the District Basic Education Officer, Kaushambi in compliance of the order dated 21.06.2021 passed in Writ (A) No.3854 of 2021 has passed the impugned order dated 25.03.2022 directing the stoppage of the payment of family pension to the petitioner and also directed for the recovery of the amount paid by way of Fund, Group Insurance and other benefits. The Respondent No.4, the Finance & Account Officer, Kaushambi, has proceed to pass the consequential order dated 29.03.2022. Both the orders dated 25.03.2022 and 29.03.2022 are under challenge in the writ petition.

6. Learned counsel for the petitioner has assailed the impugned orders principally on the following grounds:-

The impugned orders are ex-facie illegal and against the law in as much as the Respondent No.3, the District Basic Education Officer, Kaushambi, travelled beyond the direction of this Court in Writ (A) No.3854 of 2021. The Respondent No.3 was required to consider the claim of compassionate appointment of the petitioner instead he proceeded to decide the matter regarding payment of family pension

The Respondent No.3 has nowhere discussed the claim of the petitioner regrading the compassionate appointment and as such the impugned orders cannot be sustained.

The petitioner is the second wife of late Manoj Kumar and the real younger sister of the first wife. He first wife is insane since last more than 17 years and her marriage has been performed with Manoj Kumar with her consent and she is looking after the children of late Manoj Kumar and her name is entered in the service book of late Manoj Kumar. No objection was ever raised in that regard.

7. It is thus submitted that the impugned orders are liable to be set aside. The payment of family pension is liable to be resumed and her claim for compassionate appointment is liable to be considered.

8. Learned Standing Counsel in opposition to the writ petition submits that the District Basic Education Officer, Kaushambi, while passing the impugned order has considered all aspects of the matter and even got an inspection done through the Tehsildar, Chail, who recorded the statements of the family members of the deceased Manoj Kumar and concluded that late Manoj Kumar never entered into any marriage with the petitioner even though she is stated to have taken care and brought up the children of her sister Smt. Pushpa Devi, the wife of late Manoj Kumar. The conclusion so arrived at by the District Basic Education Officer cannot be faulted as the petitioner is not the legally wedded wife of the deceased and cannot be entitled to the terminal dues and family pension. It is, accordingly, prayed that the writ petition is liable to be dismissed.

9. Heard learned Counsel for the petitioner as also the learned Standing Counsel for the State-Respondents and perused the record.

10. The moot question for consideration can be enumerated as under:-

(1) Whether on the admitted facts, the petitioner who claims herself to be the second wife of the deceased Manoj Kumar even during the subsistence of the marriage and the first wife being alive is entitled to the terminal dues and family pension?

(2) Whether the amount already paid to the petitioner by way of the terminal dues of late Manoj Kumar and the family pension consequent to the death of Manoj Kumar is liable to be recovered from the petitioner?

(3) Whether the petitioner can claim compassionate appointment consequent to the death of Manoj Kumar as his second wife during the life time of the first wife and subsistence of the first marriage?

(4) Whether the impugned order can be sustained on the admitted facts?

11. The facts, inter-se parties are not in dispute. The family pension is governed by the provisions of the Civil Service Regulations and the U.P. Retirement Benefit Rules, 1961. "Family" is defined under sub Rule (3) of Rule 3, which reads as under:-

"(3) "Family" means the following relatives of an officer:

(i) wife, in the case of any male officer;

(ii) husband, in the case of a female officer;

(iii) sons (including step-children and adopted children)

(iv) unmarried and widowed daughters. (Including step-children and adopted children)

(v) brothers below the age of 18 years and unmarried and widowed sisters (including step-brothers and step-sisters);

(vi) father;

(vii) mother;

(viii) married daughters (including step-daughters), and

(iv) children of a pre-deceased son"

12. Rule 6 provides for nomination of one or more persons the right to receive any gratuity that may be sanctioned. The proviso clarifies that at the time of making nomination if the officer has a family, the nomination shall not be in favour of any person other than one or more members of the family. Rule 6 is extracted:

"6. Nomination. – (1) A Government Servant shall, as soon as he acquires or if he already holds a lien on a permanent pensionable right to receive any grauity that may be sanctioned under sub-rule (2) or sub-rule (3) of rule 5 and gratuity which after becoming admissible to him under sub-rule (1) of that rule is not paid to him before death :

Provided that if at the time of marking the Nomination the officer has a family, the nomination shall not be in favour of any person other than one or more of the members of the family."

13. Rule 7 of Part-III of the Rules provides that family pension may be granted to the family of the officer who dies, whether after retirement or while still in service after completion of not less than twenty years' qualifying service. Sub-Rule (4) of Rule 7 provides who shall be entitled to receive pension in the event the deceased employee had two wives. Sub-rule (4) is extracted:

(4) "Except as may be provided by a nomination under sub-rule (5) below:

(a) a pension sanctioned under this Part shall be granted—

(i) to the eldest surviving widow, if the deceased was a male officer or to the husband, if the deceased was a female officer;

(ii) failing the widow or husband, as the case may be, to the eldest surviving son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) these failing, to the eldest widowed daughter; and

(b) in the event of the pension not becoming payable under clause (a) the pension may be granted—

(i) to the father;

(ii) failing the father, to the mother;

(iii) failing the father and mother both, to the eldest surviving brother below the age of 18;

(iv) these failing, to the eldest surviving unmarried sister;

(v) these failing (i) to (iv) above, to the children of a predeceased son in the order it is payable to the children of the deceased officer under clause (a) (ii), (iii) and (iv), above.

***Note**.—The expression "eldest surviving widow" occurring in clause (a) (i) above, should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows."*

14. Claim of the petitioner towards family pension can be considered provided she falls within the scope and ambit of the definition "family' as defined in Rules, 1961.

15. A bare perusal of the Rules, 1961, is indicative that the definition of "family' does not include the second wife, it only refers to 'wife', and family pension, as per Rule 7(1), is granted to the member of the 'family' of an officer. Sub-rule 3(e) of Rule

7 provides that pension is not payable to a person who is not a member of the deceased/officer's family. Sub-rule 4(a)(i) provides that pension shall be sanctioned under Part III to the eldest surviving widow and the note appended to the rule clarifies the expression "eldest surviving widow" should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows.

16. Sub-rule (5) requires the Government Servant to make nomination indicating the order in which pension sanctioned would be payable to the members of his 'family', provided the nominee is not ineligible, on the date on which the pension may become payable to him or her to receive the pension under the provisions of sub-rule (3) of rule 7. Thus, the scheme of the Rules provide that in case the Government Servant leaves behind two wives, the second wife, not being a member of the family, is not eligible to family pension, as long as, the first wife survives. Further, there could not have been any nomination in favour of the second wife as she was ineligible to have been nominated under sub-rule (5), being not a member of the family of the employee, thus, ineligible to receive pension under sub- rule (3) of Rule 7.

17. Taking a case that there was nomination in favour of the second wife, the family pension would have been payable in accordance to such nomination provided the nominee is not ineligible, on the date on which the family pension became payable to her under sub-rule (3) of Rule 7. In the facts of the present case, since the first wife is alive on the date on which the family pension became due, the second wife cannot set up a claim for family pension even on the consent of the first wife, further, nomination in favour of second wife would be invalid as she being not a member of the government servants family [sub-rule (3)(e) of Rule 7].

18. The Hindu Marriage Act, 1956 came into force on 18 May 1955, the Act amended and codified the law relating to marriage among Hindus. Section 4 provides that the Act has an overriding effect. Section 4 is extracted:

"4. Overriding effect of Act.-Save as otherwise expressly provided in this Act.-

(a) any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

19. Section 5 provides the the conditions for Hindu marriage between two Hindus and one of the condition provides that neither party should have a spouse living at the time of marriage. Section 5(i) is reproduced:-

"5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of marriage;"

20. Section 11 provides for void marriages. Section 11 reads thus:

"11. Void Marriages.- Any marriage solemnized after the

commencement of this Act shall be null and void and may, on a petition presented by either party thereto [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

21. Section 29 of the Hindu Marriage Act saves the marriages performed between Hindus before the commencement of the Act. Section 29(1) is reproduced:-

"29. Savings.-(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-divisions of the same caste."

22. Thus as per the scheme of the Hindu Marriage Act, marriage between two Hindus solemnized before the commencement of the Hindu Marriage Act, which was otherwise legal and valid, would be saved under Section 29 of the Act and would not be void under Section 11. The marriage as per the case of the petitioner between the deceased employee Manoj Kumar and the petitioner came to be solemnized after the enactment of the Hindu Marriage Act. The employee contracted the second marriage with the petitioner after the commencement of the Hindu Marriage Act, the marriage, therefore, is void and a nullity in the eye of law, petitioner would have no right of being a legally wedded wife.

23. In a Full Bench decision of this Court in the case of ***Nutan Kumar versus IInd Additional District Judge, Banda and others; (AIR 1994 Alld 298)*** in paragraph 8 of the majority judgement, the Court has observed as under:

"The appellation 'void' in relation to a juristic act, means without legal force, effect or consequence; not binding; invalid; null; worthless; cipher; useless; and ineffectual etc."

24. This Court in ***Shakuntala Devi (Smt.) Versus Executive Engineer, Electricity Transmission Ist U.P. Electricity Board, Allahabad and another, [2001(1) UPLBEC 869]*** while dealing with two wives wherein the nomination was in favour of the second wife it was held that it cannot defeat the claim of the legally wedded wife, only legally wedded wife is entitled to retiral benefits, provident fund and appointment under Dying-in-Harness Rules.

25. In ***Rameshwari Devi Versus State of Bihar and others, [2000(1) ESC 577 (SC)]*** where the Government servant being a Hindu having two wives died while in service, Supreme Court held that the second marriage was void under the Hindu law, hence, the second wife having no status of widow is not entitled to anything, however, children from the second wife would equally share the benefits of gratuity and family pension as per law.

26. Further, the U.P. Government Servant Conduct Rules, 1956, which came into force on 28th July, 1956, Rule 29 prohibits a Government Servant from bigamous marriage. Rule 29 reads thus:

"29. Bigamous marriages-(1) No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the

Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him."

27. Thus, Hindus cannot contract marriage after the enforcement of the Hindu Marriage Act, if any of them is having a living spouse, the marriage would be a nullity and would also not be protected under the Conduct Rules, as well as, the pension rules, therefore, it follows that the "second wife" as referred to under the Rules, 1961 would only include second wife whose marriage was otherwise permissible under the personal law or law prevalent at the time of marriage, but in the case of Hindus the second wife will have no right, whatsoever, as the law prohibits second marriage, as long as, the government servant has a spouse who is alive. Thus for harmonious construction of the Rules governing pension, wherever, the rule provides for "wives', it has to be interpreted as per the law governing marriage as applicable to the government servant and in cases where the second marriage is void under the law, second wife will have no status of a widow of the government servant. In the facts of the case in hand admittedly the second marriage is stated to have been contracted after enforcement of the Hindu Marriage Act, therefore, the marriage is void. The petitioner would have no right in law to claim family pension, nor can she claim the status of widow of the deceased employee.

28. Having regard to the facts and circumstances brought on record it is not in dispute that the petitioner claims to be the second wife of the deceased Manoj Kumar though the impugned order dated 25.03.2022 of the Basic Education Officer records that no formal marriage took place between Manoj Kumar and the petitioner as per the report of the Naib Tehsildar, Chail, Kaushambi. In any case even if it is assumed that the petitioner did enter into a marriage with the deceased Manoj Kumar the second marriage cannot have any sanctity in law and is void as the first wife is very much alive and no divorce has taken place. The second wife does not fall within the definition of Family and cannot be entitled to the terminal dues of the deceased Manoj Kumar. The petitioner cannot be a regarded as a family member of the deceased Manoj Kumar by virtue of her being the real sister of the first wife of Manoj Kumar. Mere nomination of a stranger, who is not a family member of the deceased employee is not be entitled to family person.

29. Likewise, the petitioner cannot be entitled to compassionate appointment on the demise of Manoj Kumar in harness. The claim of the petitioner for compassionate appointment is thus not tenable in law and does not merit consideration for the reasons stated herein before. Besides the Court on the perusal of the pleadings in the writ petition finds that though grounds and pleadings have been set up with regard to compassionate appointment but no relief in that regard has been claimed by the petitioner and the relief has been confined to quashing of the impugned orders and grant of family pension.

30. Now coming to the question as to whether the respondents are entitled to the recovery of the amount of terminal dues and family pension already disbursed to the petitioner as per the impugned orders. In this regard the Court finds that the petitioner has been looking after her elder sister Smt. Pushpa Devi the lawfully

wedded wife of deceased Manoj Kumar as also the children begotten from the marriage of Pushpa Devi and Manoj Kumar. The marriage of the elder daughter namely Jigyasa has also been solemnized by the petitioner. There is is no allegation that the amount received towards the terminal dues of late Manoj Kumar and the family pension has been usurped/misappropriated by the petitioner. In such circumstances, the Court is of the opinion that the amount already disbursed to the petitioner shall not be recovered from her. However, in future the family pension shall be drawn up in the name of Smt. Pushpa Devi, the legally wedded wife of late Manoj Kumar and the dependent children as per law instead of the petitioner.

31. In view of the above, the writ petition is **partly allowed**. The impugned order dated 25.03.2022 passed by the District Basic Education Officer, Kaushambi and the consequential order dated 29.03.2022 passed by the Finance and Accounts Officer, Basic Education, Kaushambi, so far as they direct for stoppage of family pension and recovery against the petitioner are set aside. The order dated 25.03.2022 passed by the District Basic Education Officer, Kaushambi, is modified to the extent that the family pension shall now be drawn in the name of Smt. Pushpa Devi, the legally wedded wife of late Manoj Kumar and the dependent children and the same shall be released month to month as and when the same falls due. Necessary orders to the above effect shall be passed by the District Basic Education Officer, Kaushambi, within three weeks of receipt of the certified copy of this order.

32. It is clarified that the amount already disbursed to the petitioner shall not be recovered.

(2022) 10 ILRA 67
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 17008 of 2001

Smt. Baby ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Lavkush Kumar Shukla, Sri Lokesh Kumar Dwivedi

Counsel for the Respondents:
C.S.C., Sri Arun K. Singh Deshwal

A. Service Law – Compassionate Appointment – Dying-in-Harness Rules, 1974 - Rule 2(C)(iii); Employees Service Regulations, 1980 - Rule 104 - U.P. Cooperative Societies Employees Service Regulations, 1975 - Regulation 104(5) - The Rule of Compassionate Appointment for dependents of deceased Government Employee Dying-in-Harness has been carved out as an exception of the general rule of equal opportunity in employment u/Article 16 of the Constitution. The reason for carving out for such exception is to save a dependent of a deceased employee from destitution and penurious conditions. (Para 11)

The petitioner's case has not been rejected on the ground of failure of the petitioner to prove her dependence on her dead mother. The Respondents have not said that the petitioner is not a deserted woman left to fend for herself and her two children and that she was not living with her mother at the time of her death. The rejection of the petitioner's case has never been on the merits of the case of the petitioner for seeking compassionate appointment because of the indigent circumstances, she was facing. The Respondents have always relied upon the

technical grounds to defeat the claim of the petitioner. Every time such order has been passed rejecting the claim of the petitioner on technical ground, this Court has intervened in extraordinary jurisdiction u/Article 226 of the Constitution and rejected the grounds taken by the respondents. The petitioner has been forced to face repeated litigation for no fault on her part. The petitioner was not responsible for the financial condition of PCF, therefore, in case, the PCF has suffered financial loses since the time of the death of the petitioner's late mother, it cannot be said that the petitioner should be deprived of her legitimate right to be adjusted as a Class-IV employee in the establishment of the Respondents. (Para 11)

The order dated 12.03.2021 is set aside. This writ petition is disposed of with a direction to the respondents to consider the claim of the petitioner for appointment on compassionate grounds and pass appropriate orders thereon. (Para 12, 13)

Writ petition disposed off. (E-4)

Precedent followed:

1. Smt. Vimla Srivastava Vs St. of U.P., Writ Petition No. 60881 of 2015, decided on 04.12.2015 (Para 3(1))

2. Shiv Kumar Dubey Vs St. of U.P. & ors., (2014) 2 ADJ 312 (Para 3(4))

Present petition assails order dated 12.03.2021 received alongwith covering letter dated 17.08.2021, passed by Uttar Pradesh Cooperative Federation Limited (PCF), Lucknow.

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

(Oral)

1. Heard learned counsel for the petitioner and Sri Arun K. Singh Deshwal, learned counsel for the respondents no. 2 and 3.

2. This petition has been filed by the petitioner challenging the Order dated 12.03.2021 received alongwith covering letter dated 17.08.2021 passed by the Respondent No.2 and praying for a Mandamus to be issued to the respondent No. 2 and 3 to appoint the petitioner on compassionate ground within a stipulated time period.

3. It is the case of the petitioner that the mother of the petitioner Smt. Shakuntala Devi was working as a Sweeper with the Respondent No.2 & 3 and she died in harness on 14.01.2006 leaving behind her husband, who expired on 28.05.2015 and her three daughters, Smt. Baby i.e. the petitioner, Smt Neelam W/o Moolchand and Smt. Sunita W/o Pradeep, who also died on 22.01.2010. After the death of Smt. Shakuntala her brother's son Sri Anil Kumar produced a bogus Adoption Deed dated 18.11.1996 and tried to get compassionate appointment on the basis of such Adoption Deed. The petitioner challenged the said Adoption Deed by filing Original Suit No. 352 of 2012, which was allowed on 20.03.2014, by declaring the Adoption Deed as void. The order passed by the trial court was not challenged in any Appeal and it attained finality. After judgement and decree dated 20.03.2014, the petitioner moved an application on 05.06.2014 before the Senior Regional Manager on PCF, Agra for appointment on compassionate ground, such application was forwarded to the Respondent No.4. Although in the application made by the petitioner, she had clearly stated that she was living with her mother as her husband had deserted her and she had one son and one daughter to take care of, her application was rejected on 20.10.2015 on the ground that she is a married daughter and married daughter does not come within

the list of dependents/family members as per the 1975 Regulations governing Cooperative Societies.

The petitioner challenged the order dated 20.10.2015 in Writ Petition, namely, Writ-A No. 1446 of 2016, 'Smt. Baby vs. State of U.P. and Others, which was disposed of by this Court on 20.01.2016 by making observations that in view of the ratio laid down by the Division Bench of this Court in Writ Petition No. 60881 of 2015, "Smt. Vimla Srivastava vs. State of U.P. decided on 04.12.2015, the respondents should reconsider the application of the petitioner. The order dated 20.10.2015 was set aside.

In Writ-C No. 60881 of 2016, Smt. Vimla Srivastava (Supra) a Division Bench of this Court had held that the claim of the writ petitioner for compassionate appointment cannot be rejected on the ground that the definition of family in Rule 2(C) of the Dying-in-Harness Rules, 1974 does not contain the expression "married daughter'. The Court held the exclution of married daughters from the Rules as illegal and unconstitutional being violation of Article 14 and 15 of the Constitution of India. The Court struck down the word "unmarried' in Rule 2(C) (iii) of the Dying-in-Harness Rules, 1974.

The case of the petitioner was considered by the Respondents again, but it was rejected on 20.05.2016, on the ground that the application that made by the petitioner for compassionate appointment on 07.06.2014 was beyond the time limit fixed in the Government Order No. 06/12/73-Ka/93 dated 16.04.1993 which provided for an appointment on compassionate grounds to be given within five years of the death of the deceased employee.

The petitioner challenged the Order dated 20.05.2016 in Writ-A No. 31054 of 2016 which Writ Petition was allowed and the order dated 20.05.2016 was quashed by referring to the observations made by the Full Bench of this Court in ***Shiv Kumar Dubey Vs. State of U.P. and Others (2014) 2 ADJ 312 ,*** where the Full Bench had held that Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the death of the deceased employee. The power conferred by the first *proviso* is a discretion to relax the period in case of undue hardship and for dealing with the case in a just and equitable manner. Although there is no general right which can be claimed by the dependent of the deceased employee for compassionate appointment, in case a member of the family/dependent is a minor at the time of the death of the Government Servant or there are any other genuine reasons which caused the delay in approaching the employers, the reasons and justifications of such delay shall be considered by the employer and the power to relax can be exercised in favour of a dependent of a deceased employee, if sufficient reasons to the satisfaction of the employer can be shown by the dependent claiming compassionate appointment. The Court while allowing Writ-A No. 31054 of 2016 and set aside the order dated 20.05.2016, observed that in case the family of the deceased is living in a financial destitution and penurious conditions, the application can be considered subject to evidence led by the applicant that the family is still living in indigent circumstances.

4. After the order passed by this Court on 11.08.2016, the petitioner made a representation detailing all circumstances for delay caused in approaching the employer i.e. the Respondents No. 2 and 3

in application for compassionate appointment. Such application of the petitioner was rejected by order dated 23.11.2016 by the Managing Director, Uttar Pradesh Cooperative Federation Limited (PCF) on the ground that under the Employees Service Regulations of 1980, Rule 104 provided the definition of family which still excluded "married daughter', and the petitioner challenged such order in another Writ Petition, namely, Writ-C No. 1475 of 2017, where a Division Bench of this Court allowed the Writ Petition on 30.10.2019 setting aside the order dated 23.11.2016 and also declaring Rule 104 (5) of the Employees Service Rules, 1980 as ultra-virus to the extent it excludes "married daughter' from the definition of "family'. The respondents were directed to reconsider the claim of the petitioner for compassionate appointment.

When the order passed by this Court dated 30.10.2019 was not complied with the petitioner was forced to file a Contempt Application (Civil) No. 1476 of 2021, the Court disposed of the Contempt Application with liberty to the petitioner to move a fresh application before the respondent, who shall decide the same within two months from the date of production of copy of the order before the authority concerned.

5. The petitioner moved a representation in compliance of the Order passed by this Court in Contempt Petition before the Respondents, which has been rejected by the impugned Order dated 12.03.2021 with the observations that the respondent is a Apex Level Cooperative Society/Federation which has to bear the cost of salary and allowances of its employees from its own resources and under the U.P. Cooperative Societies Act, 1965, no establishment cost/subsidy or grant is made available by the Government of U.P. or any other Authority for the Federation to give salary to its employees. It is suffering financially since long and has to take loans from banks to meet its expenses. In the Balance Sheet of the year 2019-2020, a total of Rs. 489 Crores were shown as accumulated losses. Under the U.P. Cooperative Societies Employees Service Regulations, 1975, the Federation is incapable of bearing the financial costs of even its existing employees and that the Federation has not engaged any dependent of deceased employee on compassionate ground since 2018. As and when, the financial status of the Federation improves the case of the petitioner for grant of compassionate appointment shall be considered.

6. The petitioner has challenged the order passed by the Respondents rejecting her application now on the ground of lack of financial resources by saying that at least till 2018, the Federation was making appointment of dependent of deceased employee on compassionate ground. The petitioner's claims was filed initially in June, 2014. It could not have been rejected as her right crystallized in 2014 itself. Had the respondents considered the application for compassionate appointment in the right perspective when it was initially filed in 2014, she would have been granted compassionate appointment, as it is the own case of the respondents that they continued to give compassionate appointments to dependents of deceased employees till 2018. The petitioner has been forced to approach this Court thrice in Writ Petitions earlier and once in Contempt jurisdiction only because of intransigence of the Respondents.

7. Sri Arun Kumar Singh Deshwal, on the basis of his counter affidavit, has submitted that the application of the

petitioner for compassionate appointment was made on 05.06.2014 much after five years limitation period prescribed for the same. The petitioner was a married daughter and did not come within the definition of dependent of the deceased employee as per the Regulation 104 (5) of the U.P. Cooperative Societies Employees Service Regulations,1975, therefore, her claim was rejected earlier.

8. It has further been submitted that no objection certificate given by Smt. Neelam, the elder sister of the petitioner is not on a notarized stamp paper, and therefore, it cannot be looked into. The gratuity of Late Shakuntala Devi has been sanctioned by an order dated 02.12.2006 which was communicated by letter dated 07.02.2007 of the General Manager (Administration), PCF to the legal heirs of Late Shakuntala Devi through the District Manager, PCF, Agra with the requirement that such legal heir should submit the Death Certificate, Succession Certificate, No Objection Certificate of other legal heirs, and complete all formalities, but the petitioner has not completed any formalities, and therefore, gratuity of Late Shakuntala Devi has also not been released.

9. It has further been submitted that the claim of the petitioner for compassionate appointment was rightly rejected as Regulation 104 (5) of U. P. Cooperative Societies Employees Service Regulations, 1975 did not include "married daughter' in the definition of family initially. Also the financial condition of PCF is very poor. It has suffered loss of more than Rs.488 Crores in the financial year 2020-2021, therefore, no appointment on compassionate ground can be made and in fact has not been made since 2018. The financial condition of PCF is so poor that even arrangement for salaries of its officers and employees has become very difficult, and therefore, the benefit of the Seventh Pay Commission has not been given to the employees of the PCF. As soon as the PCF's financial conditions improves the petitioner's case shall be considered for appointment on compassionate ground.

10. This Court having heard the learned counsel for the parties finds that the respondents have not disputed the candidature of the petitioner on the ground that there is a dispute amongst the legal heirs/dependents of Late Shakuntala Devi. The case of the petitioner was initially rejected on the ground that she was a married daughter. When this Court allowed her writ petition and directed the respondents to consider her case in the light of judgement rendered in ***Smt. Vimla Srivastava (Supra),*** the respondents rejected the claim of the petitioner on the ground of being delayed. The petitioner approached this Court and this court clarified that there was no delay in approaching the respondents and even if there was delay it had been sufficiently explained. Again, when her case was considered, it was rejected on the ground that under the Employees Service Regulation of 1975, married daughter was excluded from the definition of family under Rule 104 (5). The petitioner was forced to approach this Court again by filing a writ petition, which writ petition was again allowed by a Division Bench quashing Rule 104 (5), insofar as, it excluded married daughter within the definition of family/dependents. The petitioner's case was not being considered, therefore, she filed a Contempt Petition and the Contempt Petition was disposed of with the direction to the respondents to consider the case of the petitioner afresh in the light

of the judgement of this Court in earlier Writ Petitions filed by the petitioner. Now, a new ground has been raised by the Respondents saying that they do not have the financial capacity to engage a Class-IV employee or to give salary to a Sweeper. The petitioner is only asking to be adjusted/appointed on compassionate ground as a Sweeper, it is not the case of Respondents that they have not made any fresh appointments, or that they have not been making any fresh appointment after the PCF started running into loss.

11. This Court finds from a perusal of the judgements passed earlier in the case of the petitioner by this Court that the petitioner has been unduly harassed by the respondents for one reason or the other. Now a fresh ground is being raised that the PCF does not have financial capacity to engage the petitioner as Sweeper on compassionate ground. No doubt, the PCF may be suffering from financial loss and no doubt appointment on compassionate ground cannot be claimed as a reservation or as an indefeasible right by a dependent of a deceased employee. However, the law as settled by the Hon'ble Supreme Court and by a Full Bench of this Court clearly provides that the Rule of Compassionate Appointment for dependents of deceased Government Employee Dyingin-Harness has been carved out as an exception of the general rule of equal opportunity in employment under Article 16 of the Constitution. The reason for carving out for such exception is to save a dependent of a deceased employee from destitution and penurious conditions. The petitioner's case has not been rejected on the ground of failure of the petitioner to prove her dependence on her dead mother. The Respondents have not said that the petitioner is not a deserted woman left to fend for herself and her two children and that she was not living with her mother at the time of her death. The rejection of the petitioner's case has never been on the merits of the case of the petitioner for seeking compassionate appointment because of the indigent circumstances, she was facing. The Respondents have always relied upon the technical grounds to defeat the claim of the petitioner. Every time such order has been passed rejecting the claim of the petitioner on technical ground, this Court has intervened in extraordinary jurisdiction under Article 226 of the Constitution and rejected the grounds taken by the respondents. The petitioner has been forced to face repeated litigation for no fault on her part. The petitioner was not responsible for the financial condition of PCF, therefore, in case, the PCF has suffered financial loses since the time of the death of the petitioner's late mother, it cannot be said that the petitioner should be deprived of her legitimate right to be adjusted as a Class-IV employee in the establishment of the Respondents.

11. The order dated 12.03.2021 is ***set aside,***

12. This writ petition is ***disposed of*** with a direction to the respondents to consider the claim of the petitioner for appointment on compassionate grounds and pass appropriate orders thereon, keeping in mind the observations made herein above within a period of six weeks from the date of copy of this order is produced before them.

(2022) 10 ILRA 73
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-A No. 35066 of 2008
With
Writ -A No. 35068 of 2018

Rishi Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Senor Adv.)

Counsel for the Respondents:
C.S.C.

A. Service Law – Dismissal – Punishment - U.P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 - Rule 14(1) – No violation of rules of natural justice – All 3 delinquent constables have been sent the copy of the charge-sheet to which they (2 petitioners herein) have submitted their reply/explanation which has been considered in inquiry. Even after notifying the date of examination of witnesses the delinquent constables did not appear which implies that they intentionally did not participate in the proceedings. (Para 13)

B. Scope of Judicial Review - The Constitutional Court while exercising its jurisdiction of judicial review U/Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of malafides or perversity, i.e., where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. (Para 12)

It is true that strict Rules of evidence are not applicable to departmental enquiry proceedings. However, the only requirement of law is that the allegation against the delinquent must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravity of the charge against the delinquent employee. It is true that mere conjecture or surmises cannot sustain the finding of guilt even in the departmental enquiry proceedings. (Para 12)

It is settled that the power of judicial review, of the Constitutional Courts, is an evaluation of the decision-making process and not the merits of the decision itself. It is to ensure fairness in treatment and not to ensure fairness of conclusion. The Court/Tribunal may interfere in the proceedings held against the delinquent if it is, in any manner, inconsistent with the Rules of natural justice or in violation of the statutory Rules prescribing the mode of enquiry or where the conclusion or finding reached by the disciplinary authority if based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached or where the conclusions upon consideration of the evidence reached by the disciplinary authority is perverse or suffers from patent error on the face of record or based on no evidence at all, a writ of certiorari could be issued. To sum up, **the scope of judicial review cannot be extended to the examination of correctness or reasonableness of a decision of authority as a matter of fact.** (Para 12)

C. Proportionality of punishment – Delinquent constables had the duty to safely get the criminals back to Moradabad. But they not only went to criminals' relatives' house but had food at a hotel and consumed alcohol. They were so drunk that the criminals ran away after opening their handcuffs and constables kept sleeping. This amounts to grave misconduct and

indolence on their part. The punishment of dismissal is absolutely appropriate. (Para 19)

Writ petitions dismissed. (E-4)

Precedent followed:

1. M. Paul Anthony Vs Bharat Gold Mines Ltd. & ors., AIR 1999 SC 1416; (1999) 3 SCC 679 (Para 6)

2. State of Rajasthan Vs B.K. Meena & ors., AIR 1997 SC 13; (1996) 6 SCC 417 (Para 6)

3. St. of T.N. Vs T.V. Venugopalan, (1994) 6 SCC 302 (Para 12)

4. Government of T. N. & ors. Vs A. Rajapandian, (1995) 1 SCC 216 (Para 12)

5. B.C. Chaturvedi Vs U.O.I. (UOI) & ors. (1995) 6 SCC 749 (Para 12)

6. U.O.I. Vs H.C. Goyal, AIR 1964 SC 364 (Para 12)

7. H.P. State Electricity Board Ltd. Vs Mahesh Dahiya, (2017) 1 SCC 768 (Para 12)

8. Pravin Kumar Vs U.O.I. (UOI) & ors., (2020) 9 SCC 471 (Para 12)

9. Deputy General Manager (Appellate Authority) & ors. Vs Ajai Kumar Srivastava, (2021) 2 SCC 612 (Para 12)

10. U.O.I. (UOI) Vs P. Gunasekaran, (2015) 2 SCC 610 (Para 12)

11. The St. of Karn. & ors. Vs N. Gangaraj, (2020) 3 SCC 423 (Para 12)

12. U.O.I. & ors. Vs Dalbir Singh, (2021) 11 SCC 321 (Para 12)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

तथ्यात्मक रुपरेखा-

1. याचिकाकर्ता आरक्षीगण (ऋषिपाल सिंह व प्रेमपाल सिंह) व एक अन्य आरक्षी के विरुद्ध, निम्नलिखित घटना, घटित होने के कारण उत्तर प्रदेश अधीनस्थ श्रेणी के पुलिस अधिकारियों कर्मचारियों एवं अपील नियमावली 1991 (संक्षेप में नियमावली 1991) के अंतर्गत अनुशासनिक कार्यवाही प्रारम्भ करी गयी:

"आरक्षी 234 स0पु0 प्रेमपाल सिंह, आरक्षी 241 स0पु0 दिनेश चन्द्र गुप्ता एवं आरक्षी 96 स0पु0 ऋषिपाल सिंह के विरुद्ध दिनांक 09.7.2004 को रायफल कारतूस, हथकड़ी सहित केन्द्रीय कारागार बरेली से अभियुक्तगण राजेश, मनोज, जमील को मान0 न्यायालय में पेशी के उपरान्त मुरादाबाद से बरेली लाते समय अभियुक्तगण द्वारा दी गयी एल्कोहल का सेवन करके, बेहोश हो जाने व पुलिस अभिरक्षा से अभियुक्तगण के भाग जाने एवं बेहोशी हालत में स्टेशन पर उतारे जाने व मेडिकल परीक्षा में शराब का सेवन करने की पुष्टि हुई।"

2. उपरोक्त घटना के फलस्वरुप दिनांक 09.07.2004 से निलम्बित पाये जाने सम्बन्धी प्रकरण में उत्तर प्रदेश अधीनस्थ श्रेणी के पुलिस अधिकारियों/कर्मचारियों की दण्ड एवं अपील नियमावली, 1991 के नियम 14 (1) के अन्तर्गत विभागीय कार्यवाही पीठासीन अधिकारी को अभिविष्ट की गयी जिसने 24.03.2005 को आरोप पत्र तैयार किया व उसी दिन आरोपित आरक्षीगण को प्रेषित किया गया व स्पष्टीकरण मांगा गया परन्तु दो अवसर देने के उपरान्त दोनों याचिकाकर्ता ने अपना-अपना स्पष्टीकरण प्रस्तुत किया, जिसमें मात्र कहा कि प्रकरण माननीय न्यायालय, मुरादाबाद में विचाराधीन है, अतः विभागीय कार्यवाही को स्थगित करा जाये व पुलिस रेगुलेशन के प्रस्तर 494 का अवलोकन किया जाये।

3. आरक्षीगण को दो बार नोटिस प्रेषित किया गया, कि वो साक्ष्य लेखबद्ध की कार्यवाही में सम्मलित हो परन्तु, नोटिस प्राप्त होने के उपरान्त भी वो कार्यवाही में सम्मिलित नहीं हुए। अतः उनकी अनुपस्थिति में 28.05.2005 को कुछ साक्षीगण के साक्ष्य लेखबद्ध किये गये। पुनः नोटिस प्रेषित किया गया व शेष साक्षी के कथन 10.6.2005 को लेखबद्ध किये गये, परन्तु आरक्षीगण कार्यवाही में उपस्थित नहीं रहे। इस कारणवश उनकी ओर से कोई जिरह

नहीं हो पायी। साक्षी हे0कां0प्रो0 630 दिग्विजय शर्मा थाना जी.आर.पी. जंक्शन बरेली का कथन महत्वपूर्ण होने के कारण निम्न पुनरावर्त किया जा रहा है:

"दिनांक 9.7.2004 को वह व आरक्षी 534 मुकेश बाबू, कां0-45 उदयवीर, कां0 4620 प्रभुनाथ व हेड सैक्शन पी0ए0सी0 24 वीं वाहिनी मुरादाबाद के साथ थाने से रवाना होकर प्लेटफार्म जंक्शन बरेली पर जहर खुरानी गिरोह से सम्बन्धित संदिग्ध व्यक्तियों को चैकिंग में मामूर था। गाड़ी सं. 4312 डा0 गांधी धाम एक्सप्रेस के प्लेटफार्म नं0 1 पर चेकिंग करते हुए ए0सी0 कोच से आगे लगे हुए स्लीपर में जब वह व हमराह स्टाफ पहुँचे तो आमने सामने की सीटों पर तीन सिपाही बार्बदी दुरुस्त लेटे मदहोश हालम में मिले। उनकी रायफले हथकड़ी व एक बैग पास में रखा था। तीनों सिपाहियों को उठाया तो नहीं उठे। एक सिपाही जिसे नशा कम था उठा और अपना नाम आरक्षी 234 ए0पी0 प्रेमपाल सिंह पुलिस लाइन बरेली बताया व साथी आरक्षियों का नाम 241 स0पु0 दिनेश चन्द्र गुप्ता, कां0 227 स0पु0 ऋषिपाल सिंह बताया। इसके अतिरिक्त आरक्षी प्रेमपाल सिंह ने बताया कि "हम तीनों आरक्षी सेंट्रल जेल बरेली से अभि0 गण छोटा जमील, राजेश व मनोज कुमार को मान0 न्यायालय मुरादाबाद में पेशी हेतु ले गये थे। पेशी के बाद जब रेलवे स्टेशन मुरादाबाद आये थे तब काशीनाथ विश्वनाथ एक्सप्रेस निकल चुकी थी तब अभि0 छोटा जमील के कहने पर वह सब लोग उसके रिश्तेदार के घर मिलने चढ्ढा सिनेमा के पास ले गये थे उसके बाद छोटा जमील के कहने पर एक होटल में खाना खाने गये थे अभि0 छोटा जमील ने पैसे देकर एक बैगपाइपर (अंग्रेजी शराब की बोतल) व 4 कोल्ड ड्रिंक्स अपने आदमी को पैसे देकर मंगाये। हम तीनों व उक्त तीनों अभियुक्तगण ने कोल्ड ड्रिंक्स में मिलाकर शराब पिलाई थी तथा स्वयं कोल्ड ड्रिंक्स पी थी तथा सबने मुर्गा साथ साथ खाया। वहां पर नशा अधिक हो गया था तभी उक्त तीनों मुल्जिमानों ने अपने हाथों से हथकड़ी निकाल ली थी और जब बरेली आने के लिये रेलवे स्टेशन मुरादाबाद जा रहे थे तभी स्टेशन के पास से तीनों अभियुक्त कोल्ड ड्रिंक्स लेने चले गये, इन्हे ज्यादा नशा हो गया था इसलिये यह लोग नहीं गये और बरेली आने वाली इस ट्रेन में बरेली के लिय बैठ गये। उकने व साथी हमराह कर्मचारियों द्वारा उक्त तीनों आरक्षियों को गाड़ी से उतार उनके सामान को कब्जे में लेकर थाना जी0आर0पी0 जंक्शन बरेली आये थे। आरक्षियों की रायफल सं0 6480, 0224 व 60 कारतूस दो हथकड़ी संख्या 250 व 712 दो रस्सा सूत व भोगें हुए तीनों अभियुक्तों के वारण्ट थाने पर दाखिल किये। उक्त तीनों आरक्षियों को बास्ते उपचार जिला अस्पताल बरेली में वह व हमराही लेकर गये वहां पर सिपाहियों को उपचार हेतु दाखिल कर थाना वापस आये। उक्त घटना के सम्बन्ध में उनके द्वारा थाना जी0 आर0पी0 जंक्शन बरेली पर मु0अ0सं0 352/2004 धारा 221/223/223/225 ए भा0 द0 के विरुद्ध आरक्षी 241 स0 पु0 दिनेश चन्द्र 96 स0पु0 ऋषिपाल सिंह, 234 स0पु0 प्रेमपाल सिंह पुलिस लाइन बरेली बन्दी राजेश पुत्र तेजपाल निवासी बेहटा जयसिंह थाना बहजोई मुरादाबाद, बन्दी मनोज पुत्र तेजपाल सिंह निवासी चितौरा थाना बहजोई मुरादाबाद, बन्दी जमील उर्फ छोटा पुत्र लल्लू अमीन निवासी हसइल्स बाली मस्जिद थाना मुगलपुरा जिला मुरादाबाद पंजीकृत करावाया। उक्त अभियोग का घटना स्थल जनपद मुरादाबाद रेलवे स्टेशन का होना पाये जाने पर थाना जी0 आर0पी0 जंक्शन मुरादाबाद में मु0 अ0 सं0 571/2004 धारा 221/223/224/225 ए भा0द0 व पंजीकृत होकर विवचेना की गयी है।" (महत्ता दी गयी)

4. जाँच अधिकारी ने अभिलेख साक्ष्य का विश्लेषण किया व इस निष्कर्ष पर पहुँचे कि सभी आरक्षीगण के विरुद्ध आरोप सत्य है व उपरोक्त कृत अत्यन्त लापरवाही पूर्ण, उदासीनता, अकर्मण्यता व अनुशासनहीनता पूर्ण है व स्पष्ट रुप से दोषी पाये जाने के कारण उनके आरक्षी पद की सेवा से पदच्युत किये जाने की संस्तुति करी गई। निष्कर्ष का महत्वपूर्ण अंश निम्न है:

"इस प्रकार सम्पूर्ण तथ्यों से यह पाया गया कि आरक्षीगण 234 स0 पु0 प्रेमपाल सिंह, आरक्षी 241 स0 पु0 दिनेशचन्द्र गुप्ता एवं आरक्षी 96 स0 पु0 ऋषिपाल सिंह द्वारा अभियुक्तों राजेश, मनोज व जमील उर्फ छोटा को मान0 न्यायालय में पेशी के उपरान्त जानबूझकर लालचवश उनके कहने पर घर ले जाकर परिजनों से मिलवाया गया तथा अभियुक्तों के साथ एक होटल पर बैठक अभियुक्तों द्वारा मंगाई गयी अंग्रेजी शराब/ कोल्ड ड्रिंक्स का सेवन करने के

पश्चात् खाना मुर्गा खाया। आरक्षीगण के अत्यधिक नशे में होने के कारण बरेली आने के लिये रेलवे स्टेशन मुरादाबाद पर अभियुक्तगण इन्हे छोढ़कर कोल्ड ड्रिंक्स लेने के बहाने पुलिस अभिरक्षा से फरार हो गये तथा मदाहोशी की हालत में उक्त तीनों आरक्षीगण बरेली के लिये आने वाली गांधीधाम एक्सप्रेस 4312 डाउन में स्लीपर कोच में बैठ/लेट गये जिनहें स्वयं का भी पता नहीं था कि हम कहां है। बरेली आने पर उक्त तीनों आरक्षीगण को मदाहोशी की हालत में थाना जी0आर0पी0 जंक्शन बरेली के हे0 का0 प्रो0 दिग्विजय शर्मा द्वारा मय हमराह कर्मचारियों की मदद से उतार कर थाने लाये व चिकित्सा परीक्षण/उपचार हेतु जिला चिकित्सालय बरेली ले जाकर दाखिल किया गया तत्समय समाचार पत्रों में भी उक्त घटित तथ्यों की खबर मुख्य रुप में प्रकाशित की गयी थी। जिसकी समाचार की कतरन भी पत्रावली पर उपलब्ध है। आरक्षीगण उक्त के इस कृत्य से पुलिस की छवि धूमिल हुई है। पुलिस जैसे अनुशासित बल में रहकर एक महत्वपूर्ण (मुल्जिम ड्यूटी/ राजकीय कार्य में अपने कर्त्तव्यों को अनदेखा करते हुए लालचवश उक्त आरक्षीगण 234 स0 पु0 प्रेमपाल सिंह, आरक्षी 241 स0 पु0 दिनेश चन्द्र गुप्ता व आरक्षी 96 स0पु0 ऋषिपाल सिंह द्वारा किया गया उपरोक्त कार्य अत्यन्त ही लापरवाही पूर्ण, उदासीनता, अकर्मण्यता व अनुशासनहीनता पूर्ण है और अभिलेखों से भी स्वतः प्रमाणित हैं जिसके लिये आरक्षी 234 स0 पु0 प्रेमपाल सिंह, आरक्षी 241 स0 पु0 दिनेश चन्द्र गुप्ता व आरक्षी 96 स0 पु0 ऋषिपाल सिंह पूर्ण रुपेण स्पष्ट रुप से दोषी पाये जाते हैं।" (महत्ता दी गयी)

5. उपरोक्त जांच आख्या को अनुशासनिक प्राधिकारी (वरिष्ठ पुलिस अधीक्षक) को प्रेषित की गयी। जिसके उपरान्त अलग-अलग 'कारण बताओ नोटिस' दिनांक 03.01.2006 को आरक्षीगण को प्रेषित किया गया कि वो अपना-अपना स्पष्टीकरण प्रस्तुत करें। दोनों याचिकाकर्ता ने नोटिस का जबाव दिया, जिसके द्वारा घटना से इंकार नहीं किया गया परन्तु अपराधीगण के शातिर किस्म के होने व उनके द्वारा धोखे से शराब पिलाने के कारण घटना घटित हुई ऐसा स्पष्टीकरण दिया तथा डाक्टरी परीक्षण करने वाले डाक्टर का ब्यान अंकित न करना भी जाँच आख्या गलत होने का एक कारण बताया व प्रार्थीगण को जाँच कार्यवाही के दौरान नैसर्गिक न्याय के सिद्धान्तों से वंचित किया गया। एक स्पष्टीकरण के मुख्य अंश निम्न है:

"2. यह कि दिनांक 09.07.2004 को तीनों अभियुक्तों की पेशी मुरादाबाद में होने के पश्चात् मय अभियुक्त व दो अन्य सहयोगियों के साथ गांधी धाम ट्रैन से मुरादाबाद से बरेली जा रहा था तो अभियुक्तगण प्रार्थी को एल्कोहल का सेवन करवाया और जिसका लाभ उठाकर उक्त तीनों अभियुक्त पुलिस अभिरक्षा से भागने में सफल रहे। प्रार्थी व प्रार्थी के साथी बेहोशी हालत में मय दो अदद राइफल, 60 कारतूस व दो हथकड़ी थाना जी0आर0पी0 बरेली के कर्मचारियों द्वारा बरेली स्टेशन पर बरामद किया गया तथा प्रार्थी को बेहोशी हालत में ट्रेन से उतारा गया।

5. यह कि प्रार्थी को अभियुक्तगण ने बेहोश कर भाग गये इस स्थिति में घोर लापरवाही की कोई बात ही नहीं बनती।

6. यह कि यहां तक कि प्रार्थी के खिलाफ कोई भी विभागीय जांच नहीं की गयी और बिना विभागीय जांच के ही सीधे नैसर्गिक न्याय सिद्धान्त का उल्लंघन कर बिना किसी प्रकार का अवसर प्रदान किये गये प्रार्थी की सेवाओं की समाप्ति का नोटिस दे दिया गया जो कि विधि विरुद्ध है।

8. यह कि प्रार्थी के कोई इस तरह का कार्य नहीं किया है जिससे पुलिस फौजी फोर्स की बदनामी हो प्रार्थी को शराब पिलाकर एवं बेहोश कर शातिर किस्म के अपराधी प्रार्थी की बेहोशी का लाभ उठाकर भाग गये इस तरह अभियुक्त ने एक और अपराध किया है जिसके वे सजा के पात्र हैं।" (महत्ता दी गयी)

6. वरिष्ठ पुलिस अधीक्षक बरेली ने आरक्षीगण का स्पष्टीकरण व जांच आख्या का अध्ययन व मनन कर, आरक्षीगण के स्पष्टीकरण के तथ्यों को निराधार माना व अलग-अलग आदेश दिनांक 24.1.2006 के द्वारा आरक्षीगण को तत्काल प्रभाव से पुलिस विभाग की सेवा से हटाये (पदच्युत) किये जाने का आदेश पारित किया, जिसके मुख्य अंश निम्न हैं:

"आरोपी कान्स0 का उक्त कथन मान्य नहीं है, और निराधार है, क्योंकि आरोपी के विरुद्ध

अभियुक्तों के साथ लगाई गयी महत्वपूर्ण डियूटी के दौरान अभियुक्तों के साथ शराब पीने, खाना खाने, तथा नशे में हो जाने पर अभियुक्तों के इनकी अभिरक्षा से भाग जाने के गम्भीर आरोप है और इस प्रकार के गम्भीर आरोपों के संबंध में विभागीय कार्यवाही इस उद्देश्य से की जा सकती है कि वह अनुशासन एवं कार्य की योग्यता की दृष्टि से विभाग में बने रहने के योग्य है अथवा नहीं, तथा अपराधिक कार्यवाही केवल उसके द्वार घटित किये गये अपराध के संबंध में दण्डित किये जाने के उद्देश्य से की जाती है। और जिसका प्राविधान माननीय उच्चतम् न्यायालय द्वारा कैप्टन एम.पाल. एन्थनी बनाम भारत गोल्ड माइन्स लिमिटेड एवं अन्य (1999) 3 एस.एस.सी. के निर्णय के प्रस्तर-20 एवं 22 में दिया गया है, इसी प्रकार माननीय उच्चतम् न्यायालय द्वारा राजस्थान बनाम बी.के. मीना एवं अन्य एस.एस.सी. 1996 (6) में भी प्राविधान दिया गया है।

4. आरोपी कान्स0 द्वारा अपने प्रस्तुत स्पष्टीकरण में दूसरा बिन्दु यह अंकित किया है कि जांचकर्ता अधिकारी द्वारा जांच के दौरान उसके बयान अंकित करके उसे अपना पक्ष प्रस्तुत करने का अवसर प्रदान नहीं किया गया है। आरोपी का यह कथन बिल्कुल असत्य एवं निराधार है क्यों कि प्रकरण में प्रा0 जांचकर्ता अधिकारी द्वारा आरोपी से पूछताछ की गयी है, और आरोपी द्वारा अपने साथी कां. 96 स.पु. रिषीपाल सिंह के बयानों का समर्थन किया गया है, इसके अतिरिक्त विभागीय कार्यवाही के दौरान भी पीठासीन अधिकारी द्वारा इन्हे अपना पक्ष प्रस्तुत करने का पूरा-पूरा अवसर प्रदान किया गया है, जैसा कि दण्ड पत्रावली पर उपलब्ध अभिलेखों से स्पष्ट है।

5. आरोपी कान्स0 द्वारा अपने प्रस्तुत स्पष्टीकरण में तीसरा तथ्य यह अंकित किया गया है कि विभागीय जाचं के मध्य डाक्टरी परीक्षण हेतु ले जाने वाले अधिकारी एवं डाक्टर का बयान अंकित नहीं किया गया है। आरोपी का यह कथन भी पत्रावली पर उपलब्ध अभिलेखों के अनुसार असत्य एवं निराधार है क्योंकि पीठासीन अधिकारी द्वारा कार्यवाही के दौरान जी.आर.पी. थाना जंक्शन बरेली में नियुक्त हे.कां. प्रो0 के0 दिग्विजय शर्मा का कथन अंकित किया गया है, और जिसके द्वारा अपने बयानों में आरोपी को मेडीकल परीक्षण हेतु मय हमराह जिला अस्पताल ले जाना व्यक्त किया है, तथा मेडीकल परीक्षण रिपोर्ट पत्रावली पर उपलब्ध है, जिनसे आरोपी द्वारा शराब का सेवन किये जाने की पुष्टि होती है।

इस प्रकार सम्पूर्ण तथ्यों से यह स्पष्ट है कि आरक्षी 234 स0पु0 प्रेमपाल सिंह मय हमराह आरक्षी 241 स0पु0 दिनेश चन्द्र गुप्ता एवं आरक्षी 96 स0पु0 रिषीपाल सिंह के द्वारा दिनांक 9.7.04 को अभियुक्त राजेश, मनोज, व जीमल को वाद मा0 न्यायालय ए.सी.जे.एम. द्वितीय मुरादाबाद में पेशी के जानबूझकर लालचवश उसके साथ होटल पर शराब का सेवन किया गया और इनके नशे में हो जाने की हालत में अभियुक्त रेलवे स्टेशन मुरादाबाद पर इनसे कोल्ड ड्रिन्क लाने का बहाना करके इनकी अभिरक्षा से भागने में सफल हुये, एवं आरोपी को मय हमराह कान्स0 गण के बेहोशी की हालत में ट्रेन से रेलवे स्टेशन बरेली जंक्शन पर उतारा गया। इनके इस कृत्य से जनमानस में पुलिस की छवि खराब हुई, तथा अनुशासित बल का सदस्य होने के नाते आरोपी का उक्त कृत्य घोर अनुशासन हीनता, कर्तव्य के प्रति लापरवाही एवं अकर्मण्यता बरतने का प्रतीक है, तथा इसका यह कृत्य अपने पद के अयोग्य होने का परिचायक है। आरोपी का प्राप्त स्पष्टीकरण पूर्णतयाः असंतोषजनक एवं बलहीन है।" (महत्ता दी गयी)

7. प्रार्थीगण द्वारा उपरोक्त दण्ड आदेश के विरुद्ध नियमावली 1991 के नियम 20 के अन्तर्गत पृथक-पृथक अपील की गई, जो अपीलीय प्राधकारी पुलिस उपमहानिरीक्षक, बरेली परिक्षेत्र, बरेली के द्वारा गुण-दोष पर पृथक-पृथक आदेश दिनांक 28.4.2007 द्वारा अस्वीकार की गई। आदेश के महत्वपूर्ण अंश निम्न है:

"समस्त तथ्यों के आधार पर मैं इस निष्कर्ष पर पहुँचा हूँ कि याची विचाराधीन बंदी राजेश, मनोज, जीमल जिन्हे यह माननीय न्यायालय ए.सी.जे.एम. द्वितीय, मुरादाबाद में पेशी हेतु केन्द्रीय करागार बरेली लेकर वापस आ रहे थे इनके द्वारा रास्ते में शराब का सेवन किया गया नशे हो जाने के कारण अभियुक्तगण इनकी अभिरक्षा से भाग गये। मेडीकल परीक्षण में इनके द्वारा शराब का सेवन किया जाना पाया गया। अपीलकर्ता द्वारा घोर अनुशानहीनता, कर्तव्य के प्रति घोर लापरवाही, अकर्मण्यता का परिचय दिये जिसके लिए पूर्णतः

दोषी है. पुलिस विभाग की छवि धूमिल हुई। इनके विरुद्ध सम्पूर्ण कार्यवाही विधिवत की गई है जिसमें कोई त्रुटि अथवा अनियमितता नहीं है दण्डाधिकारी द्वारा पूर्ण साक्ष्यों के आधार पर याची को सेवा से हटाये जाने का आदेश पारित किया है वह पूर्णतयः नियमता है अतः याची की अपील अस्वीकार की जाती है।" (महत्ता दी गयी)

8. उपरोक्त संदर्भित आदेश दिनांक 24.1.2006 व 28.4.2007 प्रार्थीगण द्वारा पृथक-पृथक याचिका के माध्यम से आक्षेपित किये गये हैं।

याचिकाकर्ता का पक्ष-

9. श्री अशोक खरे, वरिष्ठ अधिवक्ता अपने सहयोगी सिद्धार्थ खरे, अधिवक्ता के साथ याचिकाकर्ताओं का पक्ष रखा कि जांच की कार्यवाही पूर्णतः मौखिक साक्ष्य, जिसका कोई प्रतिपरीक्षा नहीं हुई के आधार पर एक पक्षीय पूर्ण की गई जो नैसर्गिक सिद्धान्त के विपरित है। याचिकाकर्ताओं की चिकित्सा जांच की आख्या, जाँच प्रक्रिया के दौरान पत्रावली पर नहीं लाई गयी, जिससे यह साबित हो सके कि याचिकाकर्ता पूर्णतः शराब के नशे में थे। अगर यह मान भी लिया जाये की याचिकाकर्ता के विरुद्ध आरोप सिद्ध होता है, फिर भी दिया गया दण्ड, आश्चर्यजनक रुप से अनुपातहीन है। दण्ड आदेश पारित करते हुए याचिकाकर्ता के पूर्व आचरण का संज्ञान किया गया जो अनुचित था, क्यों कि इस नाते उनको, कोई नोटिस या स्पष्टीकरण नहीं मांगा गया था। अतः यह न्यायालय आक्षेपित आदेश को अपास्त करे।

प्रतिवादी का पक्ष-

10. श्री विक्रम बहादुर यादव, स्थाई अधिवक्ता ने उपरोक्त कथन का विरोध किया और प्रतिवेदन किया कि जांच अधिकारी ने आरक्षीगण को आरोप पत्र की एक प्रति भेजी व स्पष्टिकरण मांगा परन्तु मात्र एक याचिकाकर्ता द्वारा अपना स्पष्टीकरण दिया गया, जिसका उल्लेख पूर्व में किया जा चुका है। दोनों याचिकाकर्ता को नोटिस दिनांक मई 2005 द्वारा यह सूचना दी गई कि 11.05.2005 से 14.05.2005 के मध्य अभियोजन साक्षियों के कथन अभिलिखित किये जायेंगे, इसके लिये वो जाँच अधिकारी के समक्ष उपस्थित रहें। परन्तु उक्त तिथियों में कोई कार्यवाही न होने के कारण अग्रिम तिथि 28 व 29.05.2005 निर्धारित की गई व इस नाते याचिकाकर्ता को पुनः नोटिस दिनांक 17.05.2005 भेजा गया, परन्तु दोनों याचिकाकर्ता नोटिस प्राप्त होने के उपरान्त भी 28.05.2005 को अनुपस्थित रहे। उस दिन जांच अधिकारी ने कुछ अभियोजन साक्षियों के कथन लेखबद्ध किये और अन्य के लिये दिनांक 10.06.2005 नियत की व पुनः एक नोटिस दिनांक 06.06.2005 आरक्षीगण को प्रेषित किया गया। उक्त नोटिस को याचिकाकर्ता प्रेमपाल सिंह द्वारा 08.06.2005 को प्राप्त किया परन्तु वो व अन्य आरक्षी 10.06.2005 को उपस्थित नहीं हुए उस दिन साक्षी हे.कां. (प्रो.) दिग्विजय सिंह का कथन लेखबद्ध किया परन्तु दोनों याचिकाकर्ता की अनुपस्थित के कारण जिरह नहीं हो सकी। याचिकाकर्ता को पूर्व सूचना होते हुए भी जांच कार्यवाही में भाग न लेना से विदित है, कि नैसर्गिक न्याय के सिद्धान्तों का पूर्व पालन हुआ व याचिकाकर्ता को जानकारी के होते हुये भी, जांच कार्यवाही में भाग न लेने के उपरान्त, उनका यह कथन की समस्त कार्यवाही, एक पक्षीय हुई, मान्य नहीं हो सकता है।

11. स्थाई अधिवक्ता ने आगे प्रतिवेदन किया कि हे.का. प्रो. 630 दिग्विजय शर्मा ने अपने साक्ष्य में स्पष्ट रुप से कहा कि दोनों याचिकाकर्ता व अन्य आरक्षी डा0 गांधी धाम एक्सप्रेस में स्लीपर कोच में लेटे हुए मदहोश हालत में मिले और होश आने पर घटना का विवरण दिया जिसके आधार पर आरोप प्रेषित किया गया। अनुशासनिक अधिकारी के समक्ष प्रस्तुत स्पष्टीकरण में भी घटना घटित होने से इंकार नहीं किया गया है। परन्तु समस्त दोष अपराधीगण पर डालने का प्रयास किया गया, जो जाँच अधिकारी/ अनुशासनिक पदाधिकारी व अपीलीय अधिकारी ने सिरे से खारिज कर दिया, जो विधिक रुप से मान्य भी है।

12. **अनुशासनात्मक कार्यवाही की न्यायिक समीक्षा की विधि** :

"22. भारत के संविधान के अनुच्छेद 226 या अनुच्छेद 32 या अनुच्छेद 136 के अंतर्गत

संवैधानिक न्यायालयों द्वारा, विभागीय / अपीलीय अधिकारियों द्वारा किए जाने वाले अनुशासनात्मक जांच के मामलों में, न्यायिक समीक्षा की शक्ति, मात्र उन विधिक व प्रक्रियात्मक त्रुटियों को सुधारने की सीमाओं तक सीमित है, जिसके फलस्वरूप प्रत्यक्ष रुप से अन्याय या प्राकृतिक न्याय के सिद्धांतों का उल्लंघन प्रकट होता हो और यह समीक्षा अपीलीय प्राधिकरण के रूप में गुण दोष के आधार पर मामले के निर्णय करने के समान नहीं है, जिसको इस न्यायालय द्वारा ***तमिलनाडु बनाम. टी.वी. वेणुगोपालन : 1994 (6) एस सी सी 302*** *और बाद में* ***टी.एन. सरकार व एक अन्य बनाम ए. राजपांडियन : 1995 (1) एस सी सी 216*** *और आगे इस न्यायालय की तीन न्यायाधीशों की पीठ ने* ***बी.सी. चतुर्वेदी बनाम. भारत संघ और अन्य : 1995 (6) एस सी सी 749*** *में परखा व निम्न निर्धारित किया:-*

"अनुशासनिक प्राधिकारी, तथ्यों का एकमात्र न्यायाधीश होता है और जहां अपील प्रस्तुत की जाती है तो अपील प्राधिकारी के पास साक्ष्य या दंड की प्रकृति का पुनर्मूल्यांकन करने की सह अस्तित्व व्यापक शक्ति होती है। एक अनुशासनात्मक जांच में, विधिक साक्ष्य की ठोस प्रमाणिकता व उस साक्ष्य पर निष्कर्ष, प्रासंगिक नहीं होते हैं। साक्ष्य की पर्याप्तता या साक्ष्य की विश्वसनीयता को न्यायालय या प्राधिकरण के समक्ष परखने की अनुमति नहीं दी जा सकती है। ***भारत संघ बनाम एच.सी. गोयल :(1964) 4 एससीआर 718****, में इस न्यायालय ने प्रस्तर 728 में यह निर्धारित किया कि अनुशासनिक प्राधिकारी द्वारा साक्ष्य पर विचार करने पर, दिया गया निष्कर्ष यदि विकारग्रस्त है या प्रत्यक्ष रुप से त्रुटिग्रस्त है या कोई साक्ष्य ही नहीं है, तब उत्प्रेषण लेख जारी किया जा सकता है।"*

23. तत्पश्चात् इस न्यायालय के ***हिमाचल प्रदेश राज्य विद्युत बोर्ड लिमिटेड बनाम महेश दहिया : 2017(1) एस सी सी 768****, के निर्णय व हाल ही में इस न्यायालय की तीन न्यायाधीशों की खंडपीठ ने* ***प्रवीण कुमार बनाम भारत संघ और अन्य : 2020(9) एस सी सी 471*** *के निर्णय में इसका लगातार अनुगमन किया जा रहा है।*

24. इस प्रकार यह अवधारित किया गया है कि संवैधानिक न्यायालयों की न्यायिक समीक्षा की शक्ति, निर्णय लेने की प्रक्रिया का मूल्यांकन है, न कि निर्णय के गुण दोष का। यह प्रक्रिया में निष्पक्षता सुनिश्चित करने के लिए है न कि निष्कर्ष की निष्पक्षता सुनिश्चित करने के लिए। न्यायालय/प्राधिकरण, अपचारी के विरुद्ध नियोजित कार्यवाही में हस्तक्षेप कर सकता है, यदि यह किसी भी तरह से प्राकृतिक न्याय के नियमों के असंगत है या उन वैधानिक नियमों का उल्लंघन हुआ है जो जांच के तरीके को निर्धारित करते हैं या जहाँ अनुशासनिक प्राधिकारी द्वारा जो निष्कर्ष दिया गया हो वो किसी भी साक्ष्य के आधारित न हो या निष्कर्ष इस तरह का हो जिस पर कोई भी तर्कसंगत व्यक्ति कभी नहीं पहुँच पाये या जहां अनुशासनिक प्राधिकारी द्वारा साक्ष्य पर विचार करने पर निष्कर्ष विकृत होता है या पत्रावली के संदर्भ में प्रत्यक्ष रूप से आधारभूत त्रुटि से ग्रस्त होता है या किसी भी साक्ष्य पर आधारित नहीं होता है, तो उत्प्रेषण लेख जारी किया जा सकता है। संक्षेप में, वस्तुतः न्यायिक समीक्षा का दायरा, किसी प्राधिकरण के निर्णय की यथार्थता या तर्कसंगतता की परीक्षा की सीमा तक विस्तार नहीं किया जा सकता है।"

"27. यह सच है कि विभागीय जांच कार्यवाही पर साक्ष्य के सख्त नियम लागू नहीं होते हैं। हालांकि, विधि की एकमात्र आवश्यकता यह है कि अपचारी के विरुद्ध आरोप को ऐसे साक्ष्यों द्वारा स्थापित किया जाना चाहिए, जिसके आधार पर एक तर्कसंगत व्यक्ति यथोचित एवं वस्तुपरक होकर दोषी कर्मचारी के विरुद्ध, निष्कर्ष पर पहुंच सकता है कि आरोप की गंभीरता को क़ायम रख पाये। यह सच है, कि विभागीय जांच कार्यवाही में भी केवल अनुमान या अटकलों पर आधारित अपराध बोध का निष्कर्ष मान्य नहीं किया जा सकता है।

28. संवैधानिक न्यायालय संविधान के अनुच्छेद 226 या अनुच्छेद 136 के तहत न्यायिक समीक्षा के अपने अधिकार क्षेत्र का प्रयोग करते हुए विभागीय जांच कार्यवाही में तथ्यों के निष्कर्षों में हस्तक्षेप नहीं करेगा, सिवाय दुर्भावना या दुराग्रह के मामले में जहां निष्कर्ष के समर्थन में कोई भी साक्ष्य न हो या जहां कोई ऐसा निष्कर्ष हो, जो कोई भी यथोचित व्यक्ति तटस्थ होकर उस निष्कर्ष को मान्य कर सके और जब तक विभागीय प्राधिकारी द्वारा दिये गए निष्कर्ष का समर्थन करने के लिए कुछ साक्ष्य हैं, उसे बनाए रखा जायेगा।"

(देखें:- डिप्टी जनरल मैनेजर (अपीलीय अथारिटी) व अन्य प्रति अजय कुमार श्रीवास्तव : (2021)2 SCC 612) (उपरोक्त प्रस्तर 22, 23, 24,

27 व 28 का हिन्दी अनुवाद न्यायालय द्वारा किया गया है)

"13. ***यूनियन ऑफ इंडिया बनाम पी. गुनासेकरन*** *:(2015)2 SCC 610 के एक अन्य फैसले में, उच्चतम न्यायालय ने कहा कि साक्ष्य की पुनः मूल्यांकन करते हुए उच्च न्यायालय अनुशासनात्मक कार्यवाही में अपीलीय प्राधिकारी के रूप में कार्य नहीं कर सकता है। न्यायालय ने निम्न मापदंड निर्धारित किये जब उच्च न्यायालय अनुशासनात्मक कार्यवाही में हस्तक्षेप नहीं करेगा:-*

"13. संविधान का अनुच्छेद 226/227 के अंतर्गत उच्च न्यायालय निम्न नहीं करेगा:-

(i) साक्ष्य का पुनः मूल्यांकन ;

(ii) विधि के अनुसार किए जाने की स्थिति में जांच के निष्कर्षों में हस्तक्षेप ;

(iii) साक्ष्य की पर्याप्तता की जाँच ;

(iv) साक्ष्य की विश्वसनीयता की जाँच ;

(v) यदि कोई कानूनी साक्ष्य है जिस पर यदि निष्कर्ष किसी विधिक साक्ष्य पर आधारित हो तो हस्तक्षेप;

(vi) तथ्य की त्रुटि, कितनी भी गंभीर क्यों न हो उसका सुधार ;

(vii) सजा की अनुपातिकता में हस्तक्षेप तब तक नहीं जब तक कि वह अन्तरण को आघात न दे।"

(देखें:- कर्नाटक राज्य व अन्य प्रति एन. गंगाराज, (2020)3 SCC 423) (उपरोक्त प्रस्तर 13 का हिन्दी अनुवाद न्यायालय द्वारा किया गया है)

"24. ..... दंड विधि में, सबूत का भार अभियोजन पक्ष पर होता है और जब तक अभियोजन पक्ष " उचित संदेह से परे" आरोपी के अपराध को साबित करने में सक्षम नहीं होता है, तब तक उसे न्यायालय द्वारा दोषी नहीं ठहराया जा सकता है। दूसरी ओर, एक विभागीय जांच में, "संभाव्यता की प्रबलता" के आधार पर किए गए निष्कर्ष पर अपचारी अधिकारी को दण्डित किया जा सकता है।"

(देखें:- यूनियन ऑफ इण्डिया एवं अन्य प्रति दलबीर सिंह , (2021)11 SCC 321) (उपरोक्त प्रस्तर 24 का हिन्दी अनुवाद न्यायालय द्वारा किया गया है)

<u>विश्लेषण व निष्कर्ष</u> -

13. सर्वप्रथम यह निर्धारित करना है कि अनुशासनात्मक कार्यवाही के दौरान नैसर्गिक न्याय के सिद्धान्तों का पालन हुआ है या नहीं। जैसा की आक्षेपित आदेश में पूर्ण स्पष्ट रुप से वर्णन किया गया है कि तीनों आरक्षीगण को आरोप की प्रति भेजी गयी व दोनों याचिकाकर्ता ने स्पष्टीकरण भी प्रेषित किया, जिस पर विचार भी किया गया, परन्तु साक्षीगण के कथन के लेखबद्ध होने के तिथि की पूर्व सूचना होते हुए भी आरक्षीगण का अनुपस्थित होना तथा जिसके कारण उनकी ओर से जिरह का न हो पाना, यह निर्धारित करता है कि नैसर्गिक न्याय के सिद्धान्तों का पालन किया गया परन्तु आरक्षीगण ने अपनी इच्छा से कार्यवाही में भागीदारी नहीं करी। ऐसी स्थिति में वरिष्ठ अधिवक्ता का कथन की नैसर्गिक न्याय के सिद्धान्तों का पालन नहीं हुआ व कार्यवाही एक पक्षीय करी गई, असत्य व पत्रावली पर उपस्थित तथ्यों के विपरीत होने के कारण बलहीन है, इसलिये है, इसलिये अस्वीकार किया जाता है।

14. आरक्षीगण के अनुशासनात्मक प्राधिकारी के समक्ष स्पष्टीकरण से यह स्पष्ट है कि घटना घटित होने से इंकार नहीं किया गया व यह भी इंकार नहीं किया गया कि आरक्षीगण शराब के सेवन के कारण मदहोश थे, जिसका लाभ उठाकर अपराधीगण रेलगाड़ी से मुरादाबाद से बरेली लाते समय हिरासत से भाग गये। अतः मात्र इस कारण से कि शराब सेवन की आरक्षीगण की चिकित्सा आख्या या डाक्टर जिसने मेडिकल किया, उसका साक्ष्य लेखबद्ध नहीं किया गया तो समस्त जाँच कार्यवाही दूषित हो गयी ऐसा नहीं माना जा सकता है। वो भी जब शराब सेवन से आरक्षीगण ने इंकार नहीं किया है।

15. इस नाते साक्षी हे0कां0 दिग्विजय शर्मा का कथन महत्वपूर्ण हो जाता है जिससे आरक्षीगण को शराब के सेवन के कारण मदहोश हालत में रेलगाड़ी के डिब्बे में देखा और सर्वप्रथम घटना का विवरण सुना व कार्यवाही का कथन किया।

16. जाँच कार्यवाही के दौरान उपरोक्त साक्षी के कथन से यह विदित होता है कि आरक्षीगण, अभियुक्तगण के कहने पर उनके रिश्तेदार के घर गये और सभी एक होटल में खाना खाने गये, वहां न केवल खाना खाया अपितु शराब का अत्यधिक सेवन

भी किया जिससे नशा हो गया और बरेली जाने वाली ट्रेन में जब बैठे तब अभियुक्तगण कोल्ड ड्रिंक्स के बहाने हथकड़ी खोल कर भाग गये और आरक्षीगण रेलगाड़ी में मदहोश होकर सोते रहे। उपरोक्त तथ्यात्मक परिणाम को अनुच्छेद 226 के अन्तर्गत सीमित समीक्षा का अधिकार के अंतर्गत अमान्य नहीं किया जा सकता।

17. जैसा की ऊपर विधि का उल्लेख किया गया है कि 'संभावना की प्रबलता' के सिद्धान्त व इस न्यायालय द्वारा अपीलीय अधिकारी की तरह शक्ति का उपयोग न करने के कारण उपरोक्त तथ्यात्मक परिणाम में हस्तक्षेप नहीं किया जा सकता है। अनुशासनात्मक कार्यवाही में किसी भी प्रकार का दोष नहीं है। नैसर्गिक न्याय के सिद्धान्तों का पूर्ण रुप से परिपालन किया गया। आरक्षीगण ने यह माना है कि उन्होने शराब का सेवन किया जिससे वो मदहोश हो गये जिसका लाभ उठाकर अपराधीगण फरार हो गये। उपरोक्त तथ्य की पुष्टि हे◌ेकां. दिग्विजय शर्मा के साक्ष्य से पूर्ण रुप से होती है।

18. अतः जांच आख्या व अनुशासनिक अधिकारी द्वारा लिये गये निर्णय, जिसके द्वारा आरक्षीगण द्वारा किया गया कृत सिद्ध होता है व उनके कृत से अनुशासनहीनता, घोर लापरवाही, अकर्मण्यता का परिचय होता है, में कोई भी विधिक त्रुटि नहीं है।

19. अन्त में न्यायालय को यह विचार करना है कि क्या दण्ड आश्चर्यजनक रुप से अनुपातहीन है। आरक्षीगण का यह कर्तव्य था कि वो अपराधियों को सकुशल मुरादाबाद से वापस बरेली ले कर आते। परन्तु उन्होने घोर लापरवाही की व अपराधीगण के साथ न केवल उनके रिश्तेदार के घर गये बल्कि उनके साथ होटल में खाना खाया और अधिक मात्रा में शराब का सेवन किया, जिससे उनको इतना भी होश नहीं रहा कि अपराधीगण हथकड़ी खोल फरार हो गये व आरक्षीगण मदहोश होकर सोये रहे। यह कृत न केवल अनुशासनहीनता का द्योतक है अपितु कर्तव्य के प्रति घोर लापरवाही व अकर्मण्यता का परिचय है। अतः 'सेवा से हटाने' का दण्ड किसी भी प्रकार से अनुपातहीन नहीं है। अतः दण्ड विधिक रुप से मान्य है। इसमें किसी भी प्रकार से हस्तक्षेप नहीं किया जा सकता।

20. उपरोक्त विश्लेषण का एक ही निष्कर्ष है कि दोनों याचिकायें निरस्त किये जाने योग्य है। अतः निरस्त की जाती है।

(2022) 10 ILRA 81
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ-A No. 45098 of 2017

Manendra Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tejasvi Misra

Counsel for the Respondents:
A.S.G.I., Sri Pawan Kumar Mishra

A. Service Law – Recruitment – Concealment of material information - For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for. (Para 17)

The crucial question which, therefore, needs be answered is whether the lodging of the F.I.R. could result in the petitioner being liable to answer the question w.r.t.

a case pending against them in a court of law in the affirmative. (Para 15)

It is important to note that the attestation form did not require the petitioner to disclose the registration of the F.I.R. No part of para 12 of attestation form obliged the petitioner to disclose information w.r.t. a FIR that may have existed. Paragraph 12 specifically required the petitioner to truthfully declare whether he had either been convicted or if any case was pending against him in a court of law. Undisputedly the petitioner does not stand convicted in the criminal cases of which reference is made in the impugned order. The mere existence of a FIR did not, therefore, oblige the petitioner to answer either of these questions in paragraph 12 in the affirmative. As has been noted, the impugned order does not rest on the allegation that the petitioner was arrested, detained or fined in connection with the criminal case.

While it cannot be therefore said that the petitioners had suppressed material information, it is still open to the respondents to adjudge his suitability for appointment in the force since knowledge of the criminal case has come to light, albeit during the course of verification. On an overall consideration of the aforesaid aspects, it is manifest that the impugned order cannot be sustained. (Para 13, 17, 18)

B. Before a person is held guilty of *suppressio veri* or *suggestio falsi*, knowledge of the fact must be attributable to him. (Para 17)

In the present case, it is clear that Case Crime No. 35 of 2011 u/Ss.323, 504 and 506 I.P.C. was registered but it is not clear that on which date, the Court concerned took cognizance on the aforesaid case and even though the Court had taken cognizance and if so presume, then **it cannot be stated that there was a case pending against the petitioner in the Court of law since the petitioner was never informed at any point of time regarding pendency of the aforesaid case before submission of attestation form.** (Para 16)

This Court is of the opinion that the petitioner has neither concealed any material information while filling up his attestation form deliberately nor is there any wilful intention to suppress the material facts. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., 2016 (8) SCC 471 (Para 4)

2. Kalamuddin Ansari & anr. Vs U.O.I. & ors., Writ-A No. 33265 of 2017, decided on 31.10.2018 (Para 21)

Present petition assails discharge letter/order dated 15.03.2017, passed by IG-Cum-Chief Security Commissioner/ RPF, Eastern Railway, Kolkata.

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the parties.

2. The petitioner has preferred the present petition with the following prayers:-

(A) Issue writ, order or direction in the nature of Certiorari quashing impugned discharge letter dated 15.03.2017 (annexure No.4) of this petition

(B) Issue a writ, order or direction in the nature of mandamus commanding the respondent(s) to reinstate the petitioner into services, with all consequential benefits.

3. Facts in brief as contained in the petition are that an advertisement being Advertisement No.1/2011 was issued by the respondent No.3 for recruitment on the post of Constable (G.D.) in Railway Protection Special Force. Pursuant to the aforesaid advertisement, the petitioner submitted his application form and he received Admit Card for appearing in the

said examination. The petitioner duly appeared in the examination and qualified the same. Subsequently, the petitioner received appointment letter wherein he was directed to join his training at Panjab Police Taining Center Jahankalan on 01.11.2014.. During the period of training, the Police Verification Report was sought from the District Magistrate Pratapgarh regarding pendency of any criminal case against the petitioner. A report was submitted in this regard stating therein that Case Crime No.35 of 2011 under Sections 323, 504 and 506 I.P.C. was registered against the petitioner on 03.05.2011 at Jethwara Police Station, Pratapgarh in which local police has taken action under Section 110(G) of Cr.P.C. but the petitioner did not disclose the aforesaid information in Column No.12 of the attestation form, hence his selection is liable to be cancelled. After the aforesaid report, the petitioner was discharged from his training and in this regard a letter was served upon the petitioner on 27.04.2015. Aggrieved against the aforesaid, the petitioner filed a petition before this Court being Writ A No.45626 of 2015 (Manendra Singh and another Vs. Union of India and others) and the aforesaid writ petition was finally decided by a Co-ordinate Bench of this Court vide its judgement and order dated 06.12.2016. Pursuant to the aforesaid order, the petitioner was called for personal hearing on 11.01.2017 and after hearing the petitioner, the respondent No.4 passed the order dated 15.03.2017 cancelling the candidature of the petitioner on the ground of intentional suppression of the material fact while filling up his attestation form. Aggrieved against the order dated 15.03.2017, the petitioner preferred the present writ petition.

4. It is argued by learned counsel for the petitioner that insofar as Case Crime No.35 of 2011 under Sections 323, 504 & 506 I.P.C. is concerned, the petitioner has absolutely no information. It is further stated in the writ petition that neither any information in this regard was ever served upon the petitioner nor he was ever charge-sheeted in the aforesaid case. It is stated in paragraph 14 of the writ petition that the order passed by respondent No.4 dated 15.03.2017 is hit by the equality clause enshrined in the Constitution of India since on similar facts, candidatures of various candidates were found to be fit and they were reinstated. The names of candidates are Subhash Kumar, Bittu Jaiswal, Mehdi Hasan and Kuldeep Kumar and the orders passed for reinstatement of them were appended as Annexure Nos.5, 5A, 5B and 5C to the writ petition respectively. It is argued that the candidature of the petitioner was rejected in view of the fact that correct facts were not disclosed by the petitioner in Column 12 of the Attestation Form. It is argued by learned counsel for the petitioner that there is no cloumn in the Attestation Form regarding declaration of only F.I.R. and as such there is no suppression of material facts, therefore, it is wrong to say that any fact whatsoever has been suppressed by the petitioner. It is further argued that in identical circumstance, only on the basis of lodging of F.I.R., candidatures of various candidates were cancelled but after orders were passed by this Court in the writ petitions filed by them, speaking orders were passed by the authorities in their favour and permitting them to join their duties. The orders were passed by the authorities in favour of those candidates mentioning therein that there is no column in the Attestation Form regarding declaration of only F.I.R. Learned counsel for the petitioner also relied upon the judgement of Hon'ble Supreme Court passed in the case of ***Avtar***

Singh Vs. Union of India and others 2016 (8) SCC 471.

5. A counter affidavit has been filed on behalf of the respondents. In Paragraph (6) of the counter affidavit, it is stated that the petitioner has not mentioned in his attestation form about pendency of Criminal Case as "No". It is further stated in the counter affidavit that the attestation form of petitioner was sent for verification to the District Magistrate Pratapgarh regarding his character & antecedents. The District Magistrate Pratapgarh forwarded the same to the Jethwara Police Station. A report was submitted by the Jethwara Police Station which was duly endorsed by the Superintendent of Police Pratapgarh in which it is mentioned that N.C.R. No.35/11 dated 03.05.2011 under Sections 323, 504 & 506 IPC was registered against the petitioner and the local police has taken action on the basis of the aforesaid report on 23.05.2011 under Section 110 (G) Cr.P.C. and thereafter a case was registered as Case Crime No.161 of 2011 under Sections 323, 504 & 506 I.P.C.

6. It is argued that since the aforesaid facts were not disclosed by the petitioner in Column 12 of the Attestation Form correctly, therefore, his candidature was rightly cancelled.

7. In response to the counter affidavit, a rejoinder affidavit has been filed. The contents of Paragraph 6 of the counter affidavit has been denied in paragraph 4 of the rejoinder affidavit. It is stated that the petitioner has absolutely no information regarding lodging of F.I.R. at the time filling of the attestation form. It is argued that the petitioner first time came to know regarding the aforesaid fact when he was discharged from training. When he received the discharge order, then he knew that a criminal case was pending against him since 2011 and in this view of the matter it is wrong to say that any material fact has been concealed by the petitioner while filling up the attestation form. It is further stated in the rejoinder affidavit that the petitioner was neither arrested nor any police personal had ever approached him for investigation regarding the aforesaid case, therefore, the petitioner could nor filled up in the attestation form regarding the pendency of the aforesaid case. It is further stated in rejoinder affidavit that no prosecution has ever been initiated against him. It is further stated in rejoinder affidavit that the respondents have considered the case of various similarly placed candidates and all of them also provided joining on a premise that there is no column in attestation form which requires disclosure of F.I.R.

8. After exchange of counter and rejoinder affidavits, this Court passed order dated 13.12.2018 directing the petitioner to file further supplementary affidavit disclosing whether the petitioner was ever arrested or detained in respect of the aforesaid case crime number in question at any time prior to the execution of the attestation form.

9. In response to the same, a supplementary affidavit has been filed by the petitioner on 06.03.2019. In paragraph 5 of the aforesaid supplementary affidavit, it is stated that the petitioner was neither arrested nor prosecuted. It is further stated that the petitioner was never detained nor any fine was ever imposed upon him at any point of time by any Court of law. It is further stated that since the petitioner has never been convicted for any offence, hence

Clause (f) of Column No.12, he again replied in negative. In this view of the matter, it is argued by learned counsel for the petitioner that reply tendered by the petitioner in paragraph 12(a) to (12)(f) in the attestation form was absolutely correct. Insofar Case Crime No.35 of 2011 is concerned, the petitioner has absolutely no knowledge about it inasmuch as neither any police personal ever contacted nor he was ever examined under Section 161 Cr.P.C.

10. In reply to the aforesaid affidavit, supplementary counter affidavit has been filed by the respondents. In paragraph 3 of the aforesaid affidavit, it is again reiterated that the petitioner deliberately suppressed the factual information regarding registration of Police Case to mislead the Administration. It is further argued that the verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable for the post of constable in the disciplined force like R.P.F. as per Rule 52 of R.P.F. Rule 1987.

11. Heard learned counsel for the parties and perused the record.

12. Pursuant to the advertisement No.1 of 2011, the petitioner submitted the application form for recruitment on the post of Constable, the petitioner was directed to submit attestation form, copy of which is appended along with counter affidavit filed by the respondents. In paragraph 12 of the aforesaid attestation form, the petitioner was directed to submit various informations. The information seeking in tthe Column 12 of the Attestation Form are quoted below:-

"12. (a) Have you ever been arrested? Yes/No

(b) Have you ever been prosecuted? Yes/No

(c) Have you ever been kept under detention? Yes/No

(d) Have you ever been bound down? Yes/No

(e) Have you ever been fined by a Court of law? Yes/No

(f) Have you ever been convicted by a Court of Law for any offence? Yes/No

(g) Have you ever been debarred from any examination or rusticated by any University or any other educational authority/institution? Yes/No

(h) Have you ever been debarred/disqualified by any Public Service Commission/Staff Selection Commission for any of their examination/selection? Yes/No

(i) If any case pending against you in any court of law at the time of filling up this Attestation Form? Yes/No

(j) Is any case pending against you in any University or any other educational authority/institution at the time of filling up this Attestation Form? Yes/No

(k) Whether discharged/expelled/withdrawn from any training institution under the Govt. or otherwise? Yes/No

(l) If the answer to any of the above-mentioned question is "Yes", give full particulars of the case/ arrest/detention/fine/conviction/sentence /punishment/acquittal etc. and/or the name of the case pending in the Court/ University/Educational Authority etc. at the time of filling up this Form? Yes/No"

13. As it evident from the questions comprised in paragraph 12, the petitioner was called upon to disclose information in respect of whether he had ever been

arrested, prosecuted, detained or fined by a court of law. The further disclosures which were required were in respect of whether he had been convicted by a court of law for any offence and whether any case in any court of law at the time of filling up the Attestation Form was pending. The other clauses of paragraph 12 dealing with the debarment from examinations or the pendency of any case in a University or other educational institution or whether the candidate had been discharged, expelled or withdrawn from any training institution are really not relevant to the case at hand.

14. Having noticed the salient questions comprised in paragraph 12, upon which the allegations of non-disclosure is liable to be tested, this Court notices that it is not the case of the respondents that the petitioner had been arrested, detained, prosecuted or fined by a court of law. That leaves the Court to only consider whether the petitioner could be held guilty of suppressing material information while answering questions relating to whether he had been convicted by a court of law for any offence or whether any case was pending against him at the time of filling up of the Attestation Forms.

15. Undisputedly the petitioner does not stand convicted in the criminal cases of which reference is made in the impugned order. The crucial question which, therefore, needs be answered is whether the lodging of the F.I.R. could result in the petitioner being liable to answer the question with respect to a case pending against them in a court of law in the affirmative.

16. Insofar as the present petition is concerned, it is clear that Case Crime No.35 of 2011 under Sections 323, 504 and 506 I.P.C. was registered but it is not clear that on which date, the Court concerned took cognizance on the aforesaid case and even though the Court had taken cognizance and if so presume, then it cannot be stated that there was a case pending against the petitioner in the Court of law since the petitioner was never informed at any point of time regarding pendency of the aforesaid case before submission of attestation form.

17. In this regard, it is important to note that the attestation form did not require the petitioner to disclose the registration of the F.I.R. The Hon'ble Supreme Court in the case of ***Avtar Singh (supra)*** following principles ruled out:-

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of the aforesaid discussion, we summarise our conclusion thus:

38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of

the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion, may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service,holding departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

18. No part of paragraph 12 obliged the petitioner to disclose information with regard to a First Information Report that may have existed. Paragraph 12 specifically required the petitioner to truthfully declare whether he had either been convicted or if any case was pending against him in a court of law. The mere existence of a FIR did not, therefore, oblige

the petitioner to answer either of these questions in paragraph 12 in the affirmative. As has been noted, the impugned order does not rest on the allegation that the petitioner was arrested, detained or fined in connection with the criminal case. The case of the petitioner would, therefore, squarely fall for consideration in light of the principles elucidated in paragraph 30(10) of ***Avtar Singh (supra).*** While it cannot be therefore said that the petitioners had suppressed material information, it is still open to the respondents to adjudge his suitability for appointment in the force since knowledge of the criminal case has come to light, albeit during the course of verification. On an overall consideration of the aforesaid aspects, it is manifest that the impugned order cannot be sustained.

19. From perusal of the record, this Court is of the opinion that in similar circumstances, where the fact regarding filing of F.I.R. was not disclosed by the applicants, orders were passed by the respondents for reinstatement of them stating that there is no cloumn in the Attestation Form regarding declaration of only F.I.R. and as such there is no suppression of material facts, therefore, it is wrong to say that any fact whatsoever has been suppressed by the applicant.

20. In the facts and circumstance of the case as stated above, this Court is of the opinion that the petitioner has not concealed any material information while filling up his attestation form deliberately or any wilful intention to suppress the material facts.

21. Similar view was also taken by this Court in Writ A No.33265 of 2017 (Kalamuddin Ansari And Another Vs. Union Of India and others) decided on 31.10.2018.

22. Accordingly, the writ petition is allowed and the discharge order dated 15.03.2017 passed by the respondent is hereby set aside.

23. The matter stands remitted to the respondents for deciding the claims of the petitioner afresh and in light of the observations made hereinabove. The aforesaid exercise be completed within a period of two months from the date of production of certified copy of this order.

(2022) 10 ILRA 88
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 34788 of 2005

Vidyawati ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Achal Singh Vats, Sri H.N. Sharma

Counsel for the Respondents:
C.S.C., Sri M.S. Pandey, Sri V.K. Singh, Sri Azad Rai

Gaon Sabha Manual, Para Nos. 128 & 131 - Provisions of para Nos.128 and 131 of Gaon Sabha Manual are mandatory in nature - Bhumi Prabandhak Samiti is bound by the statutory duty to conduct and prosecute legal proceedings by or on behalf of Gram Panchayat - Ex-pradhan not empowered to file second appeal before Board of Revenue - The petitioner filed suit under Section 229-B/122-B (4F) of U.P.Z.A.& L.R. Act - suit was dismissed by the trial court, in appeal suit was decreed - the second appellate court without condoning the delay in filing the

second appeal as well as without setting aside the finding of fact recorded by the first appellate court allowed the second appeal and set aside the judgment and decree of the fist appellate Court - Held - As delay was not condoned in filing the second appeal and Second Appeal was entertained on behalf of the Ex-pradhan who was not empowered to file second appeal before Board of Revenue in view of the provisions contained in para Nos.128 and 131 of Gaon Sabha Manual the impugned judgments and orders dated Second Appellate Court set aside (Para 12)

Allowed. (E-5)

List of Cases cited:

Jagdish Pandey (dead) through Lrs Vs Additional Collector (City) Gorakhpur & ors. reported in 2011 (114) RD 106

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Achal Singh Vats, learned counsel for the petitioner, leaned Standing Counsel for respondent Nos.1 and 2 and Mr. Azad Rai, learned counsel for respondent No.3.

2. The instant writ petition has been filed for quashing the judgment and order dated 15.04.2005 and 30.03.2005 passed by respondent No.1 i.e. Board of Revenue, U.P. Allahabad and order dated 30.01.2001 passed by Up Ziladhikari, Phoolpur, Allahabad.

3. Brief facts of the case are that petitioner belongs to scheduled caste community, her father was in possession of plot No.78 area 0.401 hectares and plot No.79-Ka area 0.009 hectare situated in village Bagautipur @ Khuthana, Pargana and Tehsil-Soraon, District-Allahabad. Petitioner's father died leaving behind his widow Smt. Sundari Devi as his legal heir and after death of Sundari Devi, land in dispute duly devolved upon the petitioner being her daughter. Smt. Sundari Devi had also executed a registered will in favour of the petitioner. Accordingly, petitioner is continuing in actual possession of land in dispute. Petitioner filed a Suit under Section 229-B/122-B (4F) of U.P.Z.A.&L.R. Act impleading the Gram Panchayat and State of U.P. as defendants. The trial court vide judgment and decree dated 30.01.2001 dismissed the plaintiff-suit, hence the petitioner filed an Appeal before Commissioner, the same was heard by Additional Commissioner (2nd) Allahabad and appeal was allowed by Judgment and decree dated 22.04.2003 recording the finding of fact that appellant is in possession of the disputed plot since long and belongs to scheduled caste community as such appellant is entitled to benefit of Section 122 B (4F) of U.P.Z.A. & L. R. Act. Against the judgment and the decree of the first appellate Court Gaon Sabha through Ex-pradhan (Chandra Kala Devi) filed a Second Appeal, which has been allowed without condoning the delay in filing the second appeal as well as without framing the substantial question of law. Against the judgment and decree of second appellate court, petitioner filed a Review Application, the Review Application was also rejected vide order dated 15.05.2005, hence this writ petition.

4. Learned counsel for the petitioner submitted that suit under Section 229-B/122-B (4F) of U.P.Z.A.&L.R. Act filed by the petitioner was dismissed by the trial court vide order dated 30.01.2001, against the same an Appeal was filed by the petitioner which was allowed and suit was decreed by the Additional Commissioner

vide judgment and decree dated 22.11.2003 recording finding of fact that petitioner is in possession over the disputed plot before the relevant date and being member of Scheduled Caste community, petitioner is entitled to the benefit of Sectio122-B (4F) of U.P.Z.A.&L.R.Act. He further submitted that against the first appellate court judgment, the Second Appeal was filed on behalf of Gaon Sabha through Ex Pradhan who was not empowered to file the Second Appeal and the Second Appeal was allowed without framing the substantial questions of law, even finding of fact record by the first appellate Court was not set aside and second appeal has been outrightly allowed. Counsel for the petitioner placed reliance upon paragraph Nos.128 and 131 of Gaon Sabha Manual which are as follows:

"128.The conduit of Gaon Sabha Litigation shall not depend upon the individual discretion of the Chairman of the Bhumi Prabandhak Samiti (Land Management Committee) but shall be a matter of a resolution of the Bhumi Prabandhak Samiti (Land Management Committee) as a whole. In urgent cases, however, the Chairman can take action on his ow and seek ratification of the Bhumi Prabandhak Samiti (Land Management Committee) afterwards by including in the agenda of the next ensuing meeting.

131. Lawyers have been appointed who shall represent the Bhumi Prabandhak Samiti (Land Management Committee) and give it legal advice where necessary. the Committee shall not engage any lawyer other than the penal lawyer appointed. In important cases, however special lawyers can be engaged with the specific provisions of the Collector in writing.

There is a Vakil or mukhtar in each tehsil and one civil and one revenue lawyer at the district headquarters. the District Government Counsel in in charge of the whole work.

The Bhumi Prabandhak Samiti (Land Management Committee) requiring the advice of a lawyer should request the Tahsildar or the Sub-divisional Officer to arrange for it.

The Chairman of Bhumi Prabandhak Samiti (Land Management Committee)shall consult the penal lawyer in all cases in which he is summoned or is impleaded as defendant.

If in any case the Bhumi Prabandhak Samiti (Land Management Committee) refuse to sign a plaint or to defend a case, as advised by the panel lawyer or the special lawyer, if engaged, as the case may be, or as instructed by the Tahsildar or the sub-divisional Officer, the lekhpal as Secretary of the Bhumi Prabandhak Samiti (Land Management Committee) shall act for the Bhumi Prabandhak Samiti (Land Management Committee) under orders of the Tahsildar for the above purpose only."

5. Counsel for the petitioner placed reliance upon the Judgment of this Hon'ble Court on the point of para Nos. 128 and 131 of Gaon Sabha Manual in Case of **Jagdish Pandey (dead) through Lrs Vs. Additional Collector (City) Gorakhpur and others reported in 2011 (114) RD 106** in which it is held that provisions of para Nos.128 and 131 of Gaon Sabha Manual are mandatory in nature.

6. Learned counsel for the petitioner further submitted that second appeal was barred by limitation also but delay was not condoned and second appeal has been allowed.

7. On the other hand, learned counsel for the Gaon Sabha-Mr. Azad Rai, submitted that suit filed by the plaintiff was dismissed as property belonged to the gaon sabha and the second appeal was also rightly allowed as there is no requirement for framing substantial question of law by Board of Revenue under Section 331 (4) of U.P.Z.A. & L.R. Act, although they could not explained how second appeal was filed before the Board of Revenue, through Ex pradhan and how second appeal was allowed without setting aside the finding of facts.

8. I have considered the arguments advanced by the learned counsel for the parties .

9. There is not dispute about the fact that petitioner filed suit under Section 229-B/122-B (4F) of U.P.Z.A.& L.R. Act and the suit was dismissed by the trial court but in appeal suit was decreed and finding of fact has been recorded that plaintiff/petitioner being member of scheduled caste community was in possession of the plot in dispute (Plot Nos.78 area 0.401 hectares and 79Ka area 0.009 hectare) since before the relevant date, the second appellate court without condoning the delay in filing the second appeal as well as without setting aside the finding of fact recorded by the first appellate court has arbitrarily allowed the second appeal and set aside the judgment and decree of the fist appellate Court.

10. Perusal of the order passed by the second appellate court fully demonstrate that there is no finding with respect of the fact that petitioner is not in a possession of the disputed plot, there is no order for condonation of delay and even the Second Appeal has been filed at the instance of Ex-pradhan who had no authority to file second appeal before Board of Revenue in view of provisions contained in para 131 of Gaon Sabha Manual, which are mandatory in nature as held in **Jagdish pandey (supra)** in para No.12 and 13 which are as follows:

"12. In the instant case, it is admitted on record that the Gram Pradhan had refused to sign the memo of revision. On the contrary, the respondent no.4, Komal in his individual capacity signed the same. The respondent no.4 had no authority to do so and be a substitute of the Lekhpal, who is enjoined with this duty. Under the provisions of paragraph-131, the District Government Counsel ought to have called upon the Tehsildar to send the Lekhpal for appropriate signatures in order to file a memo of revision and that having not been done, the District Government Counsel failed to apply the provisions of paragraph-131. He could not have made Sri Komal a substitute in place of the Lekhpal of the village.

13. The provisions of Para 131 appear to be binding and peremptory in nature. The procedure therein cannot be bypassed or else it would lead to a chaos. If any person or villager is allowed to sign documents the same would be not only inappropriate but also illegal as such a person will have no authority to represent a Gaon Sabha. The said provision cannot be wished off merely as directory in view of he language employed therein."

11. He further submitted that second appeal has been arbitrarily allowed by the cryptic judgment.

12. In view of the facts and circumstances of the case, specially that

delay was not condoned in filing the second appeal and Second Appeal was entertained on behalf of the Ex-pradhan who was not empowered to file second appeal in view of the provisions contained in para Nos.128 and 131 of Gaon Sabha Manual as laid down in **Jagdish Pandey (Supra),** the impugned judgments and orders dated 15.04.2005 and 31.03.2005 passed by the respondent No.1 (Second Appellate Court) are hereby set aside and the judgment passed by the first appellate court dated 22.11.2003 is hereby maintained. **The Writ petition stands allowed. No order as to costs.**

(2022) 10 ILRA 92
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 6620 of 2021

Bharti Airtel Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Manju Lata Mishra, Ashish Mishra

Counsel for the Respondents:
C.S.C.

Civil Law - Central Goods and Services Tax Act, 2017 - Sections 67, 73 & 129 - Section 129 provides for Detention, seizure and release of goods and conveyances in transit - When goods are detained, they can be released upon the payment of the amount specified in clauses (a), (b), and (c) of Section 129(1) of the Act by the owner of the goods or any other person coming forward to pay - but where the owner of the goods or the person does not volunteer to pay the penalty as prescribed under clause (a), (b), (c) of Section 129 (1) of the Act in such case the department is will equipped to initiate proceedings by taking recourse to Section 73, 74, 75 of the Act read with section 122 for determination of tax and the penalty leviable - however there is no provision u/s 129 for determination of tax due, which can be done only by taking recourse to the provisions of Section 73 or 74 of the CGST Act, as the case may be - In the present case, the department proceeded to determine the tax liability as well as penalty under the provisions of Section 129 of the Act, which is not contemplated or intended - Impugned Orders quashed and set aside & it was directed that the amount paid by the petitioner for release of the goods shall be refunded to the petitioner (Para 27, 28)

Allowed. (E-5)

List of Cases cited:

VSL Alloys (India) Pvt. Ltd.Vs St. of U.P & ors. reported in 2018 (67) NTN-DX 1

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Supplementary Affidavit filed by the petitioner is taken on record.

2. Heard Sri Ashish Mishra, the counsel for the petitioner and the learned Standing Counsel, who appears for the respondents.

3. The present petition has been filed challenging the order dated 17.10.2018 purportedly to be passed in exercise of the power under Section 129 of the CGST Act as well as the order dated 31.10.2020 passed by the respondent no.4 whereby the appeal preferred by the petitioner has been dismissed.

4. The counsel for the petitioner states that as the Tribunal contemplated under the

Act has not been constituted, as such, the petitioner is availing the remedy under Article 226 of the Constitution of India and the same is being entertained in view of the admitted position that the Tribunal contemplated under the Act has not been constituted till date.

5. The facts, in brief, are that the petitioner company is a company incorporated under the Companies Act and has a warehouse situate at Lucknow as well as at Haryana Gurgaon. The company for the purposes of transportation of the goods from Lucknow to Haryana hired a transporter for transporting the said goods on which a bilty tax invoice and Part-A of the e-way bill were generated and are contained in Annexure no.1. It is stated that the petitioner paid the tax as were required under the IGST Act, however, on account of an inadvertence Part-B of the e-way bill was not generated prior to the commencement of the transport of goods. It is on record that the driver commenced the journey on 24.09.2018 at 9.30 pm from the warehouse of the petitioner company and was intercepted on 25.09.2018 at 4.43 am.

6. The case of the petitioner's company is that although the Part-B of the e-way bill was not generated, the same was attributable to the transporter, however, before the goods were actually seized, the e-way bill was generated at about 7.34 am in the morning on the next date i.e. 25.09.2018. It is stated that despite the fact that the petitioner had uploaded the Part-B of the e-way bill at about 7.34 am, the respondents authorities proceeded to pass a detention order on 29.09.2018 mainly on the ground that till 4.43 am on 25.09.2018, the Part-B of the e-way bill had not been generated.

7. The counsel for the petitioner has drawn my attention to the inspection memo of the vehicle in question which was carried out on 29.09.2018 at about 5.47 pm.

8. As the goods were not being released, the petitioner approached this court by filing a Writ Petition Misc. Bench No.33276 of 2018, which was disposed off on 16.11.2018 directing the release of the goods on the petitioner furnishing the security in terms of section 129 read with section 67 of the CGST Act 2017. It is stated that in terms of the said order, the goods were released on the petitioner furnishing a bank guarantee to the respondents on 07.12.2018 amounting to Rs.1,25,49,539/-.

9. It is stated that prior to the release of the goods, a show cause notice was issued to the petitioner company on 29.09.2018, which is contained in Annexure no.9 whereby the petitioner was called upon to show cause as to why the proposed tax and the penalty may not be levied against the petitioner. The said show cause notice was issued under section 129 (3) read with section 20 of the CGST Act. The petitioner submitted a detailed reply to the show cause notice and prayed that the show cause notice be dropped mainly on the ground that the tax was duly paid as was required under the Act and the Part-B of the e-way bill was also uploaded prior to the passing of the detention order. It is claimed that despite the submission of the reply, the department without considering the same imposed a tax liability of Rs.62,74,769.40 and levied an equal penalty of Rs.62,74,769.40 by means of an order dated 17.10.2018 as contained in Annexure no.12.

10. It is argued that the petitioner was never served with a copy of the order dated 17.10.2018, as such, the petitioner could not prefer the appeal within the prescribed time as a result whereof the respondent has threatened to encash the bank guarantee and to avoid the same, the petitioner deposited the amount as was determined against the petitioner in view of the order dated 17.10.2018. The petitioner thereafter preferred an appeal no.3 of 2019 which too has been dismissed by means of the order dated 31.10.2020.

11. The counsel for the petitioner argues that the appeal has been wrongly dismissed mainly agreeing with the findings recorded by the assessing authority which in turn had passed the order against the petitioner solely placing reliance on the judgment of the High Court of Madhya Pradesh which was passed placing reliance on the judgment in the case of ***VSL Alloys (India) Pvt. Ltd. vs. State of U.P and others reported in 2018 (67) NTN-DX 1.***

12. The contention of the counsel for the petitioner is that the order imposing tax liability as well as the appellate order are bad in law and contrary to the mandate of the provisions of the CGST Act. He argues that from the plain reading of the section 129 of the Act, it is clear that on the goods being detained, the same are to be released on the owner of the goods or any other person coming forward and offering to pay the amount as indicated in clause-a, clause-b and clause-c of Section 129(1) of the Act. He argues that to determine the amount which is liable to be paid under clause-a, clause-b and clause-c of Section 129 (1), the proper officer is empowered to specify the penalty payable. He argues that although the proper officer is empowered to specify the penalty which should be paid or offered to be paid under clause-a, clause-b or clause-c of Section 129(1) of the Act, there is no power to determine the penalty payable which can be done only in terms of the mandate of Section 122 of the CGST Act.

13. He further argues that admittedly no proceedings for determination of the penalty or for determination of the tax outstanding have been initiated either under section 73 or 74 of the CGST Act or under section 122 of the CGST Act. He further argues that in any event there was never any dispute that the tax which is required to be paid for transport of the goods was not paid and thus, the demand as well as the imposition of the penalty is neither justified nor proper exercise of the power. He further argues that no proceedings under section 73, 74 or 75 of the Act have also been initiated against the petitioner for determination of the tax liability. Thus, in short the submission of the counsel for the petitioner is that in terms of the mandate of section 129, the proper officer is neither authorized nor justified in determining the tax or imposing the penalty as has been done by means of the impugned orders and thus, the impugned orders are liable to be set aside and the amount deposited by the petitioner is liable to be refunded.

14. The Standing Counsel, on the other hand, argues that admittedly Part-B of the e-way bill was not uploaded by the petitioner prior to the commencement of the transport, which is a mandatory requirement under Rule 138 of the Rules framed under the Act and once it is admitted by the petitioner that Part-B of the e-way bill was not uploaded, no error can be found with the orders passed by the authority in exercising of the power under section 129 of the Act. He further argues

that a duty is cast upon the petitioner to have uploaded Part-B of the e-way bill, which has not been discharged. In light of the said, he argues that the petition lacks merit and is liable to be dismissed.

15. The counsel for the petitioner has placed reliance on the judgment passed by this Court in Writ Tax No.763 of 2018 decided on 09.5.2018 (Modern Traders vs. State of U.P.) ; the judgment in Writ Tax No.344 of 2018 decided on 07.02.2020 (Skipper Limited vs. Union of India); the judgment in Writ Tax No.360 of 2020 decided on 17.12.2020 (Metenere Ltd. vs. Union of India and others).

16. The Standing Counsel, on the other hand, places reliance on the judgment of the M.P. High Court in the case of Gati Kintetsu Express Ltd. vs. Commercial Tax of M.P. and others decided on 05.7.2018 reported at (2018) 56 GSTR 114. He also places reliance on the judgment of the Madras High Court in Writ Petition No.1431 of 2020 (M/s Ideal Movers Private Limited vs. The State Tax Officer (ENF), Roving Squad, Vellore) decided on 24.01.2020. In the light of the said, it is ultimately argued that the writ petition is liable to be allowed.

17. Considering the submissions made at the bar, it is essential to see the mandatory provisions and scheme of the CGST Act which cover the issue in question particularly Sections 73, 74 and 75 read with section 122 and 129 and the Rule 138 of the CGST Rules.

18. CGST Act is provided into 21 Chapters. Chapter III of the said Act provides for levy and collection of the tax. Chapter IV concerns with the time and value of the supply. Chapter X of the Act provides for liability of the payment of tax. Chapter XV of the Act in question, with which we are concern, provides for manner and demands or recovery.

19. Section 73 of the Act provides for determination of tax which is not paid or short paid or erroneously refunded or on account of wrong availment inputs tax credit for any reason other than fraud or any wilful misstatement or suppression of facts. Section 73 is quoted herein below :

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.-- *(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or

short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

20. Section 74 of the said Act confers power of determination of tax not paid or short paid or erroneously refunded or in case of wrongful availment of input tax credit availed or utilized by the reasons of fraud or any wilful misstatement or suppression of facts. Section 74 is quoted herein below :

74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.--

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously

been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.--For the purposes of section 73 and this section,--

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.

Explanation 2.--For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

21. Thus, Sections 73 and 74 deal with situations of determination of tax in case of non-payment simplicitor or for the reasons of fraud or wilful misstatement or suppression of facts respectively.

22. Chapter XIX of the said Act provides for offences and penalties. Section 122 of the Act provides for the quantum of penalty leviable in the event of a taxable person falling on the grounds mentioned under section 122(1) clause (i) to clause (xxi). The quantum of penalty is also specified under section 122 (1) of the Act. Section 122(1) is quoted herein below :

122. Penalty for certain offences.-- *(1) Where a taxable person who--*

(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

(ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

Shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

23. In the same Chapter, there is a procedure prescribed under section 129 which is invocable in respect of the goods and conveyances in transit. Section 129 is quoted herein below :

*"**129. Detention, seizure and release of goods and conveyances in transit**.--(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,--*

(a) on payment of penalty equal to two hundred per cent of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such penalty;

(b) on payment of penalty equal to the fifty per cent of the value of the goods or two hundred percent of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to five percent of the value of goods or twenty five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed:

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

*(2) ****

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within seven days of such detention or seizure, specifying penalty payable, and thereafter, pass an order within a period of seven days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1).

(4) No penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard.

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded.

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub-section (1) within fifteen days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or one lakh rupees, whichever is less:

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of fifteen days may be reduced by the proper officer."

24. Thus, in the Act in question, the power of inspection, search and seizure can be carried out under Chapter XIV or in case of goods in transit under section 129. Section 129, on the plain reading, can be equated with an alternative dispute redressal mechanism and provides an opportunity to the owner of the goods or any other person to pay amounts as specified under section 129 (1)(a) or (b) or (c) of the said Act.

25. On a plain reading of clause 129(1)(a) of the Act, which provides for payment of penalty equal to 200% of the tax payable on such goods or penalty equal to 50% of the value of the goods, further incorporates provisions for determination of quantum of penalty under section 129(3). Thus, under the scheme of the Act, the procedure for determination of tax and penalty is contained in Chapter XV read with section 122, 123, 125, 126, 127 and 128 of the Act and a parallel procedure is prescribed under section 129 of the Act in case of goods, which are in transit.

26. Section 129, can be invoked by the department with regard to the goods in transit and the goods can be released only in the event the owner of the goods comes forward for payment of penalty as specified in clause (a) or (b) or (c) of Section 129 (1) of the Act and on payment of the said amount, the intent is to give quietus to the litigation.

27. The question that arises here is that what happened the owner of the goods or the person does not volunteer to pay the penalty as prescribed under clause (a), (b), (c) of Section 129 (1) of the Act. In the said case, the department is will equipped to initiate proceedings by taking recourse to Section 73, 74, 75 of the Act read with

section 122 for determination of tax and the penalty leviable which, subject to the appeal would govern the issues in between the department and the assessee.

28. In the present case, the department has proceeded to determine the tax liability as well as penalty only under the provisions of Section 129 of the Act, which is not contemplated or intended. On a plain reading of Section 129, there is no provision under section 129 for determination of tax due, which can be done only by taking recourse to the provisions of Section 73 or 74 of the CGST Act, as the case may be.

29. As the proceedings have been initiated and concluded only under section 129 and the owner of the goods has not come forward for payment of such penalty as has been determined, the entire action of determining the tax and penalty under section 129(1) as has been done by means of the impugned order and upheld in the appellate proceedings, impugned before this Court, I have no hesitation in holding that the order passed on 17.10.2018 and as upheld by the order dated 31.10.2020 are not legally substitutable and are accordingly set aside. The amount paid by the petitioner for release of the goods shall be refunded to the petitioner with all expedition preferably within a period of two months from today.

30. With the said observations, the writ petition is allowed.

(2022) 10 ILRA 101
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.10.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 6971 of 2022

Lalitesh Pati Tripathi ...Petitioner
Versus
Union of India & Ors. ...Opposite Parties

Counsel for the Petitioner:
Shreya Chaudhary

Counsel for the Respondents:
A.S.G.I., C.S.C.

Civil Law - Passport Act, 1967 - Section 6(2)(f) - Refusal of passports, travel documents, etc - passport authority shall refuse to issue a passport on the ground that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India - However, the Central Government has issued a notification dated 25th August 1993, stating that individuals with pending criminal proceedings, can request an exemption from the passport issuance conditions, before the competent criminal court - They can seek an order from the concerned criminal court allowing them to depart from India (para 3, 4,6)

Disposed off . (E-5)

List of Cased cited:

Prashant Bhushan Vs U.O.I. & anr. Writ Petition(c) 1524 of 2015;

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Heard learned counsel for the petitioner and Sri Varun Pandey, learned counsel for the Union of India.

2. The personal liberty of the petitioner is the subject matter of contest in Crl. Misc. Writ Petition No.8213 of 2022. The arrest of the petitioner pursuant to the F.I.R. lodged against him under Sections 419, 420, 467, 468, 471 I.P.C. has been stayed in the aforesaid writ petition vide order dated 7.10.2021.

3. The present writ petition relates to re-issuance of the passport, which has already expired on 10.02.2021. The bar as regards issuance of passport or its re-issuance operates by virtue of Section 6(2)(f) of the Passport Act, 1967 which for ready reference is extracted below :-

*"**6. Refusal of passports, travel documents, etc.***

(2) Subject to the other provisions of this Act, the passport authority shall refuse to issue a passport or travel document for visiting any foreign country under clause (c) of sub-section (2) of section 5 on any one or more of the following grounds, and on no other ground, namely:?

(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India;"

4. The Central Government in the eventuality where the criminal proceedings are pending has issued a notification dated 25th August 1993, according to which, the exemption of any condition as regards issuance of passport may be prayed for before the competent criminal court where the proceedings are pending. The notification dated 25.8.1993 is extracted below:-

"GOVERNMENT OF INDIA

MINISTRY OF EXTERNAL AFFAIRS

NOTIFICATION

New Delhi, the 25th August, 1993

G.S.R. 570(E). - In exercise of the powers conferred by clause (a) of section 22 of the Passports Act, 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs no. G.S.R.298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to the issued to every such citizen shall be issued--

(i) for the period specified in order of the court referred to above, if the court specifies a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport or for the travel abroad is specified in such order, the passport shall be issued for a period one year,

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order.

(b) any passport issued in terms of a(ii) and a(iii) above can be further renewed for one year at a time, provided

the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified;

(c) any passport issued in terms of a(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued".

5. In the present case, however, personal liberty of the petitioner is the subject matter of consideration in the aforesaid writ petition wherein the arrest of the petitioner has been stayed pending investigation. The issuance of passport is a part and parcel of personal liberty protected under Article 21 of the Constitution of India.

6. The petitioner is at liberty to make an application in the pending writ petition and in case any such application is made the same may be dealt with in accordance with law. However, the writ petition cannot be entertained as an independent cause for the relief sought herein particularly when the legality of Section 6(2)(f) remains intact in view of the judgment rendered by Delhi High Court in **Writ Petition(c) 1524 of 2015; Prashant Bhushan versus Union of India and another** which we are in agreement with.

7. The writ petition is accordingly disposed of with the liberty open to the petitioner.

(2022) 10 ILRA 103
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Writ-C No. 7517 of 2020

Satish ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Uma Nath Pandey, Sri D.K. Shukla

Counsel for the Respondents:
Sri Ramendra Pratap Singh, Anjali Upadhya, Sri A.K. Ray, C.S.C., Sri Hare Ram Tripathi, S.C.

A. Land Acquisition Act, 1894 – Sections 4(1), 6(1), 11(2) & 17 – Acquisition for planned industrial development – Benefit of Additional compensation of 64.70% – Entitlement – Claim prior Gajraj's decision and post Gajraj decision, how far affect entitlement – Held, the benefit of additional compensation to the tune of 64.70% of the awarded compensation besides allotment of 10% Abadi land to the oustees, is confined to landholders who were before the Court in Gajraj and not those who staked their claim post decision in Gajraj – The benefit cannot be extended to the fence-sitters, who now raise claims for additional compensation – Ashok Kumar's case and Savitri Devi's case relied upon. (Para 11 and 14)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Gajraj & ors. Vs St. of U.P. & ors., 2011 (11) ADJ 1 (FB)

2. Savitri Devi Vs St. of U.P. & ors.; (2015) 7 SCC 21

3. Writ C No. 14113 of 2017; Runwell India Pvt. Ltd. Vs St. of U.P. & ors. decided on 31.05.2022

4. Writ C No. 32969 of 2021; Ashok Kumar & ors. Vs St. of U.P. & ors. decided on 03.03.2022

5. Writ C No. 7938 of 2012; Jai Pal & ors. Vs St. of U.P. & ors. decided on 21.05.2014

6. Khatoon & ors. Vs St. of U.P. & ors., (2018) 14 SCC 346

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

ORDER

1. The petitioner challenges the order dated 30.10.2019 passed by the Chief Executive Officer, NOIDA, refusing additional compensation for his acquired land, claimed on the basis of a right hereinafter detailed.

2. The petitioner's land comprising *Khasra* No. 545 admeasuring 7-14-15 situate in village Tugalpur, Pargana Dadari, Tehsil Sadar, District Gautam Buddh Nagar was proposed to be acquired by the State Government vide notification issued under Section 4(1) read with Section 17(4) of the Land Acquisition Act, 1894 (for short "the Act') dated September 9, 1997. A declaration under Section 6 read with Section 17 (1) of the Act dated October 9, 1998 followed. The acquired land of *Khasra No. 545 (supra)* shall hereinafter be referred to as "the land in dispute'.

3. The land in dispute was acquired according to the notification under Section 4(1) and the declaration under Section 6(1) for the purpose of "planned industrial development" for Greater Noida Industrial Development Authority. Besides the land in dispute, lands of other tenure holders of village Tugalpur were also acquired. Award in respect of the acquired land in the village including the land in dispute was pronounced on March 31st, 2010 under Section 11(2) of the Act. After pronouncement of the award, compensation for individual tenure holders has been drawn up in Form 11, which includes compensation for the land in dispute.

4. Number of notifications relating to different villages within the development area of Greater Noida Industrial Development Authority and the New Okhla Industrial Development Authority were challenged before this Court. One of the challenge that was laid by the landholders related to village Patwari. **Civil Misc. Writ Petition No.17068 of 2009, Har Karan Singh vs. State of U.P. and others** was filed relating to the subject acquisition in village Patwari. The writ petition aforesaid, along with connected writ petitions, also relating to the same village, were allowed and the acquisition notifications quashed.

5. Later on, a Division Bench of this Court, hearing a challenge to the same notifications dated March 12, 2008 and June 30, 2008 that was in issue in **Har Karan Singh's** case (*supra*) in **Writ Petition No. 37443 of 2011, Gajraj and others vs. State of U.P. and others** along with similar petitions, doubted the correctness of the judgment in **Har Karan Singh's case**. A *reference* was made for the constitution of a Larger Bench.

6. Shorn of unnecessary detail, the Full Bench that was constituted pursuant to the reference, proceeded to decide a large bunch of writ petitions challenging the land acquisition notifications relating to various villages falling in the development area of Greater Noida and Noida *vide* judgment in **Gajraj and others vs. State of U.P. and**

others, 2011 (11) ADJ 1 (FB). In Gajraj's case (*supra*) the following directions were issued :

"482. In view of the foregoing conclusions we order as follows:

1. The Writ Petition No. 45933 of 2011, Writ Petition No. 47545 of 2011 relating to village Nithari, Writ Petition No. 47522 of 2011 relating to village Sadarpur, Writ Petition No. 45196 of 2011, Writ Petition No. 45208 of 2011, Writ Petition No. 45211 of 2011, Writ Petition No. 45213 of 2011, Writ Petition No. 45216 of 2011, Writ Petition No. 45223 of 2011, Writ Petition No. 45224 of 2011, Writ Petition No. 45226 of 2011, Writ Petition No. 45229 of 2011, Writ Petition No. 45230 of 2011, Writ Petition No. 45235 of 2011, Writ Petition No. 45238 of 2011, Writ Petition No. 45283 of 2011 relating to village Khoda, Writ Petition No. 46764 of 2011, Writ Petition No. 46785 of 2011 relating to village Sultanpur, Writ Petition No. 46407 of 2011 relating to village Chaura Sadatpur and Writ Petition No. 46470 of 2011 relating to village Alaverdipur which have been filed with inordinate delay and laches are dismissed.

2(i) The writ petitions of Group 40 (Village Devla) being Writ Petition No. 31126 of 2011, Writ Petition No. 59131 of 2009, Writ Petition No. 22800 of 2010, Writ Petition No. 37118 of 2011, Writ Petition No. 42812 of 2009, Writ Petition No. 50417 of 2009, Writ Petition No. 54424 of 2009, Writ Petition No. 54652 of 2009, Writ Petition No. 55650 of 2009, Writ Petition No. 57032 of 2009, Writ Petition No. 58318 of 2009, Writ Petition No. 22798 of 2010, Writ Petition No. 37784 of 2010, Writ Petition No. 37787 of 2010, Writ Petition No. 31124 of 2011, Writ Petition No. 31125 of 2011, Writ Petition No. 32234 of 2011, Writ Petition No. 32987 of 2011, Writ Petition No. 35648 of 2011, Writ Petition No. 38059 of 2011, Writ Petition No. 41339 of 2011, Writ Petition No. 47427 of 2011 and Writ Petition No. 47412 of 2011 are allowed and the notifications dated 26.5.2009 and 22.6.2009 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to deposit of compensation which they had received under agreement/award before the authority/Collector.

2(ii) Writ petition No. 17725 of 2010 Omveer and others v. State of U.P. (Group 38) relating to village Yusufpur Chak Sahberi is allowed. Notifications dated 10.4.2006 and 6.9.2007 and all consequential actions are quashed. The petitioners shall be entitled for restoration of their land subject to return of compensation received by them under agreement/award to the Collector.

2(iii) Writ Petition No. 47486 of 2011 (Rajee and others v. State of U.P. and others) of Group-42 relating to village Asdullapur is allowed. The notification dated 27.1.2010 and 4.2.2010 as well as all subsequent proceedings are quashed. The petitioners shall be entitled to restoration of their land.

3. All other writ petitions except as mentioned above at (1) and (2) are disposed of with following directions:

(a) The petitioners shall be entitled for payment of additional compensation to the extent of same ratio (i.e. 64.70%) as paid for village Patwari in addition to the compensation received by them under 1997 Rules/award which payment shall be ensured by the Authority at an early date. It may be open for Authority to take a decision as to what proportion of additional compensation be asked to be paid by allottees. Those petitioners who have not yet been paid

compensation may be paid the compensation as well as additional compensation as ordered above. The payment of additional compensation shall be without any prejudice to rights of land owners under Section 18 of the Act, if any.

(b) All the petitioners shall be entitled for allotment of developed Abadi plot to the extent of 10% of their acquired land subject to maximum of 2500 square meters. We however, leave it open to the Authority in cases where allotment of abadi plot to the extent of 6% or 8% have already been made either to make allotment of the balance of the area or may compensate the land owners by payment of the amount equivalent to balance area as per average rate of allotment made of developed residential plots.

4. The Authority may also take a decision as to whether benefit of additional compensation and allotment of abadi plot to the extent of 10% be also given to ;

(a) those land holders whose earlier writ petition challenging the notifications have been dismissed upholding the notifications; and

(b) those land holders who have not come to the Court, relating to the notifications which are subject matter of challenge in writ petitions mentioned at direction No. 3.

5. The Greater NOIDA and its allottees are directed not to carry on development and not to implement the Master Plan 2021 till the observations and directions of the National Capital Regional Planning Board are incorporated in Master Plan 2021 to the satisfaction of the National Capital Regional Planning Board. We make it clear that this direction shall not be applicable in those cases where the development is being carried on in accordance with the earlier Master Plan of the Greater NOIDA duly approved by the National Capital Regional Planning Board.

6. We direct the Chief Secretary of the State to appoint officers not below the level of Principal Secretary (except the officers of Industrial Development Department who have dealt with the relevant files) to conduct a thorough inquiry regarding the acts of Greater Noida (a) in proceeding to implement Master Plan 2021 without approval of N.C.R.P. Board, (b) decisions taken to change the land use, (c) allotment made to the builders and (d) indiscriminate proposals for acquisition of land, and thereafter the State Government shall take appropriate action in the matter."

7. Some of the land owners, aggrieved by the judgment of the Full Bench of this Court in **Gajraj**, petitioned the Supreme Court seeking Special Leave to Appeal. Leave was granted and **Civil Appeal No. 4506 of 2015, Savitri Devi vs. State of U.P. and others** along with connected matters was decided by the Supreme Court *vide* judgment and order dated May 14, 2015, reported as (2015) 7 SCC 21. In **Savitri Devi** (*supra*) the following orders were passed by their Lordships:

"48. To sum up, the following benefits are accorded to the landowners:

48.1. Increasing the compensation by 64.7%;

48.2. Directing allotment of developed abadi land to the extent of 10% of the land acquired of each of the landowners;

48.3. Compensation which is increased @ 64.7% is payable immediately without taking away the rights of the landowners to claim higher compensation

under the machinery provided in the Land Acquisition Act wherein the matter would be examined on the basis of the evidence produced to arrive at just and fair market value.

50. Keeping in view all these peculiar circumstances, we are of the opinion that these are not the cases where this Court should interfere under Article 136 of the Constitution. However, we make it clear that directions of the High Court are given in the aforesaid unique and peculiar/specific background and, therefore, it would not form precedent for future cases."

(Emphasis by Court)

8. In between the decision of the Full Bench of this Court in **Gajraj** and the judgment of the Supreme Court in **Savitri Devi** as well as post **Savitri Devi**, there was lot of turmoil about the rights of parties relating to the additional compensation of 64.70% and allotment of 10% land to the ousted landholders. The Greater Noida Board and the Noida Board adopted resolutions determining the entitlement of parties in terms of the decision of the Full Bench in **Gajraj** and later reviewed those decisions after the decision in **Savitri Devi.**

9. The issue that arose before the Authority related to demand for additional compensation and allotment of 10% developed land proportionate to the area of landholders acquired, put forward by those, whose writ petitions were not before the Full Bench in **Gajraj** or whose writ petitions had been dismissed upholding the notifications. This demand came because of the directions appearing in sub-paragraph 4 of para 482 in the judgment in **Gajraj**. Later on, this part of the direction was modified by their Lordships of the Supreme Court, making it clear that the directions of this Court in Gajraj were issued in the peculiar and specific background of the case and would not serve as precedent for other cases.

10. In between the judgment of the Full Bench of this Court in **Gajraj** and the modifications of the directions there by the Supreme Court in **Savitri Devi**, there was again a lot of turmoil arising out of claims made by landholders whose notifications were either not under challenge in Gajraj or their challenge had failed already. All such persons or most of them have from time to time come forward with the demand for additional compensation of 64.70 % besides allotment of 10% developed land by the Authority concerned. About these claims, resolutions were adopted by the Greater Noida and the Noida, but the State Government intervened. A detail about the developments in the Board resolutions of the Greater Noida and the Noida, besides orders of the State Government, find eloquent mention in the decision of this Court in **Runwell India Pvt. Ltd. vs. State of U.P. and others, Writ - C No. - 14113 of 2017 decided on May 31, 2022** and need not be recapitulated.

11. It is pellucid from the directions issued by the Full Bench in **Gajraj** as modified by the Supreme Court in **Savitri Devi** that the benefit of additional compensation to the tune of 64.70% of the awarded compensation besides allotment of 10% Abadi land to the oustees, is confined to landholders who were before the Court in Gajraj and not those who staked their claim post decision in Gajraj playing the proverbial fence sitter. This issue fell for consideration before a Division Bench of this Court in **Ashok Kumar and others vs. State of U.P. and others, Writ - C No.**

32969 of 2021 decided on March 3, 2022, where it has been held:

"5. After hearing the learned counsel for the parties, we do not find that any case is made out for issuing directions, as prayed for by the petitioners. Hon'ble the Supreme Court in the case of Savitri Devi v. State of U.P. (2015)7 SCC 21, in paragraph 50 has specifically held that the directions issued by this Court in Gajraj's case (*supra*) will not be a precedent for future as the judgment was delivered in peculiar facts and circumstances of that case. Referring to Savitri Devi's case (*supra*) the same view has again been expressed by Hon'ble the Supreme Court in paragraph 48 of the judgment in Khatoon and others v. State of U.P. and others (2018)14 SCC 346. Further, a perusal of the judgments sought to be relied by the learned counsel for the petitioners suggest that those were passed on the concession given by the learned counsel for the State that the issues raised are squarely covered by the Full Bench judgment in Gajraj's case (*supra*). This Court has not decided the issues on merits.

6. Once it is not in dispute that the acquisition in question was not the subject matter of consideration before the Full Bench of this Court in Gajraj's case (*supra*), no benefits granted therein shall accrue to the petitioners."

12. The writ petitioner here had not challenged the notification dated September 9, 1997 issued under Section 4(1) of the Act relating to the land in dispute or the declaration under Section 6(1) dated October 9, 1998 through a writ petition that was subject matter of consideration before the Full Bench in **Gajraj**. The petitioner has come with a mammoth delay to claim the benefit of the directions for payment of additional compensation of 64.70%, going by the directions in **Gajraj**. Interestingly, the petitioner has pleaded his right on the basis of the decision of the Full Bench in **Gajraj** but has not said, as much as by a whisper, about the modification of the relevant directions for payment of additional compensation by the Supreme Court in **Savitri Devi's case** (*supra*). The petitioner asserts that in a writ petition filed much later after the decision in **Gajraj**, a Division Bench of this Court in **Jai Pal and others vs. State of U.P. and others, Writ - C No. 7938 of 2012 decided on 21.05.2014**, has extended the benefit of 64.70% of additional compensation to the ousted landholders, following the directions in **Gajraj**, though the petitioners there had not challenged the acquisition through a writ petition that was before the Full Bench in **Gajraj**. Referring to **Savitri Devi's case** (*supra*) the same view has again been expressed by Hon'ble the Supreme Court in Paragraph 48 of the judgement in **Khatoon and others vs. State of U.P. and others, (2018) 14 SCC 346.**

13. It is also pointed out that the writ petitioners in **Jai Pal** (*supra*) had entered into an agreement for payment of compensation under the U.P. Land Acquisition (Determination of Compensation & Declaration of Compensation and Declaration of Award by Agreement) Rules, 1997. They had received compensation in terms of the said rules. Yet, going by the directions in the **Gajraj's** case (*supra*), they were ordered to be paid additional compensation.

14. The submission of the learned counsel for the petitioner is that the petitioner's case stands on a better footing and he is entitled to additional

compensation on the same principles. These issues have already been examined by the Division Bench **in Runwell India Pvt. Ltd.** and the Division Bench of this Court in **Ashok Kumar** (*supra*), where the ratio was clear and unmistakable. It is to this effect: any claim for additional compensation based on the directions in the Full Bench directions in **Gajraj** which have been issued in the special facts of the case and confined to the landholders who were before the Court in **Gajraj** cannot be entertained. The benefit cannot be extended to the fence-sitters, who now raise claims for additional compensation. This is the clear purport of the directions of the Supreme Court in Savitri Devi modifying the relative directions in **Gajraj**.

15. It is for this reason that the petitioner's claim for additional compensation, for his lands acquired long ago, canvassed by petitioning the Greater Noida Industrial Development Authority, was turned down by means of the order dated October 30, 2019 that he has impugned in this petition.

16. For all the reasons indicated hereinabove, we do not find any infirmity in the order impugned passed by the Chief Executive Officer, Greater Noida Industrial Development Authority.

17. The writ petition fails and is hereby, dismissed. There shall be no order as to costs.

(2022) 10 ILRA 109
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.10.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 9330 of 2016
connected with
Writ C No. 9388 of 2016

Ramesh Chandra Rai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amit Dwivedi, Umesh Chandra Tripathi, Vinod Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Dwivedi

A. United Provinces Excise Act, 1910 – Section 34(3) – UP Excise (Settlement of License for Model Shop of Foreign Liquor) Rules, 2003 – Rule 17 – Cancellation of licence – Show cause notice issued – Liquor not seized from the licenced premises – Seizure memo does not mention that the petitioners were in 'conscious possession' of the said liquor crates – Effect – Held, cancellation of the license and the consequent seizure was clearly de hors the Rules. (Para 17 and 18)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Patel Jethabhai Chatur Vs St. of Guj.; (1976) 4 SCC 522

2. St. of Pun. Vs Balbir Singh; (1994) 3 SCC 299

3. Sanjay Dutt Vs St. Through C.B.I., Bombay (II); (1994) 5 SCC 410

4. Writ C No. 5098 of 2017; Ajay Pratap Singh Vs St. of U.P. & ors. decided on 6.7.2022

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Both the petitions involve the interpretation of provisions of law which is similar, as such, they are being decided by means of the common judgment.

2. Facts of Writ - C No.9330 of 2016:

i. The petitioner was granted a license for retail sale of foreign liquor at Mohammadabad, District Gazipur for the excise year 2009 - 10 under the Uttar Pradesh Excise (Settlement of License for Model Shop of Foreign Liquor) Rules, 2003 (hereinafter referred to as "the 2003 Rules') and the said license was renewed up to the year 2015-16. It is alleged that an FIR was lodged against the petitioner, which was registered as Case Crime No.67 of 2015 at P.S. Mardaha, District Gazipur under Section 60 of the U.P. Excise Act read with Section 392, 411 & 120B IPC. In pursuance to the said FIR, the joint residential premises of the petitioner as well as his brother Krishna Gopal Rai was searched and a seizure memo was prepared on 17.4.2015 (Annexure - 6 to the petition). In the said seizure memo, it was averred that in the house, which is jointly owned by the petitioner as well as his brother, at the instance of the informer, a raid was carried out and in the boundary wall inside the house at the North West corner 14 crates of liquor were recovered and a sample was drawn from each of the said crates.

ii. Based upon the said recovery, the petitioner was issued with a show-cause notice dated 23.4.2015 calling upon the petitioner to show-cause as to why, in exercise of powers under Section 34(3) of the United Provinces Excise Act (hereinafter referred to as "the Act') read with Rule 17(3) of the 2003 Rules, steps may not be taken for cancellation of the license and entire amounts such as renewal fee, license fee and security etc. may not be confiscated.

iii. The petitioner submitted a reply to the said show-cause notice, which did not find favour with the Collector, Gazipur who proceeded to pass an order on 1.6.2015 cancelling the license and directed for confiscation of the entire fees etc., as well as the goods which were kept in the licensed premises of the petitioner.

iv. The petitioner preferred an appeal against the order dated 1.6.2015, which too was dismissed on 27.7.2015 and the revision preferred was also dismissed on 17.3.2016. The said orders are under challenge.

3. Learned counsel for the petitioner fairly states that the shop cannot be restituted to the petitioner and confines his submissions to the illegal confiscation of the renewal fees, license fees and the security deposit as well as the confiscation of goods which were lying at the licensed premises of the petitioner and have been subsequently auctioned.

4. Facts leading to filing of Writ - C No.9388 of 2016 is as follows:

i. The petitioner was granted license for retail sale of country liquor shops at Dubiha and Bathor, District Gazipur for the Excise Year 2009-10 and 2011-12 in terms of the provisions of Uttar Pradesh Excise (Settlement of Licenses for Retail Shop of Country Liquor) Rules, 2002 (hereinafter referred to as "the 2002 Rules'). The said two licenses granted to the petitioner were renewed up to 2015-16 and subsequently on the basis of an FIR lodged against the petitioner, a search was carried out at the premises which was being used as a residence by the petitioner alongwith his brother Ramesh Chandra Rai. In the said seizure memo prepared on 17.4.2015 (Annexure - 6), 14 crates of liquor were recovered from the North West portion of the house. In view of the said recovery, a show-cause notice was issued to the petitioner on 23.4.2015 (Annexure - 7) calling upon the petitioner to show-cause as to why steps may not be taken in

purported exercise of powers under Section 34(3) of the Act read with Rule 21(3) of the Rules for cancellation of the license and for confiscation of the entire amounts deposited by the petitioner.

ii. The petitioner gave a reply to the said show-cause notice on 5.5.2015, however, the same did not find favour with the District Magistrate who proceeded to cancel the license of the petitioner vide order dated 1.6.2015 (Annexure - 3) and also directed that the entire amounts deposited by the petitioner, including the basic license fee, the renewal fee and the security deposit be forfeited and steps be taken for auction of the goods lying in the license premises of the petitioner.

iii. Aggrieved against the said order, the petitioner preferred an appeal which was dismissed on 27.7.2015. The petitioner preferred a revision which too has been dismissed on 3.2.2016. The said orders are under challenge in the present petition.

5. Learned counsel for the petitioner fairly states that the license cannot be restituted to the petitioner and confines the present writ petition to the refund of the amounts illegally confiscated as well as for refund of the amounts lying with the government on account of auction of goods lying in the licensed premises of the petitioner in pursuance to the order dated 1.6.2015.

6. Submission of learned counsel for the petitioners is that neither Section 34(3) of the Act nor Rule 17(1)(C) and Rule 17(3) of the 2003 Rules (in respect of Ramesh Chandra Rai - petitioner of Writ - C No.9330 of 2016) entitle the respondents to confiscate the amounts as has been done nor does it authorize them to sell the goods which were lying in the licensed premises.

7. Similarly, in Writ - C No.9388 of 2016 it is argued that neither under Section 34 of the Act nor under the 2002 Rules, the respondents were authorized to confiscate the amounts and the goods lying in the petitioner's premises and thus, the orders to that extent are bad in law.

8. To appreciate the controversy as raised it is essential to refer to Section 34 of the United Provinces Excise Act, 1910, which reads as under:

"34. Power to cancel or suspend licences, etc. *- (1) Subject to such restrictions, as the State Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it-*

(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such licence, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence punishable under the Dangerous Drugs Act, 1930 or under the Merchandise Marks Act, 1889, or of any offence punishable under Sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(d) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the licence or permit provide for such cancellations or suspension at will.

(2) When a licence, permit and pass held by any person is cancelled under clauses (a), (b) or (c) of sub-section (1), the authority aforesaid may cancel any other licence, permit or pass granted to such person by, or by the authority of the State Government under this Act or under any other law for the time being in force relating to excise revenue or under the Opium Act, 1878.

(3) The holder shall not be entitled to any compensation for the cancellation or suspension of his licence, permit or pass under this section nor to a refund of any fee paid or deposit made in respect thereof."

9. Rule 17(1)(C) and Rule 17(3) of the 2003 Rules are as under:

***"17. Suspension or cancellation of the license**.- (1) Licensing Authority may suspend or cancel the licence-*

(a)...

(b)...

(c) If any liquor or intoxicating drug is found in the possession of the licensee against the provisions of the Act or rules.

.....

(2).....

(3) The licensee shall not be entitled to claim any compensation or refund for suspension or cancellation of license under this rule.

....."

10. Rule 21 of the 2002 Rules reads as under:

***"21. Suspension and cancellation of the licence and penalties** - (1) Licensing Authority may suspend or cancel the license -*

*(a) if any bottle or container of country liquor is **found in the licensed premises** on which duty has not been paid and which does not carry security hologram duly approved by the Excise Commissioner as a proof of payment of duty;*

*(b) if any bottle or container of any other kind of liquor or intoxicating drug (for which licence is not granted) is **found in the licensed premises**;*

*(c) if any liquor or intoxicating drug is **found in the possession of the licensee** against the provisions of the Act or rules;*

(d) if the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false;

(e) if it is found that the licence has been obtained in a false name or the licensee is holding the licence on behalf of some other person.

(f) if the licensee fails to deposit monthly instalment of licence fee or replenish the deficit in security amount within prescribed period;

(g) if the licensee is convicted of an offence punishable under the Act or of any cognizable and nonbailable offence, or any offence punishable under Narcotics Drugs and Psychotropic Substances Act, 1985 or of any offence punishable under Sections 482 to 489 of the Indian Penal Code.

*(2) The Licensing Authority shall immediately suspend the licence and issue a show cause notice for cancellation of licence and forfeiture of security. The licensee shall submit his explanation **within 7 days of the receipt of notice**. There after the Licensing Authority shall pass suitable orders after giving due opportunity of hearing to the licensee.*

(3) In case the licence is cancelled the basic licence fee, licence fee deposited by him shall stand forfeited in favour of the Government and licensee shall not be entitled to claim any compensation or refund. Such licensee may also be blacklisted and debarred from holding any other exercise licence."

11. Learned counsel for the petitioners argues that for exercising the powers under the Rules, which are quoted herein above, it is essential that the licensing authority can pass an order of suspension or cancellation only if the "liquor is found in the licensed premises' or in the "possession of the licensee', which is not the case in the present case. He further argues that the possession of the licensee referred to under the 2003 Rules as well as the 2002 Rules has to be "conscious possession' which is not recorded even in the seizure memo. He takes me to the seizure memo, which is on record, to argue that the seizure and recovery was not in accordance with the provisions of Section 42 of the Cr.P.C. and in any case there is no reference in the seizure memo that the recovery was from the "conscious possession' of the petitioners.

12. To buttress his submissions, he places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Patel Jethabhai Chatur v. State of Gujarat; (1976) 4 SCC 522*** wherein the Hon'ble Supreme Court had the occasion of interpreting Section 66(1) of the Bombay Prohibition Act, 1949 and the Hon'ble Supreme Court after interpreting the said provisions specifically with regard to the possession recorded as under:

"6. That takes us to the second limb of the contention directed against the order of retrial on the further charge of possession of liquor. It is true that originally when the case was tried before the learned Judicial Magistrate, there was no charge against the appellant and Accused 3 to 8 for the offence of consuming liquor and the appeal of the State was also directed only against their acquittal for the offence of consuming liquor. But there can be no doubt that if, while hearing the appeal, the High Court found that, on the material before him, the learned Judicial Magistrate should have framed a further charge against the appellant and Accused 3 to 8 but he failed to do so, the High Court could certainly direct the learned Judicial Magistrate to frame such further charge and try the appellant and Accused 3 to 8 on such further charge. The High Court could legitimately in the exercise of its jurisdiction, set right the error committed by the learned Judicial Magistrate in not framing a proper charge. Here, the High Court, on a consideration of the material which was before the learned Judicial Magistrate, came to the conclusion that this material warranted the framing of a further charge against the appellant and Accused 3 to 8 for possession of liquor and it, therefore, directed that the case should go back to the learned Judicial Magistrate and he should try the appellant and Accused 3 to 8 on such further charge. The High Court clearly had jurisdiction to make such an order. But then, the complaint made on behalf of the appellant was that the material before the learned Judicial Magistrate did not justify the framing of a charge against the appellant and Accused 3 to 8 for possession of liquor and hence the order directing their trial on such further charge was not justified. This is, however a complaint on facts and we do not see any reason why we should, in the exercise of our extraordinary jurisdiction under

Article 136 of the Constitution, entertain such a complaint. It is true that there are certain observations made by the High Court which are a little too wide but it cannot be gainsaid that even a person who participates in a drinking party can in conceivable cases be guilty of the offence of possession of liquor. Suppose a person is found at a drinking party and he has a glass with him with liquor in it at the time when the raid is carried out, would it not be correct to say that he was at the relevant time in possession of liquor? The liquor in his glass would be liquor in his possession. But at the same time it would not be correct to say that merely because a participant in a drinking party can stretch his hand and take liquor for his use and consumption, he can be held to be in possession of liquor. The question is not whether a participant in a drinking party can place himself in possession of liquor by stretching his hand and taking it but whether he is actually in possession of it. Possession again must be distinguished from custody and it must be conscious possession. If, for example, a bottle of liquor is kept by someone in the car or house of a person without his knowledge, he cannot be said to be in possession of the bottle of liquor. It cannot, therefore, be laid down as an absolute proposition that whoever is present at a drinking party must necessarily be guilty of the offence of possession of liquor and must be charged for such offence. Whether an accused is in possession of liquor or not must depend on the facts and circumstances of each case. Here in the present case, the prosecution will have to establish at the trial by leading satisfactory evidence that the appellant and the other accused were in possession of liquor or else the prosecution on the charge of possession of liquor will fail. The order directing trial of the appellant and the other accused for the offence of possession of liquor must, therefore, be maintained, but we think it would be desirable if this trial is taken up after the disposal of the appeal by the High Court in regard to the acquittal of the appellant for the offence of consuming liquor.

13. He further places reliance on the judgment of the Hon'ble Supreme Court in the case of ***State of Punjab v. Balbir Singh; (1994) 3 SCC 299*** wherein the Hon'ble Supreme Court dealt with the manner of search and seizure and recorded as under:

"8. But if on a prior information leading to a reasonable belief that an offence under Chapter IV of the Act has been committed, then in such a case, the Magistrate or the officer empowered have to proceed and act under the provisions of Sections 41 and 42. Under Section 42, the empowered officer even without a warrant issued as provided under Section 41 will have the power to enter, search, seize and arrest between sunrise and sunset if he has reason to believe from personal knowledge or information given by any other person and taken down in writing that an offence under Chapter IV has been committed or any document or other article which may furnish the evidence of the commission of such offence is kept or concealed in any building or in any place. Under the proviso if such officer has reason to believe that search warrant or authorisation cannot be obtained without affording opportunity for the concealment of the evidence or facility for the escape of the offender, he can carry out the arrest or search between sunset and sunrise also after recording the grounds of his belief. Sub-section (2) of Section 42 further lays down that when such officer takes down any information in writing or

records grounds for this belief under the proviso, he shall forthwith send a copy thereof to his immediate official superior."

14. He further places reliance on the judgment of the Hon'ble Supreme Court in the case of ***Sanjay Dutt v. State Through C.B.I., Bombay (II); (1994) 5 SCC 410*** wherein the Hon'ble Supreme Court interpreted the word "possession' and recorded as under:

"19. The meaning of the first ingredient of "possession' of any such arms etc. is not disputed. Even though the word "possession' is not preceded by any adjective like "knowingly', yet it is common ground that in the context the word "possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of "possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood."

15. He also places reliance on the judgment of this Court in ***Writ - C No. 5098 of 2017 (Ajay Pratap Singh v. State of U.P. & Ors.) decided on 6.7.2022*** wherein this Court in similar circumstances had the occasion to interpret the scope of Section 21 of the 2002 Rules as well as Rule 18 of the Uttar Pradesh Excise [Settlement of Licenses for Retail Sale of Foreign Liquor (Excluding Beer and Wine Rules)] Rules, 2001 which are *pari materia* with Rule 17(1)(C) and Rule 21(3) of the 2003 Rules and held as under;

"15. The action as taken against the petitioner under the orders impugned herein was clearly an 'expropriatory action' and the provision in the Rules are also 'expropriatory'. It is well settled that expropriatory powers conferred on State through statutes are required to be interpreted strictly and the orders passed have to pass the 'strict scrutiny test'. On a plain reading of the provisions of the Rules 18 and 21 in the 2001 and 2002 Rules respectively, it is clear that the steps for suspension and cancellation of the licence can be taken only in the event that (i) any liquor is found in the licensed premises or (ii) it is found in the possession of the licensee. The other conditions specified in Rule 21 and Rule 18 need not detain this Court as the same do not arise in the present case. The words "licensed premises" has not been defined under the Act and the Rules referred above, however while granting of licence, the premises for which the licence has been granted is clearly delineated and specified in the licence itself and thus for the purposes of interpreting the word "licensed premises", reference has to be drawn to the premises referred to in the licence. Any infraction or possession of liquor or intoxicating drugs other than authorized in the 'licensed premises' would certainly empower the authority concerned to take action under Rules 18 or Rule 21 of the aforesaid Rules as the case may be. Similarly the possession of any liquor or intoxicating drugs other than the authorized in the possession of the licensee would also trigger the powers to be exercised under Rules 18 and 21 of the aforesaid Rules. In the absence of any allegation of any recovery from any place in the 'licensed premises' or in the 'possession of the licensee', the powers to suspend and cancel

cannot be resorted to under the Act or the Rules referred above."

16. The Court further allowing the writ petition passed the following order in Para - 22:

"22. As no direction for renewal of the licences can be issued in view of the change in the policy of the State Government, the writ petition is disposed off with a direction to refund the proportionate basic license fee, the proportionate license fee and the security deposit as forfeited by means of the order dated 24.02.2016 within a period of two months from the date of the petitioner moving an appropriate application before the District Magistrate, District Amethi."

17. In the present case, admittedly the recovery was not from the licensed premises and the liquor was recovered from the residential premises jointly owned by both the petitioners. In the seizure memo on record, there is no mention that the petitioners were in *"conscious possession'* of the said liquor crates, the seizure memo on record does not even record the presence of the petitioners; it nowhere records that the petitioners were conscious of the said liquor. There are no independent witness to the seizure which started on 16.4.2015 but was signed on 17.4.2015.

18. I have already held that the liquor was not seized from the licensed premises which is admitted case of the parties. Further, there being no material to come to an opinion that the liquor allegedly seized from the residential premises of the petitioners was in their conscious possession, in terms of the Rules, the cancellation of the license and the consequent seizure was clearly de hors the Rules.

19. Now coming to the second question as to whether the District Magistrate could have directed the sale of liquor seized from the licensed premises and legally under the custody of the petitioners by virtue of they being license holder, an interesting feature in the petition is that in the show-cause notice, the petitioners were never called upon to show-cause as to why the liquor legally under the custody of the petitioners and lying in the licensed premises may not be sold. The show-cause notice on record as Annexure - 7 only proposes to confiscate the amounts deposited by the petitioners and does not even proposes the punishment of sale of liquor which was in the legal custody of the petitioners. In view thereof, the District Magistrate could not have passed an order directing for sale of liquor which was legally under the custody of the petitioners in the licensed premises. Even otherwise, the sale could not have been directed as was done by the District Magistrate as there is no power under the rules for sale of the liquor kept legally in the licensed premises. Thus, on both grounds the order passed by the District Magistrate and as affirmed in appeal and revision are clearly not sustainable.

20. Accordingly, both the writ petitions are ***allowed***.

21. Orders dated 17.03.2016, 27.07.2015 & 01.06.2015 (Annexures - 1, 2 and 3 respectively in Writ - C No.9330 of 2016) as well as Orders dated 03.02.2016, 27.07.2015 & 01.06.2015 (Annexures - 1, 2 & 3 respectively in Writ - C No.9388 of 2016) are set aside.

22. Respondents are directed to refund the proportionate basic license fee, proportionate license fee and the security deposit as forfeited vide order dated 1.6.2015 to the petitioners.

Respondents are further directed to refund the amount obtained by them through auction of the liquor which was directed to be sold from the licensed premise of the petitioner in Writ - C No.9330 of 2016 and that of the petitioner in Writ - C No.9338 of 2016.

23. The amounts as directed above, shall be paid to the petitioners within a period of four months from the date of them moving an appropriate application before respondent no.5.

(2022) 10 ILRA 117
ORIGINAL JURISDICTION
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DATED: ALLAHABAD 31.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ-C No. 13935 of 2018

Ghansu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hari Om Khare, Sri Akash Khare

Counsel for the Respondents:
Sri Ajay Prakash Paul (State Law Officer), Sri Nitin Kumar Agarwal (Addl. C.S.C.)

A. Constitution of India – Article 226 – Writ – Maintainability – Laches – Ground of making representation, how far acceptable – Allegation was made that the petitioner's land was submerged due to construction of a water reservoir – Representation, claiming compensation for loss was made – No enquiry was made to know about the status of their representation – Effect – Held, the petitioners should have been vigilant enough and enquire about the status of their representation so made before the authorities concerned – High Court refused to grant relief relying upon the stand of the St. that height of the dam has not been increased and whatever was there a century before, has been retained. (Para 2, 7 and 10)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Writ C No. 10967 of 2022; Smt. Pushpa Devi Vs St. of U.P. decided on 05.05.2022

2. Writ C No. 4796 of 2022; Ram Avtar Sharma Vs St. of U.P. & ors. decided on 07.03.2022

3. P. S. Sadasivasway Vs St. of T. N.; (1975) 1 SCC 152

4. New Delhi Municipal Council Vs Pan Singh & ors.; (2007) 9 SCC 278

5. St. of Uttaranchal & anr. Vs Sri Shiv Charan Singh Bhandari & ors.; 2013 (6) SLR 629

6. Chennai Metropolitan Water Supply & Sewerage Board & ors. Vs T. T. Murali Babu; 2014 (4) SCC 108

7. St. of M. P. & ors. etc. etc. Vs Nandlal Jaiswal & ors. etc.; AIR 1987 SC 251

8. St. of Jammu & Kashmir Vs R. K. Zalpuri & ors.; 2015 (15) SCC 602

9. U.O.I. & ors. Vs Chaman Rana; 2018 (5) SCC 798

10. Senior Divisional Manager, L.I.C. Vs Shree Lal Meena; (2019) 4 SCC 479

11. Sheel Kumar Jain Vs New India Assurance Co. Ltd.; (2011)12 SCC 197

12. Civil Appeal No.1009 of 2020; Bharat Coking Coal Ltd. & ors. Vs Shyam Kishore Singh decided on 05.02.2020

13. U.O.I. & ors. Vs N. Murugesan & ors.; (2022) 2 SCC 25

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

ORDER

1. By means of present petition, the petitioners, who are 05 in numbers, are seeking a direction to the respondents either to clear the land in question or to pay suitable compensation of their land, which is submerged due to construction of water reservoir situated at Gwalior Road, Jhansi commonly known as "Pahunj Band Pariyojna'.

2. Brief facts of the case are that the petitioners are stated to be the occupants of the land in question as hereditary tenant having bhumidhar with transferable rights after commencement of U.P. Zamindari Abolition and Land Reforms Act, 1950. The detailed descriptions of the land relating to the petitioners have been mentioned in para 4 of the present petition. It is stated that in the year 1909, a water reservoir commonly known as "Pahunj Band Pariyojna' situated at Gwalior Road, Jhansi, was constructed with the consent of villagers, on account of which some land was permanently submerged and some land was used for water flow during rainy season. The petitioners are claiming compensation on account of loss of their crop / submerged land caused by water reservoir.

3. The learned counsel for the petitioner urged that the petitioners are recorded owner of their respective land, which are affected by conservation of water more than the prescribed limit due to which the land in question have been submerged. As the land in question was never acquired, the petitioners are claiming compensation for the loss. For the said purpose, the petitioners had made objection before the concerned authority but of no avail. The petitioners also made several representations in this respect but no action was taken. It has been further stated that the petitioners are deprived from cultivation of their valuable land as such suitable compensation may be awarded to them for their loss. It is further urged that since the height of the water reservoir has been raised, the petitioners are facing hardship and due to which they seek a direction to the respondent authority to pay adequate compensation for the loss.

4. *Per contra*, the learned State Law Officer submitted that the land falling under the submerged area of the water reservoir was willingly given by the villagers for its construction in the year 1909-10 and it was consented that no compensation could be claimed on account of damage of swamping which may cause after construction of reservoir. It is further urged that since the date of construction, the height of the water reservoir is maintained at 786 feet. The petitioners have failed to bring any material on record to show that the height of the water reservoir was ever enhanced. Counsel further urged that the present petition has been filed after huge delay. The petitioners have failed to explain the reason in approaching to this Court after such a huge delay. He prays for dismissal of the present petition on the ground of latches also.

5. After hearing the arguments of the learned counsel for the parties, the Court has perused the records.

6. It is not in dispute that the water reservoir was constructed way back in the year 1909-10 with due consent of the

villagers. Pursuant to that an agreement was also executed on 7.7.1910, copy of which has been filed as Annexure No. 1 to the counter affidavit of the respondents. The record shows that in the year 2009, a proposal was only made for raising the height of the water reservoir from 786 feet by 1.27 meters, however, the said proposal was dropped by the High Level Committee of the Government in the meeting held on 21.6.2013. In the said meeting it was decided to construct a retaining wall /non over flow section. Since the height of the water reservoir was not raised and is maintained as 786 feet therefore no loss of any kind could be suffered by the petitioners. There is no question for payment of any compensation to the petitioners for the land in question.

7. The reservoir was constructed in the year 1909-10. The issue sought to be raised by the petitioners for the first time in the year 2010, after more than a century especially when the petitioners were no where in the picture, when the land was taken. No explanation has been submitted for the latches caused in filing the petition. The only bald allegation has been made that they were approaching the authorities and filed representations which were not decided.

8. Recently this Court in **Writ C No. 10967 of 2022** titled as **Smt. Pushpa Devi Vs. State of U.P.** decided on May 5, 2022, after considering the various judgements of the Hon'ble Apex Court has held that the petition filed with the huge delay is required to be dismissed at the threshold.

9. This Court in **Writ C No. 4796 of 2022** titled as **Ram Avtar Sharma Vs. State of U.P.** and others decided on March 7, 2022 has dismissed the petition on the ground of delay and latches. Relevant paras of the said judgement are extracted below:-

"3. After hearing learned Senior Counsel for the petitioner, we do not find any case is made out for interference in the present writ petition, on account of huge delay and laches. The impugned order was passed by the Secretary of the Department concerned on February 10, 2012 and the writ petition has been filed more than a decade thereafter. As to how the petition, filed after huge delay, has to be dealt with has been considered by the Courts on number of occasions and the opinion expressed is that these petitions are required to be dismissed at the threshold.

4. In **P. S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152,** wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the court at least within six months or at the most a year of such promotion. It is not that there 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 extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for the relief.

5. In **New Delhi Municipal Council v. Pan Singh and others, (2007) 9 SCC 278,** the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and

laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

6. In **State of Uttaranchal and another v. Sri Shiv Charan Singh Bhandari and others 2013 (6) SLR 629,** Hon'ble the Supreme Court, while considering the issue regarding delay and laches observed that even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Relief to a person, who puts forward a stale claim can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer.

7. In **Chennai Metropolitan Water Supply and Sewerage Board and others v. T. T. Murali Babu 2014 (4) SCC 108**, Hon'ble the Supreme Court opined as under:-

"13. First, we shall deal with the facet of delay. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp, (1874) 5 PC 221, which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

15. In **State of M. P. and others etc. etc. vs. Nandlal Jaiswal and others etc. etc., AIR 1987 SC 251**, the Court observed that it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep

itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant "a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. ... A court is not expected to give indulgence to such indolent persons- who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

8. In **State of Jammu & Kashmir vs. R. K. Zalpuri and others 2015 (15) SCC 602,** Hon'ble the Supreme Court considered the issue regarding delay and laches in raising the dispute before the Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paras thereof are extracted below:-

"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias - thanks to God".

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

9. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana 2018 (5) SCC 798**.

10. Subsequently, a Constitution Bench of Hon'ble the Supreme Court in **Senior Divisional Manager, Life Insurance Corporation v. Shree Lal Meena (2019) 4 SCC 479**, considering the principle of delay and laches, opined as under:-

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment.

37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

11. Recently, in **Bharat Coking Coal Ltd. And othyers v. Shyam Kishore Singh (Civil Appeal No.1009 of 2020, decided on 5.2.2020)**, the issue regarding the delay and laches, was considered by Hon'ble the Supreme Court and a petition filed belatedly, seeking change in the date of birth in the service record, was dismissed.

12. Relying on T.T. Murali Babu' case (supra) and R.K. Zalpuri'case (supra), same view has been expressed by Hon'ble the Supreme Court in Union of India and others Vs. N. Murugesan and others (2022) 2 SCC 25 observing:

"We have already dealt with the principles of law that may have a bearing on this case. ... there was an unexplained and studied reluctance to raise the issue .... Hence, on the principle governing delay, laches ... Respondent No. 1 ought not to have been granted any relief by invoking Article 226 of the Constitution of India."

13. In the case in hand, after hearing learned counsel for the parties and taking the above authorities into account, in our opinion, the petitioner is not entitled to any relief. It is, however, sought to be contended that the order dated February 10, 2012 was communicated vide Communication dated December 30, 2021, which is sought to be relied upon to show that the order was communicated to the petitioner quite late in the year 2021. However, a perusal thereof shows that it is not addressed to him. It is merely an inter-departmental communication from the Joint Secretary in the State of U.P. to the Greater NOIDA. In any case, the same cannot be taken to be a reasonable explanation for condoning huge delay in filing the present writ petition. In this case, the direction was issued by this Court about a decade back. The petitioner should have been vigilant and enquired about the status of the application filed by him before the competent authority. There is nothing on record to suggest that he ever made any representation or enquired about the order passed on his representation. In any case, the release of land under Section 48 of the Act is not a matter of right with the landowner. It is a power conferred on the Government."

10. In the case in hand, it is evident that after construction of water reservoir in the year 1909-10, the representations were made for the first time in the year 2010. Thereafter no efforts were taken by the petitioners. In our opinion, the petitioners should have been vigilant enough and enquire about the status of their representation so made before the authorities concerned. There is nothing on record to suggest that the petitioners ever made any inquiry, whatsoever, in respect of the representations so made. It is the definite stand of the State that height of the dam has not been increased and whatever was there a century before, has been retained. Thus in our view, the petitioners are not entitled for any relief.

11. In view of above, the petition is devoid of merit. No interference is called for by this Court. The writ petition is, accordingly, dismissed.

12. There shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 14321 of 2022

Shakuntala Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gopal Misra

Counsel for the Respondents:
C.S.C., Sri Vijay Kumar Dixit

A. UP Kshettra Panchayat and Zila Panchayat Act, 1961 – Section 251 – Relief seeking demolition of Dak Bunglow and providing access to the petitioner's house was rejected – Appeal against it, was claimed to be filed u/s 251 – An Appeal u/s 251 lies only against any order or direction of Zila Panchayat passed in exercise of powers conferred upon it under the specific provisions, but no relief was sought under any such provision – Held, the right to appeal is a creature of statute and unless such right is clearly and expressly provided for under an statute, it does not exist – Earlier direction of High Court to decide the recall application and appeal on merits could not be construed as conferring jurisdiction upon respondent no. 3 to act as appellate authority. (Para 10, 12 and 13)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. U.P. Awas Evam Vikas Parishad Vs Gyan Devi (Dead) By LRS. & ors.; (1995) 2 SCC 326

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard counsel for the petitioner, learned Standing Counsel for the State respondents and Sri Vijay Kumar Dixit on behalf of Zila Panchayat, Bijnor (respondent no. 2).

2. The petitioner has called in question an order dated 30.3.2022, passed by District Magistrate, Bijnor (respondent no. 3), in an appeal filed by the petitioner under Section 251 of U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, challenging order of Zila Panchayat dated 9.9.2019.

3. The case of the petitioner is that she got a plan sanctioned on 24.4.1995 for construction of a residential building. The petitioner admits that near her house, there is Dak Bungalow, belonging to Zila Panchayat, Bijnore. The petitioner claims right of way to her house through the Dak Bungalow. It is alleged that respondent no. 2 had closed the rasta to her house by constructing a wall. The petitioner being aggrieved by the said action of respondent no. 2, preferred Writ Petition No. 13478 of 2018, which was disposed of with liberty to the petitioner to move a representation before Zila Panchayat, with direction to Zila Panchayat to decide the same within two months.

4. It seems that in terms of the said order, the petitioner filed a representation in which prayer made was for removal of the wall constructed by Zila Panchayat and thus, provide free access to the petitioner to her house from the main road. The representation of the petitioner was decided by Apar Mukhya Adhikari by an order dated 9.9.2019. In the said order, specific finding has been recorded that Nihal Singh (husband of the petitioner), was an employee of Zila Panchayat/Zila Parishad and he retired on 31.10.2017. Even after his retirement, he did not vacate the servant quarter, which was in his possession as an employee of Zila Panchayat/Zila Parishad. He is making false and fake claim regarding rasta through Dak Bungalow to exert pressure on the authorities, so that they may not ask him to vacate the quarter or pay rent for the same. It is specifically recorded in the order that the claim made

by the petitioner on basis of an alleged certificate by Adhyaksh or Apar Mukhya Adhikari, Prithvi Singh Chauhan, admitting existence of any common passage, is not acceptable, as at the relevant time, there was no officer by that name. It is a fake document. It is also held that the petitioner already has a passage on the northern side of the wall of Dak Bungalow through which she has access to her house. The representation was thus found to be devoid of merit and was rejected.

5. Being aggrieved by the said order, the petitioner filed an appeal purportedly under Section 251 of U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961. It seems that while the appeal remained pending, the petitioner approached this Court by way of Writ Petition No. 35772 of 2019 for a direction to the Appellate Authority to decide the appeal. The said writ petition was dismissed by an order dated 7.11.2019, observing that the petitioner had not enclosed along with the writ petition, any evidence relating to submission of the memo of appeal in the office of District Magistrate and consequently, no positive direction could be issued. It was left open to the petitioner to obtain details from the Postal Department regarding service and approach the Appellate Authority with such details and pray for early disposal of the appeal. On 24.12.2019, the appeal was dismissed, observing that the petitioner had not preferred any appeal against the order dated 9.9.2019.

6. The petitioner once again approached this Court by way of Writ Petition No. 33062 of 2021, alleging that there was a typographical error in mentioning the date of presentation of the appeal as 19.7.2019 in the order of this Court. The correct date was 17.9.2019. It was also corrected by this Court. The petitioner also took a plea that she had preferred a recall application, seeking recall of the order of District Magistrate and prayed for decision on merits. The writ petition was disposed of on 20.12.2021 with direction to District Magistrate to pass appropriate orders on the pending recall application, as well as pending appeal, on merits, within a specified time frame.

7. The Appellate Authority has now passed the impugned order dated 30.3.2022, wherein it is noted that the alleged appeal is in fact a representation addressed to Apar Mukhya Adhikari, Zila Panchayat, Bijnor, with copy thereof being forwarded to various authorities, including the District Magistrate. However, the Appellate Authority after noting said fact, has proceeded to consider the grievance on merits and has observed that the petitioner has separate access from the main road and that her claim for a passage through the Dak Bungalow, is wholly without any basis. Accordingly, the claim made by the petitioner for removal of the wall of Dak Bungalow and thereby providing access to her through Dak Bungalow, has been turned down. In the concluding part, it has been observed that as a matter of fact, no appeal has been filed by the petitioner, but the matter is being decided in compliance of the order of this court dated 20.12.2021.

8. Learned counsel for the petitioner submitted that respondent no. 3 has wrongly observed that as a matter of fact, no appeal was preferred by the petitioner against order dated 9.9.2019. It is urged that the petitioner is an illiterate woman and therefore, could not file appeal in proper format. It is submitted that since there was specific direction of this Court to

decide the appeal on merits and therefore the observations made in the impugned order with regard to non-filing of any appeal against the order dated 9.9.2019, is incorrect.

9. The provision with regard to appeals from order of Zila Panchayat is contained under Section 251 of the U.P. Kshettra Panchayat And Zila Panchayat Adhiniyam, 1961. The relevant provision is being extracted below:-

"251. Appeals from order of Zila Panchayat. *- (1) Any person aggrieved by any order or direction made by a Zila Panchayat or a Kshettra Panchayat, as the case may be, under the powers conferred upon it by Sections 165(1), 171, 184, 191(6), 193, 202, 216, 218, 221 or under a bye-law made under sub-head (a) of Heading D and under Heading E of sub-section (2) of Section 239, may within thirty days from the date of such direction or order, exclusive of the time requisite for obtaining a copy thereof, appeal to such officers as the State Government may appoint, for the purpose of hearing such appeals or any of them or, failing such appointment, to the District Magistrate.*

(2) The appellate authority may, if it thinks fit, extend the period allowed by sub-section (1) for appeal.

(3) No appeal shall be dismissed or allowed in part or whole unless reasonable opportunity of showing cause or being heard has been given to the parties."

10. It is noteworthy that under Section 251, appeal lies against any order or direction made by Zila Panchayat in exercise of powers conferred upon it by Section 165(1), 171, 184, 191(6), 193, 202, 216, 218, 221 or under a bye-law made under sub-head (a) of Heading D and under Heading E of sub-section (2) of Section 239. On specific query made by the Court as to under which of these provisions, order passed by Zila Panchayat dated 9.9.2019 would fall, counsel for the petitioner is not in a position to point out to any of the above sections whereunder the Zila Panchayat had exercised its power in passing order dated 9.9.2019, rejecting the representation of the petitioner.

11. We are of considered opinion that the order dated 9.9.2019, rejecting the prayer of the petitioner to demolish boundary of Dak Bungalow and thereby provide access to the petitioner to her house, would not fall under any of the above sections. Consequently, no appeal would lie against such an order.

12. It has been consistently held that the right to appeal is a creature of statute and unless such right is clearly and expressly provided for under an statute, it does not exist. In order for a litigant to invoke the remedy of an appeal, such right must be expressly conferred by the statute. The Constitution Bench of the Supreme Court in the case of **U.P. Awas Evam Vikas Parishad v. Gyan Devi (Dead) By LRS. And Others,** has held that right to appeal is a statutory right and the courts cannot confer or infer it. It was further held that what is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it is a creature of statute and granting such right in the absence of express statutory provision would be legislating and not interpreting.

13. The direction of this Court in the earlier round of litigation to decide the recall application and appeal on merits could not therefore be construed as

conferring jurisdiction upon respondent no. 3 to act as appellate authority. Consequently, the direction of this Court has to be construed in the light of the above settled legal position.

14. Accordingly, in our opinion, even if we assume that the representation dated 17.9.2019 was an appeal preferred before respondent no. 2, as is sought to be contended, it was not maintainable. Moreover, the Appellate Authority as well as Apar Mukhya Adhikari, Zila Panchayat, Bijnore, have considered the plea of the petitioner on merits and have held that the petitioner is already having separate passage for ingress and egress to her house from a lane on the northern side of the wall of Dak Bungalow and that she does not have any right of passage through the Dak Bungalow.

15. We find no illegality or perversity in the said finding to warrant interference in exercise of writ jurisdiction.

16. The petition is accordingly **dismissed**.

(2022) 10 ILRA 126
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.10.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 14359 of 2019

Anandi Water Park Resorts And Club Pvt. Ltd. ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Apoorva Tewari, Aditya Tewari

Counsel for the Respondent:
C.S.C.

A. Tax Law – Constitution of India – Article 265 – UP Entertainment and Betting Tax Act, 1979 – Sections 2(l) (iii) & 12 – Entertainment tax – It's imposition on the costume used in the water park – Legality challenged – Held, the costume used in the water park would neither fall within the definition of words 'instrument' or 'contrivance' – The renting on 'costumes' cannot be included in the term 'payment for admission' as defined under Section 2(l) – Held further, the tax can be levied only when specially provided for and not by intendment – Assessment order was held beyond the authority of law and is violative of Article 265 of the Constitution of India. (Para 15 and 16)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Aditya Tewari, learned Counsel for the petitioner and Sri Rajesh Kumar Shukla, learned Counsel appearing on behalf of the State.

2. The present petition has been filed challenging the order dated 31.08.2010 whereby the entertainment tax of Rs.3,17,378.04/- was imposed in exercise of powers conferred under Section 12 of The Uttar Pradesh Entertainment and Betting Tax Act, 1979 (hereinafter referred to as "The 1979 Act") along with penalty of Rs.20,000/-. The petitioner also challenges the order dated 21.01.2016 whereby the statutory appeal preferred by him was rejected as well as the order dated 30.03.2017 whereby the application for recall of the appellate order was also rejected.

3. The facts in brief are that the petitioner is a Company incorporated under

The Companies Act, 1956 and is a Proprietor of a water park situate at Faizabad Road, Lucknow and runs a water park in the said premises in accordance with the permission obtained from the requisite authorities.

4. The contention of the Counsel for the petitioner is that the entertainment tax levied on the water park was exempted vide order dated 22.05.1998, however, the said issue need not detain us as the issue in the present case arises out of a survey conducted at the premises of the petitioner on 21.04.2010 and on the basis of the said survey, a show cause notice was issued to the petitioner on 05.05.2010 stating therein that on the date of the survey as conducted at the premises, on an inquiry, it was found that Rs.30/- per male and Rs.60/- per female was being charged towards costume and despite notice, the assessee has not come forward to disclose the said fact. It is further stated that the costume would also be subject to levy of entertainment tax in view of the provisions contained in Section 2(l)(iii) of the 1979 Act, thus it was proposed in the said show cause notice as to why the assessment may not be done at Rs.3,17,378.04/- and a penalty of Rs.20,000/- may not be imposed.

5. The petitioner preferred a reply to the said show cause notice denying all the allegations and also requesting that the petitioner may be provided with the copy of the survey report, proposed to be relied upon against the petitioner during the course of assessment proceedings, however, without giving any opportunity of hearing and without providing the said survey report, an order came to be passed on 31.08.2010. Assessing the entertainment tax on the renting of the costume at Rs.3,17,378.04/- and further a penalty of Rs.20,000/- was imposed upon the petitioner in purported exercise of powers under Section 12 of the 1979 Act. The petitioner preferred an appeal against the said order and took specific ground with regard to the non-providing of the survey report, however, the appeal was dismissed without granting opportunity of hearing and ex-parte in the absence of the petitioner. The petitioner preferred an order recall application which too was dismissed. The said three orders are under challenge before this Court.

6. The contention of the Counsel for the petitioner is that very foundation for charging entertainment tax on the 'costume' as alleged against the petitioner is wholly illegal, inasmuch as, in terms of the mandate of Section 2(l)(iii) of the 1979 Act, the costume would not come within the meaning as described, as such, very foundation based upon which the order has been passed is without any authority of law. He further argues that the petitioner had opened a separate counter at the park and has authorized a special contractor to give costumes on rent to whosoever desires and the said facility was not being managed by the petitioner and thus the petitioner was in any case not liable.

7. The Counsel for the petitioner further argues that taking of the costume was voluntary and was not a part of the 'payment for admission' and thus, the petitioner cannot be made liable even if for the sake of argument, all the allegations are treated to be correct. He further argues that the manner in which the quantum has been fixed is wholly arbitrary, inasmuch as, it is common knowledge that in winter months, the water park remains closed whereas the assessment has been made for the period 13.03.2009 to 21.04.2010 which is contrary

to the powers conferred upon the authorities under Section 12 of the 1979 Act. He specifically refers to the manner in which the said powers are to be exercised on the basis of best judgment assessment. He argues that the 'best judgment assessment' is to be interpreted in the light of the materials which are existent and cannot confer arbitrary exercise of powers on the authorities and in the present case, the manner in which the assessment has been done would not qualify as 'best judgment assessment'. The Counsel for the petitioner further argues that even otherwise in terms of the mandate of Section 12 of the 1979 Act, it is incumbent that an opportunity of hearing be granted prior to passing of the order which has not been done. He further argues that the entire assessment has been done based upon one survey which is neither a proper exercise of power nor does it give any indication to come to the conclusion with regard to the quantum of tax due. He places reliance on the specific averments regarding not providing an opportunity of hearing made in the writ petition which have not been denied in the counter affidavit and thus it is argued that the writ petition is liable to be allowed.

8. Learned Standing Counsel, on the other hand, argues that the survey was conducted at the premise of the petitioner. He further refers to an earlier survey conducted on 05.08.2009 wherein, as per the said survey the petitioner had accepted the charging of Rs.30/- per costume per male and Rs.60/- per costume per female. In the light of the said, he thus argues that the authorities has not exceeded its jurisdiction to access in terms of the mandate of Section 12 and thus argues that the writ petition is liable to be dismissed.

9. On the basis of the submissions made at the bar this Court is to consider the scope of Section 2(l)(iii) of the 1979 Act and as to whether the orders impugned which are without any opportunity of hearing, satisfies the tax under Section 12 of the 1979 Act?

10. To consider the first submission that the charge of costume would not fall within the definition of Section 2 (l)(iii) of the 1979 Act. It is essential to produce Section 2(l)(iii), which is as under:

"(l). 'payment for admission' includes -

(i) ...

(ii) ...

(iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get."

11. The payment for admission, includes any payment made for loan or use of any 'instrument' or 'contrivance' which enables a person to get a normal or a better view or hearing or enjoyment of the entertainment which without the aid of such instrument or contrivance such person would not get. Thus to include any amount under Section 2(l)(iii), it is essential that there should be a use of 'instrument' or 'contrivance' which enables the person to use the benefits and without which such entertainment or enjoyment is not possible. A costume used in the water park, as stated by the Counsel for the petitioner, is provided to the persons who wants to take it on rent. There is no material on record to suggest that the costumes would be an 'instrument' or 'contrivance'. Further there

is no material to state that such costume enhances the enjoyment of the persons to enjoy the entertainment of water park and further there is no material on the record to state that without such costume being provided, the person entering into the water park would not in a position to enjoy the entertainment.

12. The words 'instrument' or 'contrivance' have not been defined under the Act, as such, the dictionary meaning of the said two words is to be resorted to. The Cambridge Dictionary defines the word 'Contrivance' as *"the act of intentionally arranging for something to happen by clever planning, or something that is arranged in this way" and "a clever device or object that has been invented for a particular purpose"*.

13. Similarly the 'Instrument', which has not been defined under the Act, under the Cambridge Dictionary, it is defined as *"an object such as a piano, guitar, or drum, that is played to produce musical sounds"* or *"a tool or other device, especially one without electrical power, used for performing a particular piece of work"* and also defines the "Instrument' as *"a way of achieving or causing something"*.

14. In The Oxford English Dictionary, the word 'Contrivance' defines as *"the action of contriving or ingeniously endeavouring the accomplishment of anything; the bringing to pass by planning, scheming, or stratagem; maneuvering, plotting; deceitful practice'*. In the said dictionary, the word 'Instrument' reads as *"that which is used by an agent in or for the performance of an action; a thing with or through which something is done or effected; anything that serves or contributes to the accomplishment of a purpose or end; a means.*

15. In the present case, the costume used in the water park would neither fall within the definition of words 'instrument' or 'contrivance', thus I am inclined to accept the submission of the Counsel for the petitioner that the renting on 'costumes' cannot be included in the term 'payment for admission' as defined under Section 2(l), thus on that score alone, the assessment order is beyond the authority of law and is violative of Article 265 of the Constitution of India.

16. It is well settled that the tax can be levied only when specially provided for and not by intendment. If the legislation was of the view that the renting of the costume should be included for the purpose of determination of the taxes, it could have specifically provided for under the Act which has not been done, thus, I have no hesitation in holding that demand of levy of tax as well as the penalty is without authority of law.

17. I am not going into the second question as I have already held that levy itself is without authority of law.

18. Accordingly, the writ petition stands ***allowed***. The impugned orders dated 31.08.2010, 21.01.2016 and 30.03.2017 are set aside.

19. The amount deposited by the petitioner as pre condition of appeal shall be refunded to the petitioner within a period of three months from today.

(2022) 10 ILRA 130
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2022

BEFORE

THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 15295 of 2022

C/M Sri Malviya Inter College & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Alok Dwivedi

Counsel for the Respondents:
C.S.C., Yogesh Kumar Saxena

A. UP Intermediate Education Act, 1921 – Committee of Management – Single operation – Principle of natural justice – No notice was given before order of single operation – Validity challenged – Opportunity of hearing, how far can be claimed – Tenure of three years providing under un-amended Scheme of Administration was expired – Effect – Held, in addition to demonstrating breach of natural justice, proof of prejudice is also to be demonstrated – The petitioner having no right to continue beyond the period of three years, is no longer entitled to continue as Manager of the Committee of Management – Though notice may not have been given to the petitioners prior to issuance of the impugned order of single operation of the account, no prejudice has been caused to them. (Para 18 and 22)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Committee of Management Saltnat Bahadur Post Graduate College, Badlapur, Jaunpur & anr. V. St. of U.P. & ors.; 1 2013 (5) ADJ 326(FB)

2. Committee of Management, Janta Higher Secondary School & anr. Vs St. of U.P. & ors.; 2013(1) ADJ 300

3. Committee of Management, Janta Inter College, Jaitpur Kalan, District Agra & anr. Vs St. of U.P. & ors.; 2021 (12) ADJ 235

4. Committee of Management, Janta Inter College & anr. Vs St. of U.P. & ors.; 2014 (1) ADJ 111

5. Aligarh Muslim University & ors. Vs Mansoor Ali Khan;(2000) 7 SCC 529

(Delivered by Hon'ble Jayant Banerji, J.)

1. Heard Sri Alok Dwivedi, learned counsel for the petitioner and the learned Standing Counsel appearing for respondents.

2. Sri Yogish Kumar Saxena, learned counsel states that he had filed a caveat application on 17.5.2022 on behalf of the President of the Committee of Management.

3. Background of the case are that the petitioner's institution is recognised under the U.P. Intermediate Education Act, 1921 and the Rules and Regulation framed thereunder. The institution is under grant-in-aid list of the State Government and payment of salary of its teachers and employees is being made under the provisions of the U. P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971.

4. There is an approved scheme of administration and thereunder, the election of the Committee of Management of the institution was duly held on 25.4.2018, in which the petitioner no.2 was elected as Manager of the institution. The Inspector, Kanput Dehat had recognized this election and attested the signatures of petitioner

no.2 as Manager of the institution. It is stated that model scheme of administration was issued by the Education Department by means of Government Order dated 25.8.2011 and the Committee of Management of the institution adopted the new amended model scheme of administration by a resolution dated 11.9.2020, which amended scheme of administration was approved by the Joint Director of Education by means of his order dated 18.12.2020. It is stated in the writ petition, that in terms of clause X of the newly adopted scheme of administration, the term of the Committee of Management of the institution would be five years that is to say the term of the Committee of Management elected on 25.4.2018 would be upto 24.4.2023. It is stated that the salary of teachers and employees of the institution was being duly paid under the signature of petitioner no.2 and the Finance and Accounts Officer and there was no default. Even for the month of March 2022, the salary of teachers and employees were paid under the signature of petitioner no.2 as Manager and Finance and Accounts Officer in the office of Inspector, Kanput Dehat. However, the Inspector, by means of the impugned order dated 11.4.2022 passed an order of single operation of the salary distribution account of the petitioner's institution on the ground that after expiry of three years from the date of election dated 25.4.2018, the Committee of Management has become time-barred.

5. Under challenge in the present writ petition is an order dated 11.4.2022, passed by the respondent no.3, District Inspector of Schools, Kanpur Dehat bearing order No.Ma-Derapur/345-49/2022-23, whereby an order of single operation has been passed and also directing the President of the petitioner's institution to place a time-table/proposal, whereby the observer for election can be appointed and the election in accordance with the scheme of administration can be effected.

6. The contention of the learned counsel for the petitioner is that the old scheme of administration provided three years term for the Committee of Management. Under the old scheme of administration, the last admitted election was held on 25.4.2018. It is contended that during the sustenance of term of that Committee of Management, an amendment in the scheme of administration was proposed for extending the period of the Committee of Management from three years to five years which came to be approved by the order of the Joint Director of Education dated 18.12.2020 that has been enclosed as Annexure-3 to the writ petition. Learned counsel has vehemently argued that in view of the aforesaid approval granted by the Joint Director of Education, the previous approved scheme of administration was rendered redundant and, therefore, in view of the judgement of a full Bench of this Court in **Committee of Management Saltnat Bahadur Post Graduate College, Badlapur, Jaunpur and another V. State of U.P. and others**, the existing Committee of Management would have its term extended with immediate effect.

7. It is also contended by the learned counsel for the petitioner that the petitioner continued to function as Manager of the Committee of Management and was forwarding bills for payment of salary of the teachers and other staffs of the institution, illustrative of which are documents that has been enclosed as Annexure-5 to the writ petition. Learned

counsel states that there is no situation existing in the management that could support the order of single operation. It is further contended that no opportunity of hearing was provided to the petitioner prior to passing of the instant order of single operation, hence the same is in violation of principles of natural justice and is liable to be set aside by this Court.

8. Learned counsel for the petitioner in support of his contention has also relied upon judgements of this Court in the matter **of Committee of Management, Janta Higher Secondary School and another Vs. State of U.P. and others, Committee of Management, Janta Inter College, Jaitpur Kalan, District Agra and another Vs. State of U.P. and others.**

9. Learned Standing Counsel and Sri Yogish Kumar Saxena, learned counsel have vehemently opposed the writ petition and stated that the term of the amended scheme of administration as approved by the Joint Director of Education regarding extension of term of the present Committee of Management for a period of five years would not enure to the benefits of the petitioner's Committee of Management. Learned counsel has further stated that Full Bench decision of this Court in **Saltnat Bahadur (supra)** has been explained and clarified by the Division Bench of this Court in **Committee of Management, Janta Inter College and another Vs. State of U.P. and others.** It is further contended that in view of the Division Bench judgement of 2014 aforesaid, the term of Committee of Management elected on 25.4.2018 would not extend beyond the period of three years, that is, uptill 24.4.2021 in terms of the unamended scheme of administration. It is further stated that under the circumstances, the petitioner had no vested right to continue as Manager of the institution beyond the period of three years with effect from 25.4.2018 as specified in the previous scheme of administration.

10. Having considered the rival contentions of the learned counsel for the parties, it would be appropriate to look into the impugned order of single operation passed by the Inspector that appears at page 50 of the writ petition which is as follows:-

"**कार्यालय, जिला विद्यालय निरीक्षक, कानपुर देहात**
आदेश सं०:मा०-डेरापुर /2022-23
दिनांकः 11.04.2022
एकल संचालन आदेश

श्री मालवीय इण्टर कालेज मुंगीसापुर, कानपुर देहात हाईस्कूल स्तर की सहायता प्राप्त एवं मान्यता प्राप्त संस्था है, विद्यालय में कार्यरत शिक्षक एवं शिक्षणेत्तर कर्मचारियों की सेवायें माध्यमिक शिक्षा अधिनियम 1921 के अन्तर्गत व्यवहरित होती हैं तथा वेतन भुगतान वेतन वितरण अधिनियम 1971 के अन्तर्गत किया जाता है। कार्यालय में उपलब्ध पत्रावली के अनुसार विद्यालय प्रबन्ध समिति का विगत चुनाव दिनांक 25.04.2018 का सम्पन्न कराया गया था तथा विद्यालय की प्रबन्ध समिति का चुनाव प्रशासन योजना में निहित व्यवस्था के अनुरूप निर्धारित तीन वर्ष का कार्यकाल पूर्ण हो चुका है तथा वर्तमान में प्रबन्ध समिति कालातीत की श्रेणी में है।

अतः अध्यक्ष, श्री मालवीय शिक्षा प्रसार समिति, मुंगीसापुर नन्दपुर, कानपुर देहात को निर्देशित किया जाता है कि पत्र निर्गमन से एक माह के अन्दर नवीन चुनाव कराये जाने की कार्ययोजना/प्रस्ताव तैयार कर इस कार्यालय को उपलब्ध करायें, जिससे पर्यवेक्षक की उपस्थिति में विद्यालय प्रबन्ध तंत्र का चुनाव कराया जा सके साथ ही प्रबन्ध तंत्र के कालातीत होने के कारण शिक्षक एवं शिक्षणेत्तर कर्मचारियों के वेतन वितरण में कोई अवरोध उत्पन्न न हो, को दृष्टिगत रखते हुये वेतन वितरण अधिनियम 1971 की धारा (यथासंशोधित) की धारा 3(3) एवं 5 उप धारा-2 के अधीन संस्था श्री मालवीय इण्टर कालेज मुंगीसापुर, कानपुर देहात के वेतन वितरण खाता, जो अद्यतन वित्त एवं लेखाधिकारी कार्यालय जिला विद्यालय निरीक्षक कानपुर देहात एवं प्रबन्धक श्री मालवीय इण्टर कालेज मुंगीसापुर, कानपुर देहात के संयुक्त हस्ताक्षरों से संचालन किया जा रहा था, का एकल संचालन किया जाता है जो इस आदेश के निर्गमन के पश्चात वित्त एवं लेखाधिकारी (मा० शिक्षा), कार्यालय जिला विद्यालय

निरीक्षक कानपुर देहात के एकल हस्ताक्षर से संचालित किया जाएगा।

ह० अप०
(अरबिन्द कुमार द्विवेदी)
जिला विद्यालय, निरीक्षक,
कानपुर देहात।"

11. It is admitted to the parties that the previous election that was held on 25.4.2018 was under the unamended scheme of administration in which the period of Committee of Management was three years, that is uptill 24.4.2022. It is also admitted that by the order dated 18.12.2020, the approval to the amended scheme of administration was granted by the Joint Director of Education rendering the previous scheme of administration ineffective. At this stage, it would be pertinent to refer to the two questions referred to the Full Bench of this Court in the case of **Saltnat Bahadur (supra)** which were as follows:

"(1) Whether the amendment will become effective from the date of the amendment?

(2) Whether the amendment, extending the term of the Committee of Management, will apply to the existing Committee of Management, which has made the amendment or it applies to the Committee of Management which will be formed after the election being held after the amendment?"

12. While answering the second question referred, the Full Bench observed as follows:

"12. Following the same, the second question is answered by holding that the amendment, extending or curtailing the term of the Committee of Management, will become effective immediately and as a result, then existing Committee shall have its term extended or modified in accordance with the amendment. We may add here by way of precaution that if the authority competent to make the amendment itself chooses to specify that the amendment shall be effective from a future date then the amendment shall apply from such later date as may be specified. Similarly, if the approving authority has the necessary powers to lay down similar stipulation, then the amendment may apply as per conditions or stipulations laid down by the approving authority. In absence of such special feature or stipulation, the amendment shall apply to the Committee of Management existing on the date amendment comes into force."

13. In the case of **Committee of Management, reported in 2014(1) ADJ 111(supra),** this Court had the occasion to consider the judgement of the Full Bench in **Saltnat Bahadur (supra).** The Court referred to the circular of Director dated 4.8.2003 and held as under:-

"13.....

Since the Director is vested with a statutory power to grant or refuse his prior approval, incidental to the exercise of power, it is open to the Director to stipulate that the approval shall not enure to the body which has proposed by a resolution, the enhancement of the term. Secondly, the Director has, by his circular of 4 August 2003, clarified the matter beyond doubt by stipulating that when the term of a Committee of Management is enhanced from three years to five years by an amendment in the scheme of administration, the benefit of the amendment will enure only to the Committee of Management that would be elected after fresh elections are held."

14. The Full Bench, inter alia, held that for want of a special feature or stipulation by the authority competent to make the amendment to the Scheme of Administration to make the amendment effective from a future date, the amendment shall apply to the Committee of Management existing on the date the amendment comes into force. Given the mandate of the Division Bench clarifying the answer to question no. 2 of the Full Bench, in view of the circular dated 4.8.2003, and given the fact situation of the present case, it is evident that the term of the Committee of Management, which was elected on 25.4.2018 under the unamended scheme of administration, came to an end on expiry of three years on 24.4.2021. It is pertinent to mention here that the existence, currency and validity of the aforesaid circular of 4.8.2003 is not disputed.

15. Though a photocopy of salary bill for the month of March 2022 signed by the Manager of the institution and the Finance & Accounts Officer is on record, in view of the legal position regarding the term of the Committee of Management as discussed above, no benefit of that can accrue to the petitioner. Merely for the reason that no default regarding payment of salary has occurred, the order of single operation cannot be struck down unless the petitioners establish and demonstrate that the Committee of Management could legally continue beyond the term of three years on the strength of the amended Scheme of Administration, which they have failed to do.

16. In view of the aforesaid position, it needs to be examined whether the petitioner was entitled to an opportunity of hearing under the facts and circumstances of the case.

17. In the present case, it is iterated that in view of the aforesaid Division Bench judgement of this Court clarifying the answer of the question by the Full Bench in **Saltnat Bahadur(supra),** the petitioner has no vested right to continue as Manager of the institution beyond the stipulated period of three years as provided in the previous scheme of administration.

18. It has been repeatedly held by this Court as well as by the Apex Court that in addition to demonstrating breach of natural justice, proof of prejudice is also to be demonstrated. The petitioner having no right to continue beyond the period of three years, is no longer entitled to continue as Manager of the Committee of Management. At this stage, it is pertinent to refer to the judgment of the Supreme Court in **Aligarh Muslim University and others Vs. Mansoor Ali Khan;(2000) 7 SCC 529,** in which it has been held as under:

"23. Chinnappa Reddy, J, in S.L. Kapoor case laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi V. State Bank of India Sabyasachi Mukharji, J (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of

notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31).

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent.... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala V S.K. Sharma. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in **Rajendra Singh V. State of M.P.**

.....

26. It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in S.L. Kapoor V. Jagmohan, namely, that on the admitted or indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued."

19. In the judgement cited by the learned counsel for the petitioner, which is reported in **2013 (1) ADJ 300 (supra),** there was a dispute with regard to the Committee of Management which was pending before the Joint Director of Education and an order of single operation was passed. The argument advanced was that the same cannot be a ground to invoke the provisions of U.P. Act No. 24 of 1971, unless default is established. In this view, the Court observed as follows:-

"5. Having heard learned counsel for the parties, this is not a case where the Court should await any filing of further Affidavits as the impugned order on the face of it is in teeth of the provisions of U.P. Act No. 24 of 1971, which mandatorily requires the issuance of a notice prior to passing of an order of single operation. Admittedly, no notice was issued to the petitioner-Committee of Management. Apart from this, the mere pendency of a dispute cannot be the reason for passing of an order of single operation inasmuch as there is nothing in the order to indicate that the payment of salary was ever obstructed. In such a situation, the passing of the order is absolutely unjustified."

In such a situation, the order impugned was held to be unjustified. However, the fact scenario of the present case are different.

20. In the other matter cited by the learned counsel for the petitioner, reported in **2021 (12) ADJ 235 (supra),** it appears that during the sustenance of term of the Committee of Management, 16 new members were enrolled, out of which, petitioner no.2 therein was also enrolled as a member. The Manager of the Committee of Management died, as a result, a casual vacancy came into existence and the petitioner no.2 being a valid member was elected as manager for the residue period under a resolution which was duly approved by the Inspector. It was only on the complaint made by the Principal of the institution, the proceeding of single

operation was initiated without providing an opportunity of hearing. It was, therefore, in view of the facts of that case, the order of single operation was set aside.

21. Therefore, the aforesaid two judgements are of no help to the petitioner.

22. In view of the aforesaid facts and circumstances of this case, though notice may not have been given to the petitioners prior to issuance of the impugned order of single operation of the account, no prejudice has been caused to them. In the aforesaid judgement in Aligarh Muslim University, the Supreme Court held that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) has to be proved. In view of the indisputable facts of the present case, only one view is possible, and that is, that the petitioner Committee of Management had no right to continue beyond 24.4.2021. The benefit of the extended term of the Committee of Management, brought about by the amendment in the Scheme of Administration, would not inure to the petitioner Committee of Management which was existing on the dates of adoption and approval of the amended Scheme of Administration.

23. In view of the aforesaid facts and circumstances of the case, in the opinion of the Court, the petition has no legs to stand and it is, accordingly, **dismissed**.

(2022) 10 ILRA 136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-C No. 19361 of 2020

Allure Developers Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Samarath Singh, Sri Hritudhwaj Pratap Sahi, Sri Sankalp Narain, Sri Siddharth Singhal, Sri Ravi Nanda, Sri Amit Saxena (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh, Sri Sarthak

A. Local authority – Zero period benefit – Lease deed executed, but the possession of land could not be handed over due to dispute with farmer, resulting into non commencement of project – Encroachment was removed only on 21.08.2020, however claim of zero period benefit was granted only upto 30.09.2016 – Lease rent also charged – Legality challenged – Held, the petitioner was liable to get zero period benefit from 19.12.2014 up to 21.8.2020 when the encroachment was admittedly cleared from the plot allotted – Held further, the respondent No. 2 is not justified to charge the lease rent @ 2.5% of the total premium from 19.12.2014 up to 21.8.2020. (Para 14)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. Shri Amit Saxena, learned Senior Advocate assisted by Shri Siddharth Singhal & Shri Ravi Nanda, learned counsel for the petitioner and Shri Sarthak under the authority of Shri Kaushalendra Nath Singh, learned counsel for the respondent No. 2.

2. The writ petitioner is a private limited company registered under the provisions of the Companies Act, 1956, with its registered office at 3016/5, Second Floor, Street No. 12A, Ranjeet Nagar, New Delhi. The petitioner is engaged in the development of residential as well as commercial projects.

3. The writ petition was initially filed seeking the following reliefs:-

"i) a writ, order or direction in the nature of mandamus directing the respondent no.2 to handover the vacant, physical and peaceful possession of the Encroached Portion of the Subject Plot admeasuring 17261 sqm forming part of Plot No. SC02/C, Sports City, Sector 150, Noida Gautam Budh Nagar allotted to the petitioner.

ii) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to give "zero period" from the date of execution of the Lease Deed i.e. 19-12-2014 till the time the petitioner is given the vacant, physical and peaceful possession of the said Encroached Portion of the Subject Plot being Plot No. SC-02/C, Sports City, Sector 150, Noida Gautam Budh Nagar allotted to the petitioner.

iii) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to defer the payment of annual lease rent for the period commencing from the date of execution of Lease Deed dated 19-12-2014 till the date on which the vacant, physical and peaceful possession of the Encroached Portion of the Subject Plot is handed over to the petitioner:

iv) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to grant extension of time with regard to the time period stipulated in the lease deed for completion of the project commencing from the date of execution of lease deed i.e. 19-12-2014 till the date on which the vacant, physical and peaceful plot of Encroached Portion of the Subject Plot is handed over to the petitioner; and

v) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to not issue any demand note or any further or subsequent default notices till the time the petitioner is given the vacant, physical and peaceful possession of the Encroached Portion of the Subject Plot being Plot No. SC02/C, Sports City, Sector 150, Noida Gautam Budh Nagar allotted to the petitioner; and

vi) any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case to meet the ends of justice.

vii) Award cost of the petition to the petitioner."

4. The writ petition was amended and the following reliefs were incorporated:-

"viii) a writ, order or direction in the nature of certiorari quashing the impugned order dated 11-02-2021 issued by New Okhla Industrial Development Authority i.e. respondent no.2 (Annexure no.18 to this writ petition) in relation to Plot being SC-02/C, Sports City, Sector 150, Noida, Gautam Budh Nagar, U.P.

ix) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to not take any coercive steps/actions pursuant to the Impugned Order dated 11-02-2021.

x) a writ, order or direction in the nature of mandamus directing the respondent no. 2 to expeditiously grant approval of the building plans submitted vide application dated 12-03-2020 (Annexure 19 to this writ petition) in

respect of group housing project of the petitioner in the Subject Plot."

5. It is contended on behalf of the petitioner that the respondent No. 2 floated a scheme, being Scheme 2014-15 (Sports City) for development of Sports City in Plot No. SC-02 in Sector 150, NOIDA and invited bids from interested parties for being awarded the project under the scheme. The petitioner submitted its bid as a consortium member and the bid was accepted by the respondent No. 2 vide letter of acceptance dated 7.7.2014 issued in favour of the consortium addressed to Lotus Greens Constructions Pvt. Ltd., as lead member. The consortium was allotted Plot No. SC-02, Sector 150, NOIDA ad-measuring 12,00,000 square meters @ Rs.19,400/- per square meter. A sum of Rs.96,40,00,000/- was deposited by the consortium including the petitioner after adjusting earnest money of Rs.20 crores. As per the understanding by the petitioner and other consortium members, the petitioner would be entitled to an area of 60,000 square meters out of the said Sports City, Plot No. SC-02/C. The petitioner deposited a sum of Rs.23,28,00,000/- being 20% of the total consideration in respect of the plot in question. The respondent No. 2 on 19.12.2014 executed a lease deed in respect of the 60,000 square meters for a period of 90 years. However, the possession of the plot i.e. SC 02-C (area 60,000 square meters) could not be handed over on account of disputes with farmers and land owners regarding the acquisition of the land. The petitioner on account of not being handed over possession of the leased plot could not commence the project. The petitioner under the aforesaid circumstances applied for grant of zero period benefit and for different of payment of installments lease premium and annual lease rent which was accorded by the respondent No.2 from the date of allotment i.e. 07.07.2014 upto 30.09.2016 vide letter dated 12.09.2016.

6. The lead member of the consortium M/s Lotus Greens Constructions Pvt. Ltd. for itself and also on behalf of its members including the petitioner also applied to the respondent No.2 for grant of zero period benefit till the vacant, peaceful and physical possession of the land allotted was handed over to the Consortium Members. When there was no response from the respondent No.2 M/s Lotus Greens Constructions Pvt. Ltd., filed Writ Petition No.18798 of 2017 which was disposed of directing the respondent No.2 to decide the application regarding handing over of possession and grant of zero period benefit within one month vide order dated 29.05.2019. The respondent No.2 did not comply with the order dated 29.05.2019.

7. The petitioner under the zero period policy of the respondent No.2 made an application for re-schedulement of the outstanding dues of lease premium and deposited a sum of Rs.10,26,20,453/- as re-schedulement fee as per the policy. The respondent No.2 instead of allowing the re-schedulement raised a demand of Rs.10.88 Crores. The petitioner contested the said demand on the ground that such demand could not be raised during the period, the petitioner was not handed over vacant physical possession of the plot allotted. When the Respondent No.2 did not take any decision in the matter, the petitioner filed Writ Petition No.7962 of 2020 which was disposed of vide order dated 05.03.2020 directing the respondent No.2 to decide the application seeking grant of zero period benefit and regarding annual lease rent within six weeks by order dated

05.03.2020 in the light of the observation made in the order. The respondent No.2 in compliance of the order dated 05.03.2020 has decided the representation of the petitioner and arbitrarily rejected the same by the impugned order dated 11.02.2021.

8. In the aforesaid factual backdrops the petitioner submits that the inaction on the part of the respondent No. 2 in arranging vacant peaceful and physical possession of the encroached portion of 17261 square meter of the plot allotted to the petitioners even after more than 5 years of execution of the lease deed is causing serious financial loss and the request for grant of zero period benefit was liable to be allowed. Instead the respondent No. 2 has proceeded to reject the same. Admittedly, the respondent No. 2 did not have possession over the encroached area of the plot and the encroachment was removed only on 21.8.2020 after six years of the allotment of the land, the petitioner was certainly entitled to the benefit of the zero period policy. Further, the petitioner cannot be forced to pay the lease premium and annual lease rent in respect of the plot substantial portion of which has not been handed over to the petitioner. The petitioner cannot be penalized for the fault/lapse of the respondent No. 2 who, admittedly, failed to clear the plot allotted to the petitioner of the encroachment existing over it at the time of allotment of the plot and consequently, the petitioner was deprived from utilizing the full potential of the allotted plot. It is, thus, prayed that the writ petition be allowed.

9. A counter affidavit sworn by Shri Anil Kumar Singh son of late Shri Ram Shanker Singh posted as AGM in New Okhla Industrial Development Authority (NOIDA), Gautam Budh Nagar has been filed in response to the writ petition on behalf of respondent No. 2 stating therein that the petitioner was given possession of the plot SC-02/, Sector 150 having an area of 60,000 square meters on 26.12.2014 and there was no encroachment on the said plot. The entire land allotted to the petitioner was acquired land of the NOIDA authority and there was no disturbance with the farmers. The land of the farmers is on the other side of the road. The petitioner never applied for approval of map to raise constructions and the request for grant of zero period benefit is unjustified. The lead member of the petitioners consortium M/s Lotus Greens Construction Pvt. Ltd., has already been given the benefit of zero period vide letter dated 12.9.2016 and the petitioner was also extended the benefit of zero period from 10.9.2014 to 30.9.2016. The NOIDA authority does not have policy to declare zero period in respect of lease rent and as such, the relief in that regard prayed for cannot be granted to the petitioner. The representation of the petitioner has been rightly rejected by the impugned order. If the petitioner is still aggrieved, it may avail the remedy of approaching the State Government under Section 41 (3) of the U.P. Urban Planning & Development Act, 1973 read with Section 12 of U.P. Industrial Area Development Act, 1976.

10. In the rejoinder affidavit, the petitioner has reiterated its stand taken in the writ petition and highlighted the contrary stand of the respondent No. 2 in the counter affidavit.

11. We have heard the learned counsel for the parties and have perused the record.

12. We find that the respondent No. 2 while passing the impugned order has not considered the case of the petitioner in

correct perspective. The respondent No. 2 was required to decide the representation in compliance of the order dated 5.3.2020 passed in Writ Petition No. 7962 of 2020 (Allure Developers Pvt. Ltd. versus State of U.P. and 2 others). The operative portion of the order dated 5.3.2020 reads as under:

"The writ petition is disposed of with the direction to the Chief Executive Officer, NOIDA-respondent no.3 to pass a fresh order only with regard to lease rent, which has been charged from 2015 upto 2020, especially in view of the fact that the 'zero period' has been allowed upto 30.9.2016 and why the petitioner should be saddled with extra lease rent, once the property in question was not handed over to the petitioner and 'zero period' having been declared by the authority itself. The said decision shall be taken by the Chief Executive Officer-respondent no.3 within a period of six weeks from the date a certified copy of this order is presented before the authority concerned.

Till such decision is taken by the Chief Executive Officer, so far as lease rent is concerned, no coercive steps shall be taken against the petitioner pursuant to the demand notice dated 6.9.2019 only with regard to lease rent. The said demand shall be subject to final decision that may be taken by the Chief Executive Officer."

13. A perusal of the orders of the co-ordinate Bench dated 5.3.2020 shows that this Court required the Chief Executive Officer to take a decision regarding charging of lease rent for the period possession of the plot not having handed over to the allottee. We find that the respondent No. 2 while rejecting the representation of the petitioner has not gone into this question at all and simply has stated that there is no such policy of the authority.

14. We also find that the respondent No. 2 under the impugned order dated 11.2.2021 has noted that the encroachment ad-measuring 17621 square meter was removed only on 21.8.2020. It necessarily flows that the petitioner was not put in possession of the entire land allotted to it on 26.12.2014 consequent to the execution of the lease deed on 19.12.2014. In such view of the matter, we are of the view that the respondent No. 2 was not justified to restrict the zero period benefit from 19.12.2014 up to 30.9.2016 only. In the circumstances that stood attracted to the case of the petitioner, it was liable to get zero period benefit from 19.12.2014 up to 21.8.2020 when the encroachment was admittedly cleared from the plot allotted. We also find that the respondent No. 2 is not justified to charge the lease rent @ 2.5% of the total premium from 19.12.2014 up to 21.8.2020.

15. Accordingly, the writ petition stands **allowed**. The order dated 11.2.2021 passed by the respondent No. 2 in relation to Plot No. SC-02/C, Sports City, Sector 150, Noida, Gautam Budh Nagar, U.P., is set aside. The respondent No. 2 is directed to grant benefit of zero period to the petitioner from 19.4.2014 up to 21.8.2020 and not charge the lease rent in respect of the area of the plot, the possession of which has not been handed over at the time of allotment.

16. So far as the relief regarding grant of approval to the building plans submitted vide application dated 12.3.2020 is concerned, we expect the Authority to do the needful in accordance with law

considering the observations made hereinabove.

(2022) 10 ILRA 141
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 20102 of 2022

Vijay ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamlesh Sharma

Counsel for the Respondents:
C.S.C., Sri Rahul Kumar Singh, Ms. Shreya Gupta

A. Civil law – Dispute between two private parties – Separation of judicial and executive power – Duty of administrative authorities – First appeal before the Court of District Judge was pending – During the course, the District Magistrate directed for inspection of the property, in question – Revenue authority forcibly disposed the petitioner – Legality challenged – Held, although the District Magistrate was fully well aware about the dispute relating to the boundary issue and pendency of the civil proceedings between the parties relating to the disputed land before the civil court, he has overreached his jurisdiction by entering into the disputes to be adjudicated by the revenue court or the civil court – Held further, in our Constitution, there is clear separation of judicial and executive powers – Administrative Officials cannot enter into any such dispute in exercise of the power conferred on them under the provisions of Cr.P.C. and the Revenue Code to fill in the gap and pass executive orders which explicitly belongs to the realms of Civil Court or the revenue court respectively. (Para 20 and 26)

Writ petition disposed off. (E-1)

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Sri Kamlesh Sharma, learned counsel for the petitioner, Sri K.R. Singh, learned Chief Standing Counsel appearing for the State and Ms. Shreya Gupta, learned counsel for the respondent no. 7.

2. The petitioner has knocked the doors of this Court under Article 226 of the Constitution of India being aggrieved by the action on the part of the Sub-Divisional Magistrate, Tehsil - Kasimabad, District - Ghazipur in foraying into the dispute relating to private property on the application filed by the respondent no. 7 before the District Magistrate, Ghazipur and as such has prayed, inter alia, for the following reliefs:

(I) Issue a writ, order or direction in the nature of mandamus directing the respondent no. 3 to restore the land of the petitioner in its previous position which was dispossessed by he respondents during pendency of the Appeal No. 11 of 2022 (Natthe & anothr Vs. Vikrama) pending before the learned District Judge, Ghazipur.

(II) Issue a writ, order or direction in the nature of mandamus directing the respondent no. 1 to take disciplinary action against the respondent nos. 2 to 6 who have illegally dispossessed the petitioner from his land without adopting any legal procedure.

3. This Court while issuing notice in the present writ petition vide interim order dated 20.7.2022 has expressed its

reservation to the manner in which the authorities got indulged in a private dispute and knowingly or unknowingly side with one of the contesting parties to the litigation, resulting in filing of similar kinds of writ petitions in the past. In the said background, this Court had called upon the District Magistrate, Ghazipur, and Sub-Divisional Magistrate, Tehsil - Kasimabad, Ghazipur to file their respective personal affidavits explaining as to how they had entered into the dispute between private parties relating to the immovable property and that too during the pendency of the proceedings between parties before the Civil Court. This Court has also directed the Principal Secretary (Revenue), Government of UP, Lucknow to take action against the erring officers by initiating disciplinary proceedings.

4. The personal affidavits of DM, Ghazipur and SDM, Kasimabad, Ghazipur have been filed and the same were taken on record. Vide order dated 4.8.2022, the explanation received by the Chief Standing Counsel from the office of the Principal Secretary, Government of UP, Lucknow was also taken on record on the same date.

5. The facts of the present case lie within a narrow compass. It is the contention of the petitioner that he is Bhumidhar of Araji No. 932 measuring area 0.0900 hectare and respondent no. 7 is Bhumidhar of Arjai No. 933-A situated at village Kodari, Pargana - Pachotar, Tehsil - Kasimadabad, District - Ghazipur. Since both the Arajis are continguous, there is ensuing dispute lead to filing of Original Suit No. 679 of 2008 for permanent injunction by respondent no. 7 before the learned Additional Civil Judge (Junior Division), Ghazipur against the petitioner.

6. It is the case of the petitioner that the aforesaid suit was decided in favour of respondent no. 7 on 4.1.2022 and aggrieved therefrom the petitioner has preferred an appeal bearing No. 11 of 2022 before the District Judge, Ghazipur on 15.3.2022 which is still pending and, as such, according to him the matter is sub judice.

7. It is further the case of the petitioner that although the respondent no. 7 has neither filed execution of the judgment / order dated 4.2.2022 of the Additional Civil Judge (Junior Division), Ghazipur, nor has filed any demarcation proceedings under Section 24 of the UP Revenue Code, 2006 during the pendency of the civil appeal, but in order to short circuit the entire civil proceedings, has filed an application on 18.4.2022 before the District Magistrate, Ghazipur for demarcation and possession of the land in dispute.

8. It seems that on the said application, the DM, Ghazipur had issued direction to the SDM, Tehsil - Kasimabad, District - Ghazipur, to make inquiry on the spot. The spot inspection and measurement of the plot in question then followed under the instruction of the DM, Gahzipur whereafter reports dated 26.4.2022, 3.5.2022 and 18.5.2022 were submitted by the Revenue Inspector. Pursuant to the said reports the petitioner contends that the SDM, Kasimabad, Ghazipur alongwith revenue authorities visited the spot on 26.5.2022 and directed both the contesting parties to maintain status quo. However, subsequently, revenue authorities alongwith local police again visited the spot on 11.6.2022 and allegedly put on pressure upon the petitioner and after obtaining his signatures had forcibly

dispossessed him and gave possession of the disputed land to respondent no. 7.

9. After the said dispossession, the petitioner has moved a representation to the Superintendent of Police, Ghazipur on 13.6.2022 and the DM, Ghazipur on 14.6.2022, disputing his signatures on the alleged spot memo dated 11.6.2022 and complaining about the action on the part of the local police and the revenue authorities.

10. This Court has taken pain in narrating the facts in details to convince itself and yet again this is the case wherein the respondent-authorities have embarked on the path of interjecting into the dispute relating to the immovable property between private person during the pendency of the civil litigation, which has been deprecated by this Court on several occasions.

11. This Court in the case of **Jitendra Bahadur Singh Vs. State of UP and others in Civil Misc. Writ Petition No. 50033 of 2015** has directed the Principal Secretary (Revenue) to take disciplinary action against officers concerned, who entered into the dispute between two private parties in respect of immovable property. Pursuant thereto, the Government Order was issued on 16.10.2015 as reminder to the District Magistrates in the State of UP to desist from taking any action in a dispute of immovable properties of private persons and especially those where matter is pending in the Civil Court. It means that the orders issued by the State Government are being ignored by the Administrative Officers as the Court is receiving petitions against such orders almost on daily basis.

12. In a recent decision on 13.6.2022 in **Civil Misc. Writ Petition No. 17951 of 2022 Shree Energy Developers Pvt Ltd. Vs. State of UP ans 6 others),** the Principal Secretary, Government of UP, Lucknow was directed to look into the matter and to issue direction to the District Magistrates of all the Districts in the State of UP not to interfere into any kind of private dispute relating to immovable property. The Principal Secretary, Government of UP was directed to submit action taken report to this Court through the Registrar General of this Court. No such report had been brought before us and, moreover, this Court is flooded with this kind of litigations where the District Magistrate, Sub-Divisional Magistrates and the police authorities on the complaint of private parties are passing administrative orders to deal with their disputes relating to immovable property.

13. In the aforesaid compelling circumstances, this Court found its bounden duty to call upon the administrative authorities for explanation. The respondent no. 2 in the affidavit filed in his personal capacity has justified his act by stating that before 14.6.2022 neither the petitioner nor the respondent no. 7 ever informed in writing or orally about the pendency of any civil suit or appeal in Civil Court.

14. He states that he came to know about the civil suit / appeal when he received the order dated 20.7.2022 passed by this Court in the present writ petition. In the first blush the justification seems to be bonafide and this Court expected restitution in the light of its earlier judgment and Government Order as stated herein above. However, it seems that the respondent no. 2 has taken deep inquiry into the matter, wherein he has not only taken pain to justify his stand but has also went a step

further in entering an arena shadowed with dispute essentially belonging to the competent civil or criminal courts.

15. Apparently, the respondent no. 7 had filed representation dated 18.4.2022 to the respondent no. 2, wherein he claimed seeking resolution of the boundary disputes with the petitioner and as such had prayed for intervention of the District Magistrate. It is this representation which formed the basis of the whole gamut of actions and highhandedness of the respondent no. 2 to dispossess the petitioner. This Court find absolutely absurd as to how the respondent no. 2 can claim to justify in his affidavit that action under Section 129 of the UP Revenue Code, 2006 can be initiated against the petitioner, whereas foundation seems to be essentially the boundary dispute covered under Section 24 of UP Revenue Code. Further this Court find it unable to understand as to how the respondent no. 2 has shown such teary hurry in calling for a report on the said representation given in 'Janata Darshan'. Although the procedure for initiating process under Section 24 or Section 29 of the UP Revenue Code is altogether different and governed under the UP Revenue Code and the Rules framed thereunder.

16. This Court is also convinced that the respondent no. 2 has deliberately either ignored the reports dated 26.4.2022 and 3.5.2022 of the revenue authorities or proposal, remained silent about the same in his affidavit, which sufficiently indicates that the issue was relating to boundary dispute and could be resolved in an appropriate proceeding under Section 24 of the UP Revenue Code and, in any case, the reports in clear terms indicated that the same was made on the basis of consideration of the court cases pending between the parties and as such the parties were required to maintain status quo and all further action in the matter was subject to the resolution of the boundary dispute and the decision of the competent court of law.

17. Although the respondent no. 2 has mentioned in the affidavit that the application dated 25.5.2022 of the respondent no. 7 also did not indicate about any civil suit or order passed by the civil court, but this Court find the said stand to be meaningless in the presence of the reports dated 26.4.2022 and 3.5.2022 of the revenue authorities. There was no occasion for the respondent no. 2 to claim that no action was taken by the SDM concerned and call for another report dated 31.5.2022 issuing fresh direction to take action, which has led to the revenue officials going on the spot on 26.5.2022 and ultimately dispossessing the petitioner on 11.6.2022. The explanation offered by respondent no. 2 is an effort to misguide this Court. The appropriate cause of action for the District Magistrate was to direct the applicant/respondent no. 7 to approach the competent revenue / civil court to seek appropriate remedy, soon after the presentation of the application on 18.4.2022 in 'Janta Darshan' as the dispute was about an immovable property between private persons. No explanation could be given by him about this digression from the settled legal principle at the first instance.

18. Secondly, even after the reports were submitted by the revenue officials dated 26.4.2022 and 3.5.2022 giving clear opinion that the applicant/respondent no. 7 has to wait for the outcome of the litigation pending in the Court, the respondent no. 2/ District Magistrate, Ghazipur entertained another application on 25.5.2022 of the

respondent no. 7 and issued direction to take action against a private person, the petitioner herein.

19. We are afraid to accept that the reports dated 26.4.2022 & 3.5.2022, which were forwarded to the higher authorities, did not come to the knowledge of the District Magistrate. Had it been otherwise, the District Magistrate/respondent no. 2, instead of issuing fresh direction on the application dated 25.5.2022, ought to have sought reports from the SDM about the action taken on his previous directions. In any case, the justification of the respondent no. 2/ District Magistrate of his action is not convincing.

20. Thus, this Court finds that the respondent no. 2 has proceeded in a reckless manner resulting in the dispossession of the petitioner in the first instance and later seeking to take shelter under Section 129 of the UP Revenue Code in his personal affidavit filed in this Court. In any case, this Court is unable to appreciate the manner in which the respondent no. 2 has conducted himself and the proceedings in the present case as he has sought to justify his highhandedness under Section 129 of the UP Revenue Code. Although he was fully well aware about the dispute relating to the boundary issue and pendency of the civil proceedings between the parties relating to the disputed land before the civil court. The respondent no. 2 has overreached his jurisdiction by entering into the disputes to be adjudicated by the revenue court or the civil court.

21. There is another aspect of the matter, the respondent no. 2 has after receipt of the order dated 20.7.2022 passed by this Court, promptly directed the SDM concerned to make an inquiry and submit a report relating to the allegations made by the petitioner in his letter dated 14.6.2022. The SDM concerned gave the report dated 30.7.2022 that the petitioner was not only present on the spot on 11.6.2022 and the demarcation was done in his presence but also reported that respondent no. 7 was given possession of the disputed land in the presence of the petitioner and he had also appended his signatures on the said alleged spot memo. This Court find it difficult to appreciate the teary hurry of the SDM and especially when he was made aware about the pendency of the Civil case between the parties in the reports dated 26.4.2022 and 3.5.2022 submitted by the revenue officials. It was expected that once the respondent no. 3 was made aware of the pendency of the case in the Civil Court, he ideally would have submitted his report to the District Magistrate instead of proceeding to dispossess the petitioner on 11.6.2022, despite having knowledge of the private dispute relating to immovable property between two private individuals rather than justify his actions and highhandedness in his action on 11.6.2022.

22. Further, the respondent no 2 in his affidavit has also tried to justify his action by stating that the patta in the name of the petitioner's mother was canceled vide order dated 30.7.2014 and although the revision filed by the petitioner before the Additional Commissioner, Varanasi was allowed by virtue of the order dated 2.11.2018 by which the patta cancellation order was set aside and the matter was remanded back to the concerned authority for deciding afresh, but as a Writ-C No. 5086 of 2019 has been filed against the said revisional order wherein an interim order staying the order passed by the Additional Commissioner has been passed on 20.2.2019, the patta cancellation order stood revived. The said

petition is still pending consideration before this Court and hence the action taken by him under the shield of Section 129 of the Revenue Code is justified. Be that as it may, this Court does not intend to dwell into the merits of the claim in the writ petition, which obviously would be decided on its own merit, but the factum of there being proceedings pending relating to the immovable property before the Civil Court and the court of competent jurisdiction cannot be negated.

23. The respondent no. 3 further stated in his affidavit that after he joined as SDM, Kasimabad only on 29.6.2022, an order dated 14.7.20122 has been issued by him to the effect that as the case is pending before the Civil Court and further that with respect to the map correction is pending before the Additional District Magistrate (LR), both the contesting parties should maintain the status quo on the spot and may not raise any new constructions on the spot. Both the parties, however, started quarreling on the spot and as such a challani report under section 151, 107, 116 Cr.P.C. has been submitted. Both of the parties also lodged NCR on 17.7.2022 against each other. The officer now posted as the sub-division officer, however, showed his ignorance about the previous action taken in the matter.

24. The specific query of this Court in the order dated 20.7.2022 seeking explanation from the DM and SDM as to how they entered into private dispute relating to immovable property remained unanswered in the affidavit of both the officers.

25. From the aforesaid conspectus of the fact, it is evident that the situation of law and order that has arisen on the spot due to the dispute involving immovable property belonging to private individuals could have been easily avoided, had the respondent authorities observed restrained and guided themselves by the orders passed by this Court as well as the Government Orders.

26. In our Constitution, there is clear separation of judicial and executive powers. The civil disputes are to be decided by the Civil Court and unsuccessful litigant has a right to file an appeal. The Administrative Officials cannot enter into any such dispute in exercise of the power conferred on them under the provisions of Cr.P.C. and the Revenue Code to fill in the gap and pass executive orders which explicitly belongs to the realms of Civil Court or the revenue court respectively. The due process of law has to be followed in all respect and the executive authorities are not supposed to usurp the the power bestowed on the civil / revenue courts as it would not only be exercise of excessive jurisdiction not permissible under law but would also lead to overlapping jurisdiction which is against the tenets of the basic structure of our Constitution.

27. The present case is a glaring example of encroaching and over reaching the realm of the Civil Court on the part of the respondent-authorities. Although the respondent no. 2 has taken a stand that he was not aware of the pendency of the civil appeal, but the action of the respondent no. 2 even after submission of the reports by the revenue officials does not seem convincing to this Court from any angle. The authorities concerned ought not to have exercised administrative power for entering into the disputed property and issue order for delivery of possession etc against one or the other party. This

primarily should be left to the competent court of civil jurisdiction.

28. The very issuance of advisory by the Government of UP dated 3.8.2022 vide No. 1291/EK-2022/9-RA-9 pursuant to the Government order dated 16.10.2015 is evident of the fact that even the Government of UP is not oblivious to the exercise of excessive administrative powers by the execution in civil dispute relating to immovable properties between private individuals. It is high time that the said advisory acts like yet another reminder to all the executive authorities to desist from taking any action in a dispute relating to immovable properties of private persons and especially when the matter is pending in a civil court as in the present case.

29. Having noted the effort of the Government of UP in issuing the aforesaid advisory, this Court further expects that the Government should also prescribe consequential effect against the erring officers and provide for remedial steps by framing high level committee of senior officers at the Government level, which should include the Revenue Secretary so that not only accountability can be fixed but a redressal forum be available to the victims and this Court is not flooded with similar kinds of litigations in future.

30. For all above reasons, we are inclined to allow this writ petition. This court without expressing any view on the merits of the dispute pending before the competent courts and in the peculiar facts and circumstances of the present case directs the District Magistrate, Ghazipur and the SDM, Tehsil - Kasimabad, District - Ghazipur to ensure that the parties are restored possession as was existed prior to 11.6.2022 in order to bring them to their original position. Needless to say that such arrangement shall be subject to the out come of the civil appeal and other litigations pending between the petitioner and respondent no. 7. We clarify that we have not expressed anything on the merit of the contention of the parties, which may be permissible to the parties as per law and as such we did not find any reason to issue notice to respondent no. 7 before passing this order.

31. Further, before parting with this judgment, this Court issues strict warning to the respondent no. 2 the officer posted as the District Magistrate, Ghazipur for trying to mislead this Court, to refrain from repeating any such mistake in future. We call upon the departmental head to issue a Warning to the District Magistrate, Ghazipur to be kept in his service record. A Warning be also issued to all such erring officials, to be circulated widely, so that they shall desist from repeating such acts in future and that any such repetitive act must entail disciplinary action against them as per the Rules.

32. With the aforesaid observations and directions, the writ petition stands disposed of.

33. No order as to cost.

(2022) 10 ILRA 147
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Writ-C No. 20156 of 2022

Kiran Pal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Pushkar Mehrotra, Ashish Kumar Singh

Counsel for the Respondents:
C.S.C., Anjali Upadhya, Kaushalendra Nath Singh

A. UP Industrial Area Development Act, 1976 – Sections 2(d), 9 & 10 – Unauthorized construction over the land notified under the Act – Demolition order passed – Validity challenged – No permission u/s 9 was taken from the Authority – No evidence to proof the construction being old was produced – No evidence of allotment was given – Effect – Held, the subject land being flood plain zone of river Yamuna, the constructions raised by the petitioners are illegal and unauthorized and are liable to be demolished – However, the High Court clarified that the petitioners are free to get their rights adjudicated in appropriate proceedings. (Para 9, 12 and 13)

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Ashish Kumar Singh for the petitioners, learned standing counsel for respondents no.1 & 4 and Mrs. Anjali Upadhya for respondents 2 & 3.

2. The petitioners have prayed for quashing of an order dated 13.5.2022 passed by respondent no.1 i.e. Chief Executive Officer, NOIDA, Gautam Budh Nagar. By the said order, the representation filed by the petitioners in response to a notice dated 20.12.2021 issued by respondent no.2 (NOIDA) has been decided in compliance of order dated 28.1.2022 passed by this Court in Writ-C No.692 of 2022. The objection of the petitioners has been rejected and it has been held that the constructions raised by the petitioners over Khasra No.734 are illegal and unauthorised and are therefore liable to be demolished.

3. In brief, the facts necessary for disposal of the instant petition are that a demolition notice was issued to the petitioners on 20.12.2021 by respondents no.3 and 4 mentioning that Khasra No.734 is land notified as 'industrial development area' under Section 2 (d) of the U.P. Industrial Area Development Act, 1976. It is flood plain zone of river Yamuna and whereupon the petitioners were found raising illegal constructions. The notice makes reference to Section 10 of the Act and directs the petitioners to forthwith stop further development and remove the constructions made so far, failing which, the same will be demolished by the Authority and the expenses incurred in this behalf shall be recovered from the petitioners as arrears of land revenue. The notice further mentions that in case the petitioners have any sanctioned plan or rely on any other document, it shall be open to them to file their reply within fifteen days, failing which, it will be assumed that the petitioners have nothing to say in the matter.

4. The petitioners being aggrieved by the said notice approached this Court by way of Writ-C No.692 of 2022 contending that the constructions are old and were made prior to constitution of the NOIDA Authority in the year 1976. It was also the case of the petitioners that they had already replied to the demolition notice, but without deciding the same, the NOIDA Authority was threatening to demolish the constructions. The writ petition was disposed of by an order dated 28.1.2022

with direction to respondent no.2 to pass a reasoned order, taking into consideration the objections filed by the petitioners. It is in compliance of the said direction that the impugned order has now been passed.

5. The impugned order records as follows:-

(a) Plot No.734 is notified as 'industrial development area' and is flood plain zone of river Yamuna.

(b) The notification of the village in which Khasra No.734 lies as industrial development area under Section 2 (d) of the Act, was issued on 11.07.1989. No development work in any area notified under Section 2 (d) can be undertaken without the permission of NOIDA Authority.

(c) The State Government had issued a Government Order dated 16.3.2010 directing that all unauthorized constructions in flood plain zone be removed forthwith.

(d) Tehsildar, Dadari in his report dated 20.4.2022 has mentioned that Khasra No.734 is recorded as banjar in khatauni of 1427 - 1432 fasali. There is no evidence of the said plot being allotted for agricultural purposes.

(e) Since Khasra No.734 is notified as 'industrial development area' and is flood plain zone, therefore, the constructions raised by the petitioners without approval of NOIDA Authority are in clear violation of Section 2 (d) read with Section 10 of the Act.

6. On 21.07.2022, the following order was passed:-

"Supplementary affidavit filed today is taken on record.

It is submitted by Sri Kaushalendra Nath Singh, learned counsel appearing on behalf of Noida Authority that except for a bald plea that constructions were old and raised prior to the area being declared as notified area no evidence in this behalf was led by the petitioners. This was despite the fact that notice specifically mentioned that the petitioners were found raising new constructions without obtaining any permission from the authority.

Sri Ashish Kumar Singh, learned counsel for the petitioners seeks time to ascertain whether any evidence was filed by the petitioners before the respondent authority to show that the constructions were old constructions, raised before the area was declared as notified area under the provisions of U.P. Industrial Area Development Act, 1976.

List as fresh on 25.07.2022."

7. In compliance of the above order, a supplementary affidavit has been filed in which it is admitted that the petitioners are not having any electricity connection over the premises in question. It is stated that the property is in shape of a Gher and is being used as such. It is also admitted that the property is situated near the river embankment and for this reason, no electricity connection has been provided. No evidence has been filed alongwith the supplementary affidavit to show the extent of constructions or that they were old constructions.

8. It is not disputed before us that after an area has been notified as industrial development area, the occupier thereof is not entitled to raise constructions over it without obtaining permission from the Authority. This is in view of the mandate of Section 9 which stipulates that- no person shall erect or occupy any building in any industrial development area in contravention of any building regulations made under sub-section (2). Regulation 4 of the New Okhala Industrial

Development Area Building Regulation, 2010 provides that no person shall erect any building or a boundary wall or fencing without obtaining a prior permission thereof from the Chief Executive Officer or an officer authorised by the Chief Executive Officer for this purpose. Regulation 5 stipulates that any person who intends to erect a building within the industrial development area shall give application in the Form given at Appendix-1 and subject to compliance of the provisions laid down under the Regulations, permission shall be granted/refused. Regulation 20.3 stipulates that in case of unauthorized development, the Chief Executive Officer or an officer authorized by the Chief Executive Officer shall take suitable action which may include demolition of unauthorized work, sealing of premises, prosecution and criminal proceedings against the offenders in pursuance of relevant Acts in force.

9. Before this Court, the petitioners have only raised plea of constructions being old, but no such evidence was filed before the Authority nor even before this Court.

10. Sri Ashish Kumar Singh, learned counsel for the petitioners fairly admits that there is no evidence with the petitioners to show that the constructions were raised before the area was notified as industrial development area so as to take the same outside the clutches of the Building Regulations framed by the Authority. He, however, submitted that the observation in the impugned order that Khasra No.734 is recorded as banjar and there is no evidence of settlement of the said land with any person, is an incorrect observation.

11. Mrs. Anjali Upadhya, learned counsel appearing on behalf of NOIDA Authority submitted that the observation is based on a report of Tehsildar, Dadari. It is a mere passing observation and the dispute relating to right, title or interest in the subject land was not decided by the Authority.

12. We find considerable force in her submission. The observation made in the impugned order in respect of subject land being recorded as banjar land and there being no evidence of allotment thereof in favour of any person is not an adjudication made by the Authority qua the rights of the petitioners in the subject land. We therefore clarify that the petitioners are free to get their rights adjudicated in this behalf in appropriate proceedings and wherein the above observation will have no adverse effect.

13. However, as noted above, since the petitioners have failed to prove that the constructions over the subject land were old or were raised prior to the area being declared as Industrial Development Area and also in view of the admitted fact that the subject land is flood plain zone of river Yamuna, we find no illegality in the impugned order in so far as it holds that the constructions raised by the petitioners are illegal and unauthorized and are liable to be demolished.

14. The petition lacks merit and is dismissed subject to the above clarification.

(2022) 10 ILRA 150
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.10.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 22593 of 2021

C/M, Sohan Lal Balika Inter College ...Petitioner

Versus

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

Counsel for the Petitioner:
Om Prakash Mani Tripathi

Counsel for the Respondents:
C.S.C.

A. UP Intermediate Education Act, 1921 – Ch. III – Reg. 101 to 104 – Post of Clerk – Selection and appointment – Prior approval of District Inspector of School, how far required before initiating selection – Held, no prior approval is required for initiating the selection process, however, prior approval is required before issuance of any appointment letter – Impugned order passed on the analogy that prior approval for the selection was not taken was held contrary to the judgments of this Court. (Para 13 and 14)

Writ petition disposed off. (E-1)

List of Cases cited:-

1. Jagdish Singh Vs St. of U.P. & ors.; (2006) 2 UPLBEC 1851

2. Abhishek Tripathi Vs St. of U.P.; (2015) 2 UPLBEC 1272

3. Preet Kumar Srivastava Vs St. of U.P. & ors.; 2011 (9) ADJ 591

4. Deepak Kumar Singh Vs St. of U.P. & ors.; MANU/UP/1820/2019

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Om Prakash Mani Tripathi, learned Counsel for the petitioner and Sri Savitra Vardhan Singh, learned Additional Chief Standing Counsel.

2. The present petition has been filed challenging the order dated 07.07.2021 passed by the Director, Secondary Education, Uttar Pradesh, Lucknow whereby the request of the petitioner's institution for granting approval to the selection made on Class-III post has been rejected as well as the order dated 07.10.2021 passed on similar grounds by the respondent no.2.

3. The averments in brief are that the petitioner Society is running an institution in the name of *Sohan Lal Balika Inter College* and is managing the affairs of the institution. On 31.07.2020, the regular clerk posted in the institution was retired, as a result whereof, a vacancy accrued on 01.08.2020.

4. As the institution was suffering on account of the vacancy, a request was made on 07.08.2020 to the Director, Secondary Education through the District Inspector of Schools informing that the clerk working in the institution has retired and one post of clerk sanctioned for the College is laying vacant since 01.08.2020, as such, permission may be granted to fill up the vacant post through direct recruitment. Thereafter, the District Inspector of Schools communicated the request of the petitioner to the Director, Secondary Education giving reference to the request made by the petitioner. The said letter is contained in Annexure-3 to the writ petition.

5. It is stated that despite the request, no orders were being passed, as such, the petitioner approached this Court by filing a Writ Petition No.21223 (MS) of 2020 seeking a direction upon the respondents to decide the application of the petitioner for making the selection. The said writ petition was disposed off vide order dated 19.11.2020 directing the respondent no.2 therein to consider and decide the application of the petitioner by speaking order within six weeks. It is argued that despite the said directions, no decision was taken within six weeks, as such, the

Managing Committee once again sent a reminder on 30.01.2021 with a request to take a decision.

6. As no decision was being taken despite the directions, the Committee of Management constituted a Committee for selection of a candidate to the post of Junior Clerk and issued an advertisement in the newspaper, namely Swatantra Chetna on 05.02.2021 (Annexure-7). The Committee took interview of the eligible candidates and on the basis of the quality points selected one Mr. Vibhanshu Maurya for being appointed on the Class-III posts. A resolution to that effect was passed on 29.04.2021. The process of selection was intimated to the District Inspector of School-II, Lucknow on 27.05.2021, however, it is stated that he refused to accept the documents, as such, the same was sent through registered post which was received back with the remark "refused to receive".

7. As no action was being taken for approval of the selection made by the Committee, another writ petition was filed by the petitioner being Writ Petition No.13593 (MS) of 2021 which was disposed off vide order dated 06.07.2021 by this Court directing the respondents to take a decision within a period of one months. However, on the very next day, an order came to be passed which is contained as Annexure-1 to the writ petition, stating that the said order was being passed in compliance of the earlier directions given by this Court vide order dated 19.11.2020. By means of the said order which is impugned in the writ petition, the Director, Secondary Education proceeded to reject the request of the petitioner on various grounds.

8. A perusal of the order impugned (Annexure-1) reveals that the District Inspector of Schools found that two posts were vacant in Class-III category (The Counsel for the petitioner states that the same has been wrongly recorded and was rightly held to be one post in the subsequent order dated 07.10.2021 which is also impugned). The order further records that process of selection undertaken was contrary to the mandate of the High Court in its judgment dated 19.11.2020. It further records that the District Inspector of Schools, Lucknow in his report has stated that the selection of Vibhanshu Maurya has been done without any prior approval, as such, it is improper to approve the said selection. It further records that a ban has been imposed by the State Government on 30.10.2019 in respect of 26 colleges. It also places reliance on another Government Order dated 19.01.2021 which relates to the colleges except 26 colleges mentioned in the Government Order dated 30.10.2019 and thereafter concluded that for the reasons as disclosed, it would not be proper to grant approval as sought by the petitioner. Subsequently, another order came to be passed on 07.10.2021 (Annexure-15 added through an amendment) which was also challenged through an amendment application. In the order dated 07.10.2021, while deciding the representation of the petitioner as directed by this Court vide order dated 06.07.2021, it was observed that there was one post of Class-III was vacant in the petitioner's institution. It further records that although no procedure for filling the vacancy is specified, as such, any selection may result in nepotism in the process of selection. It also places reference to the Government Order dated 26.04.2014 and holds that any selection made without any prior approval, could not be entitled for salary from the State exchequer. The said two orders are under challenge.

9. The Counsel for the petitioner argues that Regulation 101 in Chapter III of The Uttar Pradesh Intermediate Education Act, 1921 confers power of appointment subject to approval by the District Inspector of Schools. He argues that the scope of Regulations 101 to 104 came up for interpretation before this Court in the case of ***Jagdish Singh vs State of U.P. and others; (2006) 2 UPLBEC 1851*** wherein the Division Bench of this Court was of the view that prior approval contemplated under Regulation 101 is required after the process of selection and before the issuance of the appointment letter to the selected candidate. He further places reliance on the judgment of this Court in the case of ***Abhishek Tripathi vs State of U.P.; (2015) 2 UPLBEC 1272*** wherein this Court following the earlier judgment rendered in the case of ***Preet Kumar Srivastava vs State of U.P. and others; 2011 (9) ADJ 591*** as well as *Jagdish Singh (Supra)* has held that necessity for prior approval would arise only subsequent to the selection and prior to issuance of the appointment letter.

10. In the light of the said two judgments, learned Counsel for the petitioner argues that the orders impugned are bad in law, inasmuch as, it refused the approval for selection which is contrary and in the teeth of the aforesaid two judgments of this Court. He further argues that mention of the Government Order restraining the appointment in 26 colleges would not apply to the case of the petitioner, inasmuch as, the name of the petitioner 's College does not find mention in the list of the said 26 colleges. He argues that the Director, Secondary Education ought to have applied his mind with regard to the manner in which the selection was made which does not exist in the said impugned order and thus, the same are bad in law. He further argues that as the selection has already been done and the person is working, a direction is liable to be issued for payment of salary. In support of that he places reliance on the judgment of this Court in the case of *Sunil Kumar vs State of U.P. and others* (Service Single No.2341 of 2010) decided on 03.12.2018.

11. Sri Savitra Vardhan Singh, learned Additional Chief Standing Counsel appears on behalf of the State has tried to justify the orders impugned on the strength of judgment of this Court in the case of *Deepak Kumar Singh vs State of U.P. and others; MANU/UP/1820/2019.*

12. A perusal of the said judgment makes it clear that this court while deciding the issue considered the earlier judgment of this court in the case of *Jagdish Singh (Supra)* and held that the member of the Committee of Management cannot issue an appointment letter or permit joining of a candidate without there being a prior approval.

13. Considering the submissions made at the bar, in the present case, there is no dispute that one substantive vacancy existed in the institution in question, the Committee of Management has made selection without there being prior approval and after completing the selection process issued letter to the selected candidate and in view of the law laid down by this Court in the case of *Jagdish Singh (Supra)* followed in the cases of *Preet Kumar Srivastava (Supra)* and *Abhishek Tripathi (Supra),* it is clearly settled that no prior approval is required for initiating the selection process, however, prior approval is required before issuance of any appointment letter.

14. From the perusal of the orders impugned, it reflect that there is no

application of mind in respect of the selection made by the petitioner. The respondents have proceeded to pass the order on the analogy that prior approval for the selection was not taken which stand is contrary to the judgments of this Court as referred above. The other ground that the action of the petitioner was contrary to the order of this court passed on 19.11.2020 also merits rejection, inasmuch as, this Court while passing the order dated 19.11.2020 had simply directed the respondents to take a decision in terms of the request made by the petitioner within six weeks, which the respondents did not do. The other reasoning mentioned in the impugned orders that in terms of the Government Order, there was a bar for making appointment in respect of the 26 colleges also does not find favour of this court in view of the fact that the petitioner Institution is not named in the list of the 26 colleges as referred to in the Government Order, thus for all the reasons recorded above and in the light of the judgments of this Court rendered in the case of *Jagdish Singh (Supra)* followed in the cases of *Preet Kumar Srivastava (Supra)* and *Abhishek Tripathi (Supra),* the orders impugned dated 07.07.2021 and 07.10.2021 are set aside.

15. The matter is relegated to the Director, Secondary Education for passing a fresh order after considering the observations made hereinabove and the law laid down by this Court in the case of *Jagdish Singh (Supra)* followed in the cases of *Preet Kumar Srivastava (Supra)* and *Abhishek Tripathi (Supra).*

16. The Director, Secondary Education shall take decision with all expeditions preferably within a period of two months from the date of production of certified copy of this order.

17. The Director shall take decision in terms of regulations and shall pass orders on the request of the petitioner to grant of approval for selection on the Class-III posts.

18. It is made clear that the question of the petitioner not taking prior approval before the selection process shall not be a ground for passing the orders as directed above.

19. So far as the prayer of the petitioner for granting approval with all consequential benefits cannot be accepted in terms of the orders passed by this Court, inasmuch as, the law is well settled that before issuance of appointment letter and permitting a person to join, prior approval is necessary. The entitlement of salary to the selected candidate shall be subject to the outcome of the fresh order to be passed by the Director as directed hereinabove.

20. For the reasons recorded above, the writ petition is ***disposed off.***

(2022) 10 ILRA 154
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

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

Writ-C No. 50437 of 2011

U.P.S.R.T.C., Azamgarh & Anr.
...Petitioners
Versus
Labour Court, U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ajit Kumar Singh, Sri S.M. Mishra, Sri Sunil Kumar Misra

Counsel for the Respondents:

C.S.C., Sri J.P. Singh, Sri Samir Sharma, Sri Sandeep Kumar Rai

A. UP Industrial Disputes Act, 1947 – Section 6(2-A) – Termination of workmen – Domestic enquiry – Claimed to be illegal and unfair – Burden of proof, on whom lie – Held, the domestic inquiry is one that is held in violation of principles of natural justice or the conclusions are not *bona fide* or the inquiry is unfair, lies on the workman, not on the employers – Labour Court committed a manifest and patent error of law in proceeding to hold the inquiry unfair by requiring the employers to establish that it was fair, just and *bona fide*. (Para 17 and 19)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi Vs Their Workmen represented by District Secretary, (2019) 18 SCC 814

2. Uco Bank Vs The Presiding Officer & anr., 1999 SCC OnLine Del 657

3. Cooper Engineering Limited Vs Shri P.P. Mundhe, (1975) 2 SCC 661

4. Karnataka St. Road Transport Corporation Vs Lakshmidevamma (Smt.) & anr., (2001) 5 SCC 433

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

1. This writ petition is directed against the judgment and award passed by the Presiding Officer, Labour Court, U.P., Lucknow in Adjudication Case No. 170 of 2007 dated 18th March, 2010, published on 3rd March, 2011.

2. Ganga Rai, respondent no.2 to this petition, was employed as a driver with the Uttar Pradesh State Road Transport Corporation in the year 1979. Ganga Rai shall hereinafter be referred to as 'the workman'. The two petitioners here, who are substantially one and the same, that is to say, the Uttar Pradesh State Road Transport Corporation, represented by their General Manager for the Azamgarh Region, Azamgarh, shall hereinafter be called 'the employers'.

3. Shorn of unnecessary details, the workman was placed under suspension pending inquiry by the employers on 09.12.1987. Two charge-sheets, carrying distinct charges, were issued to the workman by the employers, one dated 20.11.1987 and the other dated 01.01.1988. He was required to file his reply to the charge-sheets within the time specified. An Inquiry Officer was appointed to inquire into the charges and submit a report. It is common ground between parties that the workman participated in the ensuing inquiry. The workman was exonerated of the charges carried in the charge-sheet dated 20.11.1987. However, of the three charges carried in the charge-sheet dated 01.01.1988, the workman was exonerated in regard to Charge No. 1, but held guilty on Charges Nos. 2 and 3.

4. The Assistant Regional Manager of the employers issued a show cause notice to the workman on 04.12.1989, to which the workman submitted his reply. The Assistant Regional Manager vide his order dated 31.03.1990 ordered the workman's removal from service and forfeiture of the balance of all emoluments for the period of suspension. A departmental appeal was preferred from the said order, which was rejected by the departmental appellate authority vide order dated 26.10.1990. This order was communicated to the workman on 22.01.1991.

5. The workman invoked the provisions of the Uttar Pradesh Industrial

Disputes Act, 1947 (for the short, 'the Act of 1947') claiming the termination of his services by the employers to be unlawful. The following reference was made by the Deputy Labour Commissioner, Gorakhpur vide order dated 08.04.1991 (translated into English from Hindi):

Whether termination of services of the workman, Sri Ganga Rai (Driver) son of Sri Suryabali Rai, by the employers on 31.03.1990 is just and/ or lawful? If not, to what relief is the concerned workman entitled and with what other benefits?

6. On the aforesaid reference, Adjudication Case No. 209 of 1991 was registered on the file of the Labour Court, Gorakhpur. Later on, by a Government Order dated 31.07.2007, the industrial dispute was transferred to the Labour Court, Lucknow. After registration of the case before the Labour Court at Lucknow, notice was issued to both parties, directing them to appear. The workman appeared and put in his written statement, where after detailing the course of proceedings, already extracted hereinabove, the workman pleaded that termination of his services was unlawful and unjust. It was also the workman's case that the Inquiry Officer was not apponted by the competent officer, empowered in this behalf. The workman was not afforded any opportunity to defend himself or produce evidence in his defence. The entire disciplinary proceedings were held in utter disregard of the principles of natural justice. It was pleaded on behalf of the workman that he had not done any such act, on account of which the employers would have sustained injury. It was pleaded that he was falsely implicated by and at the behest of some persons, harbouring personall ill-will and malice against him, who conspired to implicate him.

7. The employers in their written statement pleaded that the workman was suspended and charge-sheeted on various charges, which include refusing to operate the Delux Bus on its route on 23.11.1987, misbehaving with Pramod Kumar Mishra, Senior Clerk on 08.12.1987 and on the same day threatening the Assistant General Manager, R.N. Tiwari with death. It was in consequence of these charges that the workman was suspended from service on 09.12.1987, regarding which he was served with a charge-sheet dated 01.01.1988. On the workman's reply not being found satisfactory by the employers, an Inquiry Officer was appointed on 30.12.1988. The Inquiry Officer held inquiry after summoning both parties. The workman was given due opportunity to defend himself by the Inquiry Officer, who submitted his inquiry report on 16.05.1989. The rest of the averments are about the course of proceedings, leading to the order of removal, most of which have already been recounted. It was particularly pleaded in Paragraph No. 9 of the written statement filed on behalf of the employers that if the Labour Court is of opinion that there has been any flaw in holding the inquiry or that no inquiry has been held at all, the employers have the right to prove the charges against the workman before the Labour Court by leading necessary evidence. There is a prayer carried in the written statement that in case the Labour Court reaches conclusion about any flaw in the inquiry, the employers may be given opportunity to prove the charges before the Labour Court. There is pleading to the effect, albeit in words more ceremonial than substantial, that the order of reference is bad and that the Labour Court had no jurisdiction to decide any dispute beyond the terms of reference.

8. The Labour Court, after hearing parties on 25.08.1993, framed an issue

about the validity of the domestic inquiry to the effect whether the said inquiry was fair, lawful and bona fide. The Labour Court, by an order dated 08.04.1999, held that despite opportunity being afforded to the employers on the issue about the fairness of the domestic inquiry, they chose not lead any evidence or to prove any documents. It was held that the domestic inquiry was not fair and proper. The employers were, therefore, granted opportunity to lead evidence on 02.08.1999 in support of the charges before the Labour Court.

9. The Labour Court, after consideration of the evidence led by the employers, passed the impugned award holding the charges not proved by the evidence on record. The reference was answered in terms that the termination of services of the workman by the employers on 31.03.1990 was not lawful and proper. It was further directed that the workman was entitled to be reinstated in service with continuity. The workman was awarded 20% back-wages for the period of his disengagement. The Labour Court has also invoked its powers under Section 6(2-A) of the Act of 1947 in making the impugned award.

10. Heard Mr. S.M. Mishra, learned Counsel for the employers and Mr. Sandeep Kumar Rai, learned Counsel appearing for the workman.

11. It is argued by Mr. S.M. Mishra, learned Counsel for the employers that the Labour Court has concluded in manifest error that Pramod Kumar Mishra, who was a Senior Clerk, could not prove the charge of misbehaviour with him against the workman by his evidence adduced before the Labour Court. Likewise is the submission regarding the conclusions on the charge relating to misbehaviour with the Assistant Regional Manager. It is argued by Mr. Mishra that these two witnesses, no doubt the complainants, could not be disbelieved by the Labour Court for the reason alone that they were complainants with regard to the relative charges. It is also argued that the Labour Court committed a manifest illegality in relying upon the workman's testimony to disbelieve the employers' witnesses. The entitlement of the workman to receive back-wages has been scathingly criticized by Mr. Mishra with the submission that back-wages cannot be claimed as a matter of right, when the order of removal is set aside by the Labour Court. In this connection, he has drawn the attention of the Court to the decision of the Supreme Court in **Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi vs. Their Workmen represented by District Secretary, (2019) 18 SCC 814**. In **Management of Regional Chief Engineer, PHED (supra),** it was held:

10. In our considered opinion, the courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.

11. It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to

prove it otherwise against the employee, namely, that the employee was gainfully employed during the relevant period and hence not entitled to claim any back wages. Initial burden is, however, on the employee.

12. It is argued that it was a duty of the workman to prove that he was not gainfully employed during the period he was out of employment, which he has not done. It is submitted that this burden not being discharged by the workman, the award of 20% back-wages is bad in law.

13. Mr. Sandeep Kumar Rai, learned Counsel for the workman, on the other hand, submits that the workman had urged that he was not given opportunity by the Inquiry Officer and the inquiry was not fair. On the pleadings of parties, an issue was farmed, whereon it was held against the employers by the Labour Court on 08.04.1999. The employers were granted opportunity to lead evidence, which they did. It is submitted that the employers produced the two complainants alone as witnesses, whereas regarding the incident relative to the two charges, there were a number of named witnesses, such as Shiv Nath Singh, Shiv Badan Singh, Shri Prakash Mishra and Radhey Shyam Singh, none of whom were produced by the employers. The witnesses by their own evidence utterly failed to prove the charges, as held by the Labour Court.

14. It is further submitted that the Labour Court has considered the entire evidence and reached a plausible conclusion that the charges were not established by the testimony of the two witnesses produced on behalf of the employers. It is also argued that the employers acquiesced to the order of the Labour Court dated 08.04.1991, discarding the domestic inquiry as unfair and vitiated. The employers have led evidence before the Labour Court to prove the charges, which strengthens the case of acquiescence to the said order. At this stage, the employers cannot question the said order and can only say what they may in criticism of the Labour Court's award on merits relating to the charges, which the employers attempted to establish.

15. This Court has carefully considered the submissions advanced on behalf of both parties and perused the record.

16. This Court must remark that the order dated 08.04.1991, whereby the fairness of the inquiry has been held vitiated by the Labour Court, with a direction to the employers to produce evidence, is one that cannot stand scrutiny about its validity. The order dated 08.04.1999 reads (translated into English from Hindi):

"The employers have been given many opportunities to produce evidence, but they have not produce any evidence nor have they proved any document. I order that the domestic inquiry is not proper and fair and the employers are granted opportunity to adduce evidence in support of the charges on 02.08.1999."

17. The burden to prove that the domestic inquiry is one that is held in violation of principles of natural justice or the conclusions are not bona fide or the inquiry is unfair, lies on the workman; not the employers. The order passed by the Labour Court on 08.04.1999 to hold the inquiry vitiated places the burden on the wrong shoulder. By application of no principle or yardstick, could the employers

be required to prove by evidence that the inquiry held was fair, just and bona fide. It is presumed to be so unless the workman proves to the contrary.

18. The aforesaid principle is well elucidated by the following remarks of the **Delhi High Court in Uco Bank vs. The Presiding Officer and another, 1999 SCC OnLine Del 657:**

17. In the present case petitioner Bank has held the enquiry conducted against workman on the basis of which workman has been dismissed from service. It is the workman who has raised dispute against his dismissal. He has filed statement of claim contending that enquiry conducted against him is not proper and that there is violation of principles of natural justice. Therefore, normally it is for him to prove as to how enquiry conducted against him is illegal or invalid.

18. As stated above, this issue is to be treated as preliminary issue. Only if this preliminary issue is decided against the employer and it is held that the enquiry conducted is not valid, then the burden would shift and squarely lie upon the employer to show by adducing evidence on merits that the action taken against the workman was justified and for this Bank will have to lead evidence to establish that the charges levelled against the workman were proved. Insofar as question of validity of the enquiry is concerned, initial burden lies upon the workman to prove that the enquiry conducted against him was not fair or proper.

19. In the opinion of this Court, therefore, the Labour Court committed a manifest and patent error law in proceeding to hold the inquiry unfair by requiring the employers to establish that it was fair, just and *bona fide*. The consequential action of the Labour Court to require the employers to produce evidence and establish the charges would, therefore, be vitiated.

20. The next question, that arises, is whether the employers are entitled to question the order of the Labour Court dated 08.04.1999, holding the inquiry vitiated on ground that it is unfair and defective, while challenging the Labour Court's award passed after the adjudication case has reached conclusion. This issue is raised by the learned Counsel for the workman, relying on the principle of acquiescence to submit that once the order of the Labour Court, holding the inquiry unfair, has not been challenged when made, and to the contrary accepted by the employers by leading evidence in support of the charges before the Labour Court, they cannot turn around and question the validity of the order dated 08.04.1999, on the foot of which proceedings in the adjudication case have taken their course and reached a terminus in terms of the award. This submission, though attractive at the first blush, crumbles down in the face of authority to the contrary in **Cooper Engineering Limited v. Shri P.P. Mundhe, (1975) 2 SCC 661**, where it was held:

22. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary

issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the labour court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication.

21. In view of the holding in **Cooper Engineering Limited** (*supra*), there is no force in the submission of the learned Counsel for the workman that the employers are not entitled to question the validity of the order dated 08.04.1999 passed by the Labour Court at the early stages of proceedings, holding the inquiry to be unfair, later on while challenging the award. Once the order dated 08.04.1999, holding the inquiry to be unfair, is held to be vitiated, the subsequent proceedings before the Labour Court on the foot of the said order, are also bad. The first question, that the Labour Court has to determine, is whether the inquiry that has been questioned as unfair by the workman, is indeed unfair and defective. This has to be done by requiring the workman to affirmatively prove that it is so.

22. If the workman succeeds in establishing the inquiry to be unfair or the result of a fundamentally flawed procedure, it could be the end of the matter, subject to the employers' right to lead evidence before the Labour Court on the merits of the charges against the workman. Should the contingency arise before the Labour Court that the inquiry is found vitiated on the ground of it being unfair or defective, it would then have to be seen whether the employers have, at the appropriate stage, elected to exercise their right to lead evidence as aforesaid. How and at what stage the employers could exercise that right, has been the subject matter of consideration by the Constitution Bench of the Supreme Court in **Karnataka State Road Transport Corporation v. Lakshmidevamma (Smt.) and another, (2001) 5 SCC 433**. The guidance on the issue is clear and by high authority, which need not be recapitulated.

23. In the result, this petition succeeds and is **allowed in part**. The impugned award dated 18.03.2010, published on 03.03.2011 passed in Adjudication Case No. 170 of 2007 by the Presiding Officer, Labour Court, U.P., Lucknow, is hereby **quashed**. The adjudication case is restored to the file of the Labour Court with a direction to re-hear the matter in accordance with the guidance in this judgment and pass an award afresh answering the reference. The Labour Court shall decide the reference within a period of **six months** of the date of receipt of a copy of this order. There shall be no order as to costs.

24. Let a copy of this order be communicated to the Presiding Officer, Labour Court, U.P., Lucknow, or whichever be the Court now exercising that jurisdiction, by the Registrar (Compliance).

(2022) 10 ILRA 161
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.10.2022

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Misc. Writ Petition No. 7559 of 2022

Saroj Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Arvind Kumar

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 2(h), 173(2), 204, 313 & 482 - Indian Penal Code, 1860 – Sections 201 & 302 - Indian Evidence Act, 1872 - Section - 3: - Criminal Writ Petition – mandamus for commanding the investigating authority for conduction the 'Narco Analysis Test' or 'Lie Detector Test' so as to investigation may be lead to its right direction - court finds that, since, the materials collected through these test cannot be used as corroborative piece of evidence and Narco Analysis Test or Polygraph Test is not admissible in the Law - thus, no such mandamus can be issued - relief of the petitioner is rejected - However, if the investigating officer on his own decides to get the said tests he can do so subject to consent of the accused. (Para - 9, 10)

Writ Petition Disposed of. (E-11)

List of Cases cited:

1. Madhuri Devi Vs St. of U.P. & ors., Writ Petition No.7590 (MB) of 2015, judgment dated 15.11.2019

2. Ram Prasad Vs St. of U.P. & ors.; Writ Petition No.31348 (MB) of 2019

3. Louis Vs St. of Kerala & ors., Crl. MC No.4007 of 2021

4. Union of India & anr. Vs W.N. Chadha; 1993 Cr.L.J. 859

5. St. of Bihar v. J.A.C. Saldanha, 1967 (3) SCR 668

6. Ram Lal Narang versus St. (Delhi Administration), (1979)2 SCC 322

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

1. Heard Mr. Arvind Kumar, learned counsel for the petitioners and Mr. Badrul Hasan, learned Additional Government Advocate appearing on behalf of the State.

2. By means of the present petition the petitioners have sought the following reliefs:

"*(I) issue a writ order or direction in the nature of Mandamus commanding the opposite parties to take immediate positive decision on representation dated 12.09.2022 contained as Annexure no.1 to this writ petition by which petitioners are seeking utilization of modern scientific technique of ?brain mapping test? like ?NARCO? or ?lie detector test? upon the petitioners as well as complainant to lead the investigation in right direction and contract out the truth of case pertaining to F.I.R. no.86/2022 dated 04.03.2022, U/S 302, 201 I.P.C. Police Station-Mohd. Pur Khala, District Barabanki.*

(II) issue a writ order or direction in the nature of mandamus commanding opposite party no.-4 to obtain viscera analysis report from Forensic Scientfic Laboratory Lucknow pertaining case/ F.I.R.

no.86/2022 dated 04.03.2022, U/S 302, 201 I.P.C. Police Station-Mohd. Pur Khala, District Barabanki.

(III) issue a writ order or direction in the nature and manner which deemed just and proper in the circumstances of the case.

(IV) allow the writ petition with costs."

3. The petitioners are the accused in F.I.R. No.86 of 2022, under Sections 302, 201 I.P.C. Police Station Mohd. Pur Khala, District Barabanki. They have filed this petition seeking a writ of mandamus commanding the opposite parties to take immediate positive decision on representation dated 12.09.2022 annexed as Annexure No.1 to the petition by which the petitioners have sought utilization of modern scientific technique of ?brain mapping test? like ?NARCO? or ?lie detector test? upon petitioners as well as complainant to lead the investigation in right direction and to extract the truth of the case. Another relief has been sought in the nature of mandamus commanding opposite party no.4 to obtain viscera analysis report from Forensic Scientific Laboratory, Lucknow pertaining to the aforesaid case as viscera has been preserved.

4. Learned counsel for the petitioners has relied upon a judgment of this Court dated 21.08.2015 rendered in the case of ***Madhuri Devi Vs. State of U.P. and others; Writ Petition No.7590 (MB) of 2015***. He has also relied upon another judgment dated 15.11.2019 rendered in the case of ***Ram Prasad Vs. State of U.P. and others; Writ Petition No.31348 (MB) of 2019*** in support of his case.

5. On the other hand learned A.G.A. Mr. Badrul Hasan has placed before the Court a judgment of Single Judge Bench of the Kerala High Court in the case of ***Louis Vs. State of Kerala and others; Crl. MC No.4007 of 2021*** wherein a similar request at the behest of the accused was denied on the ground that such narco analysis test etc. are not admissible as evidence and also that the accused does not have any such enforceable right.

6. We specifically asked the learned counsel for the petitioners as to whether such tests as are referred in the relief clause i.e. narco or lie detector test or brain mapping test are admissible in evidence under the Indian Evidence Act or not, learned counsel for the petitioners fairly submitted that they are not admissible in evidence, however, they would help in giving direction to the investigation and to reveal the truth.

7. We have gone through the decision of a Coordinate Bench of this Court in the case of ***Madhuri Devi*** (supra). That was a writ petition filed by the informant seeking a writ of mandamus directing the investigating agency to take action against the accused, respondents 4 to 9 in the course of investigation of the case. In effect, the petition sought issuance of a writ directing the investigating agency to conduct proper investigation. In the said judgment the Coordinate Bench referred to a decision of Hon?ble the Supreme Court in the case of ***Union of India and another Vs. W.N. Chadha; 1993 Cr.L.J. 859***. In para 92 of the judgment it has been categorically observed that the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police

report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. The Court further observed that at the same time there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances. It also referred to other decisions specifically the decision of the Hon?ble Supreme Court in the case of ***State of Bihar v. J.A.C. Saldanha, 1967 (3) SCR 668*** wherein it was opined that the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation. In para 38 of the decision in the case of ***Madhuri Devi*** (supra) relevant extracts of the judgment in the case of ***W.N. Chadha*** (supra) have been considered. The Court has nevertheless observed that although an accused would have no right of hearing, however, a duty is cast on the investigating agency to conduct fair and impartial investigation. If the investigator receives relevant information in regard to the facts of a case under investigation, be it from the complainant informant, a witness or even the accused, a duty is cast on the said investigating officer to investigate that aspect. In case the investigation is select and one sided, the truth cannot be unearthed. If facts or some evidence/material is brought to the notice of the investigator, on consideration of which it can be demonstrated that the accused is not connected with commission of the crime, surely in such cases, the investigating agency would be obliged to investigate that aspect, in the interest of fair play and purity of administration of criminal justice. For this purpose, the information given by the accused cannot be ignored on the analogy that he has no right to be heard. The Coordinate Bench referred to decisions of Hon?ble Supreme Court in the case of ***Ram Lal Narang versus State (Delhi Administration), (1979)2 SCC 322*** wherein also it has been indicated that When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, it would be a duty of that agency to investigate the genuineness of the plea of alibi. In para 42 of the decision in the case of ***Madhuri Devi*** (supra) it has also been observed that in a case of mala fide implication of an accused if the investigating officer also considers the version of the accused in that context and takes into consideration the evidence/material then there would nothing be wrong in it. We are in agreement with the above view expressed by the Coordinate Bench, however, in the case at hand the facts are very different. Here it is not a case where some relevant facts as defined in the Indian Evidence Act is available and the same is not been taken into consideration by the Investigating Officer. In fact in this context we may like to refer to the definition of investigation as contained in Section 2 (h) of Cr.P.C. The said term is defined to include all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. Now, admittedly, the result of Narco test etc. would not be admissible as evidence as already noticed herein above. We may in this context refer to the decision relied upon by learned

Additional Government Advocate as rendered by a Single Judge Bench of the Kerala High Court in the case of ***Louis Vs. State of Kerala*** (supra) wherein the court had considered the definition of ?evidence? in Section 3 of the Indian Evidence Act and the definition of term ?fact? contained therein as also the submission of the Public Prosecutor that the said definition of fact provides that that only mental condition of which any person is conscious comes under the definition of fact. The Kerala High Court has thereafter opined in the abovesaid case which is extracted as under:

"18. So when a Narco Analysis test is conducted with the intervention of some medication, when a person is not conscious and make some revelations from the sub conscious mind the credibility of that revelation stands far short of the fact described under the Evidence Act. The possibility of some persons concocting fanciful stories in the course of hypnotic stage also cannot be ignored. The responses of different individual in such circumstances would vary the result of not having any uniform criteria for evaluating the efficacy of the Narco Analysis technique is a matter of another concern as per the dictum in the Selvi's case.

19. The possibility of the testimony being not voluntary even if the person freely consents to undergo the test also is there. The danger of the person not being able to exercise an effective choice of remaining silent and imparting personal knowledge is CRL.M.C.4007/21 also there since the results are derived from the psychological responses. Apex court also had foreseen the danger of such test being permitted at the instance of prosecution since on the principle of parity of procedure if the accused files such application that also has to be allowed. That would result in re opening of cases or even can be used for the purpose of attacking the credibility of witnesses during trial.

20. Hence even if the petitioner voluntarily submits for subjecting himself for Narco Analysis Test, there is no guarantee that the statements would be voluntary. So even if the court permits the petitioner to undergo a Narco Analysis test, it has no acceptability in the eye of law.

21. The learned counsel for the de facto complainant brought to my attention Vipin Kushwaha v. The State of M.P. in M.Cr.C.No.11699/2021 dated 6.9.2021 of Madhya Pradesh High Court. That was also a petition filed under Section 482 of the Code aggrieved by an order rejecting an application filed by the applicant seeking direction to perform his Narco Test. In that decision the High Court quoted Yogesh @ Charu Ananda Chandane v. State of Maharashtra, an order passed in M.Cr.C.No.11699/2021, petition No.2420/2016 wherein the High Court of Bombay rejected the similar prayer for Narco Analysis. The relevant paragraph No.7 has been quoted in the above CRL.M.C.4007/21 decision which reads thus : -

"In fact, the order passed by the learned Sessions Judge does not warrant any interference. That the evidence which is recorded in the course of the Narco Analysis Test or Polygraph Test is not admissible in evidence. It would be a hazardous situation to permit any/every accused to undergo narco analysis test for proving his innocence. It is incumbent upon the prosecution to substantiate its case and prove the guilt of the accused beyond reasonable doubt. Criminal Jurisprudence contemplates that an accused has a right to silence and it is the duty of the prosecution to prove its case beyond reasonable doubt.

The technique such as polygraph test and narco analysis test would be helpful technology for the investigating agency or to seek a direction in the course of investigation.

"We must also account for the uses of this technique by persons other than investigators and prosecutors. Narco Analysis tests could be requested by defendants who want to prove their innocence."

22. In the present case also, the petitioner wanted to subject himself to Narco Analysis Test which according to the learned counsel, is necessary to buttress his statements under Section 313 Cr.P.C. The above settled principles of law unequivocally lay down the position that the revelations brought out during Narco Analysis under the influence of a particular drug cannot be taken as a conscious act or statement given by a person. The possibility of accused himself making exculpatory statements to CRL.M.C.4007/21 support his defence also cannot be ruled out. There is no mechanism or the present Investigating Agency is also not equipped to assess the credibility of such revelations of the accused. The Investigating Officers also would find themselves difficult to come to a definite conclusion regarding the veracity of the revelations so made and the other evidence already collected by them. So the contention of the learned counsel for the petitioner that in order to buttress his statements under Section 313 Cr.P.C , these materials collected through Narco Analysis Test can be used as corroborative piece of evidence etc, is not at all sustainable in law.

23. In the result, Crl.M.C is found to be devoid of any merit and hence dismissed."

8. The evidenciary value of a narco analysis test has been considered threadbare and it has been recorded that revelations brought out during Narco Analysis under the influence of a particular drug cannot be taken as a conscious act or statement given by a person. The possibility of accused himself making exculpatory statements to support his defence also cannot be ruled out. There is no mechanism or the present Investigating Agency is also not equipped to assess the credibility of such revelations of the accused. The Investigating Officers also would find themselves difficult to come to a definite conclusion regarding the veracity of the revelations so made and the other evidence already collected by them.

9. The Court rejected the contention of learned counsel for the petitioner therein that in order to buttress his statements under Section 313 Cr.P.C, these materials collected through Narco Analysis Test can be used as corroborative piece of evidence etc. as not being sustainable in law. The Court clearly held that the Narco Analysis Test or Polygraph Test is not admissible in law.

10. We are also in agreement with the opinion expressed by the Kerala High Court considering the aforesaid discussions as the result of the brain mapping test or narco or lie detector test would not be admissible in evidence, therefore, we see no reason to issue any such mandamus for disposal of the petitioners/accused application for undertaking such exercise by the Investigating Officer. This of course does not mean that if the Investigating Officer on his own decides to get the said tests conducted then he cannot do so, meaning thereby that if he so decides he can always get the test conducted subject to consent of the accused.

11. So far as the judgment of a Coordinate Bench in the case of ***Ram Prasad*** (supra) is concerned the same does

not consider or lay down the law on the subject. It is only the ratio of a judgment which is binding and not its operative portion.

12. Now we proceed to consider the other relief prayed for regarding the viscera analysis report. We find from the postmortem report that though the cause of death mentioned therein is due to asphyxia as a result of ante mortem drowning however to rule out poisoning viscera for chemical examination has been preserved. Therefore as for as this relief is concerned the Investigating Officer shall consider this aspect of the matter as per law.

13. We accordingly reject the relief no.1 and dispose of the petition as far as relief no.2 is concerned with the aforesaid observations.

14. The petition is ***disposed of.***

15. No orders as to the costs.

(2022) 10 ILRA 166
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 931 of 1999
With
Criminal Appeal No. 1655 of 2007

Ganesh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri D.N.Wali, Sri Apul Misra, Sri D.R. Chaudhary, Sri Dharmendra Singh, Sri Dilip Kumar, Sri Ishwar Chandra Tyagi, Sri M D Mishra, Sri Noor Mohammad, Sri P.N.Misra, Sri R.B.Sharma, Sri Rajiv Gupta, Sri Rajrshi Gupta, Sri S.P.S. Raghav, Sri S.S. Giri, Sri Syed Shahnawaz Shah, Sri Manish Kumar Tripathi, Sri Ram Babu Sharma, Sri Devendra Singh, Sri Anil Raghav, Sri R.C. Pandey, Sri Santosh Kumar Singh

Counsel for the Respondent:
A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 147,148, 149, 302 & 307-Challenge to-Conviction-murder-no delay in FIR, time taken by the witnesses to lodge the FIR is justifiable as the incident took place in midnight and the distance of police station was 7 km. from the place of occurrence- death of the deceased persons were caused as a result of ante-mortem fire arm injuries as stated by PWs 1 to 4-The eye-witness account finds support with the medical evidence-Site plan and FSL report proves the place of occurrence- Witnesses had no enmity to implicate falsely to the appellant-the method, time and manner as deposed by the ocular witness PW1 to PW4 proves their presence on the spot-As a result, Witnesses testimony is wholly reliable and trustworthy-Thus, trial court rightly appreciated the evidence.(Para 1 to 65)

B. It is well settled that the evidence of interested or inimical witnesses is to be scrutinized with care but cannot be rejected merely on the ground of being a partisan evidence. if on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence. (Para 54)

The appeals are dismissed. (E-6)

List of Cases cited:

1. St. of H.P. Vs Jeet Singh (1999) 38 ACC 550 SC

2. Rameshwar & ors. Vs St. (2003) 46 ACC 581

3. St. of Har. Vs Sher Singh & ors. (1981) Cr. Ruling 317 SC

4. Brahm Swaroop & anr. Vs St. of U.P. (2011) 6 SCC 288

5. Dalip & ors. Vs St. of Punj.(1953) AIR SC 364

6. Masalti Vs St. of U.P.(1965) AIR SC 202

7. St. of U.P. Vs Naresh & ors.. (2011) 4 SCC 324

8. Bhajan Singh Vs St. of Har. (2011) 7 SCC 421

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

10. Kailas & ors. Vs St. of Mah. (2011) 1 SCC 793

11. Durbal Vs St. of U.P. (2011) 2 SCC 676

(Delivered by Hon'ble Subash Chandra Sharma, J.)

1. These criminal appeals emanate from the judgment and order dated 21.04.1999 passed by the learned Vth Additional Sessions Judge, Meerut in Sessions Trial No. 647 of 1997 (State Vs. Ganesh and others), S.T. No. 863 of 1997 (State Vs. Sriram), S.T. No. 1042 of 1997 (State Vs. Charan Singh), S.T. No. 1559 of 1997 (State Vs. Raju and others), arising out of Crime No. 08 of 1997, under Sections 147, 148, 149, 302, 307 IPC, Police Station Hashtinapur, District Meerut, whereby the appellants-Sriram, Ganesh, Rajveer s/o Harbans, Rajveer s/o Naththu, Shekhar, Pramod, Vijendra @ Banti and Rohtash, each have been convicted and sentenced under Section 148 IPC for three years rigorous imprisonment with fine of Rs. 1000/-, in default of payment of fine they have to undergo additional imprisonment for a period of six months; under Section 307/149 IPC for seven years rigorous imprisonment with fine of Rs. 5000/-, in default of payment of fine they have to undergo additional imprisonment for a period of two years and Section 302/149 IPC for life imprisonment with fine of Rs.10,000/-, in default of payment of fine they have to undergo additional imprisonment for a period of three years. All the punishments are to run concurrently. Accused Charan Singh, Raju and Pintu were acquitted of the charges.

2. During pendency of the appeal, appellant Ganesh had died, therefore, appeal on his behalf stood abated.

3. The prosecution case, in brief, is that on 17.1.1997 at about 3.10 a.m., an F.I.R. was lodged at the Police Station Hashtinapur, District Meerut by the informant Ved Prakash r/s Village Rustampur Bhikund, P.S. Hashtinapur, District Meerut by filing a *written report* stating therein that on 16/17.1.1997, in the mid night he along with his uncle Rohtash, Mauli, Narendra, Sanjay, Baleshwar residents of Bhikund were sleeping in their house. He and his uncle Rohtash were sleeping in the *varandan* where lantern was lit up. At about 12 o'clock in the mid night, near about one dozen people in the police attire equipped with weapons came to their house and woke up his uncle, asked him to get the door opened. The informant was told by his uncle Rohtash that that was the gang of dacoit Sriram resident of Kishunpur. He and his uncle Rohtash identified Sriram, Ganesh, Rajveer Jatav, Banti Jatav, Pramod, Shekhar, Rajveer s/o Natthu but remaining six persons could not be identified. As soon as the door was

opened, Sriram and Ganesh along with their other companions started firing on the sons of Rohtash, who were sleeping inside. Due to fear the informant hid himself in a nearby hut. When the assailants came out, the informant heard that Sriram was abusing to "Gurjars' and saying that he took revenge of *''Ikwara Kand'*. The accused person thereafter went to the baithaka of Kartar Singh and made fire while abusing the *''Gurgars'* and then went away towards the forest. The informant then went to his *Dukriya (room)* where he saw in the torch light that Rohtash and his son Baleshwar were lying injured and Narendra, Mauli and Sanjay sons of Rohtash were lying dead. In the meantime, Dhan Singh came there and told him that the gang of dacoit Sriram had murdered his cousin Kartar Singh and Babu as also his son Subhash. The informant went to the police station with his injured uncle Rohtash, brother Baleshwar and Dhan Singh on the same day at about 3.10 a.m. and filed the *written report*, on the basis of which the case was registered as Crime No. 08 of 1997 under Sections 147, 148, 149, 302/307 IPC. The detail of the case was entered into the G.D. as report No. 6 dated 17.01.1997.

4. The investigation of the case was handed over to the Station House Officer R.P. Gupta.

5. Investigating Officer along with S.I. Brij Mohan Singh Rana went to the place of occurrence where on the direction of the investigating officer, S.I. Brij Mohan Singh Rana conducted the inquest of the deceased persons and inquest reports were prepared by him along with other relevant papers required for the purpose of post-mortem. Dead bodies were sealed and handed over to constables Ravindra Singh and Jagpal who took them to the Mortuary. Injured Narendra was sent to the Medical College where he was declared dead and his inquest was conducted by S.I. A.K. Sharma and inquest report along with relevant papers was prepared, the dead body was sealed and sent to mortuary.

6. The post-mortems of the dead bodies of six deceased persons were conducted on 18.1.1997 by Dr. Ashok Kumar Yadav. The antemortem injuries found on the person of deceased Mauli are as under:

I. Gun shot wound entry 2 cm x 1 cm x muscle deep on front of left and upper arm, upper part connecting to wound of Exit 2 cm x 1 cm on the inner side of arm.

II- Gun shot wound of entry 2 cm x 2 cm x chest cavity on the front and outer side of left side chest. 2 cm. Medial to axillary fold connecting to wound of exit 2.1 cm x 1. 5 cm on back of right side chest lower part.

7. The antemortem injuries found on the person of the deceased Sanjay are as under:

I. Gun shot wound of entry 2 cm x 1.5 cm x brain cavity deep on left side head. 2 cm above the left ear blackening and tattooing present.

II. Gun shot wound exit 2.5 cm x 2 cm on the front right side neck 4 cm above the right clavicle bone medial and margin averted connecting to injury no. 1.

III- Gun shot wound of entry 2 cm x 1 cm x chest cavity deep on right side front and upper of chest 2 cm below the mid line joint of right clavicle connecting to wound of exit 3 cm x 3 cm on the outer aspect of right side chest 5 cm. Below axillary joint.

IV- Gun shot wound of entry 2 cm x 1.8 cm x abdomen cavity deep on back of right side abdomen lower part. 4

cm above iliac spine connecting to wound of exit. 4 cm x 4 cm on frontal abdominal upper part small and large intestine coming out.

V- Gun shot wound of entry 1.5 cm x 1 cm x muscle deep on the outer and back aspect left forearm lower part connecting to wound of exit. 2 cm x 2 cm on the inner aspect of left forearm.

8. The antemortem injuries found on the person of the deceased Babu are as under:

I. Gun shot wound entry 5 cm x 2 cm x brain cavity deep on front of nose. Blackening and tattooing present.

II. One metallic bullet recovered from brain cavity.

9. The antemortem injuries found on the person of the deceased Kartar Singh are as under:

I. Gun shot wound entry 8 cm x 8 cm x bone deep on the right side face underneath fracture of maxilla mandible bone.

II. Gun shot wound entry 3 cm x 1 cm x chest cavity deep on left site front of chest 5 cm above left nipple.

III. Gun shot wound 2 cm x 0.5 cm x muscle deep on the frontal right shoulder two metallic of pieces recovered from underneath muscle and chest.

10. The antemortem injuries found on the person of the deceased Narendra are as under:

I. Incised wound 10 cm x 5 cm x brain cavity deep on the right side head underneath bone cut brain matter.

II. Gun shot wound of entry 2 cm x 1 cm x muscle deep outer part of right shoulder.

III. Gun shot wound of exit 3 cm x 2 cm on back of right shoulder connecting to injury no. 1 margin everted.

11. The antemortem injuries found on the person of the deceased Subhash are as under:

I. Gun shot wound entry 2 cm x 1.5 cm x chest cavity deep on frontal right side chest. 4 cm away from right nipple at 3 o'clock position, one metallic bullet recovered from the chest.

12. S.I. B.N. Rana collected pieces of board, plain and blood stained soil, empty cartridges from the place of occurrence. After inspection of the place of occurrence, prepared the site plan and recorded statements of the witnesses conversant to the facts of the case. He arrested all the accused persons and submitted the charge sheets against Ganesh, Rajveer s/o Harbansh, Rajveer s/o Nathu, Shekhar, Pramod, Brijesh, Banti and Rohtash to the court concerned. Later on, the investigation was handed over to S.I. Rajendra Prasad Yadav who conducted the identification parade of accused Charan Singh, Raju and Pintu and collected evidence, filed the charge sheets against Sriram, Charan Singh, Raju and Pintoo in the court concerned.

13. Learned Chief Judicial Magistrate took cognizance of the offence and provided copies of the prosecution papers in compliance of Section 207 Cr.P.C. to the accused persons and committed the case to the Court of sessions for trial.

14. The trial court after taking into consideration the material on record, framed the charges under Sections 148, 302/149 and 307/149 IPC against all the accused/appellants.

15. Charges were read-over and explained to the accused/appellants who pleaded not guilty, denied the charges and demanded trial. Consequently, the case was fixed for prosecution evidence.

16. In support of its case, the prosecution examined P.W.1 Ved Prakash who is the first informant; P.W.2 Rohtash; P.W. 3 Baleshwar, P.W.4 Dhan Singh, P.W. 5 H.C. Buddh Raj Singh who prepared the check report; P.W. 6 Dr. Ashok Kumar Yadav who conducted the autopsy and prepared the postmortem reports; P.W. 7 S.I. Brijmohan Rana who conducted inquest of the deceased persons and prepared inquest reports and other relevant papers; P.W. 8 constable Ravindar Singh who brought the dead bodies to the mortuary for post-mortem; P.W. 9 Mitthan Lal Jain who conducted identification parade; P.W. 10 Inspector R.P. Gupta who investigated the case and submitted charge sheet; P.W. 11 Adesh Dhankar who operated the injured Baleshwar and P.W. 12 Rajesh Prasad Yadav who conducted the investigation of the case after inspector R.P. Gupta and submitted the charge sheets.

17. On conclusion of the prosecution evidence, statements of the appellants were recorded under Section 313 Cr.P.C. wherein they had denied all the allegations made against them.

18. The defence opportunity was given to the accused persons but no evidence was adduced.

19. The learned trial court passed the order dated 21.4.1999 convicting and sentencing the appellants as aforesaid, hence this appeal.

20. Heard Sri Dharmendra Singh and Sri Akhilesh Kumar Mishra, learned Advocates for the appellants, Sri Dharmendra Singh, learned Amicus Curiae appearing on behalf of appellant Sri Ram and learned A.G.A. for the State and perused the record.

21. Learned counsel for the appellants submits that learned trial court had not made proper appreciation of evidence on record but passed the judgment and order against the established principles of law. There was no motive with the accused persons, to commit murder of the deceased persons. The incident took place in the mid of the night when identification of accused persons was not possible. There was no source of light. All the prosecution witnesses could not identify the accused but they have deposed on the basis of hearsay. There are contradictions in the statements of Prosecution Witnesses. No any public witness was present to see the incident except the relatives of the deceased whose testimony cannot be said to be reliable they being interested witnesses. Though Prosecution Witnesses had stated that accused persons had committed murder of deceased persons but no specific role had been assigned to any of the accused. In this way, the conviction as recorded by the learned trial court is not sustainable and it is to be set aside.

22. Learned A.G.A., in rebuttal, urged that though there was no personal enmity or motive with the accused against the deceased persons but there was communal rivalry between two gangs and that was the reason for the murder. At the time of incident, there was light of lantern and

lamp at the place of occurrence wherein accused persons were identified by the Witnesses, who had also sustained injuries in the same occurence. Accused persons were well identified by the Witnesses and the contradictions in the statements of witnesses are minor which do not affect their credibility. The Prosecution Witnesses are though relatives but they are natural witnesses and injured in the same occurence which fact prove their presence on the spot. In this way, the learned trial court has convicted the accused persons on the basis of the evidence on record and the decision cannot be said to be illegal but these appeals lack merit and are liable to be dismissed.

23. From the submissions made by the learned counsels for parties, the following questions emerge for consideration by this Court- (i) as to whether there was motive to commit murder of the deceased persons, (ii) source of light in which accused were identified, (iii) contradictions in the testimony of witnesses affecting the very root of the prosecution case and (iv) Prosecution Witnesses being relatives and interested are reliable.

24. Before we deal with the contentions of the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosecution.

25. P.W. 1 Ved Prakash who is informant, deposed that on the date of the incident, i.e. 16/17.1.1997 in the night, he was sleeping with his uncle Rohtash Singh in the *Varandah* where lantern was lit inside *Dukdiya* (a room) Mauli, Sanjay, Narendra, Baleshwar, Vijendra were sleeping. At about 12 o'clock, Sriram and his companions came there and woke up his uncle Rohtash and told him to get the door opened. His uncle then told the informant that accused were the members of Sriram gang and he knew them. They were 12-13 in number, out of which Sriram had rifle and others were equipped with countrymade pistols and rifles. Seeing them, the informant hid under the hut on the eastern side of the place. In the meantime, he heard the sound of firing and accused persons were abusing that they had taken the revenge of *"Ikwara Kand'*. Accused persons were carrying torches and went away. Thereafter, the informant came inside where members of his family were lying dead and lamp was lit. He saw in the light of the torch that Mauli, Sanjay and Narendra were lying dead and his uncle Rohtash, brother Baleshwar both were injured. Vijendra his cousin, ran away from the gate on the eastern side and accused persons went away towards the side of the river Ganga while abusing. Thereafter, Dhan Singh came there and told that Sriram Gang had killed his cousins Kartar Singh, Babu and his son Subhash and the incident took place in the room *(baithaka)* of Kartar Singh. Dhan Singh also disclosed the names of accused persons namely, Sriram, Rajveer, Ganesh, Banti, Rajveer s/o Natthu, Shekhar, Pramod. He along with Dhan Singh, injured Rohtash and Baleshwar went to the police station by tractor where he gave the *written report*. P.W.1 proved the *written report* in his handwriting and signature as Ext. Ka-1. P.W.1 further stated that police went to his village with him and seeing that Narendra was breathing, took him to the hospital. Police prepared the *memos* relating to torch, lantern & lamp and handed over to him after taking his signature on the memo which he proved as Exhibit- 1, 2 & 3.

This witness was cross-examined by the defence at length wherein he asserted the facts stated before. Nothing

adverse to the prosecution could come out in his cross-examination.

26. P.W. 2 Rohtash, an injured witness, deposed that there was dispute between Sriram Harijan and Karodi Gurjar wherein several people were murdered from both sides. On 5.1.1997, Karodi committed murder of six Harijans in the forest of *Ikwara*. On 16/17.1.1997, in the night at about 12 o'clock, He and his nephew Ved Prakash were sleeping in the *Varandah*. In the meantime, Sriram, Ganesh, Rajveer, Banti, Pramod, Shekhar, Rajveer s/o Natthu Alipur Morna Wala and 4-5 other persons to whom he knew came there. Sriram had rifle and other six persons had pistols. Lantern was lit where he was sleeping up in the light of which he had identified aforesaid seven persons. Sriram woke up him and asked to get the door of *dukdiya* opened at which he made a call to his sons. Those who were sleeping inside were named as, Mauli, Vijendra, Baleshwar, Narendra and Sanjay when the door was opened all the accused persons took P.W.2 also inside where they started firing causing injuries to Sanjay, Mauli and Narendra. He thought that all the three persons dead but Narendra did not die and Baleshwar also sustained fire arm injuries. Vijendra ran away and did not sustain any injury. P.W.2 himself also sustained fire arm injury on his hand which was caused from the distance of 2½ -3 feet. Thereafter, accused persons came out abusing Gurjar community. Sriram said that he took revenge of *Ikwara Kand* and the accused then went to the house of Kartar where they made fires causing injuries to Kartar, Babu and Subhash who had died on the spot from where Dhan Singh escaped and came to him and told about the incident. Later on the assailants went towards the Jungal. The report regarding the incident was lodged by his nephew Ved Prakash (P.W.1) then P.W.2 was brought by the police to Meerut for medical examination. Narendra whom he knew to be dead was also brought to Meerut by Dhan Singh for treatment where he had died as a result of fire arm injury in the Medical College, Meerut.

This witness was also subjected to lengthy cross-examination by the learned counsel for defence wherein he had asserted the facts stated before and no contradicting fact could be brought in his cross examination may affect the credibility of this witness.

27. P.W.3 Baleshwar deposed that prior to the alleged incident, gangs of Sriram and Khaleel of Bastaura were active. There was struggle between both the gangs and they committed murders of people from both sides. In the meantime, gang of Karodi became active and there were strained relations between Sriram and Karodi who had committed murders of six Harijans by cutting their throats on 5.1.1997. Sriram was shocked and on 16/17.1.1997, he along with his companions Ganesh, Rajveer, Pramod, Shekhar, Bhagwandas, bastaura ka Banti, Rohtas and Rajveer s/o Natthu came to their house. Four other persons who were with them were not known tohim. At that time, he,P.W.3. his elder brother Mauli, younger brother Narendra, youngest brother Sanjay were sleeping inside the room and Vijendra was also with them. His father Rohtash and cousin Ved Prakash were sleeping in the *Varandah* outside the room. At about 12 o'clock in the night, his father called him to open the door at which he opened the latch. As soon as he opened the latch, Sriram and his companions came inside the room and started firing. Vijendra ran away from the spot. Mauli, Sanjay and

Narendra were shot, out of which Sanjay, Mauli had died on the spot but Narendra was breathing. He (P.W.3.) himself sustained fire-arm injuries and fell down and while lying down he identified all the accused persons, who were wearing police dress. He (P.W.3) saw the accused persons in the light of lamp lit in the room, they were known to him from before as they used to visit in the village, from before. The houses of Harijans. He and his father sustained injuries in the incident, thereafter, gang of Sriram and his companion went to the house of Kartar which was situated at a distance of 15-20 steps from his house. P.W.3 classified that sounds of firing came from the house of Kartar Singh and on the basis of which he stated that Sriram and others went there. Kartar, Babu and Subhash s/o Dhan Singh were murdered but Dhan Singh escaped and came there and narrated the incident to his father. Thereafter he (P.W.3) was brought to Hashtinapur in unconscious state. He was brought to P.L. Sharma Hospital in a jeep of police from Hashtinapur and then Lokpriya Hospital where he was treated. He sustained fire arm injury on his temple, right shoulder and left thigh. Prior to this incident, Sriram used to meet the people belonging to Gurjar caste but since Karodi committed murder of Harijans, he became opposed to "Gurjar' caste.

This witness was also subjected to lengthy cross-examination but nothing adverse could be brought out. This witness categorically asserted the involvement of the appellants in the incident.

28. P.W. 4 Dhan Singh deposed that he lived in Hashtinapur. He was ordinary resident of Bhikund where his agricultural land was situated. On 16.1.1997 he, along with his son Subhash went to Bhikund for managing his agriculture field. Being late in the evening, he and his son stayed in the village at the Chaupal of his cousins Kartar Singh and Babu. He and Babu were lying asleep in *Varandah* and his son Subhash was sleeping inside the room behind the window. In the night at about 12.15 p.m., he woke up with the sounds of firing from the side of Rohtash, and heard the noise that we took revenge of *Ikwara Kand* and killed Gurjars. As he heard the noise, he hid himself in the room for buffalo and in the meantime, accused persons came near the cot of Kartar and Babu. There was lantern placed on the window in the light of which he had identified the accused persons as Rajveer, Ganesh, Rohtash, Sriram, Banti, Shekhar, Pramod and Rajveer. There were 4-5 other persons whom he could identify with face but they were not known to him from before. P.W.4 also identified the aforesaid named eight accused persons in the Court. P.W.4 stated that the accused persons made fires at Kartar, Babu, then at Subhash. All the three persons had died on the spot. He saw the accused persons while making fires at the deceased. The place where he was hiding the cots of Kartar and Babu were visible and also the place where Subhash was lying asleep as window into the door was fitted. Karodi Gurjar had committed *Ikwara Kand* prior to the present occurrence wherein Harijans (chamar) were killed and on account of which, the accused persons had attacked on them being "Gurjars'. The accused went towards the Jungle on the side of the river Ganga while abusing Gurjars. When the accused were going back, he threw light with his torch on which they cried that someone had been left and thereafter they fled away. He went to the house of Rohtash where he met the injured Rohtash who was weeping and saying that his three sons were killed and also he and his son Baleshwar

were injured. P.W.4 stated that he told Ved Prakash that the accused persons had also killed his son Subhash, cousins Kartar and Babu. Thereafter taking the injured Rohtash and Baleshwar in a tractor-Buggi they went to the police station Hashtinapur. On the way, he got off the tractor and went to inform his father and wife. His house was located at Ramleela Ground Hashtinapur. Information was given by Rohtash (P.W.2) at the police station and the report was given by Ved Prakash (P.W.2). After giving information in his house, P.W.3 again went back to the village Bhikund at about 4.30 o'clock. He further deposed that he went to the Jail, Meerut for identifying the accused persons in the identification parade and identified the accused namely Charan Singh and Raju. He saw them at the place of the occurrence and from then till the time of identification, he never saw those two accused persons. P.W.4 also identified accused Charan Singh in the court.

This witness was also subjected to lengthy cross-examination wherein he categorically reiterated the facts stated before.

29. P.W.5 H.C. Bachchhraj Singh deposed that he was posted as the head constable at the police station on 16.1.1997 and lodged the F.I.R. as Crime No. 08 of 1997 under Sections 147, 148, 149, 302, 307 IPC on the basis of the *written report*. He proved the check F.I.R. in his hand-writing and signature as Ext. Ka-3 and G.D. entry as Ext. Ka-4.

30. P.W. 6 Dr. Ashok Kumar Yadav who conducted the postmortem of dead bodies of the deceased persons deposed that on 18.1.1997, he was posted at Pyare Lal Sharma hospital, Meerut where he conducted the postmortem of deceased Mauli, Sanjay, Babu, Subhash, Kartar Singh, Narendra and prepared postmortem reports describing the injuries on their persons in his hand-writing and signature and proved them as Ext. Ka-5 to 10.

31. P.W. 7 Brij Mohan Rana deposed that, on 17.1.1997, he was posted at the police station Hashtinapur as S.I. and on that day, Crime No. 08 of 1997 under Sections 147, 148, 149, 302, 307 IPC was registered. The investigation of which was handed over to Station Officer R.P. Gupta with whom he also went to the place of occurrence and conducted inquest of the deceased persons on the direction of the Investigating Officer and also prepared the inquest reports and other relevant papers for postmortem in his hand-writing and signature which he proved as Ext. Ka-11 to 35. P.W.7 further deposed that the inquest of the deceased Narendra was conducted by S.I. A.K. Sharma who prepared the inquest report with relevant papers for postmortem, which he also proved as Ext. Ka-35 to 40 recognising the hand-writing of S.I. A.K. Singh. P.W.7 proved the recovery *memos* relating to the samples of cushion, blood stained and plain soil, empty cartridges, blood stained quilt, bedsheet taken from the place of occurrence as Ext. Ka-41-51 and also proved the sealed bundles of articles taken into possession from the place of occurrence as Material Ext. 1 to 28.

32. P.W. 8 Constable Ravindra Singh deposed that he was posted as constable at P.S. Hashtinapur on 17.1.1997 and he along with constable Jagpal was handed over the sealed dead bodies of the deceased persons to carry them for postmortem. He took the sealed dead bodies with papers for postmortem. After postmortem, he handed over the bodies to the members of their family.

33. P.W. 9 Mitthan Lal Jain, Special Executive Magistrate deposed that on 2.6.1997 he conducted the identification parade of accused Charan Singh in the

District Jail, Meerut and prepared identification memo in his hand-writing and signature as Ext. Ka-52. He further deposed that on 12.3.1997 he conducted the identification parade relating to the accused Pintu and Raju and prepared the identification memo in his hand-writing and signature which he proved as Ext. ka-53.

34. P.W.10 Inspector R.P. Gupta who investigated the case deposed that, on 17.1.1997, he was posted as the Station Officer at Police Station Hashtinapur. On that day, Crime No. 08 of 1997 under Sections 147, 148, 149, 302, 307 IPC was registered on the basis of the *written report* given rendered by the informant Ved Prakash and the investigation was handed over to him. During investigation, he visited the place of occurrence, after copying the report and F.I.R. in the case diary he recorded the statements of the informant and eye witness Dhan Singh, instructed S.I. V.M. Rana to conduct the inquest of the deceased persons. He also inspected the spot and prepared the site plan in his hand-writing and signature which he proved as Ext. Ka-54. P.W.10 further deposed that he also prepared the memo relating to lantern and torch in his hand-writing and signature which he proved as Ext. Ka-55. He made arrests of the accused persons and recorded statements of other witnesses relating to the incident and after concluding the investigation, submitted the charge sheet in his hand-writing and signature against accused Sriram, Ganesh, Rajveer s/o Harbans, Rajveer s/o Natthu, Shekhar, Pramod, Vijendra @ Banti and Rohtash which he proved as Ext. Ka-56. He also proved the test reports obtained from F.S.L. Agra as Ext. Ka-57 to 63.

35. P.W. 11 Dr. Adesh Dhankar deposed that he was posted as the Plastic Surgeon in Lokpriya Hospital on 17.1.1997. He conducted operation of injured Baleshwar and recovered a bullet from below his eye regarding which he had prepared the report in his hand-writing and signature and proved as Ext. Ka-64.

36. P.W. 12 S.I. Rajendra Prasad Yadav deposed that, on 17.1.1997, he was posted at P.S. Hashtinapur and Crime No. 8 of 1997 under Sections 147, 148, 149, 302, 307 IPC was investigated by Station Officer R.P. Gupta after whose transfer the investigation was handed over to him. He made arrests of the accused Sriram, Charan Singh and Raju and submitted charge sheets against them in his hand-writing and signature which he proved as Ext. Ka-65 to 67.

37. Now, we are required to consider the testimony of witnesses of fact as to whether they are reliable and trustworthy. P.Ws. 1 to 4 are witnesses of fact. P.W.1 Ved Prakash, P.W. 2 Rohtash and P.W.3 Baleshwar were lying asleep in one place, which was the house of Rohtash. All these witnesses were present on the spot at the time of the incident and saw the accused-appellants in the light of lantern and lamp which was lit up. There in the *varandah* and also the room where deceased Mauli, Sanjay and Narendra were sleeping with P.W. 3 Baleshwar, who also sustained gunshot injuries on his person. P.W.2 Rohtash also sustained injuries in the same occurence. P.W. 1 stated that the names of the accused appellants were disclosed to him by P.W.2 Rohtash who had identified them. P.W.3 Baleshwar also identified the accused-appellants on his own. P.W.4 Dhan Singh was lying asleep in the house of his cousins Kartar Singh and Babu where his deceased son Subhash were also asleep. The accused-appellants who by making

fires had killed three persons in the house of the deceased were identified by P.W.4 Dhan Singh in the light of lantern. The cause of murders was revenge of *Ikwara Kand* wherein six Harijans were done to death by cutting their throats by the gang of Karodi Gurjars who was opponent to Sri Ram gang, by causing six murders of Gurjars were killed in the present incident. P.W.1 and P.W.3 heard the appellants uttering the words at the time of occurrence that they took the revenge of *Ikwara Kand*.

38. Learned counsel for appellants argued that there are contradictions in the statements of the prosecution witnesses which make them unreliable. In this regard, it is to note that P.Ws. 1 to 4 have been subjected to lengthy cross-examination which was done in several parts and after a year from the incident wherein six persons were murdered. In such a situation, it cannot be expected from the witnesses that they would remember each and every event without any slip particularly where the witnesses are villagers and unaware to the tricks of wise counsels and their style of putting questions before them. In spite of this, all the witnesses had answered the questions as they remembered. Though there are some minor variations relating to some facts but those variations are not of such nature that can be said to make their testimony unbelievable. There appears to be no exaggeration in the statements of four witnesses they had narrated the incident in a natural way as it had happened. There is no contradiction or variation regarding identification of the accused persons involved in the incident. The contradictions and variations in the testimony of witnesses are natural and of cosmetic nature which cannot affect the very root of the case and, therefore, negligible. It is well settled in law that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission, to be given undue importance.

39. The learned counsel for the appellants also drew the attention of the Court towards the absence of personal motive to commit the murder. He urged that the prosecution had failed to prove motive on the part of the appellants to commit the crime.

40. In this regard, it is fairly well settled that while motive does not have major role to play in cases based on eye witness account of the incident, it assumes significance in cases that rest on circumstantial evidence. There is no such principle or rule of law that where the prosecution fails to prove motive for commission of the crime, it must necessarily result in acquittal of the accused. Where ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of crime has not been proved.

41. In ***State of Himachal Pradesh Vs. Jeet Singh 1999 (38) ACC 550 SC,*** it was held that no doubt it is a sound principle to remember that every criminal act was done with a motive but it's corollary is not that no offence was committed if the prosecution failed to prove the precise motive of the accused to commit it as it is almost an impossibility for the prosecution to unravel full dimension of the mental deposition of an offender towards the person whom he offended.

42. This Court has also made such observations in the case of ***Rameshwar and others vs. State 2003 (46) ACC 581*** that when there is direct evidence, the motive was not important. Likewise in the case of **State of Haryana vs. Sher Singh and others 1981 Cr. Ruling 317 SC** it has been held that the prosecution is not bound to prove the motive, more so, when crime is proved by direct evidence.

43. In the case at hand, it has been stated by the prosecution witnesses that there was rivalry between Sri Ram Gang and Karori Gurjar Gang. Karori Gurjar committed murder of six harijans by cutting their throats in *Ikwara* jungle which shocked Sri Ram and he also promised to take revenge. In pursuance thereto he committed six murders of six Gurjars in the present incident. The witnesses (P.W.1 and P.W.3) categorically stated that they heard the cries that the appellants took revenge of *Ikwara Kand*. In this way, there was communal rivalry which became the main cause of the commission of this massacre though there was no individual grudge with the deceased persons. Where there is communal rivalry, no one thinks about individual interest of others but to show their power or feeling of revenge, they commit such incident based on the particular community or caste. The present incidents was also committed by the accused persons with the view to take revenge for their community.

44. It has also been argued that the incident took place in the mid night and all the accused persons were equipped with firearms, therefore, it was not possible for the witnesses to identify them. In this regard, PW.1 and PW.2 have categorically stated that they were sleeping in the veranda where lantern was lit and PW.3 was sleeping in the room (Dukaria) where lamp was lit. In the light of lantern and lamp, the witnesses had identified the accused persons. PW.2 Rohtash was woken up by the accused persons and told to get the door opened. He called his sons who opened the door of the room from inside, where PW.3 Baleshwar was also sleeping with his other brothers. Since there was light of lantern and lamp and there was conversation between PW.2 with the assailants, therefore, PW.2 had sufficient opportunity for identifying the accused persons. It cannot be said that on account of darkness, he could not identify them. Likewise, PW.3 Baleshwar who was also inside the room where his other three brothers were shot dead and he himself was injuried, had all the opportunity to identify the accused persons. It has also been stated by the witnesses that the accused persons used to come to their village, so they were known to them. Sri Ram used to come in the house of Gurjars in the village but got annoyed with the incident wherein Karori Gurjar Gang committed murder of six Harijans in the jungle of *Ekwara* by cutting their throats. PW.4 Dhan Singh was also sleeping in the verandah of house of Kartar Singh. When he saw the accused persons coming towards his house and heard their utterance that they had taken revenge of *Ekwara Kand*, he hid himself in the room where buffalos were kept and saw the accused persons in the light of lantern placed at the open window. Even during the cross-examination of these witnesses nothing could be brought on record so as to make the identification of accused persons doubtful. In this way, there is no any doubt in the identification of accused persons by the Prosecution Witnesses.

45. Regarding the accused/appellant Rohtash, it has been argued by the learned

counsel the appellant that PWs.1 & 2 had not named him as an accused, except P.W.3, therefore, his involvement cannot be said to be proved. It is true that the name of Rohtash was not mentioned in F.I.R. which was lodged by P.W.1 Ved Prakash. P.W.2 also did not name him. P.W.3 Baleshwar, however, had named him to be a member of the gang. PW.3 is an injured witness and he was within the room where his three brothers were murdered. His account about the incident cannot be brushed away. Likewise PW.4 Dhan Singh also stated about his involvement of appellant Rohtash in the incident. In this way, according to eye-witness account of injured witness PW.3 and PW.4, the involvement of accused/appellant Rohtash is also proved. There is nothing on record to show that his involvement is doubtful.

46. From PW-1 to 4, all are related to each other and also to the deceased persons regarding which the argument had been made that all these witnesses being relatives and highly interested, are not reliable in the lack of account of an independent witnesses in support of their case. No doubt the prosecution witnesses from PW-1 to 3 relating to the fact as examined in the case are members of the same family. P.W. 1 Ved Prakash is nephew of P.W. 2 Rohtash and P.W. 3 is son of P.W. 2 who is also father of deceased Mauli, Sanjay and Narendra. Likewise, P.W.4 Dhan Singh is father of deceased Subhash. Thus, all of them are related to the deceased persons but their relationship itself is not a ground to reject the testimony of the witnesses, rather a family member would be last person to leave the real culprits and falsely implicate any other innocent person.

47. In this case, the incident took place in the mid of night in the houses of Rohtash and of deceased Kartar Singh where Dhan Singh (P.W.4) and his son Subhash were sleeping. At that time, presence of other persons of the village was not be possible. Except the family members, no one else could be the natural witnesses of the incident.

48. In the case of **Brahm Swaroop and another vs. State of U.P. (2011) 6 SCC** 288 the Apex Court in Para No.21 has observed as under

"merely because the witnesses were related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the real culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

49. The Court also referred cases of ***Dalip and others vs. State of Punjab A.I.R. (1953) SC 364; Masalti vs. State of U.P. (A.I.R.) 1965 SC 202.***

50. In ***Masalti vs. State of U.P. A.I.R. 1965 SC 202***, the Apex Court observed in Para No.14

"but it would, we think, be unreasonably to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on sole ground that it's partisan would

inveriably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it's partisan cannot be accepted as correct.

51. It is common knowledge that village *(mohalla)* life is faction ridden and involvement of one or the other in the incidents is not unusual. One has also to be cautious about the fact that wholly independent witnesses are seldom available or are otherwise not inclined to comeforth. Lest they may invite trouble for themselves for future. Therefore, relationship of eye-witnesses inter se, cannot be a ground to discard their testimony. There is no reason to suppose the false implication of the appellants at the instance of the eye-witnesses. It would also be illogical to think that witnesses would screen the real culprits and substitute the appellants for them.

52. This Court has also made such observations in Para No.14 of ***Rameshwar and others vs. State 2003 (46) ACC 581.***

53. It is pertinent to note that PW-2 Rohtash and PW-3 Baleshwar are injured witnesses and their presence on the place of occurrence cannot be disputed. It can also not be said that they would conceal the names of real assailants and implicate the false ones.

54. It is a settled law that testimony of injured witness is considered to be very reliable and is accorded a special status in law. The statement of an injured witness is generally considered to be very reliable and it is unlikely that he has spared the actual assailants in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. There must be convincing evidence on record to discredit the testimony of an injured witness.

55. In the case of **State of U.P. v. Naresh & Ors. (2011) 4 SCC 324**, it was held that the evidence of an injured witness cannot be doubted merely because there is a background of previous dispute or enmity between the parties because this could well be the motive of causing assault by the accused on injured witnesses. The evidence of an injured witness has to be appreciated keeping in view that ordinarily a person, who has been assaulted by someone would not allow him to go scot free and falsely implicate persons other than those who actually assaulted him. The evidence of an injured witness stand on different pedestal as compared to any other witness cited by the prosecution as eye witness, who claims to have seen the incident. Where an injured witness clearly named the persons and the assault made on him by those persons which is broadly corroborated with what has been found in the medical report, even though there may not be any mathematical precision with regard to the manner of assault, the evidence of an injured eye witness cannot be lightly thrown because of certain minor contradictions and omissions. It cannot be a case of some exaggeration or it could even be some discrepancy in recollecting the whole incident with exactitude and certainty but on certain minor discrepancy disbelieving altogether the testimony of an injured eye witness, would be against the settled principle of appreciation of evidence.

56. In the case of ***Bhajan Singh Vs. State of Haryana (2011) 7 SCC 421*** it was observed that in Para No.21 :-

21. The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide: Abdul Sayeed v. State of Madhya Pradesh (2010) 10 SCC 259; Kailas & Ors. v. State of Maharashtra (2011) 1 SCC 793; Durbal v. State of Uttar Pradesh, (2011) 2 SCC 676; and State of U.P. v. Naresh & Ors., (2011) 4 SCC.

57. Therefore, in the light of law reproduced as above and applying the same to the facts of the present case, it can be categorically stated that the testimony of the injured witnesses in the present case is absolutely clear and cogent and free from any kind of discrepancies, embellishments and concoctions. Thus, no ground is made out for brushing aside the testimony of the injured witnesses. There are no grounds for rejection of the evidence of PW-2 and PW-3 as discussed above unless and until there are no major contradictions and discrepancies in the testimony of injured witnesses,there arises no reason for either doubting their presence at the spot of incident or for that matter questioning the injuries suffered by them. Moreover, in the case at hand, the testimony of PW-2 and PW-3 is not only firm, cogent and convincing but is also in consonance with the medical evidence on record.

58. Injuries on the person of deceased Mauli, Sanjay, Naredra, Kartar, Babu and Subhash were caused by fire arms as stated by P.Ws. 1 to 4. Ext. Ka-5 to 10 are the postmortem reports wherein gun shot injuries were found on the persons of the deceased and P.W. 6 Dr. Ashok Kumar Yadav had proved the injuries and stated that except deceased Narendra, all the deceased persons had died due to fire arm injuries and the death of Narendra was caused as a result of injuries caused with sharp edged weapon like farsa. He also stated that the death of all the deceased persons was possible in the mid night at about 12 o'clock on 16/17.1.1997. It is noteworthy that in postmortem of the deceased Narendra, an incised wound was found on his head and one entry and exit wound was also found on the upper part of the right shoulder which was caused by fire arm. During his cross-examination, nothing has been stated by the witness (P.W.6) as to infer that the injuries as aforesaid were not caused by fire arms and at about the aforesaid time. In this way, the injuries on the body of the deceased persons are proved to have been caused by fire arms in the night at about 12 o'clock on 16/17.1.1997 and it also corroborate the manner of causing injuries resulting into death as stated by P.Ws. 1 to 4. In this way,

the eye witness account finds support with the medical evidence available on record.

59. The incident is said to have taken place in the house of Rohtash and Kartar. In the site plan Ext. Ka-54, the place of occurrence has been shown to be the house of Rohtash and Kartar. Blood was also found there. The investigating Officer S.I. R.P. Gupta had proved the site plans and no question relating to the place of occurrence was put to him during his cross-examination. Blood stained and plain soil were collected from those places by the Investigating Officer regarding which the reports were obtained from F.S.L. which are on record as Ext. Ka-57 to 63, and thus indicate that the samples as positive.

60. P.Ws. 1 to 4 also stated about the place of occurrence being the house of Rohtash and Kartar, thus the place of occurrence stood proved and no dispute in this regard could be raised by the learned counsel for the appellants.

61. There is no delay in lodging the F.I.R., occurrence took place at about 12 o'clock in the night of 16/17.1.1997 and the F.I.R. was lodged at 3.10 am on 17.1.1997 after three hours and ten minutes of the incident. The distance between the place of occurrence and the police station was 7 km. The time gap of three hours in lodging the F.I.R. cannot be treated to be a delay. In such a situation, where six persons were gunned down and others were injured and the incident took place in the mid night the time taken by the witnesses to reach at the police station and lodge F.I.R is justifiable. The F.I.R. was thus, prompt which does not leave room for any doubt or deliberations.

62. There is not even an iota of evidence on record which could suggest that PW-1 to PW-4 had any other grudge against the appellants in any case to implicate them falsely.

63. To sum up, we do not find any major contradiction either in the evidence of the P.Ws. 1 to 4 or conflict in the medical and ocular evidence of P.Ws. 1 to 4 which would tilt the balance in favour of the appellants. The minor improvements, embellishments etc, apart from being for yield of human faculties are insignificant and ought to be ignored since the evidence of the witnesses otherwise overwhelmingly corroborate each other in the material particulars. The testimony of P.Ws. 1 to 4 gets support with the medical as well as other evidence on record. The method, time and manner of causing death, the weapon used, the place of occurrence and promptness in lodging the F.I.R., all these factors corroborate the occular testimony of the prosecution witnesses. The presence of witnesses on the spot cannot be said to be doubtful, as a result of the evidence of P.Ws. 1 to 4 Ved Prakash, Rohtash, Baleshwar and Dhan Singh being wholly reliable and trustworthy.

64. Having regard to the evidence on record, we are of the opinion that the trial court has correctly analyzed the material on record in the factual as well as legal perspectives to arrive at its conclusion. The judgment and order of conviction and sentence passed by the learned Sessions Judge, Meerut stands intact and is hereby affirmed. The appeals filed by the appellants being devoid of merit are liable to be dismissed.

65. These appeals are hereby ***dismissed.***

66. The appellants are in jail, they will serve out the remaining period of sentence.

67. Copy of this judgment alongwith the original record be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. The office is directed to keep the compliance report on record.

68. Sri Dharmendra Singh, learned Amicus Curiae rendered valuable assistance to the Court. The Court quantifies Rs.15,000/- to be paid to Sri Dharmendra Singh, Advocate towards fee for the able assistance provided by him in hearing of this Criminal Appeal. The said payment shall be made to Sri Dharmendra Singh Advocate by the Registry of the Court within the shortest possible time.

(2022) 10 ILRA 182
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE SURENDRA SINGH-I, J.

Criminal Appeal No. 1087 of 2016

Rajendra Sharma ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Anil Kumar Rai, Sri Abhishek Mayank, Sri Durgesh Kumar Singh, Sri Noor Mohammad, Sri Yogesh Kumar Tiwari

Counsel for the Respondent:
Sri HMB Sinha, A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973- Section 374(2) - Indian Penal Code, 1860 - Sections 302 & 201- Challenge to- Conviction- Murder- Circumstantial evidence- accused married to the deceased-she was died of coma as a result of ante-mortem injuries-accused administered diazepam and disfigured her face-weapon recovered-body of the deceased was not recovered from the house of appellant but from the mustard field-Confessional statement given to police officers not admissible -The I.O. have not proved that they had separately recorded the recovery statement of the appellant in the case diary as per provision of law, they only mentioned the alleged disclosure statement in the recovery memo-weapon of offence recovered as a consequence of disclosure of statement is admissible in evidence, but it only shows that the accused had the knowledge of the place where recovered items were kept, it does not prove that the weapon of offence and other items were used by the appellant-no link evidence to connect the appellant with the murder of deceased-Prosecution failed to discharge its duty of proving charge against the appellant beyond reasonable doubt- Hence, in the absence of any convincing explanation by the appellant, no presumption can be drawn that he committed the murder of deceased/wife- Hence, the appellant is entitled to get the benefit of doubt. (Para 1 to 31)

B. In order to sustain the conviction on the basis of circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. (Para 19)

The appeal is allowed. (E-6)

List of Cases cited:

1. Sattatiya @ Satish Rajanna Kartalla Vs St. of Mah. (2008) 3 SCC 210

2. Satpal Vs St. of Har. (2018) 6 SCC 610

3. Devi Lal Vs St. of Raj. CRLA No. 148 of 2010

4. Digamber Vaishnav Vs St. of Chhattisgarh (2019) AIR SC 1367

5. Anjan Kumar Sarma & ors. Vs St. of Assam (2017) 14 SCC 359

6. Mangal @ Bhanu & ors.. Vs St. of U.P. (2000) 41 ACC 303

7. Timukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

(Delivered by Hon'ble Surendra Singh-I, J.)

1. This appeal arises out of judgment and order of conviction and sentence dated 27.01.2016 passed by Additional Session Judge, Court No. 6, Aligarh, in Sessions Trial No. 604/2013, State of Uttar Pradesh Vs. Rajendra Sharma, arising out of Case Crime No. 1161/2012, Police Station- Gandhipark, District- Aligarh, convicting the appellant, Rajendra Sharma, u/s 302, 201 I.P.C. and sentencing him to undergo imprisonment for life and a fine of Rs.20,000/- u/s 302 I.P.C. and imprisonment of 3 years and a fine of Rs.5,000/- u/s 201 I.P.C. with default stipulation in both sections.

2. According to prosecution case, informant, Radhey Lal, son of late Uttam Chandra Sharma, submitted written report (Ext.Ka.1) on 21.12.2012 in Police Station- Gandhipark, District- Aligarh, to the effect that accused-appellant, Rajendra Sharma, son of Roshanlal, ran a dye factory on Ravanteela road. The informant's son, Suraj, visited the factory for getting training in the dyeing work. The accused-appellant, Rajendra Sharma, often visited the house of informant, for calling his son to the factory. During course of such visits, accused-appellant, Rajendra Sharma, and informant's daughter, Rani, fell in love with each other. The informant, his wife and his son had no knowledge that accused-appellant, Rajendra Sharma, was earlier married to Ballo. Accused-appellant left his wife, Ballo, and seduced his daughter, Rani, and married her in some temple about three years earlier to her murder. The informant's daughter, Rani, started living with accused-appellant, Rajendra Sharma. Their marital relation was cordial for one year. After this period, accused-appellant, Rajendra Sharma, started torturing and beating his daughter, alleging that she is characterless. The informant's daughter, Rani, requested the informant on phone that he may save her from the accused-appellant otherwise he will murder her as he has expelled his first wife, Ballo, after beating her. Two days earlier in the evening at 7 p.m., accused-appellant, Rajendra Sharma, had informed the informant's son, Suraj, that Rani had left his home. If she has reached her parental home, she may be sent back. After getting this information, informant Radhey Lal, visited the residence of accused-appellant, Rajendra Sharma, and enquired about his daughter, Rani, but Rajendra could not give any satisfactory explanation about the disappearance of Rani. After not getting proper explanation from the appellant about the whereabout of her daughter, Rani, the informant searched for his daughter, Rani, at different places. On 21.12.2012 at 2 p.m., on getting information, he visited village- Bhadesi, with his son, Suraj, and son-in-law, Deepak, where he found the dead body of his daughter, Rani. After murdering his daughter, her face was burnt to make her unidentifiable.

3. On the written report of the informant, a first information report against accused-appellant, Rajendra Sharma, was registered on 21.12.2012 at 16.10 hours in Police Station- Gandhipark, District-

Aligarh (Ext.Ka.4) as Case Crime No. 1161 of 2012 u/s 302, 201 I.P.C. The lodging of the first information report was mentioned in the G.D. of the case at the same time which is as (Ext.Ka.5).

4. The inquest proceedings of the dead body of Rani was conducted on 21.12.2012 at 1700 hours and inquest report was prepared as (Ext.Ka.2).

5. The postmortem on the dead body of Rani, wife of Rajendra Sharma, was done by P.W.3 Dr. K.R. Ahmad, Deputy D.D.O. (T.B. Abolition), District- Aligarh, on 22.12.2012 at 03.30 p.m. He prepared the postmortem report as (Ext.Ka.3). The deceased was average body built. Rigor mortis had passed the dead body. During postmortem proceedings, following antemortem injuries were found on the body of deceased Rani :-

(i) Incised wound 14 cm x 12 cm x bone deep present over face. Most of the facial bone, frontal bones and mandibles are fractured. Both eyes with eyeball and socket of eyeball, most of the facial bones, muscles of face and skin are missing. Grey matter of brain is visible and coming out from wound.

(ii) Incised wound 5 cm x 3 cm present on right side of face, underlying bone fractured.

(iii) Incised wound 3 cm x 2 cm x bone deep present on right ear, underlying bone fractured.

(iv) Incised wound 3 cm x 2 cm x bone deep present on head in midline, underlying bone fractured.

According to the opinion of the doctor conducting postmortem, the death was caused due to coma as a result of antemortem injuries.

6. The Investigating Officer, P.W.6 S.I. Jitendra Pal Singh, visited village- Bhadesi and on the pointing out of informant, Radhey Lal, prepared the site plan of the place where the dead body of Rani was found in the mustard field of Suresh Chandra. The site plan proved as (Ext.Ka.7). Accused-appellant, Rajendra Sharma was arrested on 27.12.2012. He told the Investigating Officer that he was heavily indebted to money-lenders who used to harass him for refund of money. His wife, Rani, taunted him and spoke ill towards him. He became enraged with her ill-spoken words. He administered diazepam laced tea to her. When she became unconscious, then at 2 o' clock at night, he smashed her face against the floor and murdered her. After murdering her, he inflicted incised wounds on her face and disfigured her face so that she could not be recognized/identified. He carried her dead body in Maruti Zen car, bearing registration no. U.P. 14 F-8105 and threw it in the mustard field in village- Bhadesi.

7. On the pointing out of accused-appellant, Rajendra Sharma, on 27.12.2012 at 6.40 a.m. in his rented house in Mohalla-Dharmpuri, Vikasnagar, District- Aligarh, from below his mattress, a strip of diazepam containing 8 pills was recovered as well as one knife as a weapon of assault from the terrace of the room. Accused-appellant led the police party to the house of Vishnu Sharma, son of Rampal Sharma, situated at Qwarsi, Aligarh, where Maruti Zen car bearing registration no. U.P. 14 F-8105 of sky blue colour was recovered on his pointing out. Accused-appellant told that he had carried the dead body of his wife on the back-seat of Maruti Zen in the night of 18.12.2012 and threw it in the mustard field of village- Bhadesi.

8. After investigation, the Investigating Officer P.W.6 S.I. Jitendra Pal Singh submitted charge-sheet (Ext.Ka.5) u/s 302, 201 I.P.C. against accused-appellant, Rajendra Sharma.

9. On 12.09.2013, Additional Sessions Judge, Court No. 6, Aligarh, framed charge u/s 302, 201 I.P.C. against the accused, Rajendra Sharma. The accused denied the charge and claimed trial.

10. To prove the charge, the prosecution examined P.W.1 Radhey Lal, who proved the written report as (Ext.Ka.1), P.W.2 Suraj and P.W.7 Yagyadutt Sharma as witnesses of fact and P.W.3 Dr. K. R. Ahmad, who proved the postmortem report as (Ext.Ka.3) and P.W.4 Yashvir Singh, proved the first information report (Ext.Ka.4) and G.D. relating to lodging of F.I.R (Ext.Ka.5), P.W.5 R.P. Chaudhary proved the recovery memo of weapon of offence, knife (Ext.Ka.6) and P.W.6 Jitendra Pal Singh, who proved the site plan of place of occurrence (Ext.Ka.7), site plan of place of recovery of diazepam (Ext.Ka.9) and Maruti Zen car (Ext.Ka.10) and the charge-sheet, he also proved the cloth in which the knife was wrapped as material Ext.1 and knife as material Ext.2 and clothes worn by the deceased as material Exts.3 to 9, were examined as formal witnesses.

11. On 06.10.2015, the court recorded the statement of the accused, Rajendra Sharma, u/s 313 Cr.P.C., who stated that the witnesses were giving false evidence and they have falsely proved the documentary and material exhibits. He was wrongly prosecuted due to enmity.

12. Accused-appellant further stated that his wife, Rani, was a college student where she got involved in bad company. The goon students killed her and he was falsely implicated due to his being her husband.

13. Accused-appellant, Rajendra Sharma, examined D.W.1 S.I.(m) Hargovind Singh and D.W.2 S.I.(m) Harishankar Sharma in his defence.

14. It has been argued on behalf of the appellant that the prosecution case is based on circumstantial evidence which does not complete the entire chain of evidence to convict the accused. The medical evidence collected by the Investigating Officer does not corroborate the prosecution case. The appellant has already discharged his burden u/s 106 of the Evidence Act in order to prove his innocence. The prosecution has not proved the motive of the appellant to kill deceased, Rani.

15. Sri HMB Sinha, learned A.G.A. for the State has argued that, admittedly, deceased, Rani, was the wife of the appellant, Rajendra Sharma. She was staying with him. On 21.12.2012, the dead body of Rani was recovered from village-Bhadesi, at a distance of 2-4 kms. from the house of accused-appellant. Thus, it was the responsibility of the appellant u/s 106 of the Indian Evidence Act to explain as to under what circumstances the deceased left her home and soon thereafter, her dead body was recovered. The appellant has not given proper explanation how after leaving her house, Rani, was killed and her dead body was recovered thereafter. It has also been argued on behalf of the State how the prosecution has proved the case against the appellant through firm and convincing circumstantial evidence. The prosecution has proved that soon before her disappearance and death, Rani had

informed her father that appellant, Rajendra Sharma, tortured and beaten her and she has apprehension that she would be killed by the appellant. The prosecution has proved all the circumstances forming the chain on the basis of which, the conclusion can be drawn against the appellant that he must have committed the murder of the deceased, Rani. It was also being argued on behalf of the State that as the chain of circumstantial evidence, the prosecution has proved the recovery of weapon of offence i.e. knife, and strip of diazepam containing 8 pills on the pointing out of the appellant which was used in first making Rani unconscious by giving her diazepam laced tea and thereafter, disfiguring her face by assaulting it with the knife. It has further been argued on behalf of the State that the prosecution has proved the important chain of circumstantial evidence that by recovery of Maruti Zen car bearing registration no. U.P. 14 F-8105 of sky blue colour which was procured by the appellant, Rajendra Sharma from its owner P.W.7 Yagyadutt Sharma for driving test before purchasing it, which was used by him for carrying the dead body of Rani from his residence and throwing it in the mustard field of village-Bhadesi, from where it was recovered. Thus, the prosecution discharged its duty in proving, by circumstantial evidence, to the guilt that appellant, Rajendra Sharma, committed murder of his wife, Rani and threw her dead body and disposed it of.

16. We have heard learned counsel for the parties present and perused the entire lower court record.

17. Admittedly, there is no eye-witness who has seen the appellant, Rajendra Sharma, murdering and disposing of the dead body of Rani. The prosecution has produced circumstantial evidence to prove the charge framed against the appellant.

18. The prosecution has proved the confession given by the appellant, Rajendra Sharma, to the Investigating Officers, P.W.5 R.P. Chaudhary and P.W.6 Jitendra Pal to the effect that he has committed the murder of his wife and disposed of her dead body accordingly.

19. Law in respect of circumstantial evidence has been well-settled by a catena of decisions of Hon'ble Supreme Court which are as follows :-

In **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210,** the Hon'ble Supreme Court, while dealing with circumstantial evidence, observed as under :.

"11. In *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

"10. ..... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. In *Padala Veera Reddy v. State of AP* [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

13. In *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." In **Satpal Vs. State of Haryana, (2018) 6 SCC 610**, the Hon'ble Supreme Court has observed as under :

"If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

In **Devi Lal Vs. State of Rajasthan, in Criminal Appeal No. 148 of 2010 decided on 08.01.2019,** the Hon'ble Supreme Court, while dealing with circumstantial evidence, observed as under :

14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra* 1984 (4) SCC 116. The relevant excerpts from para 153 of the decision is assuredly apposite:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra* [(1973) 2 SCC 793 where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

15. It has further been considered by this Court in *Sujit Biswas Vs. State of Assam* 2013 (12) SCC 406 and *Raja alias Rajinder Vs. State of Haryana* 2015 (11) SCC 43. It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

In **Digamber Vaishnav Vs. State of Chhattisgarh, AIR 2019 SC 1367,** decided on 05.03.2019, the Apex Court has held as under (with respect to circumstantial evidence) :

15. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.

16. This Court in *Jaharlal Das v. State of Orissa*, (1991) 3 SCC 27, has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the

conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused."

In **Anjan Kumar Sarma and Ors. Vs. State of Assam; (2017) 14 SCC 359,** the Hon'ble Supreme Court has observed as under :

"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must' or "should' and not "may be' established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other 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. (See: *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116 (para 185 & 153); M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200 (para 18).

20. The trial court in its judgement has relied on following evidence for convicting the appellant Rajendra Sharma :-

(i) After the disappearance of deceased Rani from the house of appellant Rajendra Sharma on 18.12.2012, her dead body was found on 21.12.2012. Thus, soon before her death, Rani was living with the appellant Rajendra Sharma, and he did not explain why she left his house and how she was murdered. Thus, relying on Section 106 of the Indian Evidence Act, the trial court held that an important chain of the incident was proved due to the failure of appellant Rajendra Sharma in giving any proper explanation how Rani left his house and she was murdered.

(ii) On the confessional statement of accused-appellant, Rajendra Sharma, given to the Investigating Officers, P.W.5 S.I. R.P. Chaudhary and P.W.6 S.I. Jitendra Pal Singh to the effect that due to failure of his business and closure of his factory, he

was heavily indebted to the borrowers who were harassing him for the refund of their loan and Rani used to taunt on the appellant for his inability to pay the loan amount. Due to her harsh words, he got enraged and murdered Rani and got her body disposed of, disfiguring her face with a knife. The trial court has also relied on the evidence of recovery of material exhibits on the pointing out of appellant, Rajendra Sharma, which included knife as material Ext.2 and strip of diazepam which included 8 pills and 2 pills missing wrongly mentioned as material Ext. 2 and Maruti Zen car no. U.P. 14 F-8105 allegedly used by accused-appellant, Rajendra Sharma, for disposing of the dead body of Rani.

(iii) According to P.W.3 Dr. K.R. Ahmad, who conducted postmortem on the dead body of Rani, the death of Rani was caused due to coma as a result of antemortem injury. P.W.3 Dr. K.R. Ahmad has also stated in his evidence that the face of deceased was not disfigured to the extent that it may become unidentifiable. The trial court has also relied on the evidence of P.W.3 Dr. K.R. Ahmad that the injury found on the body of deceased could have been caused in the manner alleged by the prosecution i.e. by smashing the face of deceased Rani on the floor and then disfiguring her face by scratching it with knife.

(iv) The trial court refused to rely on the defence plea taken by accused-appellant, Rajendra Sharma, that the deceased Rani was studying in degree college. She came in the company of bad students and due to that reason, she was murdered by goons.

21. We find that there is no direct eye-witness to the incident of the murder of deceased Rani by appellant Rajendra Sharma. P.W.1 Radhey Lal, father of the deceased, has only given evidence that her daughter deceased Rani has complained earlier to him about the torture, misbehaviour and beating done by appellant, Rajendra Sharma and she had expressed her apprehension that she may be killed by her husband, appellant, Rajendra Sharma. P.W.1 Radhey Lal Sharma has also given evidence that two days before the recovery of the dead body of Rani, appellant Rajendra Sharma, had phoned to his son, P.W.2 Suraj, that Rani, is missing and if she has gone to her parental home, she may be sent back to him. P.W.1 Radhey Lal has also given evidence that on receiving the phone call of the appellant regarding the missing of Rani from his home, then he along with his son, Suraj, visited the house of the appellant, Rajendra Sharma and inquired about Rani, but he was evasive and could not give any satisfactory answer regarding her whereabout. He has also deposed that the dead body of his daughter, Rani, was recovered about 2-4 kms. away from the place, Vikasnagar, where she was residing with the appellant, Rajendra Sharma. P.W.2 Suraj, has also given evidence similar to that of P.W.1 Radhey Lal. Thus, P.W.1 Radheylal and P.W.2 Suraj have not given any direct or clinching circumstantial evidence about the involvement of appellant, Rajendra Sharma in the murder of deceased Rani.

22. Another witness of fact relied upon by the prosecution P.W.7 Yagyadutt Sharma, whose vehicle was allegedly involved in disposing of the dead body of deceased Rani by appellant Rajendra Sharma, has only deposed in his evidence that appellant, Rajendra Sharma, on 18.12.2012 borrowed his Maruti Zen car U.P. 14 F-8105 on the pretext of prior test drive before purchasing it and he returned

the car the next day. P.W.7 Yagyadutt Sharma informed that the appellant refused to purchase the car, as it was much costly. He has given evidence that the aforesaid vehicle was detained by the police being involved in the murder of Rani which was later released by the court on his application in favour of its registered owner, B.M. Agarwal. P.W.7 Yagyadutt Sharma has admitted that when he received back the vehicle, there were no blood stains on it. He has added that it appeared that the vehicle was washed. Thus, there is nothing in the evidence of P.W.7 Yagyadutt Sharma involving the appellant, Rajendra Sharma, in committing the murder of deceased Rani and using Maruti Zen car bearing registration no. U.P.-14 F-8105 in disposing of her dead body.

23. The other evidence relied by the trial court in convicting the appellant, Rajendra Sharma, is his disclosure statement given by him to the Investigating Officers, P.W.5 S.I. R.P. Chaudhary and P.W.6 S.I. Jitendra Pal Singh, while he was in their custody to the effect that since his business collapsed and his factory was shutdown, he fell in great debts and was unable to pay the loan taken by him from the money-lenders.

24. The aforesaid disclosure statement is confessional statement given to police officers which is totally not admissible in evidence being hit by the provisions of Section 25 of the Indian Evidence Act.

25. P.W.5 S.I. R.P. Chaudhary and P.W.6 S.I. Jitendra Pal Singh have only mentioned the alleged disclosure statement in the recovery memo. The Investigating Officers have not proved that they had separately recorded the recovery statement of appellant, Rajendra Sharma, in the case diary as per the provision of law. Thus, the prosecution has failed to prove the disclosure statement of appellant, Rajendra Sharma, as per the requirement of law.

26. According to the evidence of P.W.5 S.I. R.P. Chaudhary and P.W.6 S.I. Jitendra Pal Singh as per the disclosure statement of appellant, Rajendra Sharma, the weapon of offence i.e. knife, strip of diazepam (from which 2 pills were used in making Rani unconscious before committing her murder) and Maruti Zen car, bearing registration no. U.P. 14 F-8105 by which appellant disposed of dead body of Rani, were recovered on the pointing out of the appellant.

27. The Hon'ble Supreme Court has held in **Mangal alias Bhanu & others Vs. State of U.P., 2000 (41) ACC 303** that weapon of offence recovered as a consequence of disclosure statement is admissible in evidence, but it only shows that accused had the knowledge of the place where weapons of offence and other recovered items were kept. It does not prove that the weapon of offence and other items were used by the appellant, Rajendra Sharma, in committing the offence. Thus, other than the alleged confessional statement given by the appellant, Rajendra Sharma, to aforesaid police officers, there is no link evidence to connect the appellant with the murder of deceased Rani.

28. It has been argued on behalf of the State that principle of house murder as propounded by Hon'ble Supreme Court in **Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681** shall be applicable and according to the provisions of Section 106 of the Evidence Act, it is the burden of appellant to explain out the circumstances under which Rani left her

home and later on, her dead body was recovered.

29. Since the dead body of Rani was not recovered from the house of appellant, Rajendra Sharma, but according to prosecution, from mustard field in village- Bhadesi, which is situated about 2-4 kms. away from Vikasnagar where the appellant was living with deceased Rani, the principle of house murder as propounded by Hon'ble Supreme Court in aforesaid case will not be applicable and in the absence of any convincing explanation by the appellant, no presumption can be drawn that he committed the murder of deceased Rani. The provisions of Section 106 of the Indian Evidence Act becomes appealable only after prosecution has discharged its initial duty of proving that the offence was committed by the accused (here appellant) but since the prosecution has not discharged its duty of proving the charge against the accused by legal, convincing and clinching evidence, there is no burden on appellant, Rajendra Sharma, to explain out the circumstances under which deceased Rani went missing from his house and later her dead body was recovered from mustard field of village- Bhadesi.

30. Taking the cumulative effect of the evidence, we find it difficult to uphold the conviction of the appellant, Rajendra Sharma. He is entitled to get the benefit of doubt.

31. Accordingly, the appeal succeeds and is allowed and the impugned judgement is set-aside.

32. The appellant, Rajendra Sharma, is in jail. He be set free forthwith, if not required in any other case.

33. The appellant, Rajendra Sharma, is further directed to file personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of Section 437-A of the Code of Criminal Procedure, 1973.

34. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.

(2022) 10 ILRA 192
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.06.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Misc. Writ Petition No. 7632 of 2022

Brijesh @ Bhola ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Goswami

Counsel for the Respondents:
G.A.

Criminal Law – Constitution of India,1950 - Article 226 - Criminal Procedure Code, 1973 - Section - 165(3) - Copy Right Act (Amendment), 1957 - Sections 63 & 65, - Trade Marks Act, 1999 - section - 103, 104, Indian Penal Code, 1860 - Sections 420, 468, 469, 481, 482, 483, 485, 486, 487 & 488:- Criminal Writ Petition – challenging the FIR - Informant/respondent alleged that petitioner has used the name of *Panchi Petha* - which is denied by the petitioner by stating that since he was Ex-manager of respondent firm and running his own business of *petha dalmoth* as such he was falsely implicated - appreciation of documentary evidence - court held that since prima facia case is made out as such instant petition cannot be

entertain - in the light of judgment of Hon'ble Apex Court in matter of Arun Bhandari' Case writ petition is devoid of merit liable to be dismissed. (Para - 4)

Writ Petition Dismissed. (E-11)

List of Cases cited:

Arun Bhandari v. St. of U.P. & ors. (2013 SCC vol. 2)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Gautam Chowdhary, J.)

1. Heard learned counsel for the petitioner and learned A.G.A. for the State.

2. By way of this petition, the accused-petitioner prays for quashment of the impugned first information report dated 15.01.2022 registered in Case Crime No.0028 of 2022 under Sections 420, 468, 469, 481, 482, 483, 485, 486, 487, 488 I.P.C., Section 63, 65 of Copy Right Act (Amendment) 1957 and Sections 103, 104 of Trade Mark Act, 1999, Police Station Tajganj, District Agra and also for staying his arrest in respect of the aforesaid first information report.

3. Learned counsel for the petitioner submits that neither there is infringement of Copy Right (Amended) Act 1957 nor Trade Marks Act, 1999 and due to business rivalry, the respondent no.4 has lodged the F.I.R. when in fact, the petitioner has nowhere used the name of Panchi Petha, which is the firm of the respondent no.4. He further submits that the learned Magistrate has allowed the application under Section 156 (3) Cr.P.C. which has resulted into lodgement of the impugned F.I.R. He further argued that the petitioner has been falsely implicated on the ground that he is running a business of Petha and Dalmoth in the name and style of Petha Dalmoth without using the trademark of Panchi Petha. Learned counsel has next argued that prior to running of aforesaid business by the petitioner, the petitioner was working as a Manager in the firm of Panchi Petha since 2015 to 2020, whereas the petitioner started his own business after the lockdown in the country. It is lastly argued that since the petitioner was working as Manager in the firm of Panchi Petha, thereafter started his own business, due to which the petitioner has been falsely implicated in the present case.

4. We have perused the documentary evidence. Panchi logo on the petitioner's firm before the word "Petha" give us impression that the firm is representing "Panchi Petha", which is the firm of the respondent no.4. This fact prima facie can very well be ascertained with the photograph annexed at page 30 and 32 of the paper book. Therefore, we cannot entertain this petition, as it cannot be said that no prima facie case is made out. The exercise of extra-ordinary writ jurisdiction under Article 226 of the Constitution of India cannot be exercised against the petitioner.We fortified our view in view of the judgement of Hon'ble Apex Court in the matter of ***Arun Bhandari Vs. State of U.P. and others reported in 2013 (2)*** S.C.C.

5. In that view of the matter, the present writ petition is devoid of merit and is dismissed.

(2022) 10 ILRA 194
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 1419 of 2009
With
Criminal Appeal No. 1313 of 2009

Kripa Shanker Dubey ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.K. Singh Yadav, Sri Jitendra Singh, Sri Manvendra Singh, Sri S.P. Srivastava

Counsel for the Respondent:
Govt. Advocate, Sri S.K. Srivastava

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34 - Arms Act,1959 - Section 25 -Challenge to-Conviction-death of deceased was caused with fire arm-FIR ante-time-no motive-PW-1 & PW-2 were relatives, interested witnesses, their testimony was full of contradictions-Presence of PW-1 is not mentioned in the FIR-PW-2 statement was not recorded by the I.O. u/s 161 Cr.P.C. but she was introduced by the prosecution for the first time before the trial court so her testimony cannot be relied upon-Witnesses those were named in the FIR had not been examined by the prosecution-Hence, the whole prosecution story becomes doubtful and the benefit of doubt is to be extended to the accused appellants-Thus, the prosecution could not proved its case beyond reasonable doubt-Appellants are entitled for acquittal.(Para 1 to 51)

B. As a general rule, the Court can and may act on the testimony of a single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the testimony of a solitary witness. That is the logic of Section 134 of the Evidence Act, 1872. It is observed that in first two category there may be no difficulty in accepting or discarding the testimony of single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (Para 42 to 44)

The appeals are allowed. (E-6)

List of Cases cited:

1. Ram Lakhan Singh & ors.. Vs St. of U.P (1977) AIR SCC 1996

2. Piara Singh & ors.. Vs St. of Punj. (1977) AIR SC 2274 (1977) 4 SCC 452

3. Darya Singh Vs St. of Punj.(1965) AIR SC 328

4. Rammi @ Rameshwar Vs St. of M.P. (1999) 8 SCC 649

5. Leela Ram (dead) thru Duli Chand Vs St. of Har. & anr.. (1999) 9 SCC 525

6. Bihari Nath Goswami Vs Shiv Kumar Singh & ors..(2004) 9 SCC 186

7. Vijay @ Chinee Vs St. of M.P. (2010) 8 SCC 191

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

9. Shyamal Ghosh Vs St. of W.B. (2012) 7 SCC 646

10. Mritunjoy Biswas Vs Pranab @ Kuti Biswas & anr..(2013) 12 SCC 796

11. Vadivelu Dhevar Vs St. of Madras (1957) AIR SC 614

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Heard Sri Jitendra Singh, learned counsel for appellant Kripa Shankar Dubey, Sri Manvendra Singh, learned Advocate for the appellant Uma Shankar Dubey and Sri Rupak Chubey, learned A.G.A. for State and perused the record.

2. These appeals emanate from the judgment and order dated 18.02.2009 passed by Additional Session Judge/Special Judge E.C. Act, Fatehpur in S.T. No.169 of 2006 (State vs. Kripa Shanker Dubey and another) arising out of Case Crime No.213 of 2005, under Section 302 read with Section 34 I.P.C. sentencing the appellants with life imprisonment and fine of Rs.10,000/- and in default of payment of fine to undergo additional one year rigorous imprisonment by each and in S.T. No.170 of 2006 (State vs. Kripa Shanker Dubey) arising out of Crime No.218 of 2005, under Section 25 Arms Act, Police Station Lalauli, District Fatehpur whereby the appellant Kripa Shanker Dubey has been sentenced with two years rigorous imprisonment with fine of Rs.1000/- and in default of payment of fine to undergo additional six months rigorous imprisonment.

3. The prosecution case in brief is that on 22.12.2005 at about 8:00 P.M. an F.I.R. was lodged at the Police Station Lalauli, District Fatehpur by the informant Suresh Kumar S/o Ramasrey resident of Kichaucha, Police Station Lalauli, District Fatehpur by filing a written report stating therein that on 22.12.2005 at about 6:00 P.M. his elder brother Umesh @ Pappu aged about 27 years went to the hand pump to fetch water and as he (deceased) reached near the hand pump Kripa Shanker Dubey S/o Ram Vishal and his brother Uma Shanker Dubey residents of the same village equipped with country-made pistol came with the intention of committing murder and shot fire at him (deceased) causing injuries in his stomach, as a result it he died and accused persons fled away towards the field. The incident was witnessed by his bua (aunt) Maun Shree and Surajpal.

4. The investigation of the case was handed over to S.H.O. Manoj Kumar Pandey who after receiving the information went to the place of occurrence alongwith other officials and conducted the inquest of the dead body of deceased Umesh @ Pappu and prepared the inquest report and other relevant papers required for the purposes of post-mortem. The dead body was sealed and handed over to constable Baburam and Devmani who took it to the Mortuary District Hospital, Fatehpur.

5. The post-mortem was conducted on 23.12.2005 at 3:30 P.M. by Dr. A.S. Khan who found the dead body in sealed cloth intact which tallied the sample seal. The external condition of the dead body as described therein is as under :-

Average built body. Rigor mortis present.

Antemortem Injuries

1. Fire arm wound of entry 2 cm x 2 cm x cavity deep in right side of the abdomen 15 cm outer to umbilicus at 9 O'clock position. Blackening present around the wound. Intestines were protruded out from wound.

2. Contusion of 6 cm x 3 cm in right side of the abdomen 20 cm below the right nipple.

3. A mattelic bullet recovered from left side of pelvic muscles which was

sealed in an envelop and sent to S.P., Fatehpur through C.M.S.

Cause of death was mentioned as shock and hemorrhage as a result of antemortem fire arm injury

6. During investigation, the statement of informant Suresh Kumar was recorded and after making spot inspection at the instance of the informant, site plan was prepared by the I.O. On 25.12.2005, accused persons Kripa Shanker Dubey and Uma Shanker Dubey were arrested near the bus stand. A country-made pistol of 315 bore and one cartridge, from the pocket of the accused and another cartridge from the chamber of the country-made pistol were recovered from the possession of accused Kripa Shanker Dubey. Recovery memo was prepared and a separate case because of the recovery of the country-made pistol and cartridge was registered u/s 25 Arms Act as Crime No.218 of 2005 at the police station, investigation of which was handed over to S.I. Ram Chandra Mishra. Further the statement of other witnesses were recorded by the I.O and on the basis of the material collected during the investigation, a prima facie case under Section 302/34 I.P.C. was found to be made out against the accused persons, as a result, the charge-sheet was submitted to the court concerned. Later on reports from the F.S.L. were received and submitted to the Court through supplementary case diary.

7. In crime no.218 of 2005 u/s 25 Arms Act, the investigating officer recorded the statement of informant Manoj Kumar Pandey and constable Sarfaraz Haider and after spot inspection at the instance of the informant prepared the site plan. After recording the statements of other witnesses and obtaining the prosecution sanction from the District Magistrate, he filed charge-sheet before the court concerned.

8. The learned court took cognizance of the offence and provided copies of the prosecution papers in compliance of Section 207 Cr.P.C. to the appellants and committed the case for trial.

9. The learned trial court after taking into consideration the material on record framed the charges against both the appellants u/s 302 read with Section 34 I.P.C. and u/s 25 Arms Act against the appellant Kripa Shanker Dubey. The charges were read over and explained to the appellants. They pleaded not guilty but denied the charges and claimed for trial. Consequently, the cases were fixed for prosecution evidence. Since both the cases were connected to each other, therefore, consolidated and tried together.

10. In support of its case, the prosecution examined PW-1 Suresh Kumar, the first informant and brother of the deceased; Pw-2 Sheetla Devi as eye-witness of the incident and mother of the deceased; PW-3 Dr. A. S. Khan who conducted post-mortem of dead body of the deceased; PW-4 Constable Kunwar Singh who prepared chick F.I.R. and entered the detail in G.D.; PW-5 S.I. Manoj Kumar Pandey the investigating officer of crime no.213 of 2005 u/s 302 I.P.C. and PW-6 S.I. Ram Chandra Mishra who investigated the case registered u/s 25 Arms Act relating to crime no.218 of 2005.

11. On conclusion of prosecution evidence statement of accused persons were recorded u/s 313 Cr.P.C. wherein appellants Kripa Shanker Dubey and Uma Shanker Dubey asserted the incident and statements of witnesses relating thereto,

false. In relation to recovery of arm and cartridge appellant Kripa Shanker Dubey termed it to be false and stated that he was arrested by the police from his house and false recovery of country-made pistol was shown against him. In defence, no evidence was adduced on the part of the appellants.

12. After hearing the arguments on behalf of the appellants as well as for the State, the trial court passed the judgment and order dated 18.02.2009 convicting the appellants as aforesaid against which these appeals are preferred.

13. Learned counsel for the appellants submits that the impugned judgment and order of conviction is bad in law being against the evidence on record. The trial court has erred in convicting the appellants without making proper appreciation of the evidence. The appellants had no motive to commit the murder of the deceased. The F.I.R. is ante-time. PW-1 & PW-2 are relatives of the deceased, therefore, they are interested witnesses, their testimony is full of contradictions. The statement of PW-2 u/s 161 Cr.P.C. was not recorded by the investigating officer during investigation but she was introduced by the prosecution for the first time before the trial court so her testimony cannot be relied upon. The presence of PW-1 is not mentioned in the F.I.R. so he cannot be said to be an eye-witness. In this way, the testimony of PW-1 being not present on the spot at the time of alleged incident and PW-2 being not examined by the investigating officer and not named in the F.I.R. as eye-witness cannot be made the basis of conviction. The witnesses those were named in the F.I.R. have not been examined by the prosecution. As a result, the whole prosecution story becomes doubtful and the benefit of doubt is to be extended to the accused appellants. Thus, the prosecution could not prove its case beyond reasonable doubt and the appellants are entitled for acquittal.

14. Learned A.G.A. opposed the contentions raised by the learned counsel for the appellants and urged that in this case the informant as well as PW-2 both were present on the spot and they had narrated the whole prosecution story as well. They are eye-witnesses, therefore, motive looses its importance. The testimony of PW-2 cannot be discarded only on the basis that her statement u/s 161 Cr.P.C. was not recorded by the investigating officer. No prejudice is caused to the accused appellants. The presence of PW-1 on the spot is not disputed. From the reading of the F.I.R., it is clear that PW-1 was present on the spot at the time of the incident. The prosecution witnesses, though relatives but their testimony cannot be discarded on this account only if they are reliable and trustworthy otherwise. The contradictions in the testimony of the witnesses are minor in nature and are not likely to affect the veracity of the statements, hence immaterial. The death of deceased Umesh Kumar Singh is said to be caused with fire arm which gets support from the post-mortem. In this way, the prosecution had proved its case beyond reasonable doubt against the appellants. The trial court has passed the judgment and order on the basis of evidence on record after appreciating the evidence according to the settled principles of law. There is no error in the judgment under challenge. These appeals being devoid of merit are liable to be dismissed.

15. From the submissions and perusal of the record, the questions which emerge for consideration of this Court are :- as to whether the F.I.R is ante-time; motive is

absent; the witnesses being relatives; no independent witnesses having been examined would have adverse affect on the prosecution case; as to whether the alleged contradictions in the testimony of witnesses make it unreliable and non-recording the statement of PW-2 u/s 161 Cr.P.C. by the investigating officer would cause prejudice to the appellants.

16. Before we deal with the contentions raised by the learned counsel for the appellants, it would be convenient to take note of the evidence adduced by the prosuection.

17. PW-1 Suresh Kumar is the first informant and brother of the deceased who deposed that there was enmity on account of village pradhani elections between both the families of the accused and the deceased. On 22.12.2005 at about 6:00 P.M., his elder brother Umesh Kumar went to fetch water at the hand pump in front of his house. As his brother reached near the hand pump, appellant Kripa Shanker Dubey opened fire which hit in the stomach of his brother on the right side near the umbilicus and after 10-15 minutes, he died. P.W.1 took the injured inside the house and made him lie down on the cot where he died. This incident was witnessed by he himself, his bua (aunt) Maun-Shree, another aunt Rajrani and Surajpal. The accused persons fled away after shooting the deceased. At the time of the incident, he (the informant) was at his gate and his bua (aunt) and another aunt were at the hand pump and Surajpal was talking to his brother (deceased). He himself wrote the written report and gave it at the police station Lalauli, which he proved in his hand writing as Ex Ka-1.

18. PW-2 Sheetla Devi mother of the deceased deposed that she knew the accused Kripa Shanker Dubey and Uma Shanker Dubey who were residents of her village. The murder of her son Umesh Kumar was committed at about 6:00 P.M. near the hand pump in front of her house where his son went there to fetch water. Kripa Shanker came there and made fire on the stomach of his son Umesh @ Pappu. No other person was with Kripa Shanker Dubey. PW-2 stated that she was at her gate at that time from there she was watching everything. The incident was witnessed by Surajpal, his wife and Maushree. Suresh also saw the incident. She further stated that Uma Shanker Dubey was on the back side and he did nothing. She stated that she narrated all these facts to the police.

Both the witnesses were cross-examined on behalf of the appellants at length.

19. PW-3 Dr. A. S. Khan has proved the post-mortem report as Ex Ka- 2 in his hand writing and signature. He told that the injury was caused with fire arm like country-made pistol at about 6:00 P.M. as a result, the deceased died. He also opined that the cause of death was shock and hemorrhage due to antemortem fire arm injury. During post-mortem, a bullet was recovered from the abdomen of the deceased which was sealed and sent to S.P., Fatehpur through C.M.S.

20. PW-4 constable Kunwar Singh has proved the check F.I.R. which was prepared by him on the basis of written report in his hand writing and signature as Ex Ka-3 and G.D. as Ex Ka-4.

21. PW-5 S.I. Manoj Kumar Pandey who investigated the case has proved the investigation and the papers prepared by him relating to the inquest as Ex Ka-5 to

10, recovery memo as Ex Ka-11, country-made pistol and cartridge as material Ex.- 1 to 3, charge-sheet as Ex Ka-12 and F.S.L. report as Ex Ka- 13 & 14.

22. PW-6 S.I. Ram Chandra Mishra has proved the investigation relating to the Crime No.218 of 2005 registered u/s 25 Arms Act, site plan as Ex Ka-15, charge-sheet as Ex Ka-16, prosecution sanction as Ex Ka-17 and check F.I.R. in the hand writing of constable Ramkripal Pandey as Ex Ka-18 and G.D. as Ex Ka-20.

23. Relating to the F.I.R, it is argued that it is antetime. In this regard, it is to note that the incident took place on 22.12.2005 at 6 p.m. and F.I.R. was lodged at 8.p.m on the same day at the police station concerned, 12 km away from the place of occurrence. P.W.4 constable Kunwar Singh deposed that he lodged the F.I.R. on 22.12.2005 at 8 O'clock on the basis of the written report given by informant Suresh Kumar and entered its detail in the G.D. report no. 26 in the presence of the Station House Officer of the police station and, thereafter, sent him to the place of occurrence. P.W. 5. Manoj Kumar Pandey, the station house officer deposed that he had gone to attend the OR of ASP at the Fatehpur Police Office, while returning he was informed on the RT set that Umesh Kumar had been murdered in the village Kichhauchha. He reached at the village directly and conducted the inquest and prepared relevant papers. It shows that PW-5 was not present at the Police Station at 8 p.m. as stated by P.W.4 but arrived at the police station after conducting the inquest and sending the dead body for post-mortem from the place of the incident.

24. P.W.1 informant has stated that he wrote the written report and gave it in the police station Lalauli, which he proved as Ex. Ka-1. During cross examination, P.W.1 stated that he called the police by phone call from the police station. The Station Officer was somewhere else from where he came on the spot. Then P.W.1 told him (P.W.5) about the incident who got him write down the report. P.W.1 showed the place of occurrence to the Investigating Officer. P.W.1 did not take the dead body to the police station. The inquest was conducted at home, then he went with the Investigating Officer to lodge the FIR. The Investigating Officer dictated, he wrote and gave that written report to him. This statement of P.W.1 clearly shows that the station house officer was not present at the police station. The informant called the police by phone and did not go to the police station for lodging the FIR on his own but after the Station Officer visited the place of the occurrence and conducted inquest, P.W.1 went with him to the police station and lodged the FIR by giving the report, written by him on the dictation of the Station Officer. The inquest shows that the proceedings were started at 20.23 p.m. and completed on 23.35 pm. It infers that the station house officer reached at the police station after 23.35 p.m. with the informant and then FIR was lodged on the basis of the written report given by the informant, mentioning therein the time of receiving information at 8 pm, which proves that the FIR was lodged ante-time.

25. It is also argued that PW2 Sheetla Devi mother of the deceased and PW 1, had not witnessed the incident. P.W.2 was not present at the time of the incident. Her statement was neither recorded by the Investigating Officer nor her name was mentioned in the list of witnesses in the charge sheet, therefore, she cannot be relied on. In this regard, it is true that the

informant did not mention her name in the F.I.R. with other witnesses who had witnessed the incident. Her statement was not recorded by the Investigating Officer under Section 161 Cr.P.C. and also her name was not included in the list of prosecution witnesses in the charge sheet but she was produced before the trial court as P.W.2 projecting her as eye witness of the incident. On 4.4.2007, after one and half year, for the first time, she (P.W.2) deposed that the incident was seen by her.

26. P.W. 2 stated that she was present at the gate of her house at the time of the incident. She further stated that she came from the tubewell and reached at her house and in the meantime, occurrence took place. She went back on the gate of the house and stood there. Suresh (P.W.1) was also there at the gate.

27. P.W.1 Suresh had not disclosed the presence of this witness i.e., P.W.2 at the place of occurrence in the F.I.R. and Section 161 Cr.P.C. statement, though during his examination in the court, P.W.1 stated about the presence of his bua Maunshree, bhabhi Rajrani and Surajpal, who were not examined during the trial. In his cross-examination, P.W. 1 also stated that his mother was in the house. At the time of occurrence, he was out of the gate and Surajpal Rakesh, Rajshree and Maunshree were collecting water. He heard the sound of firing. All people present there disbursed and accused persons fled away. He remained there alone and brought his brother, the deceased inside the house. When he brought the deceased to some distance, his mother came, then both of them took the deceased and lay his body on the cot. In this way, the version of P.W. 2 that she was present at the gate with P.W. 1 Suresh and witnessed the incident, does not get support from the statement of Suresh but it seems that she (PW-2) was in the house and came outside after the incident had occurred and while P.W. 1 Suresh was carrying the deceased from the place of occurrence to his house. Thus, the presence of P.W. 2, on the spot, at the time of the incident, is not established. Her testimony that she witnessed the accused persons making fire at the deceased does not inspire confidence of the court.

28. The names of other witnesses namely, Maunshree and Surajpal were mentioned in the F.I.R. who witnessed the incident and were present there at the time of the occurrence. But both these witnesses have not been examined by the prosecution, for the reasons best known to them. The testimony of P.W.2 about his presence is unreliable and is nothing but an improvement on the material aspect of the case.

29. It is to be noted that a witness, whose name was not mentioned in the F.I.R. as an eye witness, and whose statement was not recorded by the Investigating Officer under Section 161 Cr.P.C. and is not shown in the list of witnesses in the charge sheet but examined before the trial court to the first time years after the occurrence, his testimony cannot be considered safe to rely on, for it may cause prejudice to the accused.

30. It has been held by The Hon'ble Supreme Court in the case of ***Ram Lakhan Singh And Ors. vs. The State Of U.P. AIR1977 SCC 1996*** that *"It is true that no enmity or grudge is suggested against this witness, but we find that this witness was not even examined by the police nor was he cited in the chargesheet. In a grave charge like the present, it will not be proper to*

place reliance on a witness who never figured during the investigation and was not. named in the chargesheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross-examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. We cannot, therefore, agree that the High Court was right in accenting the evidence of this witness as lending assurance to the testimony of other witnesses on the basis of which alone perhaps, the High Court felt unsafe to convict the accused."

31. Now there remains the testimony of P.W.1 Suresh, who is the brother of the deceased and the informant.

32. It is argued by the learned counsel for the appellants that the testimony of this witness cannot be relied upon he being an interested witness. In this regard, it is true that P.W. 1 Suresh is the real brother of the deceased and comes in the category of related witness. It has also been stated by P.W. 1 that the appellants committed murder of his brother owing to the enmity relating to the village pradhan election but only on account of enmity and being related witness his evidence cannot be disbelieved, rather his testimony is to be scrutinized with case and circumspection because of the alleged enmity.

33. In ***Piara Singh and Ors. Vs. State of Punjab, AIR 1977 SC 2274 (1977) 4 SCC 452,*** Hon'ble The Supreme Court held: *"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."* In such cases, their evidence is to be scrutinized with great circumspection.

34. Further it is contended by the learned counsel for the appellants that no independent witness has been examined by the prosecution, therefore, the testimony of P.W. 1 cannot be relied upon in absence of corroboration with some independent source. It is to note that in the F.I.R., P.W. 1 named his bua (aunt) Maunshree and Surajpal as eye witnesses of the incident but both of them had not been examined before the trial court and there was no other witness said to be present at the time of occurrence. On the basis of non-examination of these two eye witnesses, the testimony of P.W. 1 cannot be discarded at all because ordinarily in village, no person wants to become a witness by putting his life in risk of inviting enmity with other villagers named as accused, therefore, non examination of independent eye witness cannot affect the reliability of related witness.

35. In the case of ***Darya Singh Vs. State of Punjab AIR 1965 SC 328,*** Hon'ble The Supreme Court observed that *"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."

36. It is also argued that there are omissions, discrepancies and contradictions in the testimony of P.W. 1 which do not inspire confidence. It is well settled law that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. ***(See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796).***

37. It is also contended that there was no motive to commit the murder of the deceased by the appellants, even though the trial court has convicted the appellants. As per the F.I.R., there was enmity between both the parties relating to the election of the village Pradhan and that was the reason of the appellants to commit murder of the deceased, as stated by P.W. 1 during his examination before the court. Further it is settled legal proposition that even if there is absence of motive, as argued, that itself is of no consequence and it pales into insignificance when direct evidence establishes the crime. In case there is direct, trustworthy evidence of the witnesses as to commission of an offence, motive looses its significance and if genesis of the incident or motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence can not be discarded only on the ground of absence of motive if otherwise the evidence is worthy of reliance.

38. Last argument on the part of the learned counsel for the appellants is that the presence of P.W.1 at the place of occurrence is also disputed because he did not fix his presence in the F.I.R. and his statement before the trial court is nothing but an improvement of the other witnesses who as per the statement in the F.I.R. had seen the occurrence were not examined.

39. In this regard, it is noteworthy that in the written report given by P.W.1

himself, he did not mention of having witnessed accused persons firing at the deceased but wrote clearly that the incident was witnessed by his *bua* (aunt) Maunshree and Surajpal "इस घटना को मेरी बुआ मौनश्री व सूरजपाल ने देखा है ।" which infers that this witness himself had not seen the occurrence.

40. During his examination before the trial court, PW-1 projected himself as a witness of the incident. In the cross-examination, he stated that his brother was taking water when the accused persons came from the North side of the way. There was sound of fire which he heard. About the presence of PW-2, he stated that his mother Sheetla Devi (PW-2) was inside the house alongwith other family members such as his sister-in-law and wife with children. He then stated that when the appellants shot the deceased, all persons present there were disbursed and he alone was left there. He carried the deceased to his house who was alive at that time. When he carried his brother to some distance, his mother came and then both of them put the deceased on a cot. Thereafter, he went to Jindpur to the doctor who did not meet and then PW-2 stated that he went for arranging the vehicle to bring the doctor and when could not get the vehicle he came back from Jindpur which was around 1 KM from his village. When he came back, his brother had already died. He then stated that he put his brother in a tractor to take to the doctor and then saw he did not have pulse, so came back. His three uncles and brother were with him. Then police was called through telephone from the police station. The Station House Officer came on his own from somewhere. The incident was narrated to him and he noted it down. He went to lodge the first information report alongwith the Investigating Officer after the inquest was concluded and the body was sent for the postmortem. PW-1 stated that whatever was dictated by the Investigating Officer, he wrote the same. In this testimony, PW-1, stated that he was outside the gate of his house at the time of the incident and other witnesses were near the handpump. The mother of the deceased Sheetla Devi (PW-2) stated that at the time of the incident she came back from the tube well and reached inside the house. The incident had occurred at that point of time and she immediately returned back. In the same breath, PW-2 stated that she was standing at the gate and was waiting for the deceased to come back so that she could talk to him. PW-1 was also with her at the gate and then stated that at that time itself, the deceased was hit and she was standing facing towards the west.

41. The postmortem report indicates only one firearm injuries on the person of the deceased which means that only one fire was shot. In light of this medical evidence, when the testimony of PW-2 is examined, her version is that she having returned from the tube well, reached inside the house and then the incident had occurred and she immediately came back. According to PW-1, the accused persons immediately ran away having shot his brother. When PW-2, mother of the deceased was inside the house she could have come out hearing the sound of fire which was one only. In all probabilities, testing the version of PW-2, she did not witness the appellants accused opening fire at the deceased. Beyond that nothing has been stated by PW-2 on confrontation, in cross, about the presence of the accused appellants. Her statement in the examination-in-chief that the appellant Kripa Shanker Dubey came and fired at her son while she was standing at her gate could not be substantiated from her version

in the cross-examination. Her statement in cross-examination is found to be inconsistent with the version of PW-2 in her examination-in-chief. It, thus, appears that PW-2 had reached at the place of the incident soon after the incident had occurred but she did not witness the incident i.e. the accused opening fire at the deceased or them being the assailants.

42. As a general rule, the Court can and may act on the testimony of a single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the testimony of a solitary witness. That is the logic of Section 134 of the Evidence Act, 1872. As regards the PW-1, from his version that he wrote the written report at the dictation of the Investigating Officer and then went to the police station, non-mentioning of his name as a witness of the incident in the F.I.R. becomes relevant. PW-1, the informant, thus, remains a solitary witness of the incident.

43. The law of evidence does not require any particular principle of witness to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories namely :- (i) wholly reliable; (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable.

44. In ***Vadivelu Dhevar vs. State of Madras AIR 1957 SC 614,*** while laying the principle of appreciation of testimony of solitary witness, as noted above, it was observed that in first two category there may be no difficulty in accepting or discarding the testimony of a single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

45. In light of the above principle, when we examine the statement of PW-1 there are material improvement on the aspect of him being eye witness, coupled with the fact that first information report was found to be ante time and the presence of PW-1 on the spot was sought to be fixed by him for the first time during his deposition in the Court, when the report itself was scribed by him, the testimony of this witness would fall in the third category as this witness is neither wholly reliable nor wholly unreliable. We can neither place reliance nor totally discard the testimony of this witness. We find his testimony to have been substantially improved at the trial than what it was to began with when the first information report of the incident was lodged.

46. In the said scenario, we cannot, therefore, agree with the Sessions Court in accepting the evidence of P.W.2 as lending assurance to the testimony of P.W. 1 on the basis of which alone perhaps, the trial Court itself felt unsafe to convict the accused.

47. So far as the recovery of the country-made pistol is concerned, it was made by the Investigating Officer during the investigation at the time of arrest of accused persons from the Bus Stand near the tea stall on the basis of an information given by informer at about 21.25 o'clock. It has been proved by the P.W. 5, S.I. Manoj Kumar Pandey who made arrest and recovery, the place where-from appellants were arrested was a public place, a tea stall near the bus stand. Ext. Ka-6 site plan of

the recovery shows that there were so many shops of tea, eggs and P.C.O. near the place of the arrest, where presence of people cannot be disputed at early hours in the night but no public witness was found by the arresting officer. It makes the recovery doubtful. Further it is noteworthy that the arrest of the accused person was made on 25.12.2005 after three days of the alleged incident of murder while they were allegedly carrying the same country-made pistol with used cartridge in its chamber and another cartridge in his pocket. It seems improbable that the culprit who is a named accused in the F.I.R. would carry the country-made pistol with used cartridge in its chamber after three days of committing murder with the same weapon. Even the police personnel accompanying him at the time of the arrest had not been examined. During the cross-examination, PW-5 expressed his inability to explain the orientation of the place of arrest and recovery. The recovery of country-made pistol and cartridge, as such, cannot be believed being beyond the shadow of reasonable doubt.

48. After having examined the entire evidence and considering the circumstances of the case at hand in totality, we are afraid to affirm the conviction on the oral testimony of the prosecution witnesses (PW-1 & PW-2) and to hold that the prosecution has established the charges against the accused persons beyond reasonable doubt. The benefit of reasonable doubt, therefore, has to go to the accused persons and they are liable to be acquitted of all the charges. The judgment and order of the Sessions Court convicting and sentencing the appellants is hereby set aside.

49. The appellant Kripa Shanker Dubey is in jail who shall be released from the detention forthwith, if not wanted in any other case.

50. Appellant Uma Shanker Dubey is on bail. He need not to surrender, his bail bonds are cancelled and sureties are discharged.

51. These appeals are, accordingly, **allowed.**

52. Copy of this judgment alongwith the original record be transmitted to the Court concerned for necessary compliance. A compliance report be sent to this Court within one month. The office is directed to keep the compliance report on record.

(2022) 10 ILRA 205
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1791 of 2014

Shri Prakash Gupta ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Pushkar Srivastava, Sri Akhilesh Kumar, Sri Naushad Ahmad Siddiqui

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 498-A, 304-B, 302/34 - ¾ Dowry Prohibition Act,1961-Challenge to-Conviction- dying declaration-deceased died due to

septicemia caused by burn injuries-Statement of PW-1 & proves that the ingredient of 'soon before death' has not established at all- death caused by the accused was not premeditated-husband was not present at the time of incident-As per evidence of PW-1 and PW-2, On account of property dispute the deceased and her husband were kicked out by the in-laws -From the statement of PW-6, PW-7 it is clear that there was no tutoring in the whole process of the recording of the dying declaration-Trial court convicted the accused on the solitary evidence of dying declaration- the deceased died after three days of incident due to the poisonous infection developed in her burn injuries, hence it cannot be said that the deceased was murdered -Hence, the case falls within the ambit of Section 304 IPC and not under Section 302 IPC-The sentence of accused persons is reduced to the period of 10 years with remission-the period already undergone can be sustained in the full period of incarceration. (Para 1 to 53)

B. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring, it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. (Para 32)

C. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into consideration. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimisically.(Para 43 to 47)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Devendra Singh Vs St. of U.K. (2022) AIR SC 2965

2. Mustafa Shahdal Shaikh Vs St. of Mah. (2013) AIR SC 851

3. Kaliyaperumal Vs St. of T. N.(2003) AIR SC 3828

4. Lakhan Vs St. of M. P.(2010) 8 SCC 514

5. Krishan Vs St. of Har. (2013) 3 SCC 280

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

7. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

8. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250

9. B.N. Kavatakar & anr. Vs St. of Karnataka (1994) SUPP 1 SCC 304

10. Md. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

11. Lakhan Vs St. of M. P. (2010) 8 SCC 514

12. Krishan Vs St. of Har. (2013) 3 SCC 280

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

14. Deo Narain Mandal Vs St. of U.P.(2004) 7 SCC 257

15. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

16. Jameel Vs St. of U.P. (2010) 12 SCC 532

17. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

18. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

19. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

20. Raj Bala Vs St. of Har. (2016) 1 SCC 463

21. Khokan @ Khakhan Vishwas Vs St. of Chhattisgarh (2021) 2 SCC 365

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. This criminal appeal is directed against the judgement and order dated 25.2.2014 and sentence dated 27.2.2014 passed by learned Additional Sessions Judge, Court No.6, Deoria in Sessions Trial No. 246 of 2010 arising out of Case Crime No. 221 of 2010 under Section 302 I.P.C., P.S.- Bhatparani, District- Deoria convicting and sentencing the appellant under Section 302 I.P.C. to undergo life imprisonment with a fine of Rs.20,000/- and in default of payment of fine further one year simple imprisonment.

2. The prosecution story as emerged out from the FIR is that Chandni, the sister of the informant was married with Rajan Gupta on 12.12.2006 but the husband was not satisfied with the dowry given in the marriage and always used to quarrel over that. On 8.6.2010, the informant came to know that the in-laws of the deceased had set ablaze his sister. On the next day when the informant went to the District Hospital, Deoria, he found his sister in a bitterly burnt condition and she told that her mother-in-law, Guddi Devi (*Chacheri*), father-in-law Shriprakash Gupta caught hold her and her mother-in-law Guddi Devi, sister-in-law Km. Rani and husband Rajan Gupta set her ablaze. The deceased (then injured) referred to the Medical College, Gorakhpur and during treatment she died on 12.6.2010. Subsequently FIR, Ex.Ka-3 was lodged on the written report Ex.Ka-1 on 16.6.2010 and G.D. Ex.Ka-4 was also prepared. The inquest of the deceased was performed and autopsy report was also prepared by Dr. Arvind Kumar Gupta, who found injuries as whole on the body of the deceased.

(i) Septic burn all over body except some part of abdomen and scalp. Superficial to deep first layer present at some place.

3. In the injury report the doctor also opined that the death was caused due to septic shock as a result of anti mortem burning. After completion of investigation charge sheet Ex.Ka-16 was submitted by the I.O against the Guddi Devi and Shriprakash Gupta, mother-in-law and father-in-law respectively of the deceased. The I.O. Inspected the spot and prepared site plan Ex.Ka-13, Inspection memo Ex.Ka-14 and submitted charge sheet Ex.Ka16 to the Court.

4. During the trial of the case accused Smt. Guddi Devi died and the case was abated against her.

5. The accused Shriprakash Gupta were charged under Section 498A, 304 B I.P.C. and Section 3/4 D.P. Act. He was also charged under Section 302/34 I.P.C. The accused denied of the charges and claimed to be tried.

6. The prosecution in order to prove its case in oral evidence has relied upon the testimonies of P.W.1 Santosh Kumar Gupta, the informant/ brother of the deceased, P.W.2 Urmila Devi, mother of the deceased, P.W.3 Cons. Kalicharan Yadav, the witness of the inquest, P.W.4 Head Moharir Veer Bahadur Yadav scribe of the FIR, P.W.5 S.I. Amarjeet Singh Yadav, witness of the inquest, P.W.6 Gulab Singh, retired Nayab Tehsildar, witness of the dying declaration and P.W.7 Dr. Arvind Kumar Gupta, who performed autopsy of the deceased.

7. The prosecution also relied upon documentary evidence and written report Ex.Ka-1, panchayatnama Ex.Ka-2, Chick FIR Ex.Ka-3, Kayami Rapat Ex.Ka-4, papers prepared for the purpose of autopsy as Ex.Ka-5, Ex.Ka-6, Ex.Ka-7, Ex.Ka-8, Ex.Ka-9, Ex.Ka-10, photo nash Ex.Ka-11, dying declaration Ex.Ka-12, site plan Ex.Ka-13, inspection memo Ex.Ka-14, arresting memo Ex.Ka-15 and charge sheet Ex.Ka-16.

8. It is pertinent to mention here that the genuineness of the site plan and charge sheet has been admitted by the defence side, hence the I.O. was not examined during the trial. In his statement under Section 313 Cr.P.C., the accused stated that he has been falsely implicated. The dying declaration is a forged document and the total incident is false. It has also been stated that at the time of the incident, the husband of the deceased Rajan Gupta had gone to the market. When the information of burning was given to him he brought the injured to District Hospital, Deoria and subsequently to the Medical College, Gorakhpur where she was admitted and during treatment she was died. The cremation was also performed by her husband Rajan Gupta. The charge sheet has been filed without any evidence on false grounds and it was not a case of homicidal or dowry death. However, no defence evidence has been adduced by the convict/ appellant.

9. The trial Court after considering the entire evidence on record, recorded the acquittal of the convict/ appellant Shriprakash. Gupta under Section 498A, 304B and 3/4 D.P. Act and at the same time recorded his conviction under Section 302 I.P.C. and sentenced him for life imprisonment and a fine to the tune of Rs.20,000/-

10. Being aggrieved and dissatisfied with the aforesaid judgement and order passed by the learned trial Court, the appellant has preferred the present appeal.

11. Heard Shri Naushad Ahmad Siddiqui, learned counsel for the appellant and Shri N.K. Srivastava, learned A.G.A. for the State.

12. Learned counsel for the appellant has submitted that no offence as alleged has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the death of the deceased was due to medical negligence and occurred was after a considerable period of time from the date of commission of occurrence.

13. It has been vehemently argued by learned A.G.A. for the State that the offence alleged is gruesome and is conclusively proved by dying declaration. Learned counsel has taken us through the evidence on record. He further submitted that life imprisonment awarded to the accused in the facts and circumstances of the case was the only punishment which could be awarded to the accused-appellant and requested for dismissal of appeal.

14. Before we start considering the evidence which we are not elaborately discussing, the reason being it is proved conclusively that the accused has caused injuries to the deceased and set her ablaze which was primarily responsible for her death. The alternative prayer about lesser punishment is to be considered.

15. After perusal of the impugned judgement, we find that the learned trial Court was not convinced as to the ingredients of Section 304B of Indian Penal Code and fully establishing in the present case on appreciation of the evidence of P.W.1 and P.W.2, who happened to be the brother and mother of the deceased respectively. The trial Court has opined that the ingredients of Section 304B, 498A I.P.C. and Section 3/4 Dowry Prohibition Act were not established. The impugned judgement leads us towards the definition of Section 304B I.P.C. Necessary ingredients of the offence of dowry death under Section 304B I.P.C. reads as follows:

304B. Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

16. From the above definition the following ingredients to establish the offence under Section 304B I.P.C. are follows:

(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

(iv) such cruelty or harassment must be for, or in connection with, demand for dowry".

17. The aforesaid ingredients have been reiterated in a catena of decisions of the Hon'ble Apex Court and of this High Court also and very recently in **Devendra Singh Vs. State of Uttrakhand** AIR 2022 SC 2965 also.

18. We have gone through the evidence of P.W.1 and P.W.2 and find that although the factum of demand of dowry and harassment caused to the deceased finds place in their deposition but they have made only general allegations against all the in-laws of the deceased and no specific role of any of the in-laws including the present accused has been stated in their entire testimony. The trial court considering the aforesaid deposition has also held that no case is made out against the accused under Section 498A I.P.C. and Section 3/4 D.P. Act. So far as the offence under Section 304B I.P.C. is concerned the essential ingredients of 'soon before' does not find place any where in the respective testimonies of P.W.1 and P.W.2.

19. The phrase 'soon before' has not been defined any where in the Indian Penal Code rather it has been explained in a

catena of decisions of the Hon'ble Apex Court and of this Court.

20. In **Mustafa Shahdal Shaikh Vs. State of Maharashtra,** AIR 2013 SC 851, the Hon'ble Apex Court held that "Soon before her death' means interval between cruelty and death should not be much. There must be existence of a proximate and live links between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become state enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

21. Also in **Kaliyaperumal Vs. State of Tamil Nadu** AIR 2003 SC 3828, the Hon'ble Apex Court held that " The expression "soon before her death' used in the substantive section 304B, I.P.C. and Section 113B of the Evidence Act is present with the idea of proximity text. No definite period has been indicated and the expression "soon before her death' is not defined. The determination of the period which can come within the term " soon before' is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression' soon before would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of woman concerned, it would be of no consequence.

22. The trial Court has come to the conclusion that since the essential ingredient of 'soon before' is also absent in the testimonies of the witnesses, the death occurred of the deceased cannot be termed as dowry death in the facts and circumstances of this case. It is to be noted here that the formal evidence adduced by the prosecution support the prosecution case in many aspects. P.W.4 Head Moharrir Veer Bahadur Yadav has fully proved the Chick FIR and G.D. of the case as Ex.Ka-3 and Ka-4 and has stated that the FIR was lodged on the basis of the application given by the informant Santosh Kumar, which has been proved by the informant P.W.1 Santosh Kumar as Ex.Ka-1. Like wise the performance of inquest has been proved by Constable Kalicharan P.W.3 and also by P.W.5 S.I. Amarjeet Singh Yadav. P.W.5 has also proved the papers prepared for the purpose of autopsy as Ex.Ka-5, Ex.Ka-6, Ex.Ka-7, Ex.Ka-8, Ex.Ka-9 and Ex.Ka-10. Both the witnesses have also proved that the inquest was performed on 13.6.2010 at the mortuary house of the B.R.D. Medical College, Gorakhpur.

23. P.W.7 Dr. Arvind Kumar Gupta has performed the autopsy of the deceased and he has proved the autopsy report as Ex.Ka-12 and has found that the death of the deceased was caused due to septic shock as a result of anti mortem burning . The post mortem has been conducted on 13.6.2010 and the deceased died on 12.6.2010.

24. The learned trial Court has relied upon the dying declaration of the deceased (then injured) recorded by P.W.6 retired Nayab Tehsildar Gulab Singh.

25. P.W.6 in his deposition has stated that by order of S.D.M. Sadar, Deoria he had recorded the dying declaration of Chandni Devi on 9.6.2010 in the female ward of District Hospital, Deoria. He has

proved the dying declaration as Ex.Ka-11 and has also stated that the dying declaration was prepared by him in his own hand writing and signature.

26. The deceased (then injured) in her dying declaration has stated like this

"मैं बयान करती हूँ कि मेरी उम्र 23 वर्ष है मेरे दो बच्चे हैं। मेरे सासु व ससुर जलाये है। मेरे उपर मिट्टी का तेल छिड़क कर जलाये तथा मारे पीटे है मेरे पति गाड़ी से लेकर अस्पताल लेकर देवरिया आये अस्पताल भर्ती कराये। मेरे सासु ससुर मुझे व मेरे पति को घर से निकाल रहे हैं कहते हैं तुम लोगों का हक हिस्सा नहीं है। भसुर मेरा ठीक है। केवल मेरे सासु ससुर ही बदमाश है वही जलाये हैं बयान सुनकर तस्दीक किया।"

27. P.W.6 in his testimony has stated that the thumb impression of Chandni Gupta was taken over the dying declaration. He has also clarified that at the time of statement, the victim was bitterly burnt but was in a condition to make statement. He had orally taken permission from the doctor concerned who had told him that the victim is in a condition to make statement. He has further stated that the statement of the victim was verified by the duty doctor.

28. The trial Court has examined the veracity of the dying declaration Ex.Ka-11 in detail in the impugned judgement. From the perusal of the whole deposition of P.W.6, we do not find any adversity in his statement. The learned trial Court has made the dying declaration to be the sole basis of the conviction in the facts and circumstances of the present case. We are duty bound to examine the legal position of the dying declaration. The dying declaration to be the sole basis of the conviction.

29. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in **Lakhan vs. State of Madhya Pradesh [(2010) 8 Supreme Court Cases 514]**, in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth"*. The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

30. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the

declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

31. P.W.6 is absolutely independent witness. In the wake of aforesaid judgment of Lakhan *(supra)*, dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in **Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

32. In **Ramilaben Hasmukhbhai Khristi vs. State of Gujarat, [(2002) 7 SCC 56]**, the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

33. In the present case though the certificate of the doctor was oral, and not in written form but this fact cannot be ignored that P.W.6 has recorded the statement on the instructions of S.D.M. Sadar in his official capacity and he had no grudge or enmity with the accused.

34. There is no possibility of false implication of the accused by this independent witness.

35. From the above precedents, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

36. In context of the dying deceleration of the deceased, it is also

relevant to note that deceased died after three days of recording it. It means that she remained alive for three days after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for three days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time.

37. Thus, the dying declaration in this case is a trust worthy, cogent, reliable and innocent peace of evidence, which has correctly been relied upon by the trial Court.

38. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads 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."

39. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

40. From the upshot of the aforesaid discussions, it appears that the death was caused by the accused in unison and it was a homicidal death whether the same was not premeditated or premeditated will have to be seen. From perusal of the dying declaration itself, it is evident that the crime was committed due to the property dispute. It transpires from the evidence of P.W.1 and P.W.2 that on account of property dispute the deceased and her husband were kicked out by the in-laws of the deceased from their house. Under these circumstance, it can be concluded that

though the injuries over the body of the deceased were sufficient in the ordinary course of nature to have caused death, the accused had no intention to do away with the deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided,** (2011) 5 SCR 300 which have to be also kept in mind.

41. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in** (2011) 4 SCC 250 and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in** 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC. The deceased no doubt as per the the opinion of the doctor, has died due to septic shock.

42. 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."

43. 'Proper Sentence' was explained in **Deo Narain Mandal vs. State of UP** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

44. 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.

45. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

46. During course of argument, learned counsel for the appellant has made an alternative prayer for reduction of the sentence and has submitted that the sentence of life imprisonment awarded to the appellant by the trial Court is very harsh. He has also submitted that the appellant is languishing in jail for the past more than 10 years and at present he is aged about 70 years and the co-accused, the mother-in-law of the deceased died during the course of trial itself. Hence a prayer has been made to reduce the sentence of the convict to 10 years.

47. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

48. We are unable to agree with the submission of learned learned A.G.A. as far as it relates to the finding of the court below that the death was a premeditated murder and falls within provisions of Section 300 of IPC and the sentence under Section 302 IPC is just and proper. The

reason for the same is that the deceased did not die an insistence death; had it been a premeditated murder, the injuries on the body would have caused her immediate death.

49. One more glaring fact is that from the record of the medical papers it is evident that the deceased survived for four days. She was admitted in Medical College, Gorakhpur and thereafter she developed fissure and later on during treatment, she breathed her last due to septicemia. Though we concur with learned Trial Judge that the death was homicidal death we are unable to accept the submission of Sri Vikas Goswami, learned A.G.A.

50. The judgment of the Apex Court in State of Uttar Pradesh Vs. Subhash @ Pappu (supra) and Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh (supra) will ensure for the benefit for the accused-appellant as the death occurred after four days of the occurrence, was not premeditated.

51. We come to the definite conclusion that the death was due to septicemia. The judgments cited by the learned counsel for the appellant would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but is culpable homicide.

52. The accused is in jail for more than 10 years. The Apex Court in such cases has converted the conviction under Section 302 of I.P.C. to Section 304 Part I of I.P.C. which will come to the aid of the accused.

53. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is **partly allowed.**

54. The conviction of the appellant under Section 302 of Indian Penal Code is converted to conviction under Section 304 (Part-I) of Indian Penal Code and the appellant is sentenced to undergo 10 years of incarceration with remission but the fine and default sentence are maintained.

55. The convict- appellant shall be released on completion of said period, if not required in any other case. The judgement and order impugned in this appeal shall stand modified accordingly.

(2022) 10 ILRA 216
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2164 of 2012
And
Criminal Appeal No. 1356 of 2012

Manish Kori ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Qazi Vakil Ahmad, Sri F. Rahman, Sri Neeraj Pandey, Sri Raj Kumar Sharma.

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34-Challenge to-Conviction-Murder-No premeditation-incident occurred at the

spur of moment-accused though had knowledge and intention that his act would cause bodily harm but did not want to do away with the deceased-Hence, the instant case falls under the Exception 1 and 4 to Section 300 of IPC-Therefore, by adopting reformative theory of punishment, the accused are convicted for the offence punishable u/s 304 Part I of IPC.(Para 1 to 30)

B. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human body 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. While determining the quantum of sentence, the court should bear in mind the 'Principle of Proportionality'.(Para 29)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Didar Singh Vs St. of Har. (1992) 2 Crimes 308 SC

2. Baldev Singh & anr. Vs St. of Punj.(1995) SCC 6 593

3. Mer Dhana Side Vs St. of Guj. (1985) AIR SC 386

4. Dalip Singh Vs St. of Har. (1993) AIR SC 2302

5. Ashiq Lal Vs St. of U.P. (1998) of CrLJ 1972

6. Khokan @ Khokhan Vishwas Vs St. of Chattisgarh (2021) LawSuit SC 80

7. Anversinh Vs St. of Guj.(2021) 3 SCC 12

8. Pravat Chandra Mohanty Vs St. Ori. (2021) 3 SCC 529

9. Pardeshiram Vs St. of M.P.(2021) 3 SCC 238

10. Tukaram & ors. Vs St. of Mah. (2011) 4 SCC 250

11. B.N. Kavatakar & anr. Vs St. of Karn. (1994) SUPP 1 SCC 304

12. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

13. Md. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

14. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

15. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

16. Jameel Vs St. of U.P. (2010) 12 SCC 532

17. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

18. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

19. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

20. Raj Bala Vs St. of Har. (2016) 1 SCC 463

(Delivered by Hon'ble Kaushal Jayendra Thaker, J.)

1. Both these appeals arise out of common judgment and order dated 25.2.2012 passed by the Additional Sessions Judge, Court No.4, Jalaun, in Sessions Trial No.280 of 2009 whereby the learned Additional Sessions Judge has convicted the accused-appellants, Babloo Kori alias Santosh Kumar and Manish Kori for commission of offence under Section 302 read with Section 34 of Indian Penal Code, 1860 (for short 'IPC') and sentenced them to undergo imprisonment for life with fine of Rs.20,000/- and in case of default in

payment of fine, further to undergo one year simple imprisonment.

2. The matter was kept for pronouncement of judgment on 14.9.2022, but due to paucity of time, the judgment could not be pronounced on the said date.

3. Heard Sri Raj Kumar Sharma, learned counsel for the accused-appellants and learned A.G.A. for the State.

4. Brief facts as culled out from the record are that on 19.10.2009, F.I.R. being Case Crime No. 1657 of 2009 came to be lodged with Police Station Kotwali, Orai District Jalaun on the basis of the complaint made by one Amar Singh Chauhan, the father of the deceased stating that on the same day at about 7.30 p.m., accused-appellant, Babloo Kori had called out his son-Sardar Singh, alias Lalla Singh (deceased) from his house and near the house of Brij Mohan where accused-appellant-Manish Kori and two unknown persons were already present. Two persons were holding the hand of his son and Babloo Kori was beating his son with iron rod in his hand. It was also alleged in the complaint that accused-appellant Manish Kori was also beating the deceased on his head and hand by iron rod in his hand. Persons who were holding the hand of the deceased were shouting "Don't let him escape, kill him". It was also alleged by the informant that the Kapil Singh, son of the deceased, had seen the accused-appellant Babloo Kori calling his father out and Veer Singh, brother of the deceased, had seen the deceased being beaten by accused-appellants, Babloo Kori and Manish Kori and other two unknown persons. On hearing the shouting of the informant and Veer Singh, the accused-persons had fled away. Beer Singh, brother of the deceased, got Sardar Singh alias Lalla Singh admitted in the hospital where he died during treatment.

5. Initially the First Information Report was registered under Section 304 of IPC but after investigation and recording of statements of all the witnesses charge-sheet was submitted by the Investigation Officer to the learned Magistrate under Section 302 read with Section 34 of Indian Penal Code against the accused-appellants and two other accused-persons.

6. The learned Magistrate summoned the accused and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court.

7. On being summoned, the accused-persons pleaded not guilty and wanted to be tried.

8. On 5.11.2009, the charges were framed under Section 302 read with Section 34 of IPC by learned Sessions Judge.

9. The Trial started and the prosecution examined 11 witnesses who are as follows:

1	Amar Singh Chauhan	PW1
2	Veer Singh	PW2
3	Dr. Shrikant Tiwari	PW3
4	Hansharam	PW4
5	Arun Prakash Singh	PW5
6	Subhash Chandra	PW6
7	Anil Kumar Verma	PW7

10. In support of ocular version following documents were filed and proved:

1	F.I.R. & G.D.	Ex.Ka.11 & Ex. Ka.21
2	Written Report	Ex.Ka.1
3	Recovery memos	Ex. Ka.14, Ka.15, Ka.16 & Ka.18
4	Postmortem Report	Ex.Ka.2
5	Panchayatnama	Ex.Ka.8
6	Charge-sheet	Ex.Ka.20
7	Site Plan	Ex.Ka.13 & 17

11. Apart from the above, Sheelbhadra Gautam and Kanhaiya Lal were examined as Court witness. At the end of the trial and after recording the statements of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellants, Babloo Kori alias Santosh Kumar and Manish Kori and acquitted the other two accused as mentioned above.

12. It is submitted by learned counsel for the appellant that the incident occurred at the spur of moment and the accused had not premeditated to do away with the deceased.

13. In support of his arguments, learned counsel for the appellants has relied on the decisions in **Didar Singh versus State of Haryana, 1992 (2) Crimes 308 SC, Baldev Singh & another versus State of Punjal, 1995 SCC (6) 593, Mer Dhana Sida versus State of Gujarat, AIR 1985 SC 386, Dalip Singh versus State of Haryana, AIR 1993 SC 2302, Ashiq Lal versus State of U.P., 1998 of CrLJ 1972.**

14. It is further submitted that conviction under Section 302 IPC is not made out as no overt act as per Section 300 IPC is made out. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of incarceration as accused are in jail for more than 14 years with remission.

15. Learned A.G.A. has submitted that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case. It is submitted that the decision of the learned Sessions Judge is just and proper and does not call for any interference/modification as both the accused-appellants have direct role assigned to kill the deceased by beating him with iron rods.

16. While considering the evidence of P.W.1 to P.W.5 in cumulative nature, the death can be said to be homicidal death. Postmortem report goes to show that the injuries on the body of the deceased would be the cause of death and that it was was homicidal death.

17. We are convinced that it was homicidal death but, it would be seen whether it is homicidal death punishable under Section 302 or Section 304 Part I or Part II of IPC?

18. It would be relevant to refer to Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

19. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

20. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80,** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

21. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that it was a case of homicidal death not amounting to murder.

22. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that her act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above

offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

23. We come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

24. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

25. 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."

26. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

27. 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.

28. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

29. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

30. Therefore, accused-appellants, Babloo Kori alias Santosh Kumar and Manish Kori are convicted for the offence punishable under Section 304 (Part I) of IPC and sentenced to 10 years rigorous imprisonment. The fine is reduced to Rs.10,000/-. The fine if they have yet not deposited, will deposit the same within four weeks from the date of release from jail. The jail authority shall see that the accused-appellants are lodged in the jail to re-incarcerate for the default period if fine is not paid after they are released. The accused be released on completion of their respective sentences

31. In view of the above, both the criminal appeals are **partly allowed.** Record and proceedings be sent back to the Court below forthwith.

(2022) 10 ILRA 222
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Appeal No. 3098 of 1984

Girish Singh ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri N.B. Singh, Sri Jai Prakash Singh, Sri Rajrshi Gupta, Sri Rahul Yadav

Counsel for the Respondent:
D.G.A.

A. Criminal Law-Criminal Procedure Code, 1972-Section 374(2) - Indian Penal Code, 1860-Section 302-Challenge to-Conviction-Murder-Accused stabbed the deceased with Ballam-testimony of witnesses PW-1 and PW-2 of fact is contradictory and full of infirmities-PW-3 did not support the prosecution version-both the witnesses ie. PW-1 and PW-2 were inimical towards the appellant and the fact of grudge and animosity is proved-Trial court could not appraise substantive facts and testimony of this case in right perspective-Prosecution failed to prove its case beyond reasonable doubt against the appellant-Hence, the accused is entitled to the benefit of doubt.(Para 1 to 34)

B. It is settled principle of criminal jurisprudence that in cases where evidence and circumstances when weighed substantially and taken cumulatively raised strong suspicion about the manner and style of the occurrence that it was in fact so caused by the accused-appellant, then benefit of doubt would be the only reasonable outcome of judicial scrutiny and this benefit of doubt always works in favour of the appellants.(Para 32)

The appeal is allowed. (E-6)

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

1. By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 31.10.1984 passed by IV Additional Sessions Judge, Ghazipur, in Session Trial No.37 of 1984, State Vs. Girish Singh, arising out of Case Crime No.76 of 1983, under Section 302 I.P.C., Police Station- Khanpur, District- Ghazipur whereby the appellant Girish Singh has been sentenced to life imprisonment.

2. Heard Mr. Rajrshi Gupta, Mr. Rahul Yadav and Jai Prakash Singh, learned counsel for the appellant, Mr. Om Prakash, Mr. Alok Kumar Tripathi, Mr. Sunil Kumar Tripathi and Mr. M.P. Singh Gaur, A.G.As. for the State and perused the record.

3. The prosecution story as unfolded through the record reflects that one Rani Devi wife of late Jainath Singh, resident of Village Nayakdih, Police Station Khanpur, District Ghazipur, lodged the written report at Police Station Khanpur on 19.06.1983 at 7:45 a.m. regarding some incident that took place yesterday night at 11:45 p.m. in village Nayakdih which was 9 kms. away from the police station Khanpur, with the description that the informant is the resident of within Police Station Khanpur. Her nephew Ramagya Singh son of Dashrath Singh was not having any issue and had given his landed property to the son of his uncle, Ujagir Singh, Shriraj Singh, Giriraj Singh by way of the Will. It so happened that for the last one year, there was some dispute with Shriraj Singh, therefore, the deceased Ramagya Singh began to reside with the son of his uncle, Jairaj Singh. Some property was sold out by the deceased and the sale consideration was given to Jairaj Singh due to which the accused were inimical with the deceased.

4. It so happened that on 18.06.1983 in the night, the deceased Ramagya Singh was sleeping on the cot in front of the door

of Bhagwati. It was around 11:30 p.m. when Girish Singh came to the house of the informant and asked whereabouts of Jairaj Singh whereupon she told that Jairaj singh has gone to attend marriage ceremony. Upon this, the accused said that he will kill Ramagya Singh today and he will see as to how he sold out his land. He went away from there. As soon as Girish Singh left her home, she raised alarm whereupon Rama Shanker Singh from her neighbourhood got up and intercepted the accused by saying that have you become mad, whereupon Girish Singh went away from the scene and saying that he proceeded on to take tobacco (Surti) and proceeded towards tubewell where the informant along with Rama Shanker Singh arrived. Thereafter, they rested in front of their houses.

5. It was around 11:45 p.m., the appellant possessing lance (Ballam) proceeded towards Rama Shanker Singh where he was sleeping and threatened him that in case he got up, he will be killed. Thereafter, the appellant proceeded towards house of Ramagya whereupon Rama Shanker Singh raised alarm then Kripa Shanker Singh and others rushed to the spot lightening torches in their hands. At that point of time, the appellant assaulted Ramagya Singh on his stomach with lance (Ballam). Ramagya Singh shouted that he will be killed. Thereafter, Kripa Shanker Singh, Rama Shanker Singh and the informant reached near Ramagya Singh. They saw lance (Ballam) being extracted by the appellant Girish Singh from the stomach (of deceased) in the torch light. Upon seeing the informant and others, the appellant fled away from the scene. Thereafter, lance (Ballam) was taken out of stomach of Ramagya Singh. No one chased the appellant out of fear. The informant could not come to lodge the first information report in the night. The report was scribed / written in the following morning and the matter was reported as such. The written report is Ext. Ka-1.

6. Contents of the aforesaid information were taken down in the Check FIR on 19.06.1983 at 7:45 a.m. at aforesaid police station at Case Crime No.76 of 1983 under Section 302 I.P.C. Check FIR is Ext. Ka-6. On the basis of entries so made in the check F.I.R., a case was registered in the relevant G.D. at serial no.10 on 19.06.1983 at 07:45 a.m. at aforesaid case crime number at Police Station Khanpur, under aforesaid section of I.P.C. against appellant, which is Exhibit Ka-7.

7. The investigation ensued and was taken over by S.P. Shukla, PW-5. He arrived on the spot. In his investigation, he has proved several documents apart from Check FIR, registration of the case in the general diary, and statement of the informant as recorded by him under Section 161 Cr.P.C. Thereafter, inquest report of the deceased Ramagya Singh was prepared by the Investigating Officer. Inquest report reveals that process commenced around 9:55 a.m. and ended at 11:55 p.m. on 19.06.1983. Inquest report is Ext. Ka-9. In the opinion of inquest witnesses, it was thought proper to send the dead body for post mortem examination so that cause of death could be ascertained properly.

8. Thereafter relevant papers were prepared for sending the dead body for post mortem examination which paper are; Police Form 13 Challan of dead body Ext. Ka-10, Photonash Ext. Ka-11, letter to R.I. Ext. Ka-12, letters to C.M.O. Ghazipur Ext. Ka-13 and Ext. Ka-14, Specimen Seal Ext. Ka-15. Post mortem examination on the

dead body of the deceased Ramagya was conducted by Dr. P.C. Srivastava, at District Hospital Ghazipur on 20.06.1983 at 2:00 p.m. wherein following ante mortem injuries were noted:

9. Punctured wound, margin sharp - mid line - on the abdomen 10 cm above umbilicus at 12 O' Clock position, oblique downward direction. 3 cm x 2 cm x abdominal cavity deep loops of bowel seen coming out of wound with faecal matter.

10. Cause of death was opined to be shock and haemorrhage as result of ante mortem injury no.1. Duration of death was said to be one and half day. This post mortem examination report is Ext. Ka-5.

11. During course of the investigation, Kathari, a sort of mattress used by the villagers was taken into possession, memo whereof was prepared by the investigation officer. The weapon of assault lance (Ballam) has been proved as material Ext. 1. The investigation officer also prepared site plan of the place of occurrence which is Ext.16. The Investigating Officer after completing other formalities filed charge-sheet Ext. Ka-17 against the appellant.

12. Thereafter, the case was committed to the court of Sessions from where it was made over for hearing and disposal to the aforesaid court of IV-Additional Sessions Judge, Ghazipur, who after hearing the prosecution and accused-appellant on the point of charge was satisfied with prima facie case and framed charge against the accused-appellant under Section 302 IPC. Charge was readover and explained in Hindi to the accused-appellant who abjured charge and opted for trial.

13. In turn, the prosecution was asked to adduce its testimony whereupon the prosecution produced in all 5 witnesses. A brief sketch of witnesses is as under:-

14. Kripa Shanker Singh PW-1 and Rama Shanker Singh PW-2 both claim themselves to be witnesses of the incident and have given eye-account testimony of the occurrence. The informant Rama Devi PW-3 has turned hostile. Insofar as Dr. P.C. Srivastava PW-4 is concerned, he has conducted post mortem examination on the body of the deceased Ramagya Singh and noted ante mortem injury during course of the post mortem examination. S.P. Shukla, PW-5 is the investigation officer in this case.

15. No further evidence was adduced by the prosecution. Therefore, evidence for the prosecution was closed. The statement of the accused was recorded under Section 313 Cr.P.C. wherein in reply to the question no.11 and 12, specific statement has been made as to how and why PW-1 and PW-2 are deposing against the appellant basically on account of enmity in collusion with the police. PW-1 and PW-2 are agents of the police. No evidence, whatsoever, has been led by the appellant.

16. The case was heard on merit by the learned trial Judge who after appraisal of facts and evaluation of the evidence and circumstances of the case, returned finding of conviction against appellant under Section 302 I.P.C. and sentenced the appellant to life imprisonment under Section 302 I.P.C.

17. Consequently, this appeal.

18. It has been vehemently submitted by learned counsel for the appellant that insofar as testimony of both PW-1 and PW-2 is concerned, when read cumulatively, it

would come out that they did not see actual assailant causing injury with Ballam (lance) to the deceased Ramagya Singh. There was some incident of extending threat alone regarding which both the prosecution witnesses have testified with variation. However, if testimony of one is taken to be true then it is noticeable that PW-1 Kripa Shanker Singh, who happened to be a doctor by profession, he cannot be expected to be a rustic man and unaware of the situation and not responding properly on the spot at the time of commission of the offence, for the reasons that the deceased Ramagya Singh remained alive after the occurrence for about 30 minutes. But this witness (PW-1) has tried to improve the case by stating that at the time when he reached to the spot, the deceased told him that he has been stabbed with Ballam (lance). The deceased Ramagya Singh was crying that the appellant had assaulted him. However, the statement under Section 161 Cr.P.C. is found not supported by him on this particular aspect of the case. It is noticeable that he being scribe (PW-1) of the report has not stated even a single word about the same in the first information report. If this piece of testimony is believed and taken to be true then it works in contrast to the testimony of Rama Shanker Singh PW-2.

19. As per testimony of PW-1, he did not see anyone committing the crime in question. When he arrived on the spot, he did not see anyone committing assault on the deceased with Ballam (lance). Either of the two versions of PW-1 or PW-2 may be true. As per testimony of Rama Shanker Singh PW-2, he arrived on the spot along with Kripa Shanker Singh PW-1. There is no case that Kripa Shanker Singh PW-1 did not arrive on the spot in company with Ram Shanker Singh.

20. It has been further submitted that insofar as the first information report is concerned that this is highly belated, for which no plausible reason has been assigned in the testimony of the informant PW-3 as to how the first information report was so belatedly lodged by her. However, it has been stated in the first information report that it being night hours, the first information report could not be lodged with the police station concerned that by itself is nothing but deliberate attempt to avoid the prevailing situation.

21. It is noticeable that in the testimony of Kripa Shanker Singh PW-1, it has surfaced that the police had arrived on the spot prior to 10:00 a.m. on 19.06.1983 and after deliberation with the police, Daroga Ji asked that report should be written / scribed, thereafter, the report was written and lodged with the police station concerned, that fact by itself is fair enough to throw away the entire prosecution case, for the reason that as per the prosecution claim, the first information report was lodged at 7:45 a.m. on 19.06.1983, Police Station Khanpur, District Ghazipur, whereas, testimony of PW-2 is reflective of fact that the dead body was taken to the police station on tractor prior to arrival of Daroga Ji at 10:00 a.m.

22. Based upon that fact position and testified by PW-2, claim is that insofar as preparation of inquest report Ext. Ka-9 is concerned, arrival of the police on the spot was stated to be around 9:45 a.m. It was time when the preparation of inquest commenced, however the inquest was completed around 11:55 a.m. That being admitted position how can the dead body be brought to the police station Khanpur prior to 11:55 a.m. But as per testimony of the prosecution witnesses, the dead body

had already been taken to the police station Khanpur, that by itself is connotative to fact that the police were acting hand in glove with the scribe and the other prosecution witnesses of this case.

23. Insofar as PW-3, informant of this case is concerned, she has denied, out and out lodging of any first information report in the shape as claimed by the prosecution witnesses. She has not supported the prosecution version. She has not accused the appellant of any act of assault being caused by him as such. The enmity with the appellant on the one hand and Kripa Shanker Singh PW-1 and Rama Shanker Singh PW-2 on the other hand is admitted. In view of the statement of the accused under Section 313 Cr.P.C. as given in reply to question no.11, both the witnesses were inimical towards the appellant, and the fact of grudge and animosity is very much proved. It is highly improbable that the appellant had killed the deceased Ramagya Singh.

24. Learned counsel for the appellant has further contended that testimony of witnesses of fact is, on the face, contradictory and full of inherent infirmities. There is no point for making charge under Section 302 I.P.C. Charge itself is erroneous. Learned trial Judge while appraising facts and evaluating evidence and circumstances misread the same and recorded erroneous and illegal finding of conviction and sentence.

25. Per contra, the learned A.G.A. retorted to aforesaid arguments by submitting that the entire scene has been described in the testimony of the Kripa Shanker Singh PW-1 and Rama Shanker Singh PW-2. Ram Devi PW-3 has not supported the prosecution case although circumstances of the case are consistently proved by PW-1 and PW-2 that prior to the incident, the appellant was threatening and he proceeded possessing Ballam (lance) towards the house / spot where the deceased Ramagya Singh was sleeping in front of the door of Bhagawati.

26. The learned counsel proceeded to add that no doubt can be raised on the innocuous testimony of PW-1 and PW-2 which positively proves guilt of the accused-appellant beyond reasonable doubt. There is no material contradiction in the testimony of the prosecution witnesses. Learned trial court has judiciously recorded conviction and has passed appropriate sentence.

27. We have also considered the rival submissions and taken into consideration rival claims.

28. In view of above, the point for determination of this appeal relates to fact as to whether the offence under Section 302 I.P.C. was committed by the accused-appellant by stabbing the deceased Ramagya Singh with Ballam (lance) on 19.06.1983 around 11:45 p.m. and he was seen by the witnesses and the prosecution has proved charge under Section 302 I.P.C. beyond reasonable doubt?

29. In that regard, we would like to discuss the point of the first information report to be ante timed as raised by the learned counsel for the appellant. In that regard, we come across detailed testimony of the scribe (PW-1) of the first information report who has testified to the ambit as appear on page 24 of the paper-book that Daroga Ji arrived on the spot around 9:00 a.m. - 10:00 a.m. and the report was written after 10 to 15 minutes of his arrival. That

piece of testimony reveals in no uncertain terms fact that the first information report was not existing at 10:00 a.m. on 19.06.1983. Moreover, Daroga Ji who arrived on the spot had surveyed the spot, prior to the report being scribed, took stock of the situation and directed the persons present over there to sribe the report.

30. It has been stated by PW-1 on page no.25 of the paper-book that Daroga Ji took the dead body to the police station concerned on tractor. This aspect of F.I.R. being ante timed overshadows the entire prosecution case, for the reason that the entire things looked vitiated and full of ambiguity cannot be believed on its face value. It appears that Daroga Ji played hand in glove with PW-1 and PW-2. PW-2 if taken to be true then his testimony vindicates that he neither saw the appellant commit the crime nor did he see the appellant in the nearby place (of occurrence) after the occurrence.

31. The prosecution has not clarified about the piece of testimony of PW-1 appearing on page no.24 of the paper-book, as discussed above, regarding arrival of Daroga Ji on the spot around 9:00 a.m. - 10:00 a.m. on 19.06.1983 and that piece of testimony by itself is established and admitted case against the prosecution and re-examination of PW-1 on this point as was required of the prosecution was waived off by it. That being the case, the other aspects of this case need not be looked into at this stage, for the reason that the informant PW-3 has not supported the prosecution story and has stated in categorical terms that report was not written on her dictation, for the reasons best known to her. Nothing adverse of the sort has emerged in the cross-examination of PW-3 by the prosecution itself.

32. It is settled principle of criminal jurisprudence that in cases where evidence and circumstances when weighed substantially and taken cumulatively raised strong suspicion about the manner and style of the occurrence that it was in fact so caused by the accused-appellant (as claimed by the prosecution), then benefit of doubt would be the only reasonable outcome of judicial scrutiny and this benefit of doubt always works in favour of the appellants.

33. The learned trial court could not appraise substantive facts and testimony of this case in right perspective and considered things from narrow angle without properly scrutinizing the same on its entirety and intrinsic potency, instead it read testimony and circumstances only on its face value, whereas, proper scrutiny of fact vis a vis testimony on record would have brought truth on the surface. It is very easy to consider and examine testimony recorded in examination in chief, whereas, the Court has to cautiously contemplate on the entire testimony as a whole and particularly as emerging from the cross examination and then to proceed to record finding on merit for arriving at just conclusion.

34. We may record our satisfaction that arguments extended on behalf of the present appellants carry force and the same are approved and sustained by us. Consequently we hold in unambiguous term that the prosecution has not been able to prove its case beyond reasonable doubt against the appellant. Thus charge framed against him become doubtful and he is entitled to the benefit of doubt.

35. In the wake of above discussion, we may sum up that the finding of

conviction recorded by the trial court is on the face erroneous and perverse and the same cannot be sustained in the eye of law. Therefore, the judgment and order of conviction dated 31.10.1984 passed by IV Additional Sessions Judge, Ghazipur, in Session Trial No.37 of 1984, State Vs. Girish Singh, arising out of Case Crime No.76 of 1983, under Section 302 I.P.C., Police Station- Khanpur, District-Ghazipur, is hereby set aside. Accused-appellant is acquitted of charge as above. Accordingly, the instant appeal is allowed.

36. In this case, the accused-appellant is already on bail. He need not surrender in this case. His bail bonds cancelled and sureties discharged. However, he shall furnish surety bonds in compliance with Section 437A Cr.P.C.

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

(2022) 10 ILRA 229
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3950 of 2016
with
Criminal Appeal No. 4177 of 2016

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

Counsel for the Appellant:
Sri Shri Ram Rawat, Sri Ajay Kumar, Sri Giri Ram Rawat, Sri Pradeep Chauhan, Sri Rakesh Kumar Verma, Sri Ram Jatan Yadav, Sadhna Rani, Sri Anil Kumar Srivastava

Counsel for the Respondent:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-Challenge to-Conviction- dying declaration-deceased died due to septicemia caused by burn injuries-Four witnesses turned hostile-Witnesses involved in recording the dying declaration fully supported the prosecution case-role of appellant is clear from the dying declaration and other evidences--Hence, Learned trial court has committed no error on acting on the sole basis of dying declaration-The case falls within the ambit of Section 304 IPC and not under Section 302 IPC as the deceased died after 14 days of incident due to the poisonous infection developed in her burn injuries-Thus, The conviction of appellant u/s 302 IPC is converted into section 304 (Part –I) IPC.(Para 1 to 40)

B. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. It is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.(Para 15 to 17)

C. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring, it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. (Para 20 to 25)

The appeals are partly allowed. (E-6)

List of Cases cited:

1. Maniben Vs St. of Guj. (2009) Lawsuit SC 1380

2. Koli Lakhmanbhai Chandabhai Vs St. of Guj. (1999) 8 SCC 624

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

4. St. of U.P. Vs Ramesh Prasad Misra & anr. (1996) AIR SC 2766

5. Lakhan Vs St. of M.P. (2010) 8 SCC 514

6. Krishan Vs St. of Har. (2013) 3 SCC 280

7. Ramilaben Hasmukhbhai Khristi Vs St. of Guj. (2012) 7 SCC 56

8. St. of U.P. Vs Mohd. Iqram & anr..[2011) 8 SCC 80

9. Bengai Mandal @ Begal Mandal Vs St. of Bih. (2010) 2 SCC 91

10. Maniben Vs St. of Guj. (2009) 8 SCC 796

11. Chirra Shivraj Vs St. of A.P. (2010) 14 SCC 444

12. Gautam Manubhai Makwana Vs St. of Guj. CRLA No. 83 of 2008

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Nalin Kumar Srivastava, J.)

1. These Criminal Appeals have been directed against the judgment and order dated 28.7.2016 passed by the Additional Sessions Judge/ Fast Track Court No.1, Agra in Sessions Trial No. 525 of 2013 (Case Crime No. 19 of 2013), P.S. Kheda Rathaur, District Agra convicting and sentencing the appellants under Section 302 I.P.C. for life imprisonment and a fine of Rs. 25,000/- each with stipulation of default clause.

2. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Ram Kishun son of Shri Ram Ratan, resident of Nagla Behari, Police Station Etmaddaula, Agra, at Police Station Khera Rathaur, District Agra with the averments that marriage of her daughter, Smt. Rima Devi, was solemnized with Nathu Ram son of Pahalwan Singh, resident of Nadgawan Mod, District Khera Rathour, on 12.3.2007 according to hindu rites and rituals in which the informant had given sufficient dowry but the in-laws of her daughter, namely, Nathu Ram husband, Pahalwan Singh, father-in-law, Harpyari, mother-in-law, Ashok Kumar, Jeth, Geeta Devi, Jethani, Smt. Chhoti Devi, Nanad, were not happy with the same. They started torturing her daughter mentally as well as physically for demand of Rs.1,00,000/- cash and a motorcycle as additional dowry. Despite the Panchayat many times, they kept demanding additional dowry again and again. On 16.2.2013, with common intention, all the aforesaid members set her ablaze by pouring kerosene oil. Information about the occurrence was not given to the informant by the in-laws, rather same was given to him by the villagers next day. When the informant, alongwith many people of the village, reached the matrimonial house of her daughter, he was informed that her daughter was admitted in Yashwant Hospital in an injured condition. Thereafter, for better treatment, informant got her hospitalized in Akash Hospital, Ram Bagh, Agra, where her condition was critical. She was 80% burnt. Since informant was busy with her treatment, he could not give information about the occurrence to the police.

3. On 17.2.2013, dying declaration of the victim (Ext. ka-2) was recorded by the Additional City Magistrate -III, Agra. She also took her thumb impression over the same. Victim was conscious at the time of statement.

4. On the basis of the written report (Ext. ka-1), chik First Information Report (Ext. Ka-12) was registered at Police Station concerned on 27.2.2013 at 15.20 p.m. against Nathu Ram (husband), Pahalwan Singh (father-in-law), Smt. Harpyari (mother-in-law), Ashok Kumar (Jeth), Geeta Devi (Jethani), Smt. Chhoti Devi (Nanad) at case crime no. 19 of 2013 under Sections 326, 498-A IPC and ¾ Dowry Prohibition Act.

4. Matter was being investigated by the Station House Officer of the concerned Police Station but during investigation victim died on 2.3.2013, hence, Section 304-B was added and investigation was entrusted to Circle Officer Ratnesh Chaturvedi. During course of investigation, the Investigating Officer recorded the statement of witnesses, prepared site plan, inquest report was prepared and post mortem was performed. After making thorough investigation, charge sheet was submitted against the accused appellants. The learned Magistrate summoned the accused and committed the case to Court of Sessions, as prima facie charges were for the sessions triable offences.

6. The charges framed were under Section 498-A, 304B of IPC and Section 4 of D.P. Act. In alternative, charge under Section 302 IPC read with Section 34 of IPC was also framed. The accused-persons pleaded not guilty and wanted to be tried. Trial started and in support of it case, prosecution examined 11 witnesses, who are as follows:

1	Kishan	PW-1 (uncle of the deceased)
2	Ram Kishan	PW-2 (informant) (father of deceased)
3	Kishan Devi	PW-3 (mother of deceased)
4	Sharda Devi	PW-4 (aunt of deceased)
5	Smt. Rekha S. Chauhan	PW-5 (City Magistrate, Agra, who recorded the dying declaration of deceased)
6	Atul Singh	PW-6 (witness of inquest)
7	Dr. Amitabh Chauhan	PW-7 (performed the post mortem of the deceased)
8	Ratnesh Chaturvedi	PW-8 (Investigating Officer, IInd)
9	Jaswant Mohal	PW-9 (Investigating Officer, Ist)
10	Dr. Surendra Singh	PW-10 (who endorsed certificate over dying declaration)
11	S.I. Vijay Pal	PW-11 (scribe of the F.I.R.)

7. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Dying Declaration	Ext. A-2
3	Inquest Report	Ext. A-3
4	Letter to C.M.O.	Ext. A-6
5	Letter to R.I.	Ext. A-4
6	Challan Nash	Ext. A-5

7	Photo Nash	Ext. A-7
8	Post Mortem Report	Ext. A-8
9	Charge Sheet	Ext. A-9
10	Site Plan of residence of deceased	Ext. A-10
11	Memo of recovery of the articles taken from the spot	Ext. A-11
12	Chik F.I.R.	Ext. A-12
13	G.D. Entry	Ext. A-13

8. Deceased was hospitalised after the occurrence by her in-laws themselves. She died after 14 days of the occurrence during the course of treatment.

9. Heard Shri Anil Kumar Srivastava, Advocate holding brief for Shri Rakesh Kumar Verma, learned counsel for the appellants in both matters and Shri N.K. Srivastava, learned AGA for the State in Criminal Appeal No. 3950 of 20116 and Shri Vikas Goswami, learned AGA in Criminal Appeal No. 4177 of 2016.

10. Learned counsel for the appellants submitted that accused persons have been falsely implicated in this case. They have not committed the present offence. It is further submitted by learned counsel that all the witnesses of fact have turned hostile. PW-1 is uncle of the deceased. He has not supported the prosecution case and declared hostile. PW-2 informant is father of the deceased. Though he supported the prosecution case in examination in-chief yet in the cross-examination he did not support the case of prosecution. He has also denied the demand of any amount or any sort of torturing her daughter by the accused persons. PW-3 is the mother of the deceased. She has not supported the prosecution version. PW-4 is also a witness of fact and has turned hostile. All these witnesses have not supported the prosecution version and on the basis of analysis of their evidence, no guilt against the accused appellants is established and proved.

11. Learned counsel for the appellants next submitted that dying-declaration of the deceased was recorded when she was surviving, but this dying-declaration has no corroboration with any prosecution evidence. All the witnesses of fact have turned hostile and nobody supported the version, which is mentioned in dying-declaration. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying-declaration only when it was not corroborated at all.

12. Learned counsel for the appellants additionally submitted that if, for the sake of argument, it is assumed that appellants have committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 14 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicaemia. As per catena of judgments of Hon'ble Apex Court and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicaemia. Learned counsel for the appellants also submitted that autopsy report also shows that cause of death was septicaemia as a result of ante mortem burn injuries. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat [2009 Lawsuit SC 1380],*** and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of

2011 delivered on 1.2.2021 by this Court and several other judgments.

13. No other point or argument was raised by the learned counsel for the appellants and confined his arguments on above points only.

14. Learned AGA, per contra, vehemently opposed the arguments placed by counsel for the appellants and submitted that conviction of accused can be based only on the basis of dying-declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. There is no merit in the appeals and the same may be dismissed.

15. First of all learned counsel for the appellants has raised the issue relating to the hostility of the witnessess. Four witnesses of the fact, namely, PW-1 Kishan, PW-2 Ram Kishan, PW-3 Kishan Devi and PW-4 Sharda Devi were examined before learned trial court. All these witnesses have turned hostile but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

16. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat [1999 (8) SCC 624],*** as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

17. In ***Ramesh Harijan vs. State of U.P.*** [2012 (5) SCC 777], the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

18. In ***State of U.P. vs. Ramesh Prasad Misra and another*** [1996 AIR (Supreme Court) 2766], the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defense.

19. Perusal of impugned judgment shows that learned trial court has scrutinised the evidence on record very carefully.

20. As far as the dying-declaration is concerned, it was recorded by Smt. Rekha S. Chauhan, Additional City Magistrate-III, Agra, who was examined as PW-5. Dying-declaration was recorded by her after obtaining the certificate of mental-fitness from doctor in the hospital. After completion of dying-declaration also the said doctor has given certificate that during the course of statement, the victim remained conscious.

21. Learned counsel for the appellants has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

22. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

23. Deceased survived for 14 days after the incident took place. Her dying declaration was recorded by Smt. Rekha S. Chauhan, Additional City Magistrate, Agra after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by her. This witness is absolutely an independent witness and has no grudge or enmity to the convicts at all. In the wake of aforesaid judgment of Lakhan (supra), dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana*** [(2013) 3 Supreme Court Cases 280] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of

mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

24. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** [(2002) 7 SCC 56], the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

25. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

26. In dying declaration of deceased (Ex.ka-2), it is also important to note that it was recorded on 17.2.2013 and the deceased died on 2.3.2013 while the incident took place on 16.2.2013. It means that she remained alive for 13 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for 13 days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellants. She only attributed the role of burning to her Jeth and Jethani, who were actual culprit.

27. In such a situation, the hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and also of the circumstances leading to her death.

28. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence,

learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. Ka-2 and convicting the accused-appellants on the basis of it.

29. Now we come to the point of argument raised by learned counsel for the appellants that deceased died due to septicaemia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 14 days of incident due to the poisonous infection developed in her burn injuries, which could be avoided by good treatment. There was no intention of the appellants to cause the death of the deceased.

30. It is admitted fact that the deceased died after 14 days of burning and post mortem report goes to show that she died due to septicaemia as a result of ante mortem burn injuries. Dr. Amitabh Chauhan has been examined as PW-7, who had conducted the autopsy of the deceased. He has specifically mentioned in the post mortem report Ext. ka-8 and deposed before the learned trial court that the cause of death was septicaemia due to burn injuries. Hence, the death of the deceased was septicaemial death.

31. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC.

32. In State of ***Uttar Pradesh vs. Mohd. Iqram and another,*** [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

33. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicaemia caused by burn injuries. The accused was convicted and sentenced for life imprisonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicaemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

34. In ***Maniben vs. State of Gujarat*** [(2009) 8 SCC 796], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn

injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

35. In ***Chirra Shivraj vs. State of Andhra Pradesh*** [(2010) 14 SCC 444], incident took place on 6. Deceased was hospitalised after the occurrence by the accused persons themselves. She died after 4 days of the occurrence during the course of treatment.

36. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 ***(Gautam Manubhai Makwana Vs. State of Gujarat)*** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn

injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

37. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

38. From the upshot of the aforesaid discussions it appears that the death caused by the accused persons was not pre-meditated. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

39. In view of the aforesaid discussions, we are of the view that appeals are liable be partly allowed and the conviction of the appellants under Section 302 IPC is liable to be converted into conviction under Section 304 (Part-I) IPC and fine amount is liable to be reduced. The convicts / appellants are in jail for the last more than 9 years.

40. Accordingly, appeals are partly allowed and the appellants are convicted for the offence under Section 304 (Part-I)

IPC and are sentenced to undergo ten years of incarceration with remission with fine of Rs. 10,000/-. We maintain the default sentence, which will start if fine is not deposited after ten years with remission.

41. Record and proceedings be sent back to the Court below forthwith.

42. This Court is thankful to learned Advocates for ably assisting the Court.

(2022) 10 ILRA 239
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4094 of 2016

Smt. Angoori Devi & Ors. ...Appellants
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ashutosh Yadav, Abhilasha Singh, Sri Shyam Lal, Sri Yogesh Kumar Srivastava

Counsel for the Respondent:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860-Sections 498-A, 304-B & 302/34 - ¾ Dowry Prohibition Act,1961-Challenge to-Conviction- dying declaration-deceased died due to septicemia caused by burn injuries-Statement of PW-1 proves that the ingredient of 'soon before death' has not established at all- death caused by the accused was not premeditated-husband was not present at the time of incident and he had been acquitted while others had been found guilty on the basis of dying declaration -From the statement of PW-6, PW-7 it is clear that there was no tutoring in the whole process of the recording of the dying declaration- the deceased died after two and a half months of incident due to the poisonous infection developed in her burn injuries, hence it cannot be said that the deceased was murdered -Hence, the case falls within the ambit of Section 304 IPC and not under Section 302 IPC-The sentence of accused persons is reduced to the period of 10 years with remission-the period already undergone can be sustained in the full period of incarceration. (Para 1 to 44)

B. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring, it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. (Para 43)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Devendra Singh & ors. Vs St. of U.K. (2022) AIR SC 2965

2. Mahendra Singh Vs St. of M.P. (2022) 7 SCC 157

3. Kailash Vs St. of M. P. (2007) AIR SC 107

4. Devinder Vs St. of Har. (2010) 10 SCC 763: 2012 (10) JT 249

5. G.V. Siddaramesh Vs St. of Karn. (2010) 3 SCC 152

6. St. Vs Veer Pal & ors. (2022) 2 SCC Crl. 224

7. St. of U.P. Vs Ram Sagar Yadav (1985) 1 SCC 552; 1985 ACC Cri. 127

8. Ramwati Devi Vs St. of Bih. (1983) 1 SCC 211: 1983 SCC Cri 169

9. B. Sanghikala Vs St. of A. P.(2005) SCC Cri.171

10. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. Heard Sri Yogesh Kumar Srivastava, learned counsel for the appellants and Sri N.K. Srivastava, learned AGA appearing for the State and perused the record.

2. The instant criminal appeal has been filed against the judgment and order dated 28.07.2016/29.07.2016 passed by Additional Sessions Judge/Fast Track Court No. 1, Hathras, in S.T. No. 493 of 2014, State vs. Arjun Singh and one another, S.T. No. 194 of 2015, State vs. Bachchoo Singh and one another and S.T. No. 146 of 2015, State vs. Sukhvir, arising out of Case Crime No. 322 of 2014, under Sections 498A, 304B IPC and Section ¾ Dowry Prohibition Act, P.S. Chandpa, District Hathras, whereby the applicants have been convicted under Section 302/34 IPC and sentenced to imprisonment for life with a fine of RS. 10,000/- each and in default to undergo 6 months additional simple Imprisonment.

3. All the three sessions trials were consolidated with S.T. No. 493 of 2014, State vs. Arjun Singh and the another, which was mentioned as leading case.

4. The factual scenario as emerged out from the FIR (Ext. K-3) is that Smt. Hema, sister of the informant Sunil Kumar was married to the accused Arjun Singh on 01.05.2013. After marriage she was harassed and subjected to cruelty for demand of dowry by her husband Arjun Singh, mother in-law Anguri Devi, *Jeth* Bachchoo Singh and *Jeth*ani Anjali Devi, who were not satisfied with the dowry given in the marriage and were demanding Rs. 50,000/- more as dowry. When the informant and his father shown their inability to pay this huge amount, they set ablaze the aforesaid Hema on 03.05.2014 at her matrimonial home. The informant on information went there and took away his sister to the hospital and when they have no money left for treatment, they left away Smt. Hema to her matrimonial home on 03.05.2014. The in-laws of the deceased took no interest in her treatment and ultimately she died on 19.07.2014.

A written report Ext. K-1 was was given to the station officer at P.S. Chandpa, District Hathras by the informant and FIR was lodged on 19.07.2014 at 09:15 a.m.

5. The investigation of the case was conducted by C.O. Narendra Dev, who recorded the statements of witnesses and made a site plan (Ext. K-6) after inspection of the house of the accused persons. The inquest report Ext. K-2 was prepared on 19.07.2014 by Tehsildar Ram Jeevan Verma and necessary papers for postmortem were also prepared. The postmortem of the deceased was performed by Dr. R.P. Singh on 19.07.2014 and autopsy report Ext. K-5 was prepared by him, who found the following antemortem injuries on the person of deceased as mentioned below :-

1.Superficial to deep burn (old) on neck and chest and face, surface of skin is covered with granulated tissues.

2.Superficial to deep burn (old) on both asens (Anteriorly and posteriorly). Surface of skin is covered with granulatial tissues.

3. Superficial to deep burn (old) on back of chest where skin surface is covered with granulated tissues.

It was opined that the cause of death was septicemic shock as a result of old burn .

6. After investigation three charge-sheets Ext. K-7, Ext. K-8 and Ext. K-9 was submitted by the Investigating Officer. Meanwhile the dying declaration (Ext. K-10) of Smt. Hema aforesaid was recorded by Sri P.S. Rana, Additional City Magistrate on 04.05.2014 at Maraj Hospital, Aligarh.

7. The accused persons were appeared before the court and their cases being exclusively triable by the Sessions court were committed to the court of Sessions.

8. Accused Arjun Singh and Anguri Devi were charged under Sections 498A, 304B read with Section 302/34 IPC and Section 4 D.P. Act, accused Bachchoo and Smt. Anjali were charged under Sections 498A, 304B read with Section 302/34 IPC as alternative charge and Section ¾ D.P. Act and charges under Sections 498A, 304B read with Section 302/34 IPC as alternative charge and Section 4 D.P. Act were framed against accused Sukhvir.

9. Accused persons pleaded not guilty and claimed to be tried and the trial started.

10. The prosecution to bring home the charges against the accused person has relied upon oral and documentary evidence.

11. In oral evidence P.W. 1 Sunil Kumar, informant/brother of the deceased, P.W. 2 Raju Singh, witness of inquest report, P.W. 3 Constable Clerk Narendra Singh scribe, P.W. 4 Dr. Ravindra Pratap Sing, P.W. 5 C.O. Narendra Dev, the Investigating Officer and P.W. 6 Pooran Singh, Tehsildar, the witness of dying declaration and P.W. 7 Dr. Mairaj Ali, Mairaj Hospital, Aligarh have been examined.

12. As documentary evidence, written report Ext. K-1, inquest report Ext. K-2, Chick FIR Ext. K-3, Case registration GD Ext. K-4, Autopsy Report Ext. K-5, site plan Ext. K-6, charge-sheet Ext. K-7, 8 and 9 and dying declaration Ext. K-10 have been produced by prosecution.

13. After the prosecution evidence is over, the incriminating circumstances and evidence adduced against accused persons were put before them. In their statements under section 313 Cr.P.C., they claimed whole prosecution evidence as false and fabricated. Accused Arjun Singh, Sukhvir, Anjali and Bachchoo Singh have taken defence of separate leaving and also claimed the suicidal death of the deceased and false implication of the accused persons.

14. Accused Arjun Singh, husband of the deceased has stated that at the time of occurrence he has not present in the village. His wife was short tempered. He has also stated that he bore of the expenses regarding treatment of his wife and has also claimed that she herself has committed suicide by pouring kerosene oil upon her and all the accused persons have been falsely implicated.

15. On behalf of accused persons DW-1, Pawan Kumar, who is the resident of the village of the appellants has been examined to prove the ill tempered nature of the deceased and also the factum of suicide committed by her.

16. As oral evidence PW-1 Sunil Kumar, the brother of the deceased has been examined who in his Examination-In-Chief has corroborated the prosecution story and proved the written report Ext. Ka-1 was reiterated the fact.

17. The main ingredients of the offence under Section 304-B required to be established are determined by the Hon'ble Apex Court in a catena of decisions and recently in ***Devendra Singh and others v. State of Uttarakhand, AIR 2022 SC 296***5 they have been reiterated as follows: -

"(i) that soon before the death, the deceased was subjected to cruelty and harassment in connection with the demand of dowry;

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(ii) the death of the deceased was caused by any burn or bodily injury or some other circumstance which was not normal;

(iii) such a death has occurred within 7 years from the date of her marriage;

(iv) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband;

(v) such a cruelty or harassment should be for, or in connection with the demand of dowry; and

(vi) it should be established that such cruelty and harassment were made soon before her death."

18. In the aforesaid matter the Hon'ble Apex Court explaining the Provision of Section 113B of Indian Evidence Act has laid down that :-

"Section 304BIPC read along with Section 113B of the Indian Evidence Act, 1872 makes it clear that once the prosecution has succeeded in demonstrating that a woman has been subjected to cruelty or harassment for or in connection with any demand for dowry soon after her death, a presumption shall be drawn against the said persons that they have caused dowry death as contemplated under Section 304B IPC. The said presumption comes with a rider inasmuch as this presumption can be rebutted by the accused on demonstrating during the trial that all the ingredients of Section 304B IPC have not been satisfied. [Ref.: Bansi Lal vs. State of Haryana, (2011)11 SCC 359: AIR 2011 SC 691, Maya Devi and Anr. vs. State of Haryana,(2015) 17 SCC 405: AIR 2016) SC 125, G.V. Siddaramesh v. State of Karnataka (2010) 3 SCC 152: 2010 AIR SCW 1387 and Ashok Kumar vs. State of Haryana (2010) 12 SCC 350: AIR 2010 SC 2839]."

19. In the light of relevant provisions, ingredients of the offences and the evidence adduced, the case has to be scrutinized. PW-1 Sunil Kumar, brother of the deceased, in his statement has reiterated the fact of dictating written report and lodging of FIR and has stated that the deceased. Hema was married with the accused Arjun Singh on 1.5.2013. She was harassed and subjected to cruelty by her in-laws with a demand of Rs. 50,000/- as additional dowry. He has further submitted that on 3.5.2014 accused persons Arjun Singh, Anguri Devi, Anjali Devi, Bachchu Singjh and Sukhbir Singh with the common object set ablaze his sister by pouring kerosene oil and ultimately she died on 19.7.2014.

20. In his cross-examination, he has stated that his sister deceased Hema was very loose tempered and irritable and used to come to her parents without informing her in-laws. He has also admitted in his cross-examination that she used to make quarrel with her in-laws on the issue of the partition of the house and had grudge with them. His brother-in-law never demanded any dowry and he was not present on spot on the day of occurrence. He has further stated that one day before the occurrence, his sister came to her parental house but she was bitterly harassed there and was sent back to her inlaws. Since, she was a peevish and ill tempered lady, she set ablazed herself. The accused persons neither set ablazed her nor assaulted.

21. PW-2 Raju Singh, witness of Panchayanama, is a resident of the village of accused persons. It is to be noted that PW-1 has also proved the inquest report as Ext. K-2 and PW-2 has also identified his signature over the inquest report. PW-3, Constable Narendra Singh is the scribe of FIR and he has proved the Chik FIR Ext. K-3 and case Registration GD as Ext. K-4. In his cross-examination, he has stated that it is true that the informant or any of his family members never informed the police regarding the said incident for a period of 2 months and 16 days.

22. PW-4 Dr. Ravindra Pratap Singh has proved autopsy report as Ext. K-5. In his cross-examination, he has stated that the deceased had died due to Septesemia and infection and pus was found in the both lungs of the deceased at the time of post mortem.

23. PW-5, Circle Officer Narendra Dev, is the Investigating Officer of the case, he has proved the topography of the place of occurrence and the site plan Ext. K-6. He has recorded the statement of the informant, scribe of the FIR, witness of the inquest report and also made a copy of the dying declaration in the case diary. After completion of investigation, he also submitted charge-sheets Ext. K-7, 8 and 9 in the court. In his cross-examination he had admitted that during investigation witness Netrapal had stated that the deceased Hema was very ill tempered and irritable lady.

24. PW-6, Tehsildar, Pooran Singh Rana, in his deposition has categorically stated that on 4.5.2014 at 11:53 am he has recorded the dying declaration of Smt. Hema at Mairaj Hospital, Aligarh, and prior to the recording of that statement he obtained the certificate from the doctor that she was fully conscious and, in a position to record her statement. After recording the dying declaration, he obtained certificate from the doctor that during the course of recording the statement, she had been fully conscious and, in a position to record her statement. PW-6 has proved the dying declaration as Ext. K-10.

25. PW-7 Dr. Mairaj Ali, has also proved the process of recording of dying declaration in his deposition and has confirmed this fact that dying declaration was recorded on 4.5.2014 at 11:50 am in Mairaj Hospital, Aligarh, by Sri P.S Rana, Additional City Magistrate I, Aligarh, he has also confirmed his certificate mentioned upon Ext. K-10.

26. In his cross-examination, PW-7 has deposed that at the time of admission in his Hospital, she was 50%-60% burnt where she remained admitted in the hospital along with her parents for 4-5 days.

27. It is a settled principle of law that the defence evidence to be weighed in the same manner as the prosecution evidence. On this aspect, shalter can be taken of ***Mahendra Singh vs State of M.P. (2022) 7 SCC 157.***

28. DW-1 Pawan Kumar Sharma who is a resident of the village of the appellants/accused persons has stated that at the time of occurrence he was present at the house of the deceased and saw that the deceased set ablazed herself and was crying. He had also tried to save the deceased. In his cross-examination he has stated that he was also burnt when he was trying to save the deceased. However, he has admitted that the deceased had not set ablazed herself before him. Hence, the deposition of D.W. 1 is of no help of the accused persons.

29. On taking note of the evidence and other aspects of the matter it is evident that the death of the deceased had occurred within seven years from the date of her marriage. From the Medical Evidence, it has been proved beyond reasonable doubt that death of the deceased had occurred in such circumstances which were not normal. Thus, the fact of unnatural death of the deceased within 7 years of her marriage has been fully established. Now, the question arises for consideration as to whether the allegations made by the prosecution would be sufficient to satisfy the ingredients of Section 304-B IPC with regard to demand of dowry, perpetration of cruelty and harassment in connection with demand of dowry. Further, if such cruelty and harassment suffered by the deceased was continuous and had put to her life miserable so as to bring her home death. It is well settled that such cruelty or harassment are to be linked with the close proximity of time soon before her death.

30. It is pertinent to mention here that there is no witness of fact on record to corroborate the deposition of PW-1 who is the brother of the deceased. No other family member from the parental side of the deceased has been examined. The evidence of PW-1 if taken as a whole, is shaky and is of uncertain character so far as the dowery death in concerned. Whereas in his examination in chief he has stated about harassment and demand of dowry from his sister, in the cross-examination, he has stated that she was very ill tempered and after used to come to her parental house without any information to her in-laws to which she was scolded and rather beaten by her parents and this incident happened just before her death. Hence, the statement of PW-1 ultimately proves that the ingredient of "soon before death' has also not been established at all. Since the prosecution failed to establish the necessary ingredient of "soon before death' which was a must to prove the guilt of the accused persons under Section 304-B IPC, it can be concluded that the offence under Section 304-B is not established from the evidence on record and therefore, no presumption can be drawn under Section 113B of the Indian Evidence Act, which means that the burden of proof remains upon the prosecution and it is not shifted on the defence side by virtue of non-application of section 113B of the Indian Evidence Act. Depending upon the facts and circumstances of the case reference can be made in ***Kailash vs. State of Madhya Pradesh, AIR 2007 SC 107***, wherein it has been held that the word "soon before death' in section 113B cannot be limited by fixing time limit. It is left to be determined by the

Courts, depending upon the facts and circumstances of the case. It has been held by Hon'ble Apex Court in ***Devinder vs. State of Haryana, (2010) 10 SCC 763: 2012 (10) JT 249*** that Section 113B read with Section 4 of the Act would mean that unless and until it is proved otherwise, the Court shall hold that a person has caused dowry death of a woman if it is established before the Court 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 similar view has been taken in ***G.V. Siddaramesh vs. State of Karnataka, (2010) 3 SCC 152*** wherein it has been held that there must be material to show that soon before the death of woman, such woman was subjected to cruelty or harassment for or in connection with demand of dowry, then only a presumption can be drawn that a person has committed the dowry death of a woman.

31. It is pertinent to mention here that alternative charge under Section 302 IPC has been framed against the accused persons and the learned Trial Court has relied upon the dying declaration of the deceased Ext. K-10, as a proof thereof.

32. The learned counsel for the appellant has vehemently argued that the dying declaration in this case is not a valid piece of evidence. It has not been corroborated by any cogent evidence. On the other hand the learned AGA has relied upon the case law of Hon'ble Apex Court in ***State v. Veer Pal and Others (2022) 2 SCC (Criminal) 224*** wherein it has been held as under :-

16 Now, on the aspect, where in the absence of any corroborative evidence, there can be a conviction relying upon the dying declaration only is concerned, the decision of this Court in Munnu Raja (Munnu Raja vs. State of M.P., (1976) 3 scc 104: 1976 SCC (Cri) 376) and the subsequent decision in Paniben vs. State of Gujrat [Paniben v. State of Gujarat, (1992) 2 SCC 474: 1992, SCC (Cri) 403] are required to be referred to. In the aforesaid decisions, it is specifically observed and held that there is neither a rule of law nor of prudence to the effect that a dying declaration cannot be acted upon without a corroboration. It is observed and held that if the Court is satisfied that the dying declaration is true and voluntary it can base its conviction on it, without corroboration. Similar view has also been expressed in ***State of U.P. Vs. Ram Sagar Yadav [State of U.P. vs. Ram Sagar Yadav] (1985) 1 SCC 552; 1985 ACC (Cri) 127] and Ramawati Devi vs. State of Bihar. [Ramwati Devi vs. State of Bihar] (1983) 1 SCC 211: 1983 SCC (Cri) 169]****. Therefore, there can be a conviction solely based upon the dying declaration without corroboration.*

33. In the present case, PW-6 has recorded the dying declaration of the deceased in the Mairaj Hospial, Aligarh on 4.5.2014 at 11:53 a.m. and has proved it as Ext. K-10. What the deceased had spoken is verbatim written in Ext. K-10 like this:-

" आग कैसे लगी- मेरे सास, जेठानी अंजली, जेठ बच्चू सिह, देवर सुखवीर ने 3-4 दिन पहले मारा था। शुक्रवार को इन लोगो ने मिट्टी तेल डाल कर आग लगाई। यह घटना सुवह की है। तुम कहाँ थी- मैं कपड़े धो रही थी। आग क्यों लगाई- मुझे निकालने को कहते थे। घरवाला कहाँ था- काम पर गये थे। शादी कब हुई- एक साल हो गया है। बच्चे हैं- नहीं । मुझे कहते थे तीन लाख रूपया कर्जा हटाने के लिये लाओ लोन का।"

34. A certificate has been given by Dr. Mairaj Ali PW-7 before and after recording of the dying declaration which has been

endorsed on Ext. K-10 to the effect that Smt. Hema Devi is all conscious and will oriented with time, place and person and is fit for recording of statement. He has also certified that the patient remained conscious and oriented till the end of recording of statement. From the statement of PW-6 and PW-7 it is absolutely clear that there is no tutoring in the whole process of the recording of the dying declaration of Ext. K-10 and it is genuine and innocent statement. PW-6 Pooran Singh Rana, the then Additional City Magistrate I, Aligarh, is a responsible officer and an interested witness. No material circumstance comes out from the analysis of the evidence on record to establish that the Magistrate had any orientation against the accused hence, question of doubt on declaration recorded by PW-6, does not arrive at all.

35. Learned counsel for the appellant submitted that the medical evidence shows that the deceased died due to Septicemic shock after about two and a half months from the date of occurrence and, therefore, it cannot be said that the deceased was done to death and she was murdered.

36. The Trial Court has also relied upon the dying declaration made by Smt. Hema and has found that offence under Section 304 B IPC is not made out against the accused persons but they could not get rid of the charge under Section 302/34 IPC. It has also been observed by learned Trial Court that perusal of dying declaration Ext. K-10 shows that accused Arjun, husband of the deceased, was not present at the time of occurrence and as such he has been acquitted from all the charges by Trial court. Accordingly, the present appellants have also been acquitted from the charges under Section 498A, 304B and Section 4 Dowry Prohibition Act, but at the same time on the basis of dying declaration they have been found guilty under Section 302/34 IPC and have been sentenced accordingly.

37. While replying to the plea of the learned counsel for the appellants that since the death was caused due to septicaemia and it took place after about two and half months from the date of occurrence, dying declaration is not reliable and inadmissible, the learned AGA has relied upon the case of **B. Sanghikala v. State of Andhra Pradesh, 2005 SCC (Criminal) 171**, wherein it has been held that there is no legal requirement that dying declaration could be admissible in evidence only when made under expectation of death.

38. While considering the conclusion arrived at by the learned Trial court and the sentence imposed upon by it, we would have to see as to whether the deceased was done to death, however, the cause of death due to Septisemic Shock will not take out from the purview of Section 300 IPC.

39. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case is that the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads 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."

40. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

41. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

42. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in ***Veeran and others Vs. State of M.P. (2011) 5 SCR 300*** which have to be also kept in mind.

43. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord

and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same."

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the certificate given by the doctor are consistent and seem to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene oil and setting her ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after about two and half months of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben vs. State of Gujrat, 2009 (8) SCC 796, the Apex Court has observed as under:-

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

44. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around two and half months after the occurrence and ultimately died of septicemia. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed and the sentence of the accused persons/ appellant is reduced to the period of 10 years with remission. The period already under gone can be sustained in the full period of incarceration.

45. The fine is reduced to Rs. 5000/- each to be paid to the original complainant. The default sentence would be 6 months with remission and will run after completion of 10 years incarceration. The accused persons have been languishing in jail since long, at least each of them has suffered for about 8 years of imprisonment and must have repented to their deed which was out of anger.

45. It is to be made clear that accused/appellant Smt. Anguri Devi, has already been released from the prison on the basis of mercy petition of 4.8.2022 hence, she need not under go any imprisonment.

Accordingly, the appeal is partly **allowed.** Record and proceedings be sent back to the court below forthwith

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(2022) 10 ILRA 249
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 4599 of 2015
with
Criminal Appeal No. 4601 of 2015
with
Criminal Appeal No. 4597 of 2015

Smt. Seema ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Atul Tej Kulshreshtha, Sri Rajrshi Gupta, Sri Vinay Kumar Khokhar, Sri Vinay Singh, Sri Dileep Kumar

Counsel for the Respondent:
G.A., Sri Braham Singh, Sri Sushil Kumar Tewari

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 498-A, 304-B, 201, 302 - 3/4 Dowry Prohibition Act,1961-Challenge to-Conviction-Accidental death converted into dowry death-Applicant and his wife met accident while returning home on a motorcycle-wife succumbed to injuries-informant gave a colour of accidental death to dowry death-applicant proved the medical reports of the treatment while trial court did not consider the Panchnama in proper manner upon which signature of informant was taken and he was also present in the cremation-Hence, on the basis of defence evidence, both oral and documentary and in the circumstances of the case, the convicts/appellants have succeeded to create a doubt about the genuineness of the prosecution case-It is well settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be

convicted-Thus, the appellants are acquitted of the charges leveled against them and the impugned order is set aside.(Para 1 to 49)

B. In a criminal trial, if the accused succeeds to create a reasonable doubt in the mind of the Court as regards to his guilt and on the basis of evidence-oral, documentary or circumstantial adduced in his defence, it is sufficient for his acquittal because the burden to prove its case lies heavily and solely beyond reasonable doubt upon the prosecution. (Para 41 to 46)

The appeals are allowed. (E-6)

List of Cases cited:

1. Maya Devi & anr. Vs St. of Har.(2015) 17 SCC 405

2. Neel Kumar @ Anil Kumar Vs St. of Har. (2012) 5 SCC 766

3. Janak Yadav & ors. Vs St. of Bih. (1999) SCC Crl. 558(559)

4. Munshi Prasad Vs St. of Bih. (2002) 1 SCC 351

5. Adam Bhai Suleman Bhai Ajmeri Vs St. of Guj. (2014) 7 SCC 716

6. Rishi Kesh Singh & ors. Vs St.(1970) AIR All 51 FB

7. V.D. Jhingran Vs St. of U.P. (1966) AIR SC 1762

8. Harbhajan Singh Vs St. of Punj. (1966) AIR SC 97

9. Bhikari Vs St. of U.P. (1966) AIR SC Pg 1

10. Pankaj Vs St. of Raj. (2016) AIAR Crl. 886 SC

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Nalin Kumar Srivatava, J.)

1. These criminal appeals have been preferred by appellants Smt. Seema, Devendra Singh and Praveen Singh against the judgment and order dated 15.09.2015 passed by Additional District & Sessions Judge / Fast Track Court No.2, Moradabad in Sessions Trial No.1549 of 2008 (State Versus Devendra Singh and others) arising out of case crime no.701 of 2005 under sections 498-A, 304-B, 201, 302 IPC and section 3/4 Dowry Prohibition Act, Police Station Asmauli, District Moradabad convicting and sentencing all the appellants for the offence under section 498-A IPC to undergo 2 years rigorous imprisonment with fine of Rs.5000/- and in default of payment of fine, three months further rigorous imprisonment, for the offence under section 304-B IPC to undergo imprisonment for life, for the offence under section 201 IPC to undergo 2 years rigorous imprisonment with fine of Rs.5000/- and in default of payment of fine, three months further rigorous imprisonment and for the offence under section 4 Dowry Prohibition Act to undergo one year rigorous imprisonment with fine of Rs.5000/- and in default of payment of fine, three months further rigorous imprisonment. All sentences were directed to run concurrently.

2. Factual scenario as culled out from the F.I.R. is that the informant (P.W.1) solemnized the marriage of his daughter with Devendra Singh (accused) on 8.4.2004 in which he spent around six lac rupees, but her husband and in-laws' were not satisfied with the dowry and they used to blame the daughter of the informant for not fulfilling their demand. Daughter of the informant had told this fact to him and other family members when she returned from her

matrimonial house. On 30.6.2004, when the informant went to meet his daughter at her in-laws' house, she told that her jeth, jethani and mother-in-law had made a demand of rupees five lacs and started extending torture to her. On 31.10.2004, the informant went to her daughter's place on the occasion of *karwachauth* and made complaint to Devendra, the husband, regarding harassment and additional demand of dowry. On 18.11.2004, the informant again visited her daughter's matrimonial house, but no one was found over there. On query being made, the neighbours informed that Devendra, his mother, his brother and bhabhi have committed the murder of her daughter due to demand of dowry and also destroyed the evidence thereof. Informant was not informed regarding the death of his daughter. The Police did not lodge any F.I.R. despite efforts of the informant and ultimately by order of the Court, F.I.R. was lodged.

3. Initially, the investigation was made by C.O. Harendra Pratap Singh (P.W.4), but subsequently it was transferred to C.O. Brijesh Kumar Srivastava (P.W.5), who conducting the proceedings of investigation, recorded statements of witnesses, prepared site plan Ext. A4 and after completion of entire formalities, charge-sheets Ext. A5 and Ext. A6 were submitted to the Court by the last I.O. Dpy. S.P. Sushil Kumar (P.W.6).

4. Magistrate concerned took cognizance in the matter and the case, being exclusively triable by the Sessions Court, was committed to the Court of Sessions.

5. The Trial Court framed charges against accused Devendra Singh, Praveen Singh and Smt. Seema for the offence under Sections 498A, 304-B, 302, 201, 3/4 Dowry Prohibition Act on 18.7.2011.

6. Accused denied the charges framed against them, pleading not guilty and claimed to be tried.

7. Accused Smt. Krishna died before framing of charge and the case was abated against her.

8. In order to prove its case, prosecution examined six witnesses. Out of them, P.W.1 is Bhagwant Singh, the informant, P.W.2 Sudeep, the brother of the deceased, P.W.3 Hukum Singh, the uncle of the deceased, P.W.4 Circle Officer Harendra Pratap Singh, the first investigating officer, P.W.5 Brijesh Kumar Srivastava, the subsequent investigating officer and P.W.6 Circle Officer Sushil Kumar, the last investigating officer.

9. As per documentary evidence, application under section 156 (3) Cr.P.C. Ext. A-1, affidavit Ext. A-2, Chik F.I.R. Ext. A-3, Site Plan Ext. A-4, Charge-sheet Ext. A-5 and A-6 and application Ext. A-7 have been filed.

10. On conclusion of prosecution evidence, statement of accused-persons were recorded under section 313 Cr.P.C. wherein they denied all the allegations and incriminating evidence against them and stated that their implication in the present case is totally false. Narrating the story, they have stated that on 16.11.2004, Devendra was returning home along with his wife (deceased) on a motorcycle bearing registration no.UP-81 - 8427 and when they reached village Nandpur Beeta at 7:30 P.M., an unknown DCM vehicle hit their motorcycle, due to which Devendra

and his wife became injured and thereafter his wife succumbed to the injuries. Devendra also received injuries in the said accident. He got treated at Sai Hospital, Moradabad, Sainik Hospital, Meerut and lastly at Army Hospital, Kocchi. It was further stated that accidental case was converted into a case of dowry death. Panchnama was prepared on spot in the presence of informant and his family members who were also present at the time of cremation.

11. Accused persons in their defence have examined D.W.1 Harpal Singh, D.W.2 Ranjit Singh, D.W.3 Tirmal Singh, D.W.4 Dr. Anurag Agarwal, D.W.5 Rajendra Singh, D.W.6 C.P. 93 Harvir Singh, D.W.7 Devendra Singh (Accused), D.W.8 Chandan Giri Goswami and D.W.9 S.I. Anil Kumar.

12. Bed Head Ticket of Sai Hospital Ext. Kha-1, Panchnama Ext. Kha-2, Discharge Slip Ext. Kha-3, Medical Report Ext. Kha-4, Medical Treatment Report Ext. Kha-5, Treatment paper and discharge slip Ext. Kha-6, Kha-7 respectively have been produced as documentary evidence by defence.

13. Trial Court, having heard learned counsels for parties and going through entire record, vide impugned judgment and order, convicted and sentenced the accused-appellants as above. Hence, feeling aggrieved with said judgment and order, accused-appellants have filed this appeal.

14. Heard Sri Rajarshi Gupta, learned counsel for the appellants, Sri N.K. Srivastava, learned A.G.A for the State and perused the entire record.

15. P.W.1 Bhagwant Singh has proved the application moved before the Court under section 156 (3) Cr.P.C. as Ext. A-1 and he has also proved the facts of the marriage of her daughter with accused Devendra Singh on 8.4.2004. He has also deposed that accused-persons Devendra, Praveen, Seema and Krishna used to demand rupees five lacs as additional dowry from her and she was subjected to cruelty for the demand of dowry. He has further deposed that his daughter used to tell those incidents to him and when on 18.11.2004 he went to the house of the accused-persons to meet his daughter, the neighbours told that the accused-persons have murdered his daughter and the dead body was set to fire. In his cross-examination, he has expressed his ignorance about the alleged motorcycle accident wherein accused Devendra got injured and subsequently hospitalized and his daughter died. He does not know the cause of death of his daughter Sarita.

16. P.W.2 Sudeep is the brother of the deceased and he has also corroborated the deposition of P.W.1 and has categorically stated that the accused-persons used to demand additional dowry from his sister and she was continuously subjected to cruelty for demand of dowry.

17. P.W.3 Hukum Singh is the brother of the informant. He has also corroborated the statement of P.W.1 and supported the prosecution version in his deposition.

18. P.W.4 C.O. Harendra Pratap Yadav has deposed as secondary witness for H.M. Ganga Singh, the scribe of the F.I.R. and has proved the chik F.I.R. as Ext. A-3. This witness is also the first I.O. of the case and he had recorded the statement of H.M. Ganga Singh.

19. P.W.5 C.O. Brijesh Kumar Srivastava is the second I.O. of the case who has proved

the site-plan Ext. A-4 prepared after inspection of the spot, which was prepared on the basis of the identification of the informant. He has also recorded the statement of the informant and other witnesses.

20. P.W.6 Dy. S.P. Sushil Kumar is the third I.O. of the case, who has proved the proceedings of investigation in his deposition and has also proved charge-sheets Ext. A-5 and A-6.

21. After prosecution evidence was over, the incriminating circumstances and evidence were put to the accused-persons. The accused-persons in their statement under section 313 Cr.P.C. has denied the prosecution story and told the whole evidence as false and fabricated. They have taken a specific defence that on 16.11.2004, accused Devendra was coming from his in-laws' house by motorcycle. At about 7:30 P.M., near village Nandpur Beeta, one unknown DCM vehicle collided with his motorcycle and both of them got injured. Deceased Sarita died of the injuries and accused Devendra was admitted into Sai Hospital, Moradabad and subsequently Sainik Hospital and later on he was treated in Sainik Hospital, Meerut and Sainik School Hospital, Kocchi (Kerala). The informant has maliciously gave a colour of dowry death to an accidental case. It has also been stated that in the pressure of the informant of the case, a panchnama was also prepared and all the family members of the deceased were present at the time of cremation.

22. To give support to the contention of whatsoever stated in the statement under Section 313 Cr.P.C., the convicts have adduced oral and documentary evidence also.

23. Assailing the findings, learned counsel appearing for appellants argued that the prosecution case is totally baseless and from the evidence available on record, no case is made out as against the convicts / appellants. The impugned judgment is based on surmises and conjectures. There was no eye-witness or even any circumstantial evidence to connect the convicts / appellants with the crime alleged against them. It has been further submitted that the learned trial court has misinterpreted the evidence available on record and has not given any weightage to the defence evidence which was against the norms of the established legal principles. It has been submitted that no ingredients to bring home the guilt of the accused under section 304-B IPC was proved by the prosecution.

24. Per contra, the learned A.G.A. has contended that the impugned judgment suffers with no lacuna or error and the appeals, being devoid of merit, are liable to be dismissed.

25. Before appreciating the rival submissions made by both the sides, we have to put a glance upon relevant provisions of law.

Section 304-B IPC - 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."

26. In a catena of decisions, the ingredients to be proved in order to convict an accused for the offence punishable under Section 304-B IPC are promulgated. In **Maya Devi and Another Versus State of Haryana (2015) 17 Supreme Court Cases 405,** it has been reiterated that the following essentials must be satisfied to successfully charge under section 304-B IPC :

(Page 417) -

(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

(iv) such cruelty or harassment must be for, or in connection with, demand for dowry.

27. P.W.1 says that the marriage between the deceased and accused Devendra was solemnized on 8.4.2004 and this fact has been corroborated by P.W.2 and P.W.3 also. The death of the deceased was caused on 18.11.2004. This is an admitted position of fact that the deceased died within seven years of her marriage.

28. The prosecution alleges that the accused-persons, to fulfill their demand of dowry, caused the dowry death of the deceased and a specific defence has been taken by the accused-persons that the deceased died in a road accident wherein accused Devendra was also got injured. It is argued that in such circumstances, one has no hesitation to say that the death of the deceased may be called as unnatural death.

29. It has also been submitted by the learned A.G.A. that P.W.1, P.W.2 and P.W.3 have narrated in their deposition that the deceased was subjected to cruelty for the demand of additional dowry by her in-laws and they used to harass her to fulfill the demand of rupees five lacs. They have also stated that the accused-persons forcibly obtained the signature of the deceased on withdrawal form and withdrew rupees two lacs from the Bank account of the deceased. P.W.1 has also stated that he went to the in-laws of his daughter and requested them not to harass the deceased, but they did not pay any attention to it. In their cross-examination, P.W.1, P.W.2 and P.W.3, besides minor contradictions, have corroborated the each other's version so far as the fact of demand of additional dowry and cruelty caused to the deceased is concerned. The learned A.G.A. has also submitted that element of "soon before" has been established by the prosecution evidence. P.W.1 in his examination-in-chief has stated that when, on 31.10.2004, he went to the in-laws of his daughter on the occasion of *Karwachauth*, the deceased told her regarding the demand of rupees five lacs and also her harassment for this demand, of which he had also complained to the accused-persons and some days after, on 18.11.2004, he was informed of the murder of her daughter. This ingredient of "soon before" has also been proved by P.W.2 in his deposition.

30. The learned A.G.A. has submitted that in this way, the prosecution has proved

its case beyond reasonable doubt and the learned trial court has committed no error in holding the accused-persons guilty of the offence of dowry death.

31. The learned counsel for the appellants has vehemently argued that no evidence has been adduced by the prosecution to show as to the death of the deceased was unnatural. He has submitted that the accused-persons / appellants have a specific defence that the death of the deceased was caused in a road accident when she was going by motorcycle with her husband accused Devendra. He has also argued that sufficient evidence in this respect has been adduced by the convicts, but the learned trial court with a preoccupied mind did not analyze the defence evidence in proper manner and rejected it out-rightly without giving any weight, which was improper.

32. In **Neel Kumar alias Anil Kumar Versus State of Haryana (2012) 5 Supreme Court Cases 766** (paragraph-30), the Hon'ble Apex Court has held - "It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Cr.P.C. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him."

33. In **Janak Yadav and Others Versus State of Bihar, 1999 SCC (Criminal) 558 (559),** it was held that Section 313 Cr.P.C. prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored.

34. The learned counsel for the appellants has submitted that to support their version in the statement under Section 313 Cr.P.C., oral and documentary evidence has also been adduced from the defence side. He has relied upon the decision of the Hon'ble Apex Court in **Munshi Prasad Versus State of Bihar (2002) 1 SCC 351** wherein it has been held that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. A lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses. The judgment was followed in **Adam Bhai Suleman Bhai Ajmeri Versus State of Gujarat (2014) 7 SCC 716.**

35. D.W.7 accused Devendra Singh himself has supported his evidence in statement given under Section 313 Cr.P.C. He has affirmed this fact that on 16.11.2004, when he was driving motorcycle with his wife sitting behind him, at about 7:00 P.M., one vehicle hit his motorcycle from behind wherein he got injured and his wife succumbed to injuries. He was admitted in Sai Hospital, Moradabad and subsequently sent to the Military Hospital, Meerut and Sanjeevini Hospital, Cochin and the record of the treatment was deposited in Mumbai Cabs. He has proved the discharge slip of the

Meerut Hospital executed by Sri Jaideep Chaudhary, Surgeon Commander as Ext. Kha-3. He has also proved the medical reports of Sanjeevini Hospital executed by the same Jaideep Chaudhary as Ext. Kha-4, 5, 6 and 7, which include the treatment report and discharge slip as well. He has also narrated this fact that report in the accident case was lodged under Sections 279, 337, 338, 304-A IPC against unknown driver, however subsequently charge-sheet against the accused / driver Narendra Singh was submitted and criminal case is pending.

36. It also transpires from the record that when F.I.R. in the accidental case was not lodged, an application under Section 156 (3) Cr.P.C. was moved by Praveen Singh, the brother of the husband / accused Devendra Singh before the Court and by order of the Court dated 11.10.2012, the application was allowed and S.O. Asmauli was directed to lodge an F.I.R. and investigate into the matter. This order (Ext. Kha-12) is available on the trial court record. Ext. Kha-11 is the copy of the judgment of the revisional court wherein the order dated 11.10.2012 was challenged and the revision was dismissed. Ext. Kha-9 and Ext. Kha-10 are the copies of F.I.R. and charge-sheet relating to the case of the accident registered as Crime No.288 of 2012 wherein the date and time of the accident is mentioned as on 16.11.2004 at 7:00 P.M. Charge-sheet into the matter has also been submitted against the accused / driver Narendra Singh. All these papers are available on the record of the trial court and proved.

37. The learned counsel for the appellants has submitted that the learned trial court has not considered the aforesaid documents in right perspective. It has been submitted that the learned trial court has emphasized upon the requirement of inquest and postmortem of the body of the deceased in an accidental case, but he has not considered Ext. Kha-2 Panchnama in proper manner.

38. It has been vehemently argued that statement of P.W.1 Bhagwant Singh has been given weightage by the trial court wherein he has stated that he was not present at the time of Panchnama and he has also relied upon the statement of cross-examination of D.W.5 wherein he has stated that when he reached on the spot, Bhagwant Singh was not present over there. The learned counsel for the appellants has drawn the attention of this Court towards the statement of P.W.1 Bhagwant Singh himself, who, in his cross-examination at page no.15 has admitted that " मैं अपने दस्तखत पहचानता हूँ काo संo 64 A / 3 प्रदर्श खा-2 पर भी मेरे हस्ताक्षर हैं l It is pertinent to mention that Paper No. Ext. Kha-2 is the Panchnama, which has been written by Rajendra Singh, D.W.5 at the place of accident. It also bears the signature of Bhagwant Singh, Surendra Singh, Gajendra Singh, Roop Singh, Jitendra Singh, Hari Om Singh and Satveer Singh. In Ext. Kha-2, it has been mentioned that the death of the deceased Sarita has been caused on spot in a road accident at Simli - Nandpur Beeta Road and Devendra Singh has been admitted into Sai Hospital, Moradabad in injured condition for treatment. It has also been mentioned that the family members of Devendra Singh and deceased Sarita are present on the spot along with several other persons. All the Panchas are of the opinion that since it is a case of sudden accidental death, no legal formality is required and with the consent of all the persons, the cremation of the deceased ought to be performed. It has

been submitted that accordingly the cremation of the deceased was performed in the presence of the family members of the deceased.

39. Learned counsel for the appellants has submitted that since Bhagwant Singh - P.W.1, the father of the deceased, was himself present on spot and was very well aware of the fact that it was an accidental death and he was also consenting for the cremation of her deceased daughter, there is no doubt that it was not a case of homicidal or dowry death rather it was a case of accidental death.

40. We have focused upon the issue of burden of proof lying upon the accused in a criminal proceeding.

41. In **Rishi Kesh Singh and others Versus State, AIR 1970 All 51 (FB)**, which is the leading case on the subject, the issue of burden of proof of the accused has been discussed. The principle enumerated in **V.D. Jhingran Versus State of U.P., AIR 1966 SC 1762** has been quoted in the aforesaid judgment, which reads like this -

"It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

42. Similarly, **Harbhajan Singh Versus State of Punjab, AIR 1966 SC 97** has also been quoted wherein it has been held that "Where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in proving a preponderance of probability."

43. In Rishi Kesh Singh's case (supra) the abovementioned principle has been accepted.

44. In **Bhikari Verus State of U.P., AIR 1966 SC Page-1**, the Court held that "The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime.....the accused may rebut it by placing before the court all the relevant evidence - oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings."

45. From the above, it is to be summed up that in a criminal trial, if the accused succeeds to create a reasonable doubt in the mind of the Court as regards to his guilt and on the basis of evidence - oral, documentary or circumstantial adduced in his defence, it is sufficient for his acquittal

because the burden to prove its case lies heavily and solely beyond reasonable doubt upon the prosecution. In the present case also, on the basis of the defence evidence, both oral and documentary and in the circumstances of the case, the convicts / appellants have succeeded to create a doubt about the genuineness of the prosecution case.

46. In **Pankaj Versus State of Rajasthan, 2016 AIAR (Criminal) 886 (Supreme Court)**, it has been held that "it is well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted". The evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. (Emphasis supplied)

47. In the facts and circumstances of the present case, the aforesaid law is clearly applicable. On the basis of defence evidence, the convicts / appellants have succeeded to provide an alternative approach to the Court to consider that they might be innocent and the incident did not occur in such a manner and at such place as the prosecution claims. The defence evidence adduced by the convicts / appellants helps their case by a preponderance of probability. The learned trial court did not appreciate the defence evidence and brushed it out in an improper manner.

48. As a result thereof, in our view, the appeals succeeds and the conviction judgment and order of the learned trial court is liable to be set-aside.

49. The Appeals are accordingly allowed. The impugned judgment and order of the Trial Court dated 15.09.2015 convicting and sentencing the convicts / appellants is hereby set aside and the appellants are acquitted of the charges levelled against them. Appellants Smt. Seema and Praveen Singh are on bail, their personal bonds are cancelled and sureties are discharged. Appellant Devendra Singh is in jail. He shall be released forthwith, if not wanted in any other case.

50. Let a copy of this judgment along with lower court record be sent forthwith to court concerned for compliance.

(2022) 10 ILRA 258
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 6351 of 2007

Naresh Chandra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.P.S. Chauhan, Sri Narendra Kumar, Sri Rabindra Bahadur Singh, Sri Sahabuddin

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law -Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-Challenge to-Conviction-One stranger killed a woman with knife-no enmity-no motive- PW-4 and PW-5 had given ocular evidence that they had seen the accused stabbing the deceased and had also caught him on the spot with murder weapon-defence witnesses found not reliable-no defect or

irregularity found in the investigation of the case-medical evidence also supports the prosecution case-death caused by accused was not premeditated-injury caused was not on the vital part of the body-accused though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased-Hence, the Instant case falls under the Section 304 Part I IPC. (Para 1 to 80)

B. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human body 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. While determining the quantum of sentence, the court should bear in mind the 'Principle of Proportionality'.(Para 75, 76)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Syed Ibrahim Vs St. of A.P. (2006) 6 JT SC 597

2. Asraf Biswas Vs St. of W.B. (2016) SCC Online Cal. 4342

3. Bhagwan Dass Vs St. (NCT) of Delhi (2011) AIR SC 1863 C

4. C. Muniappan Vs St. of T.N. (2010) 9 SCC 567

5. St. of Guj. Vs Anirudhsing & anr. (1997) 6 SCC 514

6. Rajesh Yadav & anr.. Vs St. of U.P. (2022) SCC Online SC 150

7. St. of A.P. Vs K. Srinivasulu Reddy & anr. (2003) 12 SCC 660

8. Bikau Pandey Vs St. of Bih. (2003) 12 SCC 616

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

10. Deepak Verma Vs St. of H.P. (2011) 10 SCC 129

11. Munshi Prasad Vs St. of Bih. (2002) 1 SCC 351

12. Veeran & ors. Vs St. of M.P. (2011) 11 SCC 367

13. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

14. Deo Narain Mandal Vs St. of U.P.(2004) 7 SCC 257

15. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

16. Jameel Vs St. of U.P. (2010) 12 SCC 532

17. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

18. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

19. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

20. Raj Bala Vs St. of Har. (2016) 1 SCC 463

21. Khokan @ Khakhan Vishwas Vs St. of Chhattisgarh (2021) 2 SCC 365

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Nalin Kumar Srivastava, J.)

1. This criminal appeal has been preferred by the appellant against the judgement and order dated 13.09.2007 passed by the Additional District & Sessions Judge, Court No.9, Moradabad in Session Trial No.127 of 2004 (State vs.

Naresh Chandra) (case crime no. 211 of 2003) convicting and sentencing the appellant for the offence punishable under Section 302 IPC to undergo life imprisonment and a fine of Rs. 10,000/- with stipulation of default clause.

2. Brief facts of the case, as unfolded by the informant Shyam Lal son of Daulat in the First Information Report (in short 'F.I.R.'), are that on 9.10.2003 at about 9.30 a.m. while the informant alongwith his son Natthu and daughter-in-law Shakuntala was standing at Sirswan crossing in village Manpur in front of Stall (khokha) of Pandit Ji, Naresh, son of his brother Masih Charan, suddenly came from behind the Stall and catching the hair bun of Shakuntala, stabbed with knife many times on her body due to which she fell down on another side of the road. The son of the informant made noise but no one turned-up to save her. When the informant rushed towards the Chauki Manpur situated nearby, he saw one Inspector and two Sepoy coming there. Having seen the policemen, Naresh ran away at once towards the Vidhya Niketan School but the policemen caught him alongwith the knife. Recovery memo Ext. A-4 was prepared and, thereafter, informant took away injured Shakuntala to hospital where she was declared dead. The dead body of deceased was sent to Manpur Chauki and accused Naresh was also brought to the Police Station concerned.

3. On the basis of the written report (Ext. ka-1) scribed by one Rajveer Singh, chik First Information Report (Ext. Ka-5) was registered at Police Station concerned on 9.10.2003 at 12.10 p.m. mentioning all the details as described in Ext. Ka-.1. G.D. entry was also made at the same time, which is Ext. Ka-6.

4. Investigation was entrusted to sub-Inspector Sanjiv Kumar (PW-7). He inspected the spot and prepared site plan - Ext. ka-7. He also prepared the inquest report of the deceased (Ext. ka-8) and papers relating to post mortem Ext. A-9 to Ext. A-14. The Investigating Officer also took the sample of plain earth and bloodstained earth from the place of occurrence and prepared the memo Ext. ka-15.

5. Autopsy report (Ext. ka-19) was prepared by Dr. Allauddin Saifi after performing the post mortem of the deceased on 10.10.2003 at 2.00 p.m. On examination of the dead body of the deceased, following ante-mortem injuries were found:

"i. A stabbed wound 3.0 x 2.0 cms. x cavity deep in left axilla.

ii. A stabbed wound 3.5 x 2.5 cms. x muscle deep on anterior surface of left arm 4.0 cms below top of shoulder (Not exposed).

iii. Multiple abrasion in an area 20 x 6.0 cms. on posterior lateral surface of left arm with elbow

iv. An abrasion 6.0 x 4.0 cms. on left side of back of chest 8.0 cms. below left shoulder."

6. In the opinion of the doctor, death was caused due to haemorrhage and shock as a result of ante-mortem injuries.

7. After completing the investigation, charge-sheet (Ext. ka-16) against the appellant was filed. Concerned Magistrate took the cognizance. The case being exclusively triable by sessions court, was committed to the Court of sessions.

8. Appellant appeared before the trial court and charge under Section 302 IPC

was framed against him. He denied the charge and claimed his trial.

9. Trial proceeded and in order to prove its case prosecution has examined in all seven witnesses, namely, PW-1 Shyam Lal (informant), PW-2 Natthu (eye witness), PW-3 Dr. Alauddin, PW-4 Sub-Inspector Anil Kumar Yadav (eye witness), PW-5 Constable Shyam Singh (eye witness), PW-6 H.C.P. Khem Singh (scribe of F.I.R.) and PW-7 Sub-Inspector Sanjiv Kumar, the Investigating Officer.

The following documents were exhibited :

10. Written report Ext. A-1, Recovery and arresting memo Ext. A-2, Ext. A-3 and Ext. A-4, F.I.R. Ext. A-5, G.D. Ext. A-6, site plan - Ext. A-7, inquest report Ext. A-8, photo lash Ext. A-9, paper No.33 Ext. A-10, challan lash Ext. A-11, letter to R.I. Ext. A-12, letter to C.M.O. Ext. A-13, sample seal Ext. A-14, seizure memo of plain and bloodstained soil Ext. A-15, charge sheet Ext. A-16, Analysis report from Forensic Science Laboratory Ext. A-17 and Ext. A-18, Autopsy report Ext. A-19.

11. After closure of evidence, incriminating materials appearing in the prosecution evidence were put to the appellant in his statement under Section 313 CrPC. He denied all the incriminating evidence including the alleged recovery of knife by claiming it to be false and bogus and also claimed false implication due to enmity.

12. Appellant in his defence has examined DW-1 Shomit Kumar, DW-2 Dal Chandra, DW-3 Narendra Sharma and DW-4 Constable Brajmohan Rana. DW-4 has proved the copy of G.D. as Ext. kha-1.

Evidence led by the Prosecution :

13. PW-1 Shyam Lal is the informant and eye witness of the occurrence. In his examination in chief he has stated that he reached the spot after receiving the information of murder and he did not see as to who has murdered the deceased. No one even told him the name of the accused. In his deposition he has proved the written report as Ext. A-1 and has stated that he had dictated the report to Rajveer Singh and whatsoever he has stated the same was written in the report. He has also stated that on his report F.I.R. was lodged. The witness was declared hostile by the prosecution and in his cross examination he denied so many contents of the written report Ext. ka-1. On the recovery memo of murder weapon "knife' he has identified his thumb impression which has been exhibited as Ext. A-2 but he has deposed that his thumb impression was taken on a blank paper by the police. When the witness was cross-examined by the defence, he has stated that since he was not in a fit mental condition, he could not understand as to what was written in the Tehrir and the villagers had dictated the report to Rajveer Singh.

14. PW-2, minor son of the informant, is also said to be the eye witness of the occurrence. He is also a hostile witness and has categorically stated that at the time of occurrence he was not present over there and he does not know as to who murdered the deceased. He has also shown his ignorance about the presence of his father Shyam Lal on the spot. In his cross-examination the witness has identified his signature over the recovery memo and Ext. A-3 has been marked over it but he has denied his statement under Section 161 CrPC given to the Investigating Officer. This witness has also stated that his

signature was obtained on a blank paper at the Police Chauki, Manpur. Accused Naresh was not arrested before him and no knife was recovered from the accused before him.

15. PW-3 Dr. Alauddin Saifi has performed the autopsy of deceased and has proved the autopsy report as Ext. A-19.

16. PW-4 S.I. Anil Kumar Yadav is said to be present over the place of occurrence at the time of crime. He has stated in his examination in-chief that on 9.10.2003 about 9.30 a.m. while coming to P.S. Bhagatpur from Chauki Manpur alongwith Constable Shyam Singh and Constable Brijesh Kumar Tyagi, he saw from a distance of 50 yards (gaj) that at Sirswan Mod one person was stabbing a lady with knife and other person and a boy were shouting to save her. The aggressor fled towards Tanda but the policemen chased and caught him in front of Vidhya Niketan College at about 9.45 a.m., with a knife in his right hand. He was arrested on the spot. Murder weapon "knife' was also taken into possession by the police and seizure memo Ext. A-4 was prepared on the spot. This witness has also proved the murder weapon "knife' as Material Ext.-1. In his cross-examination PW-4 has stated that he did not give any information to Tanda Police and he brought the deceased alongwith the accused to the Hospital. Deceased at that time was alive.

17. PW-5 Shyam Singh is also said to be the eye witness of the occurrence. In his deposition he has corroborated the evidence of PW-4 and has proved the factum of arrest of accused as well as recovery of murder weapon from his possession. He, claiming himself to be the eye witness of the occurrence, has identified his signature over recovery memo Ext. A-1.

18. PW-6 Head Constable Khem Singh is the scribe of the F.I.R. and has proved the chik F.I.R. and G.D. Rapat No. 24 at 12.10 p.m. as Ext. A-5 and Ext. A-6 respectively. In his cross-examination he has deposed that the scribe of report Rajveer Singh did not come to the police station alongwith the complainant.

19. PW-7 Sub-Inspector Sanjiv Kumar, the Investigating Officer of the case, has proved the proceedings of investigation in his examination-in-chief and also proved the site plan - Ext. A-7. Inquest of the body of the deceased has been performed by this witness and papers relating to the post mortem have also been prepared by him. He has proved the inquest report, photo nash, Form No. 33, challan nash, letter to R.I., letter to C.M.O. and specimen seal as Ext. A-8 to A-14 respectively in his evidence. He has also collected the bloodstained and plain soil from the place of occurrence and its seizure memo Ext. A-15 has also been proved by him. In his cross-examination he has stated that as per the memo, the deceased was taken to the hospital by her father in-law Shyam Lal and his companions but the police had not accompanied the informant Shyam Lal, according to the memo. He has also narrated that in the memo the doctor has endorsed that the stabbing was caused by an unknown person.

Evidence led by the Defence :

20. DW-1 Shomit Kumar, DW-2 Dal Chandra and DW-3 Narendra Sharma, the witnesses produced by the accused, have stated in their deposition that at the time of occurrence they were present on the spot and had seen an unknown person stabbing a lady and accused Naresh Chandra was not present over there at that time. They have

also stated that they know the accused very well and they were present at their respective shops at the time and place of occurrence.

21. DW-4 Constable Brajmohan Rana has deposed that on 9.10.2003 at 10.00 a.m. sweeper Awadhesh working at C.H.C. Tanda had given a memo to him at the police station bearing seal of C.H.C. Tanda and signature of doctor, which was entered by him in G.D. Rapat No.17 at 11.00 a.m.. The information was sent to police station Bhagat Pur, District Moradabad through wireless. DW-4 has proved the carbon copy of the G.D. as Ext. kha-1.

22. On the basis of aforesaid evidence, learned trial court came to the conclusion that the prosecution has succeeded to establish the guilt against the accused person on the basis of cogent, consistent and reliable evidence and charge against accused was proved beyond reasonable doubt and accordingly conviction order was passed.

23. Learned counsel for the appellant has assailed the impugned judgment and order on various grounds. It has been argued that prosecution version rests upon the ocular testimony of PW-1, PW-2, PW-3 and PW-4. PW-1 and PW-2 are hostile witnesses and do not support the prosecution version at all. PW-3 and PW-4 are the police officials, who are the chance witnesses and their presence over the place of occurrence is not proved by any cogent evidence. No independent witness has been examined by the prosecution in support of its case. It has also been submitted that the place of occurrence is doubtful and there is no clinching evidence as to fact that the alleged occurrence happened at the same place as the prosecution claims. It has further been argued that the accused had no motive to kill the deceased. It has further been submitted that medical evidence does not corroborate the ocular version. It has also been submitted that the learned trial court has illegally relied upon the statement of accused given to the Investigating Officer during the course of investigation and in arbitrary and illegal manner has passed the conviction order on the basis thereof.

24. Per contra, learned AGA appearing for the State respondent has vehemently argued that the prosecution case was proved on the basis of cogent and reliable evidence. There is no merit in the appeal and the appeal is liable to be dismissed.

25. We have carefully gone through the record and have given our thoughtful consideration to the rival contentions of the parties.

26. Place of occurrence has always been an essential part of the prosecution story, which is necessary to be proved by prosecution by cogent evidence in order to succeed.

27. Reliance has been placed upon ***Syed Ibrahim vs. State of Andhra Pradesh, JT 2006 (6) SC 597*** where it has been expressly held that it would not be proper to accept the prosecution case when the place of occurrence itself has not been established. Also in ***Asraf Biswas vs. The State of West Bengal, 2016 SCC OnLine Cal. 4342*** which was relied upon by the learned counsel for the appellant, it was found from the evidence on record that the place of occurrence was not proved beyond all reasonable doubts. The Calcutta High Court held that "Once it is held that the

place of occurrence has not been established beyond all reasonable doubts, then the other circumstances are hardly sufficient to establish the guilt of the accused".

28. In light of the aforesaid observations, the learned counsel for the appellant has pointed-out that in the present matter the place of occurrence is highly suspicious and from the evidence on record a genuine doubt arises in respect of the certainty of the place of occurrence. He has submitted that in the F.I.R. (Ext. A-5) place of occurrence is mentioned at Sirsawa Tiraha, Village Manpur, P.S. Bhagat Pur, District Moradabad. In the written report Ext. A-1 it has been mentioned that at the time of occurrence, informant alongwith his son and daughter-in-law, was standing in front of Khokha of Pandit Ji at Sirsawa Tiraha, Village Manpur and that was the place where the incident occurred. It has also been mentioned in Ext. A-1 that when the accused tried to escape towards Vidhya Niketan School, two policemen caught him.

29. Learned counsel for the appellant, referring to the written report Ext. A-1 has submitted that after the occurrence informant immediately rushed towards Police Chauki, Manpur but in the site plan (Ext. A-7) this fact has not been shown. It has also been submitted that place of occurrence has not been proved by the so called eye witnesses of the incident, namely, PW-1 and PW-2.

30. We made a close scrutiny of the oral and documentary evidence on record in view of the aforesaid submissions made by the learned counsel for the appellant.

31. PW-1 and PW-2 have been declared hostile and have stated that they were not present on the spot at the time of occurrence. What is the value of their evidence as hostile witness will be evaluated later on in this judgment but so far as the place of occurrence is concerned PW-1 in the opening part of his deposition has clearly stated that occurrence happened at Manpur Tiraha.

32. PW-4 and PW-5 are the two policemen, who happened to be present on the spot when crime was being committed by the accused and they are the persons who caught the accused with the murder weapon. PW-4 has clearly stated that he had seen one person stabbing a woman by knife at Sirawa Turn (Mod) and when he tried to escape and ran away towards Tanda, he and his associate policeman chased and caught him in front of Vidhya Niketan College alongwith knife. PW-5, who was accompanying PW-4 at the time of occurrence, has also narrated the same facts in his statement.

33. PW-7 the Investigating Officer has proved the site plan Ext. A-7 in his deposition. It is pertinent to mention that nothing adverse has been stated by this witness in his cross-examination on the point of place of occurrence.

34. A perusal of the site plan Ext. A-7 reveals that the Khokha (small shop), where the informant was said to be standing alongwith his son and deceased, is situated at Tiraha and at the same place the accused assaulted the deceased and she fell down. Accused ran away towards Vidhya Niketan College trying to escape but policemen, who were coming from Chauki Manpur, saw the incident and grabbed him in front of Vidhya Niketan College. All this topography has been shown in clear terms in Ext. A-7 with specific points and in this

way the place of occurrence as mentioned in Ext. A-1 and Ext. A-5 finds support from the oral evidence as well as from the site plan Ext. A-7. Learned AGA has also pointed out that seizure memo of plain and bloodstained soil has been proved as Ext. A-15 by PW-7 the Investigating Officer, as PW-7 has deposed that from the place of occurrence he had collected it and thus the place of occurrence is fixed with the aid of Ext. A-15 also.

35. We, therefore, do not find any force in the contentions of the learned counsel for the appellant regarding the fixation of place of occurrence.

. The prosecution has a definite case that the deceased was assaulted with knife by the accused and, therefore, it is very significant to search out from the evidence on record whether the death of the deceased was caused by use of knife or not. Learned counsel for the appellant has vehemently argued that the medical evidence on this point does not support the prosecution version and at this juncture the whole prosecution story fails.

37. The post mortem report is on record, which has been proved by the Dr. Alauddin Saifi - PW-3. PW-3 while proving the autopsy report Ext. A-2 has clearly and in specific terms stated that death of the deceased was caused due to haemorrhage and shock and injury no. 1 and 2 may have been inflicted by knife. He has also pointed out that death may have occurred on 9.10.2003 at 12.00 noon. It is to be reminded here that injury no. 1 and 2 are stab wounds. PW-3 in his cross examination has clarified that injury no. 1 and 2 were sufficient to cause death.

38. It is noteworthy that in the inquest report Ext. A-8 the panchas have also opined that death of deceased seems to be caused by stabbing.

39. Learned trial court has discussed the prosecution evidence with a view to find out whether it is in conformity with the medical evidence or not and has correctly opined that the prosecution version finds corroboration with the medical evidence. Hence, we are of the considered view that the prosecution story is fully supported with the medical evidence and on this point the objections raised by the learned counsel for the appellant are proved to be futile.

40. The point, which has been most vehemently argued by the learned counsel for the appellant is that there is no independent witness of the occurrence except PW-1 and PW-2, who are the father-in-law and brother-in-law of the deceased respectively. Two other persons allegedly the eye witness of the occurrence are the police personnels and are only the chance witnesses and their presence on the spot is highly improbable. No other independent witness has been examined and more over PW-1 and PW-2 have been declared hostile by the prosecution and they do not support the prosecution version at all.

41. PW-1, the informant / father in-law of the deceased, has stated in his examination in-chief that he reached the spot after being informed regarding the murder of his daughter-in-law. He did not see as to who was the author of the crime. He has been declared hostile by the prosecution. In his cross examination he, though identifying his thumb impression on seizure memo of knife Ext. A-2, has stated that it was a plain paper when his thumb impression was taken over it. He also resiled from his statement made to the Investigating Officer under Section 161

CrPC and has also stated in the cross-examination that the written report was written by Rajveer Singh on the dictation of villagers and he never narrated this fact to Rajveer Singh, the scribe, that this was the accused Naresh who had assaulted his daughter in-law with knife and was caught on the spot.

42. PW-2 was also declared hostile by the prosecution when he stated in his examination in- chief that at the time of occurrence he was not present over there and he even does not know who has murdered the deceased. He has also resiled from his statement under Section 161 CrPC and has identified his signature as Ext. A-3 over the seizure memo - Ext. A-2. It has also been stated by him that his signature was obtained by police on plain paper. He has also deposed that accused was never arrested before him nor any recovery of knife was made from him.

43. In an honour killing case reported as ***Bhagwan Dass vs. State (NCT) of Delhi, AIR 2011 SC 1863 (C),*** the Hon'ble Supreme Court found that the mother of the accused stated before the police that her son (the accused) had told her that he had killed the deceased but when she was confronted with this statement in Court she resiled from her earlier statement and was declared hostile. The Hon'ble Apex Court held that her subsequent denial in the Court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. The Hon'ble Supreme Court further held that "we are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC and her subsequent denial in Court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment."

44. The principle laid down in the aforesaid judgment is clearly applicable in this case where PW-1 and PW-2, father and brother of the accused, respectively are trying to save the accused and with this motive they have resiled from their statement given to the Investigating Officer under Section 161 CrPC.

45. The law, so far as the evidentiary value of a hostile witness is concerned, is settled. In a catena of decisions the Hon'ble Supreme Court and this High Court have held that the evidence of a hostile witness would not be rejected if spoken in favour of prosecution but it can be subjected to close scrutiny and that portion of the evidence, which is consistent with the case of prosecution, may be accepted. In ***C. Muniappan v. State of T.N., (2010) 9 SCC 567,*** the Hon'ble Apex Court settled the legal position as "the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

46. In State of ***Gujarat vs. Anirudhsing and another, (1997)6 SCC 514***, it has been held that :

"29. In view of the above settled legal position, merely because some of the witnesses have turned hostile, their ocular evidence recorded by the court cannot be held to have been washed off or unavailable to the prosecution. It is the

duty of the court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court....."

47. Virtually it is a legal duty of the Trial Judge or the Appellate Judge to scan the evidence, test the anvil of human conduct and reach a conclusion whether the evidence brought on record even if the witnesses turning hostile would be sufficient to bring home the commission of crime. In continuity of this discussion this fact is also to be examined whether ocular evidence of PW-4 and PW-5 are credible of evidence or not on the two fold tests : (i) they are police personnel, and (ii) they are the chance witnesses.

48. In the impugned judgment the trial court has discussed the evidence of PW-1 and PW-2 at length and has found that according to the written report Ext. A-1 accused is the son of Masih Charan, who is the brother of informant and PW-2 is the son of PW-1, hence, accused is the nephew of PW-1 and cousin of PW-2. The trial court has also found that deceased Shakuntala is the wife of accused. On the basis of the scrutiny of evidence of PW-1 and PW-2, the learned trial court has come to the conclusion that PW-1 probably does not want his nephew to be convicted for murder of the deceased and that is why he turned hostile. It is also noteworthy that PW-1 in his examination in-chief has clearly stated that it was he who dictated the written report Ext. A-1 to scribe Rajveer Singh and whatsoever he had spoken was written over it but in his cross examination he resiled from his earlier statement and stated that the written report was dictated by the villagers. Learned counsel for the appellant failed to explain as to why the earlier statement made by PW-1 in his examination-in-chief should not be relied upon. This makes it clear that PW-1 has deliberately trying to hide the truth and at this juncture we find ourselves in full agreement with the conclusion arrived at by the learned trial court so far as the evidence of PW-1 is concerned. Same is the position of PW-2, whose signature finds place over the arresting and recovery memo Ext. A-2. In his cross examination he has stated that his signature was obtained by the police at Chauki Manpur but according to his statement if he was not present on the spot, how and why he reached police chauki, Manpur and when his signature was obtained on Ext. A-2 has not been clarified by this witness. Hence, this witness is also trying to hide the correct facts of the case. In ***Rajesh Yadav and another vs. State of U.P., 2022 SCC OnLine SC 150*** the Hon'ble Supreme Court held as under:

"21.....Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate *qua* a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an

assessment, being a matter before it and come to the correct conclusion."

49. According to the prosecution story at the time of occurrence PW-4 and PW-5, the police personnels, were coming from Police Chauki, Manpur when they saw the occurrence and caught the accused with the murder weapon. In this way they may be termed as "chance witness'. Whether a chance witness is devoid of trust and only by levelling him as chance witness whether his evidence can be shattered as without any foundation, has been discussed in the judgment of ***State of A.P. vs. K. Srinivasulu Reddy and another, (2003) 12 SCC 660*** wherein the Apex Court has held that :

"(13).....In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses".

50. When we translate the aforesaid principle with their application to the facts of this case, we gather an impression that the learned trial court has rightly relied upon the evidence of PW-4 and PW-5. It is to be noted that for the purpose of the present case PW-4 and PW-5 shall be taken as independent witnesses. There was not even single suggestion to these witnesses that they had any animosity to the accused. There was no reason why these witnesses could falsely implicate the accused in a murder case. Learned counsel for the appellant has vehemently argued that no Rawangi G.D. has been produced before the Court to show that PW-4 and PW-5 were coming indeed from Police Chauki, Manpur. We do not find any force in this contention. Mere absence of Rawangi G.D. on record so as to show the presence of PW-4 and PW-5 on the spot at the time of occurrence does not affect the prosecution case adversely. The whole evidence of PW-4 and PW-5 is reliable and trustworthy. They were not present on the spot as police personnels but they are simply eye witnesses of the occurrence. They may be dealt with for violation of any rule to leave the Police Chauki without rawangi G.D. but this does not make their presence on the spot improbable, if a murder suddenly took place before them. They have not only grabbed the accused red handed in front of Vidhya Niketan College but also recovered the murder weapon "knife' from his possession and arrest and seizure memo Ext. A-2 was also prepared by PW-4. The T.I. and signatures of PW-1 and PW-2 and of the police personnels present over there were also obtained. No material contradiction or unnatural statement may be found in the version of PW-4 and PW-5. They are wholly reliable witnesses of fact and their ocular version finds support from other evidence available on record.

51. It has been held by Hon'ble Supreme Court in ***State of Gujarat vs. Anirudhsing case*** (supra) that merely because the witnesses are police officers, their evidence cannot and must not be rejected outright as unreliable or unworthy of acceptance. It requires to be subjected to careful evaluation like any other witness of occurrence.

52. Learned counsel for the appellant has taken us through the evidence on record and has submitted that no motive has been assigned to the accused to commit the alleged crime. He has pointed out that no witness even PW-1 and PW-2, who are said to be family members of the deceased, no where mentioned in their entire deposition that the accused had any enmity with the deceased or he had any motive to kill her.

53. Although learned trial court has relied upon the statement of accused given to the Investigating Officer during course of investigation to determine the motive behind the crime, yet it has been submitted by the learned AGA that the present case rests upon the direct evidence wherein motive has no significance. Emphasis has been laid down upon the decisions of the Apex Court in ***Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616, Anil Rai Vs. State of Bihar (2001) 7 SCC 318 and Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129.***

54. If we go through the evidence of PW-4 and PW-5, we have no hesitation to say that both the witnesses have given ocular evidence regarding the occurrence. They have seen the accused stabbing the deceased and have also caught him on the spot with murder weapon. They are reliable and trustworthy witnesses having no grudge or enmity with the accused. In these circumstances, we feel that the prosecution was never under any obligation to prove the motive in the present case and accordingly no force is found in the plea of the learned counsel for the appellant so far as the motive is concerned.

55. The genuineness of the written report Ext. A-1 and the F.I.R. Ext. A-5 has also been put under challenge by the learned counsel for the appellant, who has referred the statement of PW-1 and submitted that this witness has given contradictory statements in his examination in-chief and cross-examination as to whether written report was dictated to the scribe Rajveer Singh by him or it was dictated by the villagers. It has been pointed out earlier that if any witness turns hostile, as PW-1 was declared, the portion of his evidence which supports the prosecution version may be acted upon. In his examination in-chief PW-1 has clearly stated that he himself had dictated the written report to the scribe Rajveer Singh. Learned counsel for the appellant was unable to explain as to why this portion of his examination in-chief could be rejected or overlooked. The occurrence is said to be happened on 9.10.2003 at 9.30 a.m. and F.I.R. Ext. A-5 has been lodged on the same day at 12.10 p.m.. It is mentioned in Ext. A-5 that the police station is at a distance of 10 kilometers from the place of occurrence and in the evidence it has been shown that the deceased was immediately taken to the hospital after the occurrence to save her life but she could not be survived and, hence, the F.I.R. is prompt and not a result of deliberations or after thought. PW-6, the scribe of the F.I.R., has proved chik F.I.R. and registration G.D. as Ext. A-5 and Ext. A-6 and there is no adversity in his testimony.

56. Learned AGA has drawn our attention towards the F.S.L. report Ext. A-18, which reveals that blood clots were found over all the materials sent to the forensic laboratory i.e. plain and bloodstained soil, knife, clothings of the deceased and belongings found over her body. No doubt the F.S.L. report has also supported the prosecution version.

57. Learned counsel for the appellant vehemently argued that from the defence

side four witnesses in all have been examined and documentary evidence has also been adduced but the learned trial court has completely ignored the same and he has misinterpreted the defence evidence. It has also been argued that the evidence adduced by the defence also gets the same weight as the prosecution evidence. Reliance has been placed on a decision of the Apex Court in ***Munshi Prasad vs. State of Bihar, (2002) 1 SCC 351.***

58. Learned counsel for the appellant has referred the evidence of DW-1, DW-2, DW-3 and DW-4.

59. DW-1 Shomit Kumar has stated that he is the Barber and at the time of occurrence he was at his shop when an unknown person stabbed a woman with knife and on noise his neighbours Dal Chandra and some other persons reached there and he escaped from there. He is ac*qua*inted with the accused Naresh Chandra and he was not present at the place of occurrence. He has also stated that the police has enquired with him. In his cross-examination he has stated that accused Naresh comes to his shop for hair cutting and he does not know his wife. On the fateful day he had opened his shop at about 9.00 a.m. he had heard that some person had stabbed a woman by knife and he does not know whether the accused was caught with knife or not.

60. DW-2 Dal Chandra has stated that he knows the accused Naresh present in the Court. He was not present at the time of occurrence. He has stated that he has a shop at Sirswa Chauraha and the occurrence took place about 3- 3 ¼ years before at about 9.30 a.m.. One stranger had stabbed a woman on the road by knife and when she cried, Shomit, Narendra Sharma and he himself and several other persons scolded him and he ran away with knife in his hand. The police had enquired with him. In his cross-examination he has stated that he resides outside the house of accused Naresh but he had never seen the wife of Naresh and he does not know the woman who got injured.

61. DW-3 Narendra Sharma has a beetle shop at Sirsawa Chauraha. He has stated that on 9.10.2003 about 9.30 a.m. when he was present at his shop, he saw that a male stranger stabbed a lady by knife, who had come from the direction of village Niwad and ran away. The occurrence was seen by Dal Chandra, Shomit etc. and by him also. They went to the police chauki and on their information police came over there and brought the injured lady to the hospital. He knows the accused Naresh, who is present in the Court but he was not present on the date, time and place of the occurrence. He has also stated that he had narrated the entire story to the Investigating Officer. In his cross examination he has stated that at that time there was a huge crowd over the Chauraha.

62. Learned counsel for the appellant argued that the real picture, which comes out from the evidence of DW-1, DW-2 and DW-3 is that the accused was not present at the place and time of occurrence and he is not the guilty of the alleged offence. DW-1, DW-2 and DW-3 are the independent witnesses and there is no reason to disbelieve their version.

63. Learned AGA has countered by arguing that DW-1, DW-2 and DW-3 are not the reliable witnesses and they are telling a lie before the Court. They have stated that the Investigating Officer had enquired from them regarding the incident

but the Investigating Officer PW-7 no where states that he ever recorded the statement of any of the three defences witnesses or made any query form them. No suggestion is given to PW-7 by the defence side that he had recorded the statement of DW-1, DW-2 and DW-3 or enquired the matter from them. Since the arrest of the accused by the police personnels with the murder weapon "knife' is proved by the cogent and reliable evidence, this fact must have been known to the defence witnesses as well but they do not speak even a single word that the person who had stabbed the deceased was also caught then and there by the policemen with knife and this makes their whole evidence unreliable and false.

64. DW-4 Constable Brijmohan Rana has stated that on 9.10.2003 he was working as Constable Clerk at Thana Tanda, Rampur and a memo was received by him by the sweeper Awadhesh bearing seal of C.H.C., Tanda and signature of doctor regarding death of a deceased lady, who was admitted by her father-in-law Shyamlal. Copy of this memo was entered by him in the general diary Rapat No. 17 at 11.00 am.. Carbon copy of G.D. has been proved as Ext. kha-1 by DW-4. He has also stated that through wireless he had sent the information to the police station Bhagatpur, District Moradabad but he was informed that they have already got the information about the occurrence.

65. Learned AGA submitted that this memo Ext. kha-1 actually supports the prosecution version and shows that immediately after reaching the hospital the doctor sent the memo for information to the concerned police station and hence this document also is of no help to the appellant. We are in full agreement with the learned AGA.

66. Learned trial court has also analysed the defence evidence, oral and documentary, in the impugned judgment and has correctly found it as not reliable.

67. Therefore, from the defence evidence also the accused appellant gets no help at all.

68. Learned counsel for the appellant has also argued that the Investigating Officer has been negligent in performing the investigation and the investigation is faulty. However, he could not point out any material defect or irregularity in the investigation of the case. We also feel that the investigation conducted by the Investigating Officer in this case suffers with no material omission or irregularity. If there are some minor irregularities they are ignorable in the light of all other reliable and cogent evidence produced by the prosecution.

69. In a catena of decisions, it has been settled that for certain defects in the investigation the accused cannot be acquitted if the prosecution case is proved by other cogent evidence. In ***C. Muniappan vs. State of T.N. case*** (supra), it has been held that :

"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 IO 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 dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

70. Considering the evidence of the witnesses and also considering the medical evidence including the post mortem report there is no doubt left in our mind about the guilt of the convict - appellant Naresh Chandra.

71. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads 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."

72. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

73. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, injury caused was not on the vital part of the body, accused though had knowledge and intention to cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section

300 of IPC. While considering Section 299 IPC as reproduced herein above offence committed will fall under Section 304 Part-I IPC as per the observations of the Apex Court in ***Veeran and others Vs. State of M.P., (2011) 11 Supreme Court Cases 367*** which have to be also kept in mind.

74. This takes us to the alternative submission of learned counsel for the appellant that the *qua*ntum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

75. 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."

76. '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 *qua*ntum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

77. 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.

78. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

79. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

80. Recently in ***Khokan Alias Khokhan Vishwas vs. State of Chhattisgarh, (2021) 2 Supreme Court Cases 365,*** the Hon'ble Supreme Court in almost similar circumstances modified the sentence under Section 302 IPC for life imprisonment for the offence under Section 304 Part-I IPC sentencing the convict to the period already undergone by him that was 14.5 years in that case.

81. For the reasons recorded herein above and following the dictum given by the Hon'ble Apex Court in ***Khokan Alias Khokhan Vishwas case*** (supra), we hold the accused-appellant, Naresh Chandra, guilty of commission of offence under Section 304 Part I IPC and sentence him to 10 years rigorous imprisonment. The fine and default sentence is maintained. If the accused-appellant, Naresh Chandra, is not wanted in any other offence, he shall be set free.

82. Appeal is partly allowed, as modified above.

83. Record and proceedings be sent back to the Court below forthwith.

(2022) 10 ILRA 274
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 6842 of 2009

Sageer & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri R.P. Tiwari, Sri R.N. Maurya, Sri Ravi Shankar Tripathi

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Section 304-B - ¾ Dowry Prohibition Act,1961-Challenge to-Conviction- acid attack-dying declaration-deceased died due to septicemia caused by burn injuries-deceased survived for more than two months after making dying declaration-deceased was subjected to cruelty and was made victim of acid attack soon before her death-PW-1,PW-2 & PW-3 turned hostile-PW-8 who recorded the the dying declaration fully supported the prosecution case-defence statements are contradictory-role of appellants is clear from the dying declaration and other evidences-Accused failed to discharge their burden of proof u/s 113B of Indian Evidence Act-Ingredients of Section 304-B are fulfilled-Hence, Learned trial court has committed no error on acting on the sole basis of dying declaration-Convicts have been in jail for more than 12 years i.e. sufficient for them-Hence, they may be set free.(Para 1 to 58)

B. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. It is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.(Para 29)

C. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring, it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. (Para 38 to 52)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Maya Devi Vs St. of Har. (2015) 17 SCC 405

2. M.P. Vs Joginder (2022) 5 SCC 401

3. St. of Guj. Vs Anirudh Singh & anr. (1997) 6 SCC 514

4. Rajesh Yadav & anr. Vs St. of U.P. (2022) SCC Online SC 150

5. Bable Vs St. of Chattisgarh (2012) AIR SC 2621

6. Lakhan Vs St. of M. P. (2010) 8 SCC 514

7. Krishan Vs St. of Har. (2013) 3 SCC 280

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

9. Deo Narain Mandal Vs St. of U.P.(2004) 7 SCC 257

10. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

11. Jameel Vs St. of U.P. (2010) 12 SCC 532

12. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

13. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

14. St. of Punj. Vs Bawa Singh (2015) 3 SCC 441

15. Raj Bala Vs St. of Har. (2016) 1 SCC 463

16. Khokan @ Khakhan Vishwas Vs St. of Chhattisgarh (2021) 2 SCC 365

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. This criminal appeal is directed against the judgement and order dated 4.11.2009 in Sessions Trial No. 949 of 2003 (Crime No. 323 of 2002) State Vs. Sageer and Ors, under Sections 304B I.P.C. and 3/4 Dowry Prohibition Act, P.S.- Ijjat Nagar, District-Bareilly convicting and sentencing the appellants under Section 304-B I.P.C. to undergo life imprisonment and under Section 3/4 Dowry Prohibition Act to undergo imprisonment for two years, further imposing fine of Rs. 10,000/- each and in default of payment of fine to undergo 2 months additional imprisonment.

2. The prosecution story as culled out from the FIR is that the deceased, the sister of the informant, was married with accused Sageer. The in-laws of the deceased were demanding colour T.V. and motorcycle as additional dowry and she was subjected to cruelty on account of that demand. She used to tell the incidents of cruelty to her family members, who expressed their inability to the accused persons but they did not pay any attention to it and the harassment continued. On 27.4.2002 on information by a villager, the informant along with his family members reached the house of the accused persons where he found his sister bitterly burnt and she told that her husband Sageer, mother-in-law Jaitoon, brother-in-law Naseer and Ameer and sister-in-law Munija Begum caught hold her in the night about 9.00 pm. and her husband poured acid upon her in order to do away with her.

3. The FIR was lodged and investigation started. During investigation the injured died and Section 304-B I.P.C. was added to the matter.

4. The I.O. proceeded to record the statement of witnesses, performed inquest, sent the body of the deceased for autopsy, inspected the place of occurrence and submitted charge sheet against the accused persons

5. The accused persons appeared before the Magisterial Court, the case being exclusively triable by the Sessions Court was committed to the Court of Sessions by the Magistrate.

6. Charge under Section 304-B I.P.C. and 3/4 Dowry Prohibition Act was framed against the accused persons who denied of the charges and claimed to be tried.

7. The trial started and the prosecution in order to prove its case examined 12 witnesses in all as P.W.1 the informant/ brother of the deceased, P.W.2 Smt. Shahjahan, mother of the deceased, P.W.3 Altaf, brother of the deceased, P.W.4 Constable Dharampal Singh, Scribe of the FIR, P.W.5 S.D.M Karmveer Singh, witness of inquest report, P.W.6 Dr. A.K. Jain, who performed the autopsy of the dead body of the deceased, P.W.7 Dr. Kripal Singh, who prepared injury report of the deceased when she was alive, P.W.8 Tehsildar Shiv Bhajan, who recorded the dying declaration of the deceased, P.W.9 Rajendra Kumar Additional S.P. and second I.O. of the case, P.W.10 Constable Rakesh Dubey, who has been examined as secondary witness for the first I.O. S.I. Bihari Lal Yadav.

8. In documentary evidence, the prosecution relied upon written report Ex. Ka-1, application for post mortem Ex.-Ka-2, inquest report Ex.Ka-3, FIR Ex.Ka-4, G.D. Ex.Ka-5, specimen seal Ka-6, photo nash Ex.Ka-7, letter to R.I. Ex.Ka-8, letter to C.M.O. Ex.Ka-9, chalan lash Ex.Ka-10, autopsy report Ex.Ka-11, injury report

Ex.Ka-12, dying declaration Ex.Ka13, charge sheets Ex.Ka-14, Ex.Ka-16 and site plan Ex.Ka-15.

9. After completion of prosecution evidence, the incriminating circumstances and evidences were put to the accused persons in their statements recorded under Section 313 Cr.P.C. wherein they told the whole prosecution story and evidence as false and fabricated and claimed to be innocent. Accused Sageer stated that at the time of incident he was at Bikaner in connection with his job and came back on 27.04.2002 on being informed by his mother by telephone regarding the incident of the burning of his wife. After coming back when he went to the hospital, the treatment of his wife was going on but the police arrested him in the same evening. He has further stated that he had married with Parveen in the year 2002 and they had a son, who is no more. He and his younger brother live separately in a rented house in the same village. His brother Naseer had gone to the house of his in-laws in the very night of the occurrence, who reached in the morning and got Parveen admitted in the hospital since his mother was alone in the night. Parveen could not be admitted in the hospital in the night. The police reached after lodging of the FIR. He does not know as to when Parveen died in the hospital. Co-accused Naseer has also narrated the same version in his statement under Section 313 Cr.P.C.

10. Co-accused Smt. Jaitoon, the mother-in-law of the deceased died during pendency of the trial and the case was abated against her vide order dated 21.11.2005.

11. We are of the considered opinion that a perusal and analysis of the oral evidence along with documentary evidence is desirable to reach the correct conclusion.

12. P.W.1, the informant has proved the written report Ex.Ka-1 and has narrated the story like this that about 4-1/4 years ago his sister Parveen was living in her matrimonial house. In the morning a villager informed him that his sister is lying ablaze in her house. When he reached there along with his family members he found Parveen unconscious and burnt. He came to the police station along with Parveen, dictated the report to Sharakat Khan and on the basis of that written report case was registered in the police station. He has proved the written report as Ex.Ka-1, however, he has stated that the written report was not read over him by the scribe. He has also stated that the factum of pouring acid upon Parveen was not dictated by him and also he did not dictate this fact that his sister had told him that the accused persons caught hold of her in the night and in order to kill her, his husband threw acid upon her. He has also proved his application given to S.P. City for performing the post mortem of the body of her sister as Ex.Ka-2. He has been declared hostile by the prosecution. He has denied all the allegations of demand of dowry and cruelty caused by the accused persons to her sister. In his cross-examination he has stated that his sister never told him about the demand of dowry or harrasment caused to her by the accused persons. He has also narrated that there was no electricity connection in the house of the accused persons and they used a dibbi of kerosene oil for light.

13. P.W.2 Smt. Shahjahan, the mother of the deceased has also not supported the prosecution version in her examination-in-chief and has been declared hostile. All the

allegations against the accused persons in respect of demand of dowry and cruelty to her daughter and even her statement under Section 161 Cr.P.C. have been denied by her in her deposition.

14. P.W.3 Altaf is the brother of the deceased and following the statements of P.W.1 and P.W.2, he has also submitted that accused persons are innocent, they have never demanded dowry from her sister and never subjected any kind of cruelty to her. On the inquest report he has proved his thumb impression as Ex.Ka-3 and has denied that the I.O. had ever taken his statement under Section 161 Cr.P.C.

15. P.W.4 Constable Dharampal Singh is the scribe of the FIR, who has proved the Chik FIR and G.D. of the case as Ex. Ka-4, Ka-5 respectively.

16. P.W.5 S.D.M. Karmendra Singh has conducted the inquest proceedings and in his statement he has affirmed his signature over inquest report Ex.Ka-3 and has also proved the papers sent for the post mortem of the deceased as Ex.Ka-6, Ex.Ka-7, Ex.Ka-8, Ex.Ka-9 and Ex.Ka-10.

17. P.W.6 Dr. A.K. Jain has performed the autopsy of the deceased. He has proved the autopsy report Ex.Ka-11. Following anti mortem injuries were found by him over the body of the deceased

मृत्यु पूर्व चोटें-

1- सतह से गहराई तक आंशिक रूप से भर चुका जला हुआ घाव गर्दन के सामने व पीछे की तरफ सीने व पेट के हिस्से पर सामने की तरफ पेट के निचले हिस्से मे सामने दाहिनी तरफ, सिर के पीछे नीचे की तरफ, दोनों पैर आंशिक रूप से सीने के पीछे की तरफ।

2- पैडसोल सीने व पेट के पीछे की तरफ।

18. He had performed the autopsy on 4.7.2002 at 4.15 p.m. and has opined that the death was caused due to septicemia/ toxacemia.

19. P.W.7 Dr. Kripal Singh has medically examined the deceased, when she was alive. He was found that several burn injuries on various parts of the body of the injured as head, face, neck, below the elbow, chest, abdomen, thigh, hips etc. and she was burnt about 75%. He has proved the injury report as Ex.Ka-12.

20. P.W.8 Tehsildar Shiv Bhajan has recorded the dying declaration of the deceased on 27.4.2002 and has narrated that the doctor present over there had identified her and her family members were turned out by him at the time of recording the statement. He has also narrated that the statement was recorded after her medical examination by the doctor. He has proved the dying declaration as Ex.Ka-13 and read over it before the Court, wherein it was mentioned like this.

ब्यान परवीन पत्नी शकील आयु 20 वर्ष नि० परि बहोड़ा, इज्जत नगर, बरेली

"बहोशोहवास ब्यान किया कि दिनांक 26.4.02 को दोपहर के समय मेरे पति शकील पुत्र बाबू सास जैतुन पत्नी बाब, देवर लियाकत पुत्र बाबू, दूसरा देवर मतलो पुत्र बाबू आदि ने मिलकर मुझे पीटा तथा मुझ पर तेजाब डालकर मुझे जला दिया। ब्यान सुनकर तसदीक किये।"

21. P.W.9 Additional Superintendent of Police Rajendra Kumar is the second

I.O. of the case. He has narrated the proceedings of investigation conducted by him and has proved the charge sheet as Ex.Ka-14.

22. P.W.10.Constable Rakesh Dubey has been examined as secondary witness for the first I.O. of the case S.I. Bihari Lal Yadav and he has proved his hand writing and signature over the site plan Ex.Ka-15 and charge sheet Ex.Ka-16.

23. The trial Court relying upon the aforesaid evidence found the dying declaration as cogent and reliable evidence and opined that the prosecution has proved its case beyond reasonable doubt and passed conviction order against the accused Sageer and Naseer under Section 304-B I.P.C. and Section 3/4 D.P. Act and sentenced them accordingly.

24. Heard Shri Ravi Shankar Tripathi, for the appellants, Shri N.K. Srivastava for the State and perused the record.

25. The learned counsel for the appellants has submitted that the prosecution is guilty of suppressing the genesis of the incident, therefore, an adverse inference ought to be drawn against the prosecution. Assailing the impugned judgement on various grounds, he has firstly taken us to the depositions of the witnesses P.W.1, P.W.2 and P.W.3, who are hostile witnesses and on the basis of their statements he has vehemently argued that the ingredients of Section 304-B I.P.C. which the prosecution is bound to prove to bring home the charge against the accused, are totally absent in the present matter and no case as such is made out against the appellants.

26. To appreciate the arguments advanced by the learned counsel for the appellants we have to keep in our mind the ingredients which the prosecution has to prove in order to convict the accused for the offence under Section 304-B I.P.C. The ingredients have been settled in a catena of judgements of Hon'ble Apex Court. In **Maya Devi Vs. State of Haryana (2015) 17 SCC 405** it has been held as herein under-

"In order to convict an accused for the offence punishable under Section 304B IPC, the following essentials must be satisfied:

(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

(iv) such cruelty or harassment must be for, or in connection with, demand for dowry".

27. Recently in State of **M.P. Vs. Joginder (2022) 5 SCC 401,** the Hon'ble Apex Court has reiterated the aforesaid principle.

28. In the light of the aforesaid preposition, the evidence on record has to be scrutinized. The informant, who has denied the contents of his written report Ex.Ka-1 is certainly trying to hide facts from the Court. He has expressly stated that the written report was dictated by him to Sharakat Khan and whatsoever he has stated the same was written in it. He had identified his thumb impression upon the *tehrir* and has also clarified that in the

police station he had given the same *tehrir* and the case was lodged thereupon. Subsequently, he turned hostile and denied the contents of Ex.Ka-1.

29. The law in respect of the hostile witness is absolutely settled in a catena of decisions. The Hon'ble Supreme Court and this High Court have held that the evidence of a hostile witness would not be rejected, if not spoken in favour of the prosecution but it can be subjected to close scrutiny and that portion of the evidence consistent with the case of prosecution may be accepted.

30. In **State Of Gujarat vs Anirudh Singhh and Another (1997) 6 SCC 514,** it has been held that virtually it is a legal duty of the trial Judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record even of the turning hostile witnesses would be sufficient to bring home the commission of the crime.

31. In **Rajesh Yadav and Another Vs. State of U.P. 2022 SCC Online SC 150** it has been held like this:

".....21.The expression "hostile witness" does not find a place in the Indian Evidence Act. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. We must bear it in mind that a witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on change his view in favour of the opposite side. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the Court. With respect to the first category, the Court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence. Such evidence would become complete after the cross examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact. Therefore, not only the specific part in which a witness has turned hostile but the circumstances under which it happened can also be considered, particularly in a situation where the chief examination was completed and there are circumstances indicating the reasons behind the subsequent statement, which could be deciphered by the court. It is well within the powers of the court to make an assessment, being a matter before it and come to the correct conclusion".

32. The evidence of P.W.2 and P.W.3 stand on the same footings as is of P.W.1. The learned counsel for the appellants has failed to explain as to why the informant went to the police station with the deceased, who was ablaze at that time if she was not subjected to acid attack by her husband and in-laws. The learned counsel for the appellants has quoted the statements of P.W.1, who has tried to explain the reason behind taking away her sister to the police station before got her admitted into the hospital. In his cross-examination P.W.1 has stated that some persons had told him that without the police intervention the persons who are got injured in accident or by burning are not admitted into the hospital and that is why he went to the police station for lodging of FIR before going to the hospital.

33. We are of the considered view that this statement of P.W.1 is false and fabricated. If the deceased was burnt

accidentally and the informant wanted police intervention before any medical treatment he could have only inform the police regarding the incident of burning of his sister. He had no need to lodge an FIR in respect of that incident, merely an information was sufficient to take the police into action, if any how informant was under impression that the police ought to be informed prior to the injured taking to the hospital.

34. In **Bable vs State Of Chattisgarh AIR 2012 SC 2621** it has been held that "FIR by itself is not a substantive piece of evidence but it certainly is a relevant circumstance of the evidence produced by the Investigating Agency. Merely because the informant had turned hostile, it cannot be said that the FIR would lose of all its relevancy and cannot be looked into for any purpose". It is very important to note that after lodging of the FIR the investigation was started and culminated into a charge sheet.

35. The trial Court has appreciated the evidence of P.W.1, P.W.2 and P.W.3 and has opined that the witnesses are deliberately trying to hide the facts. He has also impressed upon Ex.Ka-2, which is an application given by the informant P.W.1 to S.P. City, Bareilly for performing the post mortem of the deceased alleging therein that it was a bride burning case and the accused persons killed the deceased by acid attack. Why Ex.Ka-2 was given by him to the high police official, has no where been explained by P.W.1 in his entire deposition.

36. We are of the considered opinion that the learned trial Court has rightly impressed upon the evidentiary value of Ex.Ka-2 and has reached the correct conclusion.

37. While the FIR has been found a credible piece of evidence, we can successfully relied upon the contents found therein. It has been clearly mentioned in the FIR that the marriage took place two years before the occurrence and the in-laws of the deceased were in continuous demand of colour t.v & motor cycle and she was subjected to cruelty and harassment for demand of dowry, and the deceased always used to tell all the story to her family members, several times the accused persons kicked her out of the house and the informant and his family members kept on requesting them not to torture the deceased, but in vain.

38. The dying declaration of the deceased has been recorded by the Tehsildar P.W.8. The learned counsel for the appellants has vehemently argued that the dying declaration is not a fair and reliable piece of evidence in this matter and the circumstances surrounding it are suspicious.

39. The trial Court has examined the veracity of the dying declaration Ex.Ka-13 in detail in the impugned judgement. From the perusal of the whole deposition of P.W.8, we do not find any adversity in his statement. So far as the dying declaration is concerned, the doctor has given his certificate before recoding it that Mrs. Parveen is conscious to give her statement and after the statement is recorded he has again certified that Mrs. Parveen remained in her senses throughout the recording of statement.

40. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court

has summarized the law regarding dying declaration in **Lakhan vs. State of Madhya Pradesh [(2010) 8 Supreme Court Cases 514]**, in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, *"a man will not meet his Maker with a lie in his mouth"*. The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

41. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

42. P.W.8 is absolutely independent witness. In the wake of aforesaid judgment of Lakhan *(supra)*, dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in **Krishan vs. State of Haryana [(2013) 3 Supreme Court Cases 280]** that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

43. In **Ramilaben Hasmukhbhai Khristi vs. State of Gujarat, [(2002) 7 SCC 56],** the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate

with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

44. From the above precedents, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

45. In dying deceleration of the deceased, it is also relevant to note that deceased died after more than two months of recording it. It means that she remained alive for more than two months after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for more than two months after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time.

46. From the above, it is also clear that the deceased was subjected to cruelty and was made a victim of acid attack soon before her death.

47. Hence, we find that all the ingredients to bring home charge against the accused under Section 304-B I.P.C are fulfilled and the prosecution has successfully established all the conditions in order to enable it to ask for conviction of the accused persons in the present case of dowry death.

48. The provisions of Section 113 B of Indian Evidence Act come into picture at this juncture. Section 113 B of Indian Evidence Act reads like this.

"[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).]"

49. A bare perusal of the aforesaid provisions makes it clear that if the prosecution succeeds in establishing the pre-conditions to obtain a benefit of presumption under Section 113B of the Indian Evidence Act in a case under Section 304-B I.P.C. it will be presumed that the accused has committed the offence and the burden of proof is shifted upon the accused that he was innocent.

50. It is pertinent to mention here that no defence evidence has been adduced by the accused persons. In his statement under Section 313 Cr.P.C., accused Sageer has taken a defence that he was at Bikaner in the fateful night and after getting information from his mother he came back in the morning but at the same time his brother co-accused Naseer in his statement

has stated that accused Sageer had gone to Bareilly for labour work. It is a major contradiction. Secondly, co-accused Naseer has stated that when he saw the deceased (then injured) ablaze he immediately went away to the house of the in-laws of accused Sageer and stayed there at night and returned in the morning. The statement is totally unnatural. When the mother of the accused persons was alone in the house and the deceased was in bitterly burnt condition why co-accused Naseer went away to the house of the in-laws of accused Sageer and why he did not make any effort to provide medical treatment to the deceased immediately, are the questions un-answered by the defence.

51. The trial Court has fairly discussed these aspects in his judgement and has found that the accused persons are telling a lie and moreover, no defence evidence to prove the aforesaid narrations has been adduced by the appellants, which makes their statement totally false. They have failed to discharge their burden of proof under Section 113 B of Indian Evidence Act after a presumption was raised against them.

52. At the same time we have also found that the medical evidence is quite clear and corroborates the facts and circumstances of the case, the minor contradictions will have to be ignored and they cannot form the dent in the prosecution of the accused persons/ appellants. All the family members of the deceased have become hostile as witnesses but this fact also has failed to provide any help to the appellants. The dying declaration goes in toto in favour of the prosecution and, therefore, there is no doubt left in our mind about guilt of the present appellants and we concur with the finding of the learned trial Court. However, the question which falls in our minds is whether on re-appraisal of the peculiar facts and circumstances of the cases, the sentence of life imprisonment imposed by the trial Court is proper or not.

53. We have given our thoughtful consideration to the request made by the learned counsel for the appellants that they have been languishing in jail for many years in this case and keeping in view the incarceration of the accused persons they should be released as undergone.

54. While considering the aforesaid aspects our attention is drawn towards the fact that it is a case of septicemial death and the death of the deceased is occurred after more than two months of the occurrence.

55. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

56. 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.

57. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

58. The dictum given in the recent judgment of State of M.P Vs. Jogendra *(supra)* (para-20) can be followed in the facts and circumstances of this case. Hence, we conclude that as the convicts have been in jail for more than 12 years i.e sufficient for them, hence they may be set free if not required in any other offence. As far as Section 3/4 D.P. Act is concerned, they have already undergone the punishment and if the fine is not paid, the default sentence would also have been over by now which would begin from the date after the period awarded by the trial court is over. As far as Section 304-B of I.P.C. is concerned, we punish all accused to 12 years of imprisonment. The fine is maintained as imposed by the trial Court and default sentence will be 6 months imprisonment. If the convicts have served out their sentence they be released, if not wanted in other offence.

59. The default sentence shall begin after 12th year of incarceration.

60. Accordingly, the appeal is **partly allowed** with the modification of the sentence as above.

61. Record and proceedings be sent back to the Court below forthwith.

62. A copy of this order be sent to the jail authorities for following this order and doing the needful.

(2022) 10 ILRA 286
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 8082 of 2008
With
Criminal Appeal No. 8081 of 2008
With
Criminal Appeal No. 8137 of 2008
With
Criminal Appeal No. 7626 of 2008
With
Criminal Appeal No. 7889 of 2008
With
Criminal Appeal No. 6973 of 2008

Rohtash Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Abhishek Mayank, Sri Anil Saxena, Sri Neeraj Singh, Sri Pavan Kumar

Counsel for the Respondent:
Govt. Advocate, Sri Ronak Chaturvedi

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 148, 302, 149 &120B-murder-death of the deceased was caused as a result of ante-mortem fire arm injuries- bullets were recovered from the dead body of both the deceased-PW-1 stated that the appellants made fire-testimony of PW-1 gets support from medical as well as other evidence on record-the method, time and manner as deposed by the ocular witness PW-1 proves his presence on the spot-As a result, his testimony is wholly reliable and trustworthy, though interested witness-Thus, trial court rightly appreciated the evidence.(Para 1 to 46)

B. It is well settled that the evidence of interested or inimical witnesses is to be scrutinized with care but cannot be rejected merely on the ground of being a partisan evidence. if on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence. (Para 32 to 35)

The appeals are dismissed. (E-6)

List of Cases cited:

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

2. Piara Singh & ors. Vs St. of Punj. (1977) AIR SC 2274

3. Hari Obula Reddy & ors. Vs St. of A.P. (1981) 3 SCC 675

4. Ramashish Rai Vs Jagdish Singh (2005) 10 SCC 498

5. Darya Singh Vs St. of Punj. (1965) AIR SC 328

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

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

8. Leela Ram Vs St. of Har. (1999) 9 SCC 525

9. Subal Ghorai & ors. Vs St. of W.B. (2013) 4 SCC 607

10. Rammi @ Rameshwar Vs St. of M.P. (1999) 8 SCC 649

11. Leela Ram (dead) thru Duli Chand Vs St. of Har. &anr. (1999) 9 SCC 525

12. Bihari Nath Goswami Vs Shiv Kumar Singh & ors. (2004) 9 SCC 186

13. Vijay @ Chinee Vs St. of M.P. (2010) 8 SCC 191

14. Sampath Kumar Vs Insp. of Police, Krishnagiri (2012) 4 SCC 124

15. Shyamal Ghosh Vs St. of W.B. (2012) 7 SCC 646

16. Mritunjay Biswas Vs Pranab @ Kuti Biswas & anr. (2013) 12 SCC 796

(Delivered by Hon'ble Subhash Chandra Sharma, J.)

1. Heard Sri Abhishek Mayank learned counsel for the appellants in all the connected appeals, Sri Ronak Chaturvedi learned counsel for the first informant and Sri Patanjali Mishra learned A.G.A. for the State-respondents.

2. These appeals emanate from the judgment and order dated 30.09.2008 passed by the Additional Session Judge, Court No.5, Aligarh in S.T. No.934 of 2004 (State vs. Kaptan Singh and others) arising out of Crime No.122 of 2003, under Sections 148, 302/149 & 120-B I.P.C., Police Station Khair, District Aligarh whereby the appellants have been convicted and sentenced for a period of 18 months rigorous imprisonment under Section 148 I.P.C.; life imprisonment u/s 302 readwith section 149 I.P.C. with fine of Rs.5000/- for each of the appellants, and in default of payment of fine to undergo three months additional imprisonment. All the sentences are to run concurrently.

3. During the pendency of the appeal, appellant Om Prakash had died and the appeal on his behalf has been abated.

4. The prosecution case in brief is that informant Sanjeev Kumar S/o Jugveer Singh, resident of Village Bisara, Police Station Khair, District Aligarh lodged an F.I.R. on 04.06.2003 at about 13:25 P.M. at the Police Station Khair, District Aligarh being brother of deceased Bablu and nephew of deceased Harveer Singh @ Munna. The written report was filed by him stating therein that on 18.03.2003 Manveer S/o Om Prakash, resident of his village, was murdered wherein his brother Banti and father Jugveer Singh and other persons of the village were implicated falsely by the brother of the deceased Manveer namely Kaptan Singh. As a result his brother and father were lodged in jail. On 04.06.2003, the date was fixed for hearing of their bail applications in relation to which the informant, his brother Bablu @ Virendar Singh, his uncle Harveer Singh @ Munna, one Alchendra Singh and Subhash went to Aligarh to do pairvi of the case but hearing was adjourned. His uncle Harveer Singh @ Munna, brother Bablu @ Virendar Singh on one motorcycle and the informant, Alchendra Singh and Subhash on another motorcycle were returning to their village Bisara. Bablu and Harveer Singh were ahead of them and when they reached near Lavkush Uchchatar Madhyamik Vidyalaya, Andala, a Maruti Car bearing no. DL 2CB-2483 crossed the motorcycle of the informant. They saw that it was being driven by Bhoora S/o Nepal Singh R/o Bisara and wherein Kaptan Singh S/o Om Prakash, Om Prakash S/o Raghunath Singh, Tikam Singh S/o Pratap Singh, Rajan @ Rajendra Singh S/o Satyaveer residents of the same village and Rohtash S/o Shanker Singh (son of phuphi of Kaptan Singh) resident of Sarua Ka Nagla Police Station Chandaus were sitting. After crossing the bike of the informant, they started firing indiscriminately at the brother and uncle of

the informant namely Bablu and Harveer Singh who were on the motorcycle at the turning of Lavkush Uchchatar Madhyamik Vidyalaya at that time. Their motorcycle fell into the pit and both the deceased ran to escape but the accused persons came down from the car, surrounded them and killed both on the spot. The informant and other two persons witnessed the incident hiding there but could not gather courage to go ahead. The accused persons went away in the car while making fire creating terror on the spot. It was further stated that Hoshiyar Singh S/o Raj Bahadur Singh, Suresh S/o Roshan Singh and Habib Khan S/o Naseer Khan residents of the village told him four days prior to the incident that Bhoora, Kaptan Singh, Om Prakash, Tikam Singh, Dharmwati, Buddha, Shyam Singh and Rajan @ Rajendra were collected at the house of village Pradhan Kaptan Singh where Rohtash was also present and they were talking that they would take revenge of the murder of Manveer Singh by killing at least two persons of informant side. The informant stated that he did not give much importance to the said information but now he realised that the murder of the brother and uncle of the informant was committed at about 12:45 P.M. by the abovenamed persons in execution of the conspiracy hatched by them.

5. On the basis of the written report scribed by Vinod Kumar, case was registered as Crime No.122 of 2003, under Sections 147, 148, 149, 302, 120-B I.P.C. & under Section 2/3 Gangster and Anti Social Activities (Prevention) Act. The detail of the case was entered into the G.D. as report no.32 The investigation of the case was handed over to S.I. Lakhan Lal.

6. The inquest of deceased Harveer Singh and Bablu @ Virender Singh was conducted by S.I. Rajendra Prasad Singh on the same day and the inquest reports were prepared by him along with other relevant papers required for the purposes of postmortem. The dead bodies of both the deceased persons were sealed and handed over to Constable Harpal Singh and Home Guard Bhoori Singh who took them to Mortuary at District Hospital, Aligarh.

7. The postmortem of both the deceased persons was conducted on 05.06.2003 at about 10:00 A.M. and 10:40 A.M.; respectively by Dr. S.K. Porwal who mentioned in the postmortem reports that dead bodies were brought by Constable Harpal Singh and Home Guard Bhoori Singh in sealed state sent by S.H.O., Khair. The sample seal was compared and found correct.

8. The findings recorded in the post-mortem report of the deceased Bablu @ Virendra Singh are as under :-

Aged about 30 years. The time of death about one day.

External Examination

Average built body, rigor mortis present in both upper extremities, eyes half closed, and clotted blood in both nostrils.

Ante Mortem Injuries

1. Lacerated wound 2 cm x 1 cm x scalp deep in front of head 1 cm below hair line in mid line with scorching of hair and blackening and tattooing present over face and forehead.

2. Gun shot wound of entry 1 cm x 1 cm x cavity deep on the back of head 11 cm below right ear. Occipital bone fractured. One bullet recovered from cavity, scalp hair scattered.

3. Gun shot wound 5 cm x 4 cm x bone deep in outer part of right upper chest, blackening and tattooing in an area of 11

cm present on upper forearm. Right humerous bone fractured. Clotted blood present.

4. Gun shot wound of exit 1.5 cm x 1.5 cm x corelating to injury no.5, left side chest 11 cm away at 5 O'clock position with 3 cm, blackening and tattooing present.

5. Gun shot wound of exit 2 cm x 2 cm in right side chest, 3 cm below right nipple at 6 O'clock position.

6. Gun shot wound of entry 2 cm x 1 cm x left side back 2 cm lateral mid line, 7 cm at the spine with bleeding all around in an area of 3 cm.

7. Gun shot wound of exit 2.5 cm x 1 cm corelating to injury no.6.

8. Two gun shot wound of entry 2 cm apart in middle of sternum with blackening and tattooing in 4 cm area. 1 cm x 1 cm x bone deep sternum fractured. Other 1 cm x 1.5 cm x chest cavity deep underlying heart lacerated. One bullet recovered from the heart.

9. Lacerated wound 2 cm x 1 cm into skin deep over right knee.

Internal Examination

Scalp/Skull - occipital bone fractured, Membrane - lacerated, Brain - lacerated, Base - NAD, Vertebra - NAD, Spinal Cord - NAD. Clotted blood in ventricles and cortex present. One bullet recovered.

Thorex

Walls, ribs and cartilages - sternum fractured, Pleura - NAD, Larynx - NAD, Lungs - NAD, Pericardium - lacerated, Heart - lacerated and bullet recovered, Vessels - NAD

Abdomen

Walls, Peritoneum - lacerated, Cavity - blood mixed fluid present, Buccal Cavity - NAD, Teeth - 15/15, esophagus - NAD, Contents of stomach - small intestine and large intestine lacerated, gases and faecal matter present, blood in stomach cavity, Liver and Gallbladder - half full, Pancreas, Spleen and Kidney - NAD, Bladder - empty , Cause of death - coma, shock and hemorrhage.

9. The findings recorded in post-mortem report of the deceased Harveer Singh @ Munna are as under:-

age about 40 years, time of death about one day

External Examination

Average built body, rigor mortis present in both upper extremities, eyes closed, natural orifices - NAD

Ante-Mortem Injuries

1. Lacerated wound 1 cm x 1 cm x through and through in left side head 1 cm behind outter end of left eyebrow. Margins irregular and inverted. Blackening and tattooing all around the wound in an area of 8 cm in face and scalp present and top of left shoulder corelating to injury no.2.

2. Lacerated wound 1.5 cm x 1.5 cm corelating to injury no.1 in back of left ear 3 cm behind margins everted.

3. Multiple abraded contusions in whole of the back in an area of 20 cm x 15 cm.

4. Abraded contusion 6 cm x 5 cm in outer part of elbow.

5. A bruise 4 cm x 3 cm in front of right knee.

6. Abrasion 2 cm x 2 cm in back of right leg.

Internal Examination

Scalp/skull - left frontal and right temporal and parietal bone fractured, Membranes - lacerated, Brain - lacerated, Base - NAD, Vertebra - NAD, Spinal Cord - not opened, Clotted Blood - in ventricles and cortex present under injuries

Thorex

Walls - NAD, Pleura - NAD, Larynx and trachea - NAD, Right and Left lungs -

NAD, Pericardium - NAD, Heart - right full and left empty, Vessels - NAD

Abdomen

Walls Pericardium and Cavity - NAD, Buccal Cavity and Larynx - NAD, Teeth - 15/15, oesophagus - NAD, Contents of stomach - one ounce pasty material present, Small and Large intestine - gases and faecal matter present, Liver - NAD, Gallbladder - half full, Pancreas - NAD, Spleen - NAD, Kidney - NAD, Bladder - empty, Cause of death - Coma as a result of ante-mortem injury.

10. During the investigation blood stained soil, plain soil, one bullet motorcycle, 17 empty cartridges 315 bore, two bullets 315 bore were taken into possession and recovery memos were prepared by the investigating officer. After recording the statement of the informant and inspection of the place of occurrence site plan was prepared and statements of the witnesses conversant to the facts of the case were also recorded. On the basis of the material collected during the investigation prima facie case was found to be made out against the accused persons except Smt. Dharmwati Devi u/s 147, 148, 149, 302, 120-B I.P.C. and the charge-sheet was submitted before the court concerned.

11. Cognizance of the offences was taken by the learned C.J.M. who provided the copies of prosecution papers to the appellants in compliance of Section 207 Cr.P.C. and committed the case to the court of session for trial.

12. Learned trial court framed the charges under Sections 148, 302 readwith Section 149 and 120-B I.P.C. on the basis of the material on record after giving opportunity of hearing to the appellants, charges were read over and explained to them. They pleaded not guilty, denied the charges and claimed for trial and consequently the case was fixed for prosecution evidence.

13. The prosecution examined PW-1 Alchendra Singh as witness of fact, PW-2 Vinod Kumar scribe of written report, PW-3 Constable Sarvesh Kumar who had prepared the chick F.I.R. on the basis of tehrir and entered the detail in the G.D., PW-4 Habib Khan witness relating to the criminal conspiracy, PW-5 S.I. Rajednra Prasad Singh who had prepared the inquest report and other relevant papers, PW-6 Dr. R.K. Porwal who conducted the post-mortem of the bodies of both the deceased and prepared the post-mortem reports, PW-7 S.I. Lakhan Lal who conducted investigation of the case, PW-8 S.I. Suresh Chandra Omhare who concluded the investigation of the case after PW-7 and submitted the charge-sheet.

14. After conclusion of the prosecution evidence the statements of appellants under Sections 313 Cr.P.C. were recorded wherein they negated the statements made by the witnesses before the court and stated that they had been falsely implicated on account of enmity and the witnesses made false statements. The appellant Bhoora Singh also stated that the case against the brother and father of informant was proved and they had been convicted and that he was not present on the place of occurrence. Prior to this incident, brother of Kaptan Singh namely Manveer Singh was murdered wherein Alchendra, Rajjo, Anees S/o Habib Khan were accused and he was the witness of recovery of knife and that was the enmity for his false implication. Appellant Rajan @ Rajendra also stated that Hoshiyar Singh

brother of Alchendra Singh was an accused and convicted in the case under Section 307 I.P.C. wherein he was witness and on account of this enmity he was falsely implicated. Appellant Rohtash stated that he was falsely implicated on account of village party bandi as being cousin of Kaptan Singh and he was resident of another village. Appellants had produced Kunwar Pal Singh as DW-1 in defence.

15. Learned counsel for the appellants argued that the judgment of the trial court is against the evidence available on record. It is bad in the eye of law being based on the testimony of interested witness related to the deceased who was not present on the spot and his testimony was full of contradictions. No independent witness had been examined though the occurrence took place at a public place. The prosecution had failed to establish the motive for committing the offence. There was no evidence of unlawful assembly and of common object. The appellants were named in the F.I.R. due to enmity but the trial court did not consider these facts while appreciating the evidence on record and illegally sentenced all the appellants. As the prosecution could not prove its case beyond reasonable doubt the appellants are entitled for acquittal and the appeals deserve to be allowed.

16. Learned A.G.A. opposed the contentions raised by the learned counsel for the appellants and urged that in this case there was proved enmity between the parties relating to the murder of Manveer S/o Kaptan Singh and the appellants, in revenge had planned the murder of the deceased persons who were making pairavi for bail of the accused persons Banti and Jugveer Singh who were in jail. The informant Sanjeev Kumar was also murdered later on and PW-1 Achlendra Singh who was an eye-witness of the incident had deposed about the incident. The testimony of PW-1 is wholly reliable and cannot be discarded only on the ground of he being relative of the deceased persons, as his presence on the spot could not be disputed. The F.I.R. was lodged promptly without any delay which rules out the possibility of concoction. The place of occurrence and the death of deceased persons due to fire arm injury could not be disputed. There are no material contradictions in the testimony of PW-1 Achlendra Singh which would go to the very root of the case. His testimony is wholly reliable and conviction as recorded by the trial court is based on the evidence available on record, it cannot be said to be erroneous from any angle. The appeals being devoid of merit are liable to be dismissed.

17. From the statements and perusal of the record, the following questions emerge for consideration of this Court; as to whether there was motive to commit the murder of the deceased persons; witness being relative and interested is reliable and trustworthy; non-examination of independent witness would have adverse effect on the prosecution case; the contradictions in the statements of witness are material which make the testimony unreliable; further whether the appellants have been implicated falsely due to enmity.

18. Before we deal with the contentions of the learned counsel for the appellants, it would be convenient to take note of the witness account as adduced by the prosecution.

19. PW-1 Achlendra Singh, the informant had deposed that on 04.06.2003

he went to the District Court, Aligarh for doing pairavi for bail of Jugveer Singh and others. Sanjeev Kumar, Subhash, Bablu @ Virendra, Munna @ Harveer were also with him. On 18.03.2003 Manveer brother of Kaptan Singh, son of Om Prakash of his village was murdered. In the said murder case, Jugveer Singh, Banti, Manish and Rabbo were accused. Kaptan Singh was the village pradhan. On 04.06.2003, the hearing was adjourned so they were returning to their village. Munna @ Harveer and Bablu on one motorcycle and he, Sanjeev Kumar alongwith Subhash on other motorcycle were going towards the village. When they reached at the Indian Gas Plant, Munna @ Harveer and Bablu went ahead on the motorcycle. Sanjeev and Bablu were driving two motorcycles. When they reached near the Uchchatar Madhyamik Vidyalaya, Andala, Police Station Khair, one Maruti Car driven by one Bhoora Singh overtook his motorcycle wherein appellants Kaptan Singh, Om Prakash, Tikam Singh, Rajan @ Rajendra Singh R/o Bisara and Rohtash son of phuphi of Kaptan Singh R/o Sarua were sitting. All those persons started firing at Munna and Bablu. As a result, their motorcycle fell on the side of the road in a pit. They tried to escape but were chased by the accused persons surrounded and shot dead on the spot. All the accused persons were equipped with fire arms. He, Sanjeev Kumar and Subhash witnessed the incident while hiding themselves. The accused persons were working as a gang for extracting money unlawfully. The occurrence took place at about 12:45 P.M. The F.I.R. was lodged by Sanjeev Kumar at the police station. It was further stated that 3-4 days prior to this incident, Suresh, Habib Khan, Hoshiyar, Bhoora, Kaptan Singh, Om Prakash, Tikam Singh, Rajan @ Rajendra Singh, Shriniwas, Buddha, Dharmwati and Rohtash were conspiring to take revenge of murder of Manveer by killing two persons on the informant side. These people in conspiracy committed murder of Munna and Bablu. Later on 02.03.2005, the informant Sanjeev Kumar was also murdered. This witness was subjected to gruelling cross-examination by the defence counsel but he could not be shaken and nothing was found in his deposition which weakens his testimony. PW1 has confirmed the fact of firing and murder committed by the appellants though, he categorically stated the fact of enmity relating to the murder of Manveer wherein his son Rabbo was also an accused and has been convicted. PW1 also admitted that in the said murder case, he was also an accused under Section 120-B I.P.C., but deceased Munna and Bablu were not accused persons in the murder case of Manveer. The impact of the admitted enmity will be discussed alongwith the argument of the learned counsel for the appellants at a later stage in this judgment.

20. PW-2 Vinod Kumar had deposed that informant Sanjeev Kumar who was murdered on 02.03.2005 was his nephew. Munna, his real brother and Bablu real nephew were murdered on 04.06.2003. The written report of this incident was scribed by him on the dictation of Sanjeev Kumar. Whatever was dictated by Sanjeev Kumar he wrote the same and readover the contents thereof and then informant Sanjeev Kumar put his signature on it. PW2 proved paper no.6 Ka the report written in his hand writing and bearing the signature of informant Sanjeev Kumar as Ex Ka-1.

This witness was also subjected to lengthy cross-examination but he asserted the fact that on the information

given on telephone by Sanjeev Kumar about the murder at about 1 O'clock, he came to the police station by Marshal Jeep where he met to Sanjeev Kumar out of the gate of the police station and wrote the F.I.R./Tehrir. Afterwards he went back to his house to console the family members. Nothing adverse could be pointed out from the testimony of this witness.

21. PW-3 Constable Sarvesh Kumar deposed that on 04.06.2003 he was posted as Constable Clerk at the Police Station Khair. He prepared the check report no.77 on the basis of the written tehrir presented by informant Sanjeev Kumar and he entered the detail thereof in the report no.32 of the G.D. at 13:25 O'clock. He proved the check F.I.R. to be in his hand writing and signature as Ex Ka- 2. He also proved the carbon copy of G.D. by comparing it with the original being in his hand writing and signature as Ex Ka-3. During the cross-examination, nothing adverse was found in his testimony.

22. PW-4 Habib Khan deposed that prior to this incident brother of Kaptan Singh namely Manveer was murdered. He stated that four days prior to the present incident at about 6:30 P.M. while he was passing by the house of Kaptan Singh where on the terrace of Kaptan Singh other persons namely Hoshiyar Singh, Suresh, Kaptan Singh, Om Prakash, Tikam Singh, Dharmwati, Srinivas, Rohtash, Buddha, Bhoora, Rajan @ Rajendra Singh were talking, he heard Kaptan Singh saying that they would kill two persons instead of one murder by the informant side and every person there agreed to him and stated that they were with him and see that the work be done. He told about this conversation to deceased Munna, Bablu and informant Sanjeev Kumar but they did not pay attention and replied that they did not believe him. Later on, deceased Munna and Bablu were murdered.

This witness was also subjected to gruelling cross-examination by the defence wherein it was disclosed that his son Anees was accused in the murder of Manveer and remained in jail for a period of 8-10 months. Prior to the incident, Kaptan Singh and others shot fires on Anees at the home for which a case under Section 307 I.P.C. was registered. The statement of this witness also disclosed the enmity with appellant Kaptan Singh and it will also be dealt with in the later part of this judgment with the submissions of the learned counsel for the appellants.

23. PW-5 S.I. Rajendra Prasad Singh deposed that on 04.06.2003, he was posted as Sub-Inspector at the Police Station Khair. He went to conduct the inquest with Inspector Lakhan Lal and S.S.I. Baljit Singh. He conducted inquest, prepared the inquest report and other relevant papers and also sealed the dead body of the deceased persons and handed over to Constable Harpal and Home Guard Bhoori Singh to carry for the post-mortem. He proved the inquest report relating to deceased Bablu @ Virendra Singh being in his hand writing and signature as Ex Ka- 4 and other papers as Ex Ka-5 to 9; the inquest of dead body of Munna @ Harveer Singh be as Ex Ka-11 to 15. During cross-examination nothing adverse could be found in his testimony.

24. PW-6 Dr. S.K. Porwal deposed that on 05.06.2003 he was posted at the District Hospital, Aligarh and conducted post-mortem of the dead body of deceased Bablu @ Virendra aged about 30 years S/o Jugveer Singh R/o Bisara, Police Station Khair at 10:00 A.M. He proved the contents

of the post-mortem report as prepared by him in his hand writing and signature as Ex Ka- 16. He also opined that the death of the deceased was caused by shock and hemorrhage as a result of ante-mortem injuries one day prior to the post-mortem and that the death was possible at about 12:45 P.M. on 04.06.2003. He further stated that on 10:40 A.M., on the same day, he conducted the post-mortem of the dead body of Munna @ Harveer Singh and also proved the contents of the post-mortem report as prepared by him in his hand writing and signature as Ex Ka- 17. The cause of death was stated as a result of ante-mortem injuries at about 12:45 P.M. on 04.06.2003. This witness was also subjected to gruelling cross-examination but nothing adverse was found in his deposition.

25. PW-7 Inspector Lakhan Lal deposed that on 04.06.2003 he was posted as the Officer In-charge at the Police Station Khair and in his presence at about 13:25 P.M. F.I.R. of this case was lodged on the basis of written report Ex Ka-1 presented by informant Sanjeev Kumar and the investigation of the case was handed over to him. He went to the place of occurrence where he recorded the statement of informant Sanjeev Kumar and other witnesses. He also inspected the place of occurrence as narrated by the informant and witnesses and prepared the site plan in his hand writing and signature which he proved as Ex Ka- 18. He got the inquest prepared and sent the dead bodies for the post-mortem. On the place of occurrence one Bullet Motorcycle was found and Memo relating thereto was prepared which was proved as Ex Ka- 13. From the spot, 17 empty cartridges 315 bore and two bullets 315 bore were taken into possession, Memo of which was prepared and proved as Ex Ka- 20. Blood stained and plain earth was also taken and sealed for sample and Memo was prepared which he proved as Ex Ka- 21. Thereafter, PW-7 tried to arrest the accused persons but they had absconded. PW-7 was transferred and the investigation was handed over to S.S.I. Baljit Singh.

This witness was also subjected to lengthy cross-examination by the defence counsel.

26. PW-8 S.I. Suresh Chandra Omhare stated that on 31.03.2004 he was posted in the office of S.I.S., I.G. Zone, Kanpur and the investigation of this case was handed over to him by the order of I.G., Zone Kanpur. He recorded the statements of witnesses conversant to the facts of the case and after concluding the investigation submitted the charge-sheet which he proved as Ex Ka- 23 being in his hand writing.

This witness was also subjected to lengthy cross-examination by the defence counsel.

27. The informant Sanjeev Kumar was murdered on 02.03.2005, before he could be examined.

28. PW-1 Alchendra Singh is the sole witness of fact who was produced as eye witness of the occurrence. PW-2 Vinod Kumar was not an eye-witness but only scribe of the written report given by the informant Sanjeev Kumar. Likewise PW-4 Habib Khan was also not an eye-witness of the occurrence but he had only narrated overhearing the conspiracy hatched by the appellants for committing murder of the deceased persons but the charge of conspiracy under Section 120-B I.P.C. was not found to have been proved beyond

reasonable doubt, therefore, the appellants were acquitted of the charges under Section 120-B I.P.C. No appeal against the acquittal under the said offence is before us. The testimony of this witness (PW-4), thus, is of no use.

29. Now reliability and veracity of the testimony of the sole witness PW-1 Alchendra Singh is to be tested before this Court in the context of the submissions made by the learned counsel for the appellants.

30. Learned counsel for the appellants submits that PW-1 is an interested witness and is inimical to the appellants. He as such is not a reliable witness. No doubt Rabbo Singh S/o Alchendra Singh (PW-1) was an accused in the case of murder of Manveer Singh wherein brother of informant, Banti and his father Jugveer Singh were also accused persons. Manveer was related to appellants. On the date of the incident, PW-1 Alchendra Singh and informant Sanjeev Kumar along with the deceased went to the District Court, Aligarh for doing pairavi for bail of accused persons namely Banti and Jugveer Singh. Further PW-1 also admitted in his cross-examination that in the murder case of Manveer, his son was also convicted and enlarged on bail and he was also an accused in that case for the offence under Section 120-B I.P.C. PW1 further admitted that his son contested the election of Village pradhani against Kaptan Singh and Jugveer & Sanjeev were on their side. A case was registered under Section 307 I.P.C. against Hoshiyar brother of PW-1 Alchendra Singh. All these facts clearly indicate that there was adequate evidence of enmity between PW-1 Alchendra Singh and the family of the appellants. The PW1, thus, clearly falls in the category of an interested witness but merely on the ground of being an interested witness, his evidence cannot be disbelieved outrightly unless it can be discerned from the record that his testimony as a whole deserves to be rejected being untrustworthy. There is an excuse to save the real culprits and to implicate the appellants falsely which is lacking.

31. On the issue of appreciation of evidence of interested witnesses, ***Dalip Singh Vs. State of Punjab, AIR 1953 SC 364,*** is one of the celebrated cases. It was held therein:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

32. Similarly, in ***Piara Singh and Ors. Vs. State of Punjab, AIR 1977 SC 2274***, the Supreme Court held:

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."

33. In ***Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, (1981) 3 SCC 675***, a three-judge Bench of the Supreme Court observed:

".. it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

34. Again, in ***Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498***, the following observations were made by the Supreme Court:

"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

35. The learned counsel for the appellants has also urged that in absence of testimony of an independent witnesses, the prosecution story is liable to be discarded. We are not impressed with this submission in the light of the observations made by this Court in ***Darya Singh Vs. State of Punjab, AIR 1965 SC 328,*** wherein it was observed:

"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 are 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."

36. Similarly, in ***Raghubir Singh Vs. State of U.P., (1972) 3 SCC 79***, it was held that the prosecution is not bound to produce all the witnesses who are 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.

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

"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."

38. Another reason for which the learned counsel for the appellants insists to disbelieve the prosecution story is that there are improvements and exaggerations in the testimony of PW 1. We find it difficult to agree with this argument in light of the judgment in the case ***Leela Ram Vs. State of Haryana, (1999) 9 SCC 525,*** wherein it was observed:

"It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment - sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."

39. Similarly, in ***Subal Ghorai and Ors. Vs. State of West Bengal, (2013) 4 SCC 607***, the Supreme Court stated as follows:

"Experience shows that witnesses do exaggerate and this Court has taken note of such exaggeration made by the witnesses and held that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record."

40. It is also argued that there are discrepancies and contradictions in the testimony of PW-1 which do not inspire confidence. It is well settled in law that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should

not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. ***(See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796).***

41. Learned counsel for the appellants also submitted that there was no motive to commit murder of the deceased persons, however, the learned trial court held that there was sufficient motive with the accused persons to commit the murder of the deceased persons. Admittedly, there was enmity between the appellants and the deceased. As disclosed in the F.I.R. by the informant Sanjeev Kumar that the murder of Manveer S/o Om Prakash was committed on 18.03.2003 wherein brother of informant namely Banti and his father Jugveer Singh were implicated who were in jail. The hearing of their bail was fixed on 04.06.2003 and the deceased persons and the informant all went to the court for doing pairavi of the bail case. While coming back from the Court on the way, the incident took place and the appellants committed murder of the deceased Bablu @ Virender Singh and Munna @ Harveer, both son and brother of accused Jugveer Singh. This infers the deep rooted motive in the minds of the appellants to commit the murder of the deceased persons who belonged to the family of accused Jugveer Singh in the murder case of Manveer S/o Om Prakash one of the appellants. In this way, there was strong motive to take revenge for murder of Manveer Singh. Further it is settled legal proposition that even if there is absence of motive, it is of no consequence and it becomes insignificant when direct evidence establishes the crime. In case there is direct trustworthy evidence of witness as to the commission of offence, motive looses its significance and if genesis of the occurrence is not proved, the ocular testimony of the witnesses to the occurrence can not be discarded. In the present case, however, motive due to enmity of the parties is fully established from the material on record.

42. It was further contended that the F.I.R. was lodged ante-time. It is to be noted that occurrence took place at 12:45 P.M. and F.I.R. was lodged on 13:25 P.M. i.e. 40 minutes after the occurrence. The place of the occurrence was turn of Lavkush Uchchatar Madhyamik Vidyalay, Andala 9 kms. from the Police Station Khair. PW-1 stated that when the incident took place, Sanjeev Kumar lodged the F.I.R. at the police station. Further stated that after the accused persons went away he and Sanjeev Kumar went to the police station and Vinod also came there from the village. They went to the police station straightway by motorcycle and it took 20-25 minutes time to reach there. They did not go to their village which was situated 11 kms. away from the police station. Keeping in view the incident and the distance between the place of occurrence and police station, taking of 20-25 minutes

time in reaching there is natural. F.I.R. was lodged on the basis of written report given by the informant at the police station. PW-3 Constable Sarvesh Kumar who was constable clerk posted at the police station on 04.06.2003 clearly asserted that he lodged the F.I.R. on the basis of the written report given by Sanjeev Kumar and entered its detail in G.D. as report no.32 at 13:25 O'clock. He also proved the F.I.R. and G.D. Though suggestions regarding the lodging of the F.I.R. ante-time was given to him but it was negated by the witness. After lodging the F.I.R., S.H.O. Lakhan Lal and S.I. Rejendra Prasad Singh went to the place of the occurrence for conducting the inquest and investigated the matter. He reached on the spot and started inquest of deceased persons at 14:30 P.M. in the presence of the witnesses who signed on the inquest report. There is entry of crime number on the inquest report and also other relevant papers prepared at that time. S.I. Rajendra Prasad Singh and Inespector Lakhan Lal also made similar statement about the time of lodging of the F.I.R. There appears no infirmity in this regard. The contention of the learned counsel for the appellants that the F.I.R. was ante-time, thus, can not be sustained.

43. The place of occurrence was said to be near the pit besides the road at Lavkush Uchchatar Madhyamik Vidyalaya, Andala. The dead bodies were found lying there as indicated in the inquest. The bullet motorcycle on which deceased persons were riding was also found lying at the aforesaid place. The blood stained and plain earth was collected from the same place of occurrence and the F.S.L. report on record proves that both match in properties. The investigating officer found 17 empty cartridges 315 bore and 2 bullets 315 bore on the spot, took them in possession and prepared the Memo. He has also proved the Memo during the examination before the court. The site plan prepared by the investigating officer also corroborates the place of occurrence. All these pieces of evidence establish the place of occurrence to be near the pit besides the Lavkush Uchchtar Madhyamik Vidyalay, Andala. PW-1 has also deposed the same place being the place of occurrence. In this way, the place of occurrence is established from the evidence led by the prosecution.

44. Undisputably, the death of deceased Bablu @ Virendra Singh and Munna @ Harveer was caused as a result of ante-mortem fire arm injuries. PW-1 Alchendra Singh had clearly stated that appellants made fire at the deceased persons and they were done to death on the spot. In the post-mortem reports Ex Ka- 16 & 17, the ante-mortem firearm injuries were found on the person of both the deceased. Two bullets were recovered from the dead body of deceased Bablu and they were sent to F.S.L. for examination, those bullets were found to be blood stained having been fired through cartridges of 315 bore. During the inquest proceedings, fire arm injuries were seen on the dead bodies. PW-6 Dr. S.K. Porwal, who conducted the post-mortem and prepared the post-mortem reports, had opined that the injuries were found on the person of the deceased caused by fire arm and a bullet was recovered from the heart and another from the head of the deceased caused about one day prior to the date of the post mortem, i.e. on 04.06.2003 at about 12:45 P.M. PW-1 Alchendra Singh who is eye-witness of the incident also stated the same about the manner and the cause of the death of the deceased persons. In this way, the death of both the deceased persons was proved to have been caused on 04.06.2003 at about 12:45 P.M. by fire arm injuries.

45. To sum up, we do not find any major contradiction either in the evidence of the PW-1 or any conflict in the medical or occular evidence as deposed by PW-1 which would tilt the balance in favour of the opponents. The minor improvements, embelishments etc, apart from being for yield of human faculties are insignificant and ought to be ignored since the evidence of the witnesses otherwise overwhelmingly corroborate each other in material particulars. The testimony of PW-1 gets support from medical as well as other evidence on record. The method, time and manner of causing the death, the weapon used, the place of occurrence and promptness in lodging the F.I.R.,and the motive, all these factors corroborate the testimony as deposed by the occular witness Alchendra Singh. His presence on the spot cannot be said to be doubtful. As a result, the evidence as deposed by PW-1 Alchendra Singh is wholly reliable and trustworthy.

46. Finally, having regard to the evidence on record, we are of the opinion that the trial court has correctly analyzed the material on record in the factual as well as legal perspective while arriving at its conclusion. The judgment and order of conviction and sentence passed by the learned Sessions Judge, Aligarh requires no interference and is hereby affirmed. The appeals filed by the appellants being devoid of merit are liable to be dismissed.

47. All the appeals are accordingly, ***dismissed.***

48. The appellant Teekam Singh is on bail. The court concerned is directed to take the appellant namely Teekam Singh in custody forthwith and send him to jail to serve out the remaining sentence.

49. The appellants Kaptan Singh, Bhoora Singh @ Nepal Singh and Rohtash Singh are in jail.

50. The appellant Rajan @ Rajendra has been released on 15.02.2020 from jail on remission of his sentence in pursuance of the Government Order dated 11.02.2020.

51. The office is directed to transmit back the lower court record alongwith a certified copy of this judgment for information and necessary compliance.

52. Certify this judgment to the court below immediately for necessary action.

(2022) 10 ILRA 300
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 1457 of 2022

Ramesh Chandra ...Petitioner
Versus
Deputy Director of Consolidation, Kanpur Dehat & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nikhil Kumar, Sri Prashant Kanha

Counsel for the Respondents:
C.S.C., Sri Rajjan Singh

Civil Law – Constitution of India,1950 - Article 226, - U.P. Consolidation of Holdings Act, - Sections 4, 5, 5(2), 5(2) (a) & (b), 9-A (2), 49 & 52: - Challenging the validity of order of DDC - by which the DDC court confirming the order of SCO - Notification u/s 4 of the U.P. CH Act, in the petitioner's village - during consolidation proceeding - an objection u/s 9-A(2) moved by the petitioner for

kept out of the plots in question from the consolidation operation on the ground that these are subject matter of a civil suit which is still pending - whether the pendency of the civil suit bars the jurisdiction of the consolidation court - court finds that - consolidation authority are competent to examine the right and title of the parties with respect to the land in question, which is covered by notification u/s 4 of the U.P. CH Act, therefore, consequence of such notification has to follow as enunciated u/s 5 of the Act - thus, no illegality, ambiguity or infirmity in the impugned orders - writ petition is dismissed. (Para - 4, 20, 21)

Writ Petition is Dismissed. (E-11)

List of Cases cited:

1. Kanchan Kumar Chaudhary Vs District Judge Mau & ors. (1999 vol. 1 AWC 152),

2. Ram Padarth Vs A,D.J., Sultanpur (1989 RD 21),

3. Shri Ram & anr. Vs 1st A.D.J. & ors. (2001 Vol. 92 RD 241),

4. Sita Ram Vs Chhota Bhondey & ors. (1990 RD 439),

5. Smt. Dulari Devi Vs Janardan Singh & others (1990 RD 193),

6. Narendra Singh Vs Jai Bhagwan & ors. (2006 RD 69),

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner, learned counsel for the private respondents No. 4 and learned standing counsel representing respondents No. 1 to 3 and 5 and perused the record.

2. Petitioner has invoked the extraordinary jurisdiction of this Court by way of filing the instant writ petition under Article 226 of the Constitution of India challenging the order dated 20.4.2022 passed by the Deputy Director of Consolidation affirming the order dated 25.1.2022 passed by Settlement Officer of Consolidation, arising out of order dated 15.7.2021 passed by Consolidation Officer in a proceeding under Section 9A (2) of UP Consolidation of Holdings Act (In brevity, 'U.P.C.H. Act').

3. Facts culled out from the averments made in the writ petition are that the present writ petition is arising out of objection dated 15.6.2009 under Section 9A (2) of UP Consolidation of Holdings Act filed on behalf of the present petitioner with a prayer that plot No. 245 area 1.0790 hectare, plot No. 260 area 1.0030 hectare and plot No. 289 area 1.6190 hectare situated in village Ghar, Tehsil Bhognipur, District Kanpur Dehat may be kept out of consolidation operation on the ground that with respect to these plots, civil suit is going on between the parties. It is averred in the application that property belongs to Shiv Lal (father of the petitioner), who was of unsound mind, and taking benefits of his mental illness respondent No. 4 has got sale deed dated 8.9.2011 executed in his favour. On the basis thereof, he got his name mutated in the revenue record. Objection goes on alleging that Shiv Lal had filed a civil suit being Original Suit No. 573 of 2011 against Dharmendra Kumar (respondent No. 4), which is pending consideration. Civil Court has granted interim order dated 19.9.2011 for maintaining status quo on spot. Consolidation Officer has rejected the objection moved by the petitioner, vide its order dated 15.7.2021 (annexure No. 3), with an observation that plot No. 260 is already out of consolidation operation and exchange value of plot No. 289 and 245 and their surrounding plots has already been fixed in the consolidation operation,

therefore, prayer, to keep the aforesaid plots out of consolidation operation, cannot be accepted. Order dated 15.7.2021 passed by Consolidation Officer was affirmed by Settlement Officer of Consolidation vide its order dated 25.1.2022 and Deputy Director of Consolidation vide its order dated 20.4.2022, which are under challenge in the present writ petition.

4. Learned counsel for the petitioner submits that the suit for injunction has been filed against the private respondent No. 4 and interim order is granted in the aforesaid suit for maintaining status quo over the land in question, therefore, consolidation authorities have got no jurisdiction to continue any type of proceeding relating to the subject matter of the suit. In support of his contention, he has cited the decision of the co-ordinate Bench of this Court in **Kanchan Kumar Chaudhary Vs. District Judge, Mau and others, reported in 1999 (1) AWC 152.** By interpreting the provisions as enunciated under Section 5 (2) of U.P.C.H. Act, learned counsel for the petitioner has tried to submit that the consolidation courts have got no jurisdiction to examine the legality and validity of the sale deed said to have been executed in favour of the respondent No. 4. It is further submitted that the pendency of the civil suit bars the jurisdiction of the consolidation court to examine the right and title of the parties over the land in question. According to learned counsel for the petitioner, the consolidation courts have passed the order without application of mind and without considering the provisions of law, as enunciated under the U.P.C.H. Act, therefore, orders impugned are illegal and suffers from infirmities and, therefore, are liable to be quashed.

5. Per contra, learned counsel for the respondents No. 4 contended that Shiv Lal had executed the registered sale deed dated 8.9.2011, in a sound state of mind, in favour of the respondent No. 4, which still stands unchallenged. Civil Suit i.e. Original Suit No. 573 of 2011 has been filed only for the permanent injunction against the defendant/respondent No. 4 with prayer not to interfere in the possession of the plaintiff, which is evident from the plaint annexed in the writ petition, therefore, right and title of the respondent No. 4 on the basis of the registered sale deed cannot be questioned. The name of the respondent No. 4 is already recorded in the revenue record by the orders passed by revenue authorities and the same was affirmed by this Court, vide its order dated 23.10.2013 passed in Writ Petition No. 58029 of 2013, which became final between the parties. It has further been contended that in the basic consolidation record, name of the respondent No. 4 was recorded, therefore, consolidation authorities have rightly fixed the exchange value of the aforesaid plot in the name of respondent No. 4. Interim order dated 19.9.2011 passed by the civil court was a time bound interim order only upto 10.11.2011 but, thereafter, there is nothing on record to show as to what has happened after 10.11.2011. Supporting the impugned orders passed by consolidation courts, learned counsel for the respondents No. 4 contended that the legality and validity of the sale deed cannot be questioned at this juncture and there is no ambiguity, perversity or infirmity in the said orders so as to warrant any indulgence of this Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, therefore, the present writ petition is liable to be dismissed with cost.

6. Carefully considered the rival submissions advanced by the learned counsel for the parties and perused the record.

7. Question for consideration in the instant matter lies in a narrow compass as to whether the consolidation authorities have got jurisdiction to fix the exchange value of the plots in question and carve out chak in the name of respondent No. 4 (recorded tenure holder) over there, which is a subject matter of civil suit.

8. Section 4 of the U.P.C.H. Act denotes the provision for gazette notification of any particular area for the purposes of the consolidation operation. The effect of the notification under Section 4 of U.P.C.H. Act, as enunciated under Section 5 (2) of the U.P.C.H. Act, denotes the abatement of proceedings regarding the correction of record & civil suit and proceeding, in respect of declaration of right, title or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceeding can or ought to be taken under the U.P.C.H. Act. For ready reference relevant portion of Section 5 (2) of U.P.C.H. Act is quoted hereinunder-

Section 5 (2)- "Upon the said publication of the notification under sub-section (2) of Section 4, the following further consequences shall ensue in the area to which the notification relates, namely -

(a) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any Court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending, stand abated :

Provided ... ...

Provided ... ...

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder.]

Explanation- ... ... "

9. Conjoint reading of sub-clause (a) & (b) of clause 2 of Section 5 evince the protection to the rights of the persons, who are affected owing to abatement of suit or proceeding, as enumerated under sub-clause (a), to agitate their right or interest under the relevant provisions of U.P.C.H. Act and the rules made thereunder.

10. In this respect, provisions as enunciated under Section 49 of U.P.C.H. Act, though not much relevant in facts of the present writ petition, is also required to be entertained, which creates a bar to the civil court jurisdiction with respect to the right and title of the parties over the land in question, which falls within the ambit of notification under Section 4 of the U.P.C.H. Act.

11. Drawing distinction between Section 5 (2) and Section 49 of the U.P.C.H. Act, in case of **Kanchan Kumar Chaudhary (supra)**, this Court explained that both the sections operates with the

same object but deals with two distinct and different fields, but in respect of same class of cases. While section 5 (2) of U.P.C.H. Act deals with the pending cases, Section 49 of U.P.C.H. Act deals with the institution of cases. Both the sections are complimentary to each other for the self same object in two different situations. Inasmuch as Section 5 freezes pendency of cases while section 49 forbids institution of fresh cases of the class of cases enumerated therein which are common in both. Both the sections are part of the same scheme.

12. Full Bench decision of this Court in the matter of **Ram Padarth Vs. Additional District Judge, Sultanpur, reported in 1989 RD 21** has diluted the distinction between the void and voidable document with respect to the filing a suit for cancellation of document before the appropriate Court i.e. Civil Court or Revenue Court. It is held that the person, who is recorded tenure holder, having prima facie title in his favour, can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of the void document. Meaning thereby, a person who is not a recorded tenure holder can take a shelter in the revenue court/consolidation court for establishing his/her right and title over the property in dispute. The relevant paragraph of the verdict given by the Full Bench in the case of **Ram Padarath (supra)** is reproduced hereunder:

... ...
... ...
... ...

The jurisdiction of the consolidation authorities is wider than civil and revenue court. Section 5 (2) of U.P. Consolidation of Holdings Act provides that any suit pending in the trial court or in appeal before any appellate court in which right, title and interest over land is involved will stand abated. In view of the said provision any appeal, may it be a special appeal, pending before Hon'ble Supreme Court, would abate. Adjudication of right, title and interest over "land" by the consolidation authorities is final. Section 8 of the U.P. Consolidation of Holdings Act provides for revision of the village map after provisional consolidation Scheme for unit is prepared. Section 8-A of the said Act provides for preparation of principles, while section 9 provides for issue of extracts from records and statements and publication of records mentioned in section 8 and section 8-A and issue of notice for inviting objection. Section 9-A provides for disposal of cases relating to claim to land and partition of joint holding. The order passed by the consolidation officer is subject to appellate and revisional jurisdiction. Even if rights are claimed on the basis of void sale deed or questioned before the consolidation authorities, the consolidation authorities, after recording a finding on the same that it was void sale deed, can determine the rights, title and interest in the land in accordance with law, ignoring the said deed on the ground that it was void. The entries are to be corrected by the consolidation authorities themselves and one has not to approach the authorities under U.P. Land Revenue Act after decision by civil or revenue court to correct the papers in accordance with their judgment and decree. If a document is cancelled by civil court then entry is to be made by the registering officer on the copy as provided in Section 31 (2) of the Specific Relief Act, which gives seal to the legal infectiveness of the said document. But

after determination by consolidation authorities the right, title of the parties taking into consideration void document, the entries will be corrected. After consolidation operations are over, the question cannot be raised or raked up before any civil or revenue court thereafter in view of section 49 of U.P. Consolidation of Holdings Act which puts a bar on the jurisdiction of civil or revenue court not only to adjudicate such right and title or interest over land adjudicated by consolidation authorities or which could have been raised before them, but was not raised. The jurisdiction of consolidation authorities is thus wider than that of civil court and revenue court.

(extracted paragraph from page 26 & 28)

... ...

... ...

... ...

We are of the view that the case of Indra Dev v. Smt. Ram Piari (1982 AlR 517 (HC LB) has been correctly decided and the said decision requires no consideration, while the Division Bench Case, Dr. Ayodhya Prasad v. Gangotri (1981 AWC 469) is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void document will lie in the revenue court, it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status as a tenure-holder is necessarily needed, in which event relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void document which made him to approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue court.

(extracted paragraph from page 31)

13. Judgment of **Ram Padarath (supra)** subsequently relied upon in several decisions of Hon'ble Court. In the matter of **Sri Ram and another Vs. 1st Additional District Judge and others, reported in 2001 (92) RD 241**, Hon'ble Supreme Court succinctly held that normally tenure holder having prima facie title and in possession, files a suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation, cannot be directed to file a suit for declaration in the revenue court. But the position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil Court on the ground of fraud and misrepresentation. Relevant paragraph No. 6 of the aforesaid judgment is quoted hereinunder:

6. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure holder, having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue court-reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit

in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession.

14. Even in the matter where co-tenancy has been claimed on the ground that collateral descendant was recorded in the representative capacity, Hon'ble Supreme Court has normally held in the case of **Sita Ram Vs. Chhota Bhondey and others, reported in 1990 RD 439** that such claims falls within the ambit of Section 52 of U.P.C.H. Act. Relevant paragraph of the aforesaid judgment is quoted herebelow:

"In the instant case respondent No. 1 was claiming an interest in the land lying in the area covered by notification issued under section 4 (2) on the basis that he is the son of Chhota, brother of Nanha and that the lands were recorded in the name of Nanha in a representative capacity on behalf of himself and his other brothers. This claim which fell within the ambit of Section 5 (2) had to be adjudicated by the consolidation authorities. Since it was a matter falling within the scope of adjudicatory functions assigned to the consolidation authorities under the Act the jurisdiction of the Civil Court to entertain the suit in respect of the said matter was expressly barred by Section 49 of the Act and the suit of the appellant was rightly dismissed on that ground."

15. In another case of **Smt. Dulari Devi Vs. Janardan Singh and others, reported in 1990 RD 193,** Hon'ble Supreme Court has held that where sale deed has been obtained fraudulently by any person, suit for its cancellation or right of the vendor, is not maintainable before the civil court by reason of bar contained in the U.P.C.H. Act.

16. In another case of **Narendra Singh Vs. Jai Bhagwan and others reported in 2006 (RD) 69,** Hon'ble Supreme Court has discarded the claim of a person being a joint owner of the property in question on the ground that he had to approach before the competent authority under the provisions of the U.P.C.H. Act.

17. It is admitted, in the matter in hand, that respondent No. 4 was recorded tenure holder of the land in question on the basis of the registered sale deed dated 8.9.2011 said to have been executed by Shiv Lal (father of the petitioner). Mutation order dated 1.4.2013 passed by the Naib Tehsildar was confirmed by Additional Commissioner vide order dated 19.7.2013. Ultimately, proceedings was culminated in favour of the respondent No. 4 vide order dated 23.10.2013 passed by High Court in writ petition No. 58029 of 2013, which became final between the parties. It appears that Shiv Lal (father of the petitioner) had filed a suit dated 19.9.2011 for permanent injunction against the respondent No. 4 and Ram Natha Yadav. A copy of the plaint is annexed in the petitioner as annexure No. 4 (page 62 to 69). Perusal of plaint reveals that it was filed for the permanent injunction not for the cancellation of the sale deed, though before filing suit sale deed had already been executed. Interim order dated 19.9.2011 was granted for a limited period for maintaining status quo on spot, that too, up to only the next date fixed i.e. 10.10.2011. There is nothing on record to show as to what happened to the

interim injunction application or as to whether stay order was extended or not.

18. It appears that the name of the respondent No. 4 was recorded in the basic consolidation record and, accordingly, exchange value of the plot in question was fixed by the Consolidation Officer and chak was carved out in his name. The Deputy Director of Consolidation, on the basis of report submitted by Consolidator, has given a categorical finding that in basic year Khatauni 1422 to 1427 Fasli, name of Dharmendra Kumar, respondent No. 4 was recorded over Khata No. 99, which consists of plot No. 245 and 260. Apart from that, name of Vishal and Dharmendra Kumar was recorded over Khata No. 269, which consists of plot No. 289. It is further observed that plot No. 260 was kept out of consolidation proceeding but exchange value of plots No. 245 and 289 was fixed in the consolidation operation. Considering all these aspects of the matter, the Deputy Director of Consolidation came to the conclusion that the exchange value of the aforesaid plots No. 245 and 289 has rightly been fixed by the consolidation authorities, therefore, at this juncture, it would not be befitting to keep them out of consolidation operation. It has further been observed by the Deputy Director of Consolidation that the order passed by the competent court qua plots No. 245 and 289 would be adhered to in future.

19. Counsel for the respondents has hammered his submissions on the basis of the observation made by co-ordinate Bench of this Court in the matter of **Kanchan Kumar Chaudhari (supra)** in which Section 5 (2) of U.P.C.H. Act has been dealt with and it has been held that suit for the injunction does not come within the ambit of U.P.C.H. Act. The facts of **Kanchan Kumar Chaudhari (supra)** are different and same is not fully applicable in the instant matter. Full Bench decision of this Court in the matter of **Ram Padarath (supra)** lay all the controversy at rest qua jurisdiction of civil or revenue/consolidation court.

20. Having regard to the judgments, as discussed above, submissions of the learned counsel for the parties and the record on Board, this Court is of considered opinion that all the three consolidation courts have rightly decided the matter discarding the prayer of the petitioners to keep the plots in question out of consolidation operation. Once the village is notified under Section 4 of the U.P.C.H. Act, the person, who is recorded in the basic consolidation record cannot be denied from his valuable rights over the property in question unless the genuineness of entry and his right and title is challenged under the relevant provisions of U.P.C.H. Act. In this eventuality, consolidation authority are competent to examine the right and title of the parties with respect to the land in question, which is covered by notification under Section 4 of the U.P.C.H. Act, therefore, consequence of such notification has to follow as enunciated under Section 5 of U.P.C.H. Act.

21. In this conspectus as above, learned counsel for the petitioner fails to substantiate his submission in assailing the impugned orders passed by three consolidation courts whereby prayer made by the petitioner to keep the plot No. 245 and 289 out of consolidation operation has been denied. There is no illegality, ambiguity and infirmity in the impugned orders passed by all the three consolidation courts,which may warrant indulgence of this Court in exercise of extraordinary

jurisdiction under Article 226 of the Constitution of India.

22. Resultantly, the instant writ petition, being devoid of merits and misconceived, is dismissed with no order as to the cost.

(2022) 10 ILRA 308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Writ C No. 25471 of 2022

Nilesh Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bharat Kishore Srivastava, Sri Shyam Mohan Singh, Sri Janardan Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, 1950 - Articles 243-E & 243-Q(2) - Uttar Pradesh Municipalities Act, 1916- Sections 3 (1), 4(1) - Constitution of Municipalities - Nagar Panchayat for an area in transition from a rural area to an urban area - Petitioner challenged the notification notifying the local limits of a transitional area & with a prayer to restrain the respondents from interfering in the functioning of the petitioner as elected Gram Pradhan - Held - Under Section 3-A(2) of the Act, every Nagar Panchayat or Municipal Council constituted under sub-section (1) is a body corporate - with the issuance of the notification, an entirely new body in the name of Nagar Panchayat - Haisar Bazar came into existence, which has a separate and distinct identity from its predecessor i.e., the Gram Panchayats whose territories have been merged in constituting the Nagar Panchayat - Gram Panchayat of which the petitioner was Pradhan, had ceased to exist - Petitioner is left with no subsisting right to continue to function as Pradhan or to resist holding of election of the newly constituted Nagar Panchayat (Para 9, 10)

Dismissed. (E-5)

List of Cases cited:

1. Smt. Mohini Sharma Vs. St. of U.P., 2016 (10) ADJ 221

2. Nagar Palika Parishad & ors. Vs St. of U.P. & ors., 2010 (3) ADJ 703

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Ram Manohar Narayan Mishra, J.)

1. The instant petition is directed against the notification dated 10.12.2020 issued under Section 4(1) of the Uttar Pradesh Municipalities Act, 1916 (hereinafter referred as 'the Act') and the notification dated 22.07.2022 issued under Section 3 (1) of the Act read with Article 243-Q of the Constitution of India. The petitioner has also prayed for a mandamus directing the respondents not to initiate exercise for fresh election of the newly constituted Nagar Palika and also restrain the respondents from interfering in the functioning of the petitioner as elected Gram Pradhan of Village Ahara, District Sant Kabir Nagar for period upto 3.05.2026.

2. The case of the petitioner is that he was elected as Gram Pradhan of Village Ahara, Block Haisar Bazar, Tehsil Dhanghatta, District Sant Kabir Nagar on

3.05.2021. His term of five years as Gram Pradhan would expire on 3.05.2026 in view of Article 243-E of the Constitution of India. However, by impugned notification, a transitional area has been constituted in the name of Nagar Panchayat, Haisar Bazar, District Sant Kabir Nagar. It includes the area of Gram Panchayat Bahara as well, of which the petitioner is Gram Pradhan, and now the respondents are intending to hold election of Nagar Panchayat, Haisar Bazar. As a result, the petitioner will automatically be ousted from his office of Pradhan of Gram Panchayat Ahara.

3. By impugned notification issued under clause (2) of Article 243-Q of the Constitution of India read with Section 3 of the Act, the Governor has notified the local limits of a transitional area by the name of Haisar Bazar. Article 243-Q is reproduced below :-

"243-Q. Constitution of Municipalities. --

(1) There shall be constituted in every State,--

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area.

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area', "a smaller urban area' or "a larger urban area' means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

4. Section 3(1) of the Act, relevant for our purpose is also produced below :-

"3. Declaration etc. of transitional area and smaller urban area- *(1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be."*

5. Constitution defines a 'Panchayat' under Article 243(d) as an institution of self-government constituted under Article 243-B, for the rural areas. Article 243-E mandates that every Panchyat, unless sooner dissolved under any law, for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

6. Similarly under Section 12 of the U.P. Panchayat Raj Act, 1947, the term of the Gram Panchayat is five years. Our Constitution is a living document. The Parliament while introducing the 74th Amendment, 1992 conferring constitutional status to institutions of self-Government like Panchayats and Municipalities, was

alive of the reality that urbanisation is making inroads in the rural areas. The constitutional scheme envisages constitution of a Nagar Panchayat for a transitional area that is to say, an area in transition from a rural area to an urban area; Municipal Council for a smaller urban area; and Municipal Corporation for a larger urban area.

7. In **Smt. Mohini Sharma vs. State of U.P., 2016 (10) ADJ 221**, a similar issue arose for consideration before this Court. It was answered as follows :-

"18. A bare perusal of the Section 5 of U.P. Municipalities Act, 1916, would go to show that whereby a notification referred to in sub-section (2) of Section 3 the Governor includes any area in a transitional area or smaller urban area, such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under this or any other enactment and in force throughout the transitional area or smaller urban area, at the time immediately preceding the inclusion of the area. Thus the affairs of the same will have to be governed under the provisions of U.P. Municipalities Act, 1916 and it may be true that Pradhan in question has been elected for a period of five years but once the very identity of the Gram Panchayat in question has been lost on account of inclusion of such area, then the provisions of U.P. Panchayat Raj Act, 1947, would not at all operate and same will have to be governed under the provisions of the U.P. Municipalities Act, 1916. Any other view would tantamount to diluting the provisions of Section 5 of U.P. Municipalities Act, 1916.

19. Apex Court in the case of ***State of Maharashtra Vs. Deep Narain Chavan, 2002 (10) SCC 565,*** *while considering the arguments advanced that once Municipal Council is constituted, then its duration shall be five years in accordance with constitutional provisions contained in Article 243-Q, has ruled while considering the expression "unless sooner dissolved under any law for the time being in force", that the moment Corporation is constituted in accordance with law, the elected Municipal Council would cease to function.*

20. Article 243-E deals with duration of Panchayat, Article 243-U deals with duration of Municipalities and both the constitutional provisions share in common the expression "unless sooner dissolved under any law for the time being in force". Once Governor takes a call for constitution of municipality in exercise of authority conferred under the constitution namely Article 243-Q that specifically refers to three type of municipalities i.e. Nagar Panchayat for transitional area, a Municipal Council for a smaller urban area and Municipal Corporation for a larger urban area, the moment declaration is made under Article 243-Q read with Section 3 of the U.P. Municipalities Act, 1916, by the State Government, then the said municipal body would be a sovereign body having both constitutional and statutory status. As already noted in the earlier part of the judgement, the constitutional as well as statutory provisions pertaining to 'Panchayats' would go to show that object of Part IX of the Constitution was to introduce the panchayat system at grass root level and strengthen the panchayat system by giving uniform constitutional vibrant units of administration in the rural area so that there can be rapid implementation of rural development sector. Once there is complete transformation from rural area to urban

area having regard to population of area, the density of population therein, the revenue generated from local administration, the percentage of employment in non-agricultural activities, the economic importance and other factors, made by the State Government, then the said area is denoted in the notification would be out from the purview of Part IX of the Constitution and the provisions of U.P. Panchayat Raj Act, 1947 and the affairs of the said area treating the same to be urban area would be covered by the provisions of Part IX A of Constitution alongwith the provisions of U.P. Municipalities Act, 1916."

8. Again, while interpreting Article 243-Q, which preserves five years tenure of Municipality, it has been held by this Court in **Nagar Palika Parishad and others Vs. State of U.P. and others, 2010 (3) ADJ 703** that the tenure contemplated under the said provision will not apply where an area of one description is converted into an area of another description. The dissolution of municipality of lower description was held to be a fate accompli. The relevant portion is extracted below :-

"Apart from what is said above, Article 243U of the Constitution of India suggests and means the duration of the same type of Municipality coming to an end and the same type of successor Municipality taking over as a consequence of term of the previous Municipality coming to an end either prior to the period of 5 years or at the end of 5 years. In other words Article 243U cannot be pressed into service in a case where the area of one description is converted into an area of another description and one description of Municipality is ceased by constituting another Municipality of a better description, that is to say that where the dissolution is fait accompli and the Municipality cannot be revived as it was before, the same cannot be termed a dissolution as envisaged under Article 243U and in such an event the provisions of Article 243U are not at all violated if an Administrator is appointed under Section 8-AA . "

9. Under Section 3-A(2) of the Act, every Nagar Panchayat or Municipal Council constituted under sub-section (1) is a body corporate. Thus, with the issuance of the impugned notification, an entirely new body in the name of Nagar Panchayat - Haisar Bazar has come into existence. It has a separate and distinct identity from its predecessor i.e., the Gram Panchayats whose territories have been merged in constituting the Nagar Panchayat. The provision of Article 243-E and Section 12 of the U.P. Panchayat Raj Act cannot be read in isolation but harmoniously, alongwith the other provisions of the Constitution and the Act. Under Section 333 of the Act, the District Magistrate has been invested with power to perform the functions and duties of the newly constituted Municipality until the holding of first election. Section 333 is quoted below :-

"333. Exercise by District Magistrate of Municipality's power pending establishment of Municipality.- *When a new municipality is created under this Act, the District Magistrate, or other officer, or committee, or authority appointed by him in this behalf, may until a Municipality is established, exercise the powers and perform the duties and functions of the Municipality, and, he or it shall, for the purposes, aforesaid be deemed to be the Municipality.*

Provided always that the District Magistrate or such other officer, or committee, or authority shall, as early as possible, make preliminary arrangements for the holding of first elections and generally of expediting the assumption by the Municipality of its duties when constituted."

10. The Gram Panchayat of which the petitioner was Pradhan, had ceased to exist in view of the constitutional scheme and the provisions of the Act. The petitioner is left with no subsisting right to continue to function as Pradhan or to resist holding of election of the newly constituted Nagar Panchayat.

11. The petition lacks merit and is dismissed.

(2022) 10 ILRA 312
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 No. 202 of 2022

R.M. U.P.S.R.T.C. Varanasi ...Appellant
Versus
M/s Krishna Bros. ...Opp. Party

Counsel for the Appellant:
Sri Vivek Saran

Counsel for the Opp. Party:
Sri Ashish Kumar Dubey, Sri Rajesh Chandra Dwivedi

Civil Law - Arbitration Act, 1996 - Section 9-Appeal against order allowing application of the Respondent filed u/s 9 of the Act, 1996-work order issued by the Appellant in favour of Respondent for supply of mineral water-security deposited-work order for limited period-Respondent supplied goods but sum of Rs. 20, 90,744/- was due-Appeallant declined to pay-Respondent approached commercial court by an application for directing the Appellant to make payment plus interest-while exercising power u/s 9-Court cannot decide the claim on merits-court below entered into merits and held deductions made by the Appellant were not permissible under the contract-impugned order set aside.

Appeal allowed. (E-9)

(Delivered by Hon'ble Manoj Kumar Gupta, J. & Hon'ble Jayant Banerji, J.)

1. Heard Sri Vivek Saran, learned counsel for the appellant and Sri Rajesh Chandra Dwivedi for the respondent. With their consent, the instant appeal is being disposed of finally at this stage itself.

2. The instant appeal is directed against the order dated 17.5.2022, passed by Presiding Officer, Commercial Court, Varanasi, in Arbitration Misc. Case No. 4/2022, allowing the application of the respondent, purportedly filed under Section 9 of the Arbitration and Conciliation Act, 1996. The appellant has been directed to pay a sum of Rs. 12,72,783/- to the respondent within one month, along with interest @ 7% per annum, since 24.1.2022, by way of damages. Thereby the application under Section 9 is "decreed with cost".

3. The brief facts of the case are that a work order dated 17.12.2018 was issued by the appellant in favour of the respondent for supply of bottles of mineral water. The respondent had deposited Rs. 30,000/- as security money, in terms of the work order. The work order was for limited period, till

permanent arrangement in this behalf is made by the Headquarter at Lucknow.

4. The case of the respondent is that it had supplied the goods in pursuance of the contract, but a sum of Rs. 20,90,744/- was due and payable to it. The appellant had declined to pay the same by its letter dated 24.1.2022. The respondent accordingly, approached the Commercial Court by way of an application, praying inter alia for a direction to the appellant to make payment of the remaining sum of Rs. 20,90,744/-, plus interest @ 8% per annum and cost of litigation.

5. The application does not specify the provision under which it was filed. However, it seems that it was registered as a miscellaneous case and has been decided, treating it to be an application filed under Section 9 of the Arbitration and Conciliation Act, 1996. The appellant had filed objection to the arbitration application, specifically raising the issue that the rates at which the goods were supplied, were contrary to the rates prescribed by the Headquarter. Consequently, certain deductions were made and that the claim of the respondent for payment of any additional sum is not sustainable. The appellant also mentioned that only a sum of Rs. 3,16,363/- is due and steps were being taken to make payment of the said amount.

6. Learned counsel for the appellant submitted that the directions issued by the court below in purported exercise of power under Section 9 of the Act are without jurisdiction. It is urged that the power under Section 9 of the Act, cannot be exercised to allow the entire claim, or to decide the issues on merits. It is also submitted that there is no indication in the application filed by the respondent, nor in the impugned order, that there was any arbitration clause, or any intention on part of the respondent to commence the arbitration proceedings.

7. Learned counsel for the respondent fairly stated that he is not in position to defend the order.

8. Section 9 of the Act relates to interim measures, etc. by Court and reads as follows: -

***9. Interim measures, etc., by Court**.? (1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court?*

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:?

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the

purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

9. The object of the said provision is to invest power in the Court to order interim measures, before or during arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced. The interim measure could be in respect of appointment of a guardian for the minor, or a person of unsound mind; for protection, preservation, interim custody or sale of any goods which are subject matter of the arbitration agreement; securing the amount in dispute in the arbitration; the detention, preservation or inspection of any property, etc.; interim injunction or the appointment of a receiver and such other interim measure or protection as may appear to the Court to be just and convenient.

10. The Court, while passing the interim measures, has to first examine as to whether there is an arbitral agreement between the parties covering the subject matter of dispute. The interim measure should be of such nature as may preserve the subject matter of the arbitration agreement, or secure the amount, or the property by such measure as may appear to be just and convenient. While exercising power under Section 9, the Court cannot decide the claim on merits, or pass an order which has the effect of decreeing the claim of one party or the other. At best, the Court could issue a direction to secure the amount that may prima facie appear to be due or payable to a party and for such purpose, it is vested with power to issue necessary directions. In the instant case, the court below has entered into the merits and has held that the deductions made by the appellant were not permissible under the contract. It has also proceeded to quantify the amount said to be due and payable to the respondent, despite specific plea that only Rs. 3,16,363/- was due and was in process of being paid. This, in our considered opinion, could not have been done.

11. The proceeding under Section 9 is not a substitute to the adjudication that has to be made by the arbitral tribunal. While exercising limited power under Section 9, the claim could not be decreed, as has been done in the instant case. We feel that the learned Judge has completely misunderstood the scope of Section 9 and has exceeded its jurisdiction in passing the impugned order.

12. Sri Vivek Saran, at this stage, states that payment of Rs. 3,16,363/- which is admittedly due, if not already made, will be made to the appellant within four weeks. He further states that the appellant is ready

to furnish security to secure the interest of the respondent.

13. In view of the foregoing discussion, the impugned order is hereby set aside, but with direction to the appellant to make payment of Rs. 3,16,363/-, if not already made (as undertaken by counsel for the appellant) and furnish security (other than cash or bank guarantee) in a sum of Rs. 10 lakhs, before the court below, within four weeks from today.

14. It is left open to the respondent to initiate arbitral proceedings as per the mandate of Section 9(2) of the Act.

15. In the result, the appeal succeeds and is allowed.

16. The Registrar General shall call for explanation from the Presiding Officer, in relation to the manner in which the case has been decided and place it before the concerned Administrative Judge for consideration.

(2022) 10 ILRA 315
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 299 of 2022

Dr. Rajeev Gupta M.D. ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Purnendu Chakaravarty

Counsel for the Respondents:
Anurag Kumar Singh

Civil Law - Prevention of Corruption Act,1988-Sections 109 & 13 (2) r/w 13 (1) (e)-Applicant's wife-government Medical practitioner-Sr.D.M.O.- in possession of disproportionate assets- Applicant-husband-abetted the possession of assets disproportionate - F.I.R.-no tenable explanation for the recovered amount.

Application dismissed. (E-9)

List of Cases cited:

1. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr. reported in (2020) 5 SCC 1

2. P.S. Kirupanandhan Vs St., Cri. A. No. 381 of 2017 and Cri MP No. 8256 of 2017

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Purnendu Chakravarty, learned counsel for the applicant and Sri Dharmendra Pratap Singh, Advocate holding brief of Sri Anurag Kumar Singh, learned counsel for the C.B.I.

2. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.690 of 2021, Crime No. RC0062019A0008, under Sections 13(2) r/w 13(1)(e) of PC Act, 1988 and Section 109 IPC, Police Station CBI/ACB, District Lucknow, with a prayer to enlarge him on anticipatory bail.

Brief Facts:-

3. The present case has been registered on the basis of a written complaint by Shri Anmol Sachan, PI/CBI/ACB/Lucknow, dated 23/05/2019 against Dr. Sunita Gupta, the then Sr. D.M.O., Northern Railway (N.R.), Divisional Hospital, Charbagh, Lucknow and her husband Dr. Rajeev Gupta, Professor, KGMU, Lucknow, U/s 109 IPC & Section 13(2) r/w 13(1)(e) of P.C. Act,

1988. It is alleged in the complaint that Dr. Sunita Gupta, the then Sr. D.M.O., Northern Railways, Divisional Hospital, Charbagh, Lucknow was in possession of disproportionate assets to her known sources of income to the tune of Rs 1,80,96,585.33 during the period 01/01/2009 to 12/07/2016, which she can not satisfactorily account for. Dr. Rajeev Gupta husband of Dr. Sunita Gupta also abetted the possession of assets disproportionate to known sources of income by Dr. Sunita Gupta.

4. The investigation revealed that Dr. Sunita Gupta was posted as Sr. D.M.O., N.R., Division Hospital, Lucknow up to October, 2015. She was transferred to Modern Coach Factory, Rae Bareli in same capacity wherein she joined on 16/11/2015 in compliance of Order No. 940E/1A/Medical Officer, dated 05/11/2015, DRM, Lucknow. Since then she is serving in MCF, Rae Bareli and staying in the Guest House of MCF, Rae Bareli. Occasionally, she comes to Lucknow. Dr. Sunita Gupta retained Government Accommodation allotted to her at Lucknow, with due permission from competent authority. While Dr. Sunita Gupta resided in Rae Bareli, her husband Dr. Rajeev Gupta resided in her official residence at Type IV-24, Church Road, Railway Colony Lucknow.

5. During investigation of RC/006/2016/A/002, by Shri Anmol Sachan, searches were conducted by Sh Sandeep Pandey. PI/CBI/ACB/Lko in presence of the CBI Team & independent witnesses at official residential premises of Dr. Sunita Gupta at IV-24, Church Road, Railway Colony, near Fatehli Chauraha, Charbagh, Lucknow on 12/07/2016. At the time of searches. Dr. Sunita Gupta was posted at Rae Bareli. Her husband Dr. Rajeev Gupta was present in the official residence of Dr. Sunita Gupta at Lucknow.

6. During the course of house search, a Search List was prepared vide which total six items including documents and cash was seized. Two Steel Almirah were kept in the Drawing Room which were opened with the keys provided by Dr. Rajeev Gupta. The Almirah contained huge currency notes. Total Rs 1,59,00,000/ were found in the Almirah. Enquiry was made from Dr. Rajeev Gupta about the source of money. He took the plea that the said cash has been earned by him through private practice. The plea taken by Dr. Rajeev Gupta was not found satisfactory. Hence, the said amount was seized. In addition to Rs 1,59,00,000/-, an amount of Rs 70,700/- was also found in the Steel Almirah, which was left for their day to day expenditure. During searches various documents pertaining to investments by Dr. Sunita Gupta and Dr. Rajeev Gupta were found and seized vide Search List, dated 12/07/2016 by Sh Sandeep Pandey, the then PI/CBI/ACB/Lko i.e. "List of Insurance Policies & FDs, "List of NSC/KVP", "List of SB A/c detail and PPF A/c, Currency Notes Rs 1.59,00,000/ seized vide "Details of Currency Notes". In the said house of the wife of the applicant, the house hold items/articles a separate Inventory Memo was prepared, annexed with the search list. In the Inventory Memo details i.e. date, time, cost of requisition, mode of acquisition and details of items/articles was noted. During the house search of Dr. Sunita Gupta, a locker key of Locker No 203C, Central Bank of India, Alambagh Branch, Lucknow was seized and the said locker was operated by Sh Atul Dikshit, PI/CBI/ACB/Lucknow, in the presence of Dr. Sunita Gupta and independent

witnesses and vide "Bank Locker Operation Cum Seizure Memo", dated 12/07/2019 amount of Rs. 9,43,000/- was seized from the said locker. The I.O. of the present case seized relevant documents. recovered cash amount from Shri Anmol Sachan vide Handing Over/Taking Over taking Memo dated 10/06/2019.

7. The pay details of Dr. Sunita Gupta and Dr. Rajeev Gupta, for the check period were collected and relevant witnesses examined to prove their income Further, Sh Sandeep Pandey, PI/CBI/ACB/Lko and his CBI team including independent witnesses to the search conducted on the official residence of Dr. Sunita Gupta were examined and they proved the Search List along with Inventory Memo dated 12/07/2016. Dr. Rajeev Gupta was present during the searches and was provided a copy of Search List dated 12/07/2016. They corroborated the seizure of Rs 1.59 crore from the official residential premises of Dr. Sunita Gupta on 12/07/2016 along with other seized documents.

8. During investigation, the I.O. collected the records from various banks pertaining to accounts maintained by Dr. Sunita Gupta & Dr. Rajeev Gupta and examined relevant witnesses for ascertaining balance at the start of the check period and at the end of the check period. The I.O. also calculated the interest received in the account and balance in the account at the end of check period.

9. The I.O. collected the records from School, Colleges to prove the expenditures incurred by Dr. Rajeev Gupta & Dr. Sunita Gupta and recorded the statements of the relevant witnesses. The I.O. collected the records from Post Offices to give the due benefit to accused regarding their income during the check period. The I.O. also collected the records from Post Offices to prove investments in the name of Dr. Rajeev Gupta & Dr. Sunita Gupta during the check period and recorded the statement of relevant witnesses.

10. On 12/07/2019, the CBI team in presence of independent witnesses had found & seized currency notes amounting Rs 1.59 crore from official residence of Dr. Sunita Gupta. At the time of searches, Dr. Sunita Gupta was posted at Rae Bareli and not present in the house. The currency notes were kept in different shelves of almirah. A large number of envelopes of different shape, size & colour were found in the almirah. The envelopes were opened & inside the envelopes currency notes of different denominations were found tied with rubber bands. On the envelopes some details regarding cash in the envelope was mentioned. All the currency notes were taken out from a large number of different envelopes. Denomination wise the currency notes were segregated, counted with the help of Currency Note Counting Machine. Thereafter, denomination wise bundles were made & seized. The envelopes/paper slips, rubber band were not seized, as the same were not required. Dr. Rajeev Gupta had claimed that every envelope (inside which the currency notes were wrapped with rubber band) had the paper slip containing details of the patient name along with the amount received by the individual patient and that the CBI team took the cash from the envelopes and taken the envelopes with slip and left rubber bands. However, the CBI team stated that only Rs. 1.59 crore cash was seized and no such slip or envelope was taken/seized by them. Hence, accused Dr. Rajeev Gupta was having all the opportunity to keep the said envelops, paper slips with himself in safe custody so

that he might produce the same as documentary evidence in his defence, as he has claimed that the said envelope/paper slip were having details of patients and amounts received by him through private practice. This shows that the said envelopes/paper slips were not having any information/details of patients/amount as claimed by Dr. Rajeev Gupta.

11. Dr. Sunita Gupta has taken the plea that the amount of Rs. 1.59 crore seized in the case has no relation with her and stated that as the amount was seized from the almirah of Dr. Rajeev Gupta, he will inform the source. Applicant/Dr. Rajeev Gupta had claimed during the searches that the recovered amount of Rs. 1.59 crore from the official residence of Dr. Sunita Gupta belonged to him, earned by him through private practice. He was issued Order (U/s 91 Cr.PC.) to produce documents/source showing income pertaining to recovery of cash amount of Rs. 1.59 crore on 12/07/2016.

12. In response to notice U/s 91 Cr.P.C., applicant/Dr. Rajeev Gupta stated that after marriage in 1993, he himself & his wife Dr. Sunita Gupta started a clinic at their residence at Mahanagar ("Mamta Mother & Child Care Center"). On 24/03/2000, they shifted to the Railway Quarter allotted to his wife and he was doing practice from there. Patients were coming to him for treatment of Cancer, consultancy in emergency and he charged regular fees from the patients. He is paid by various Doctors, owners of Nursing Home & patients for his professional advice, wherein he treated cancer patients after office hours. He named such Doctors and Nursing Homes. The amount received from such practice always became a handsome amount every month. He also visited some patients for their treatment. He attended Hepatitis B Immunization & Cancer Awareness Program in Lucknow in 2005 along with Dr. Uttam Tiwari, who used to run NGO Research India. He gave consultancy to patients and earned money. He used to get large number of patients through this NGO for treatment of Cancer disease. Dr. Rajeev Gupta further named various Doctors and Hospital owners who sent him Cancer patients for consultation, prescription of medicine/ test. chemotherapy, radiation etc. and requested for their examination.

13. The statements of the following witnesses were taken under Section 161 Cr.P.C. by the I.O.:-

(a) Dr. Rakesh Mishra, BSc, MBBS, MD. (Physician), "Urmila Hospital", Priyadarshani Colony, Sitapur Road, (In front of Vidhyanchal Mandir Railway Crossing), Lucknow.

(b) Dr. Rajesh Yadav, M.B.B.S., M.D., Managing Director Autar Hospital Diabetic & Trauma Centre, adjacent Diamond Palace & Petrol Pump. Talkatora Road, Lucknow.

(c) Dr. Rukhsana Khatoon, Managing Director "Rukhsana Medical & Trauma Centre, 20 Deen Dayal Road, Ashaarfabad, Lucknow.

(d) Dr. Ishtiyaq Ahmed, BUMS, Managing Director "Star Hospital", Hardoi Road, Tahseenganj, P.S Thakurganj. Lucknow.

(e) Dr. Maroof Ahmed, R/o 498/5KA, Nawab ganj, Barabanki, U.P.

(f) Dr. Neeraj Tandon, Prop. "Day Care Chemo Therapy Center" from 25 to 27 Vasundhara Complex, Sector 16, Behind Easy Day, Near Petrol Pump, Lucknow.

14. The aforesaid witnesses have stated that Dr. Rajeev Gupta attended patients in their hospital, after office hours,

gave consultation, prescriptions for medicines/tests & also conducted Chemotherapy of the patients. If any patients treated by Dr. Rajeev Gupta needed Radiation, he helped in getting Radiotherapy treatment at KGMC for which patient made payments to KGMC Hospital. Dr. Rajeev Gupta received payments from patients for their treatment, through the hospital staff. They furnished the estimated payments made to Dr. Rajeev Gupta towards treatment of cancer patients done by him. Dr. Uttam Tiwari, who used to run NGO Research India could not be examined as he has already expired around 2015. Further Dr. Ranjeet Singh, MBBS, MS., S/o S. P. Singh, Managing Director "Amrit Hospital". Super Specialty Hospital & Trauma Center, Gandhi Colony, Kashipur Road, Rudrapur, Uttarakhand and Dr. Mahender Pal, S/o Sh Pritam Ram, Ex MLA, R/o Vill Ami, PO Gahluya, PS Jahanbad, Pilibhit, U.P. on examination stated that they sent a large number of patients to Dr. Rajeev Gupta for their treatment of cancer and Dr. Rajeev Gupta took his consultation/treatment charges on his own. Dr. Pankaj Agrawal, M.S., FIAGES, Managing Director "Rajchandra Hospital. 554, Ga/256 Damodar Nagar, VIP Road, Alambagh, Lucknow also stated that Dr. Rajeev Gupta treated few cancer patients at his hospital. The above said Doctors were directed to furnish the documentary evidence pertaining to details of the patients treated in their hospitals/clinic/on their reference by Dr. Rajeev Gupta. However, they could not furnish any documentary evidence in this regard to prove the treatment of the cancer patients by Dr. Rajeev Gupta, they expressed their inability to furnish the records of patient treatment sought for the period 2010-2016. The same being very old one and due to lack of storage area and Medical Council of India guidelines they are not required to maintain records of the period more than 3 years and as such the same is burnt/destroyed.

15. The applicant or any other person (Doctors/Hospital Owners) summoned/examined during the investigation could not produce any valid documentary evidence in support of their statement or explanation offered by applicant that the total amount of Rs. 1.59 crore seized from the official residence of Dr. Sunita Gupta on 12/07/2016 was actually earned by applicant by indulging in private practice, after office hours.

16. In respect of the applicant, the Sanction for Prosecution, has been accorded by the competent authority and the same has been received vide Letter No. KGMU/C/79/2021, dated 30/06/2021, issued by Lt. Gen. (Dr.) Bipin Puri. Vice Chancellor, King George Medical University, U.P., Lucknow for launching prosecution U/s 109 IPC r/w 13(2) r/w 13(1)(e) of P.C. Act, 1988.

Rival Contentions:-

17. Learned counsel for the applicant has stated that the applicant has been falsely implicated in the matter. The money recovered from his possession is his genuine and hard earned money. Learned counsel for the applicant has further placed reliance on the statement of various doctors which have been examined by the Investigating Officer during investigation, who have categorically stated that the applicant used to treat various cancer patients in private and the money is a result of the said private practice.

18. Learned counsel for the applicant has further stated that the applicant is the Head of Department (Radio Therapy) in

K.G.M.U., Lucknow. In case, the applicant is released on anticipatory bail, he will not misuse the liberty of bail and the applicant is ready to cooperate in trial.

19. Per contra, Sri Dharmendra Pratap Singh, Advocate holding brief of Sri Anurag Kumar Singh, learned counsel for the C.B.I. has vehemently opposed the anticipatory bail application on the ground that the accused has not appeared in court on summons. The present application has been filed after the bailable warrants have been issued against the applicant. The sanction for prosecution has already been received and the charge-sheet has been filed in court.

20. Learned counsel for the CBI has further stated that the applicant is a radio therapist and in the said field of radio therapy, no private practice is ever seen. The said field is a specialized field and is undertaken in large Institutions and the set up required for practicing in radio therapy goes to the tune of multi crores.

Conclusion:-

21. Learned counsel for the applicant has failed to accord any tenable explanation for the recovered amount. He has further argued that the applicant is not authorized to take private practice as he is employed in a Government institution.

22. The Apex Court in para 92.3 and 92.4 of ***Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another*** reported in **(2020) 5 SCC 1** has observed as under:-

"92.3. .....While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437(3), Cr. PC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court."

23. In the case of ***P.S. Kirupanandhan Vs State, Cri. A. No. 381 of 2017*** **and Cri MP No. 8256 of 2017**, the Hon'ble Madras High Court has rejected the submissions made by the accused/applicant and decided that in DA cases, the explanation offered by the accused must be supported with valid documentary evidences. Hence, the explanation/argument of the accused/other person cited in defence is not tenable/valid

and lawful. The arguments tendered on behalf of the applicant are not based on concrete facts but are vague and general. The case is not fit for the anticipatory bail.

24. The medical practitioner administer an oath at the time of convocation as provided by Indian Medical Association which is an extension of Hippocratic oath taken the world over. The oath is not merely a formality. It has to be observed and followed in letter and spirit. It is on these lines that the apex medical education regulator, National Medical Commission has suggested that the Hippocratic oath be replaced by 'CHARAK SHAPATH' during the convocation ceremony for graduates in medical services. The medical and legal fields are more a service than a profession especially the stream of oncology which deals with life and death.

25. Corruption is a termite in every system. Once it enters the system, it goes on increasing. Today, it is rampant and has become a routine. Corruption is root cause of all the problems, such as poverty, unemployment, illiteracy, pollution, external threats, underdevelopment, inequality, social unrest. The menace has to be put to account. The offence is against the society. The Court has to balance the fundamental rights of the accused to the legitimate concerns of the society at large vis-a-vis the investigating agency.

26. The task of the Court is manifold. Firstly, it has to ensure that there is no unwarranted misuse or abuse of process to encroach upon life and liberty of the applicant as enshrined under Article 21 of the Constitution. Secondly, it has to seen that the Rule of law is followed and the administration of justice is not hampered, the guilty is brought to book.

27. In view of the above, the present anticipatory bail application is **dismissed**.

(2022) 10 ILRA 321
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Anticipatory Bail Appl. U/s 438 Cr.P.C. No. 1105 of 2022

Siddh Narain Sharma ...Applicant
Versus
Asst. Director, Directorate of Enforcement Lko & Ors. ...Opp. Party

Counsel for the Applicant:
Purnendu Chakravarty, Anuuj Taandon

Counsel for the Opp. Party:
A.G.A., Kuldeep Srivastava, Shiv P. Shukla

Civil Law - Prevention of Money Laundering Act, 2002- Section 3/4-FIR lodged-no chargesheet against Applicant-nothing incriminating -even then E.D. summoned the present Applicant couple of times for recording St.ment and producing evidence-no independent investigation by E.D.-investigation by C.B.I. reiterated by the E.D.-Applicant co-operated with the investigation and not flouted the process.

Application allowed. (E-9)

List of Cases cited:

1. Assistant Director, Enforcement Directorate Vs V.C. Mohan, Criminal Appeal No.21 of 2022 (Arising out of SLP (Crl.) No.8441 of 2021)

2. Vijay Madanlal Choudhary & ors. Vs U.O.I. & ors., in its judgment dated 27.07.2022 passed in

Special Leave Petition (Criminal) No.4634 of 2014

3. Vijay Madanlal Choudhary & ors. vs U.O.I. & ors. [Special Leave Petition (Criminal) No.4634 of 2014]

4. Parvathi Kollur & anr. Vs St. by Directorate of Enforcement [Criminal Appeal No.1254 of 2022]

5. Rajeev Wadhwa Vs U.O.I. Thru. Joint Dir. Directorate of Enforcement [Bail No.5867 of 2016]

6. Joginder Kumar Vs St. of U. P. (1994) 4 SCC 260

7. Siddharth Vs St. of U.P. & anr., (2021) 1 SCC 676

8. Aman Preet Singh Vs C.B.I. through Director, Criminal Appeal No.929 of 2021

9. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

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

1. Heard Sri Purnendu Chakravarty, learned counsel for the applicant and Sri Kuldeep Srivastava, learned counsel for the Enforcement Directorate, the opposite party.

2. As per learned counsel for the applicant, the present applicant is apprehending his arrest in Complaint Case No.1003 of 2021 in ECIR No.ECIR/01/LKZO/2018 dated 18.02.2018, under Sections 3/4 of the Prevention of Money-Laundering Act, 2002, Police Station - Directorate of Enforcement, Lucknow.

3. Counter affidavit and rejoinder affidavit have been filed and the parties have requested that the matter may be heard and disposed of finally.

4. Sri Purnendu Chakravarty, learned counsel for the applicant has submitted that the present applicant is a retired Chief Engineer. One FIR was lodged by the Central Bureau of Investigation (hereinafter referred to as "CBI") on 30.11.2017 at RC-26A/2017 against so many persons including the present applicant. The CBI has filed charge sheet against so many persons but no charge sheet has been filed against the present applicant as nothing incriminating has been found against him by the CBI.

5. As per Sri Chakravarty, the Enforcement Directorate (hereinafter referred to as "E.D.") lodged one ECIR No.01/LKZO/2018 on 18.02.2018 pursuant to the FIR and investigation so carried out by the CBI in the year 2017. In such complaint, E.D. investigated the aspect relating to money laundering against all persons either have been charge sheeted by the CBI or have not been charge sheeted by the CBI. However, nothing incriminating has been received from the possession of the present applicant and nothing incriminating was found by the CBI against the present applicant, even then the E.D. summoned the present applicant couple of times for recording his statement and producing material. Specific recital to this effect has been given in para-16 of the application wherein the applicant has indicated the dates when the applicant appeared before the investigating agency i.e. E.D. and recorded his statement under Section 50 of the Prevention of Money-Laundering Act, 2002 (hereinafter referred to as "PMLA, 2002") i.e. 25.05.2018, 07.06.2018, 26.06.2018, 23.07.2018 and 19.06.2019. Sri Chakravarty has submitted that the E.D. has recorded statements of various persons including one Sri Amit Yadav, the Contractor, on various dates i.e.

29.01.2019 and 05.02.2019. As per E.D., the said Contractor Sri Amit Yadav has stated in his statement dated 29.01.2019 and 05.02.2019 that he (Sri Amit Yadav) had withdrawn a sum of Rs.15 lakh in cash through his "self cheque" and he paid this amount to the present applicant. Sri Chakravarty has submitted that except the aforesaid statement of Sri Amit Yadav, the Contractor, E.D. is having no material to suggest that there was any involvement of the present applicant in the instant matter. Sri Chakravarty has further submitted that there was no eye witness to say that the aforesaid amount of Rs.15 lakh has been given to the present applicant by Sri Amit Yadav. Besides, after the aforesaid statement of Sri Amit Yadav being recorded by the E.D. on 29.01.2019 and 05.02.2019, the present applicant was summoned to record his statement under Section 50 of the PMLA, 2002 on 19.06.2019, but the present applicant has not been confronted with such statement of Sri Amit Yadav and no question relating to such alleged transaction has been asked from the present applicant. Therefore, that material i.e. the statement of Sri Amit Yadav dated 29.01.2019 and 05.02.2019 may not, prima facie, be treated as sufficient material to suggest that such amount has been withdrawn by Sri Yadav to make payment the same to the present applicant. As per Sri Chakravarty, the Bank Accounts etc. of the present applicant have been investigated by the E.D. and the aforesaid allegation of Sri Yadav has not been corroborated. The applicant has not been named as an accused in the charge sheet arising out of the FIR No.RC-26A/2017 and no independent investigation has been conducted by the E.D. as the investigation conducted by the CBI is reiterated in the complaint filed by the E.D.

6. Therefore, as per Sri Chakravarty, if the applicant has not been named as an accused in the charge sheet arising out of the FIR No.RC-26A/2017 of CBI predicate offence and no independent investigation has been conducted by the E.D. as the investigation conducted by the CBI is reiterated in the complaint filed by the E.D., the present applicant may not be implicated, only on the basis of statement of one co-accused Sri Amit Yadav against whom the CBI has filed charge sheet, in absence of any corroborative evidence.

7. Not only the above, when the present applicant has cooperated with the investigation so conducted by the CBI and never flouted the process of law, then no adverse inference of any kind whatsoever may be drawn against him. Despite being not charge sheeted by the CBI, the present applicant always appeared before the E.D. to record his statement on each and every date. The present applicant has not been confronted by the E.D. in respect of the statement so given by Sri Amit Yadav against the present applicant, therefore, the E.D. may not implicate the present applicant in the present case in any manner whatsoever. The present applicant is an old aged retired Government Officer, who is having no criminal history of any kind whatsoever and there is no possibility of the applicant to flee from justice, therefore, there may not be any requirement for his custodial interrogation. Hence, as per Sri Chakravarty, liberty of the present applicant may be protected till conclusion of the trial proceedings pending before the learned trial court as the present applicant undertakes that he shall cooperate with the proceedings pending before the learned trial court and shall not misuse the liberty of bail, if so granted.

8. *Per contra*, Sri Kuldeep Srivastava, learned counsel for the opposite party has opposed the aforesaid prayer of Sri Purnendu Chakravarty, learned counsel for the applicant. Sri Srivastava has submitted that bail application of one co-accused, namely, Roop Singh Yadav, who has filed his regular bail application before this Court bearing Criminal Misc. Bail Application No.1831 of 2022, has been rejected on 29.04.2022, therefore, the anticipatory bail application of the present applicant may be rejected and he may be directed to file his regular bail application. He has also submitted that the present applicant while serving on the post of Chief Engineer did not follow the financial rules to deposit the centage charges whereas the due amount was Rs.71 crore. Sri Srivastava has also pressed the statement of Sri Amit Yadav, the Contractor, dated 29.01.2019 and 05.02.2019 wherein such Contractor has stated that he had withdrawn a sum of Rs.15 lakh cash from the Bank through his "self cheque" and paid this amount to the present applicant.

9. However, on being confronted Sri Kuldeep Srivastava, learned counsel for the opposite party as to whether the present applicant has been asked/ confronted on such statement of Sri Amit Yadav when the statement of the present applicant was recorded under Section 50 of the PMLA, 2002 on 19.06.2019, Sri Srivastava has fairly submitted that the present applicant has not been confronted/ asked on such statement of Sri Amit Yadav, the Contractor. On being further confronted Sri Srivastava as to whether on the basis of aforesaid statement of Sri Amit Yadav anything incriminating has been recovered from the possession of the present applicant or found by the E.D., no satisfactory reply could be given by the learned counsel for the opposite party. Sri Srivastava has also been asked a pin point query to the effect that when the CBI has not charge sheeted the present applicant where the applicant was accused in the FIR and the E.D. has not conducted any independent investigation except to reiterate the charge sheet filed by the CBI; as to what material has been recovered by the E.D. to implicate the present applicant in the present case of E.D., Sri Srivastava has only reiterated the aforesaid submission that on the basis of the statement of Sri Amit Yadav, the Contractor, the present applicant has been implicated. However, he could not demonstrate any material/ document to show that the present applicant has been confronted on the statement of Sri Amit Yadav, the Contractor.

10. Thereafter, Sri Srivastava has raised one legal submission referring Section 45 of the PMLA, 2002 wherein Sub Section (1) (i) & (ii) lays down the following conditions:-

"45. Offences to be cognizable and non-bailable.*?(1) [Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [punishable for a term of imprisonment of more than three years under Part A of the Schedule] shall be released on bail or on his own bond unless?]*

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:"

11. As per Sri Srivastava, the Apex Court in re; **Assistant Director, Enforcement Directorate vs. V.C.**

Mohan, Criminal Appeal No.21 of 2022 (Arising out of SLP (Crl.) No.8441 of 2021), observed as under:-

".....It is one thing to say that Section 45 of the PMLA Act to offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under the PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered - although the application is under Section 438 of the Code of Criminal Procedure....."

(emphasis supplied)

12. The Hon'ble Apex Court in re; **Vijay Madanlal Choudhary & Ors. Vs. Union of India & Ors, in its judgment dated 27.07.2022 passed in Special Leave Petition (Criminal) No.4634 of 2014**, observed as under:-

".....As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under Section 438 of the 1973 Code or for that matter, by invoking the jurisdiction of the Constitutional Court, the underlying principles and rigors of Section 45 of the 2002 must come into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money-laundering....."

(emphasis supplied)

13. Sri Kuldeep Srivastava, learned counsel for the opposite party has submitted that the present anticipatory bail application may be rejected.

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

15. At the very outset, I would like to observe that this is a case wherein FIR No.RC-26A/2017 has been lodged by the CBI wherein so many persons including the present applicant were accused but after thorough investigation by the CBI, no charge sheet has been filed against the present applicant, meaning thereby nothing incriminating has been recovered from the possession of the present applicant nor found during investigation. Notably, the present applicant has properly cooperated with the investigation being conducted by the CBI and has never flouted the process of law. Thereafter, on the basis of aforesaid investigation of the CBI, E.D. started recording statement of some persons including the present applicant as no independent investigation has been conducted by the E.D. and the present applicant has been summoned to record his statement under Section 50 of the PMLA, 2002 on various dates i.e. 25.05.2018, 07.06.2018, 26.06.2018, 23.07.2018 and 19.06.2019. It is not a case of the E.D. that the present applicant has ever flouted the process of the law or he did not appear to record his statement on the aforesaid dates. The present applicant has been implicated on the basis of statement of one Sri Amit Yadav, the Contractor, which was recorded by the E.D. on 29.01.2019 and 05.02.2019 wherein he has stated that he had withdrawn a sum of Rs.15 lakh cash from the Bank through his "self cheque" and paid this amount to the present applicant but there is no eye witness/ witness/ document of any kind whatsoever to suggest that the aforesaid sum of Rs.15 lakh has been given to the present applicant. Even after recording the aforesaid statement of Sri Amit Yadav on 29.01.2019 and 05.02.2019, the present applicant was summoned on 19.06.2019 to record his statement under Section 50 of

the PMLA, 2002, but he has not been confronted on the aforesaid statement of Sri Yadav nor anything has been asked from the present applicant regarding the aforesaid statement of Sri Amit Yadav. Therefore, even if one Contractor in the name of Sri Amit Yadav has levelled any allegation against the present applicant, the same allegation has not been verified from the present applicant during investigation. As a matter of fact, no exercise has been carried out by the E.D. to collect any corroborative evidence.

16. Since no material has been filed with the counter affidavit of the opposite party to suggest that the allegation so levelled against the present applicant by Sri Amit Yadav, the Contractor, has been verified or corroborated and during the course of the arguments, Sri Kuldeep Srivastava, learned counsel for the opposite party has been asked to demonstrate the Court that the E.D. is having any corroborative material or any piece of material suggesting the involvement of the present applicant in accepting a sum of Rs.15 lakh, except the bald allegation of Sri Amit Yadav through his statement, Sri Kuldeep Srivastava could not demonstrate anything suggesting, prima facie, involvement of the present applicant. However, trial proceedings are going on and the allegations may be proved or disproved before the learned trial court by adducing the evidences from both the sides, therefore, I am not giving any finding on this point inasmuch as this is the domain of the learned trial court to conduct and conclude the trial independently strictly in accordance with law and without being influenced from any observation of this order. So far as argument of Sri Srivastava that regular bail of one co-accused Roop Singh Yadav has been rejected by this Court vide order dated 29.04.2022 (supra) is concerned, notably, the CBI had filed charge sheet against Roop Singh Yadav whereas no charge sheet was filed against the present applicant by the CBI. Further, Roop Singh Yadav had not filed any anticipatory bail application whereas the present applicant has filed the present anticipatory bail application. Law is trite that there may not be parity in rejection of bail.

17. Therefore, on the basis of aforesaid facts and circumstances, I am convinced that the twin requirements of Section 45 of PMLA, 2002 are satisfied inasmuch as the Public Prosecutor has been given ample opportunity to establish his case as the counter affidavit so filed and his arguments so advanced have been considered. Further, since thorough investigation has been conducted by the CBI pursuant to one FIR wherein the present applicant was accused and when nothing incriminating has been found against the present applicant, he has not been charge sheeted. The E.D. has not conducted its independent investigation and has reiterated the investigation of the CBI, therefore, prima facie, it appears that the present applicant is not guilty of such offence and being an old aged retired employee, his liberty may be protected. It further appears that he may not likely to commit such offence while on anticipatory bail.

18. The Hon'ble Apex Court in re; **Vijay Madanlal Choudhary & Ors. vs Union of India & Ors. [Special Leave Petition (Criminal) No.4634 of 2014**], has observed as under:-

"187..... (d) The offence under Section 3 of the 2002 Act is dependent on

illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money laundering against him or any one claiming such property being the property linked to stated scheduled offence through him."

(emphasis supplied)

19. The Hon'ble Apex Court in re; **Parvathi Kollur & Anr. vs. State by Directorate of Enforcement [Criminal Appeal No.1254 of 2022]**, observed as under:-

"Thereafter, the Trial Court, by its judgment and order dated 04.01.2019, allowed the application and discharged the appellants from the offences pertaining to the Act of 2002 while observing that occurrence of a scheduled offences was the basic condition for giving rise to "proceeds of crime"; and commission of scheduled offence was a precondition for proceeding under the Act of 2002."

(emphasis supplied)

20. As per this Judgement, the case of the applicant is fully covered within the ratio because pre-condition of "scheduled offence" is not there against the applicant.

21. This Court in re; **Rajeev Wadhwa vs. Union of India Thru. Joint Dir. Directorate of Enforcement [Bail No.5867 of 2016**], has observed as under:-

"Learned counsel for the applicant has next argued that the court below has erroneously held that the applicant is accused of "Schedule Offence" The F.I.R. No.17/15, Police Station Kavi Nagar, Ghaziabad shows that the applicant is not an accused in the said F.I.R. He submits that the entire matter has basically been investigated by the Directorate of Revenue Intelligence and the F.I.R has been lodged against co-accused Manish Jain and Rakesh Jain only, hence the applicant is entitled for bail."

(emphasis supplied)

22. Since no charge sheet was filed against Rajeev Wadhwa, he was granted bail. The ratio of this judgement is applicable, as admittedly, for applicant also, CBI has not filed charge sheet for scheduled offence.

23. There is one more aspect in the present case that the present applicant has cooperated with the investigation being conducted by the CBI and after completion of the investigation, no charge sheet has been filed against the present applicant. He has further cooperated with the Enforcement Directorate as he always appeared before the E.D. to record his statement under Section 50 of the PMLA, 2002, therefore, there is no need to take him into judicial custody inasmuch as liberty of a person may not be infringed mechanically.

24. In the judgment of Apex Court rendered in re: J**oginder Kumar vs. State of Utter Pradesh, (1994) 4 SCC 260,**

wherein it has been observed that arrest is not mandatory if an accused person co-operates with the investigation as well as in the trial proceedings unless there is any specific or cogent reason to arrest him. The issuance of direction regarding arrest is the prerogative of the learned trial court concerned but such discretion should not be unreasoned inasmuch as the liberty of any person, which is guaranteed under Article 21 of the Constitution of India, may not be compromised in a cursory manner. Therefore, before issuing such order to arrest such person the settled

25. The Apex Court in re: **Siddharth vs. State of U.P. and another, (2021) 1 SCC 676**, has observed as under:

"We are in agreement with the aforesaid view of the High Courts and would like to give out imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 of the Cr.P.C. that it does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, some across cases where the accused has co-operated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the Investigating Officer does not believe that the accused will abscond or disobey summons he/ she is not required to be produced in custody. The word "custody" appearing in Section 170 of the Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the court while filing the charge-sheet."

(emphasis supplied)

26. The Apex Court in re: **Aman Preet Singh vs. C.B.I. through Director, Criminal Appeal No.929 of 2021,** has observed as under:

"Insofar as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitled him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has bot even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge-sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

(emphasis supplied)

27. In view of the aforesaid facts and circumstances as well as the settled legal proposition, I find it appropriate that liberty of the present applicant may be protected till conclusion of the trial proceedings in view of the dictum of the Hon'ble Apex Court in re; **Sushila Aggarwal vs. State (NCT of Delhi), 2020 SCC online SC 98.**

28. Therefore, it is directed that in the event of arrest, applicant- Siddh Narain Sharma shall be released on anticipatory bail in the aforesaid complaint case number till conclusion of trial on his furnishing a personal bond of Rs.2,00,000/- with two sureties of Rs.1,00,000/- each before the

court concerned with the following conditions:-

I. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

II. that the applicant shall not leave India during pendency of the trial without prior permission from the concerned court and shall also surrender his passport, if any, before the concerned court forthwith;

III. that the applicant shall not pressurize/ intimidate the prosecution witness;

IV. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

V. that in case of breach of any of the above conditions, the court below shall have the liberty to cancel the bail.

29. Accordingly, the instant anticipatory bail application is **allowed**.

(2022) 10 ILRA 329
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 9962 of 2021

Ratan Singh ...Applicant

Versus

C.B.I. Anti Corruption Branch Lko. ...Opp. Party

Counsel for the Applicant:
Himanshu Hemant Gupta

Counsel for the Respondents:
Anurag Kumar Singh

Criminal Law - Prevention of Corruption Act, 1988 - Section 13 (2) r/w 13 (1) (d)- Applicant-Director of M/s. Drolia Coke Industries Pvt Ltd, Chandauli-manufactures special smokeless fuels-receiving raw materials from coal mines projects of NCl on subsidized rates-does not possess any coal-sell it in black market-surprise check-factory running below par-half of its capacity-out of four only one furnance working-only four labourers working-no electricity connection-chargesheet filed on 31.05.2012-Applicant not misused the liberty-entitled to be released on anticipatory bail.

Application allowed. (E-9)

List of Cases cited:

1. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

2. Siddharth Vs St. of U. P. & anr., (2021) SCC Online SC 615

3. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

4. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2021) SCC Online SC 922

5. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

6. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Ajit Kumar Sinha, learned Senior Advocate assisted by Sri Himanshu Hemant Gupta, Sri Ashwarya Sinha and Sri Alok Kumar Singh, learned counsels appearing on behalf of the applicant as well as Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation assisted by Sri

Akhilendra Singh, Advocate and also perused the material available on record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.10 of 2012 arising out of Case Crime No. R.C.0062011A0008 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station CBI, ACB, District Lucknow, with a prayer to enlarge him on anticipatory bail.

BRIEF FACTS OF THE CASE

3. As per the allegations of the FIR, the applicant, who is the Director of M/s Drolia Coke Industries Private Limited, Chandauli which manufactures Special Smokeless Fuels and are receiving the raw materials from the coal mine projects of NCL under the New Distribution Policy of Government of India on subsidized rates, does not actually process the coal, instead sale it in the black market at a high premium and earning huge wrongful gains. In pursuance of a credible information through a squealer, a surprise check was taken at the factory premises and it was found that the factory was running below par i.e. less than half of its capacity. Out of four furnaces, only one was found running and only four labourers were found working in the factory. There was no electricity connection although 125 KVA generator was found there. A shortage of 35.25 MT of coal was found. As the Coal India Limited has represented by NCL in this case, the connivance of unknown officers/officials of the NCL in the illegal sale of coal by the company was suspected. The wrongful pecuniary gain were calculated to the tune of Rs.8.36 crores by the company during the period of 2010-11.

RIVAL CONTENTIONS

4. Sri Ajit Kumar Sinha, learned Senior Counsel for the applicant has stated that the applicant is innocent and has nothing to do with the said offence. The matter is of civil nature and the applicant is being harassed by the agency by adding criminal colour to it, thus, no useful purpose would be served by keeping the applicant in custody. There is no apprehension of the applicant fleeing away from the justice or tampering with any evidence which is in the possession of C.B.I. and E.D.

5. Learned Senior Counsel has placed reliance on Clause-4.4 and 15.5.5 of the Fuel Supply Agreement (Annexure-4 to the affidavit annexed with the bail application) wherein the penalty for diversion of coal in the open market is provided as the forfeiture of security money and termination of the contract. Learned Senior Counsel has further stated that the coal supplied to it at the notified price fixed by the Coal India Limited as per the New Coal Distribution Policy dated 18.10.2007. He has further argued that on 28.04.2008, the applicant furnished a bank guarantee to the NCL to the tune of Rs.33,12,913/- and an additional bank guarantee of Rs.3,39,858/- on 05.12.2009. Learned counsel has next submitted that the Company represented by the applicant is a private company and the provisions of Prevention of Corruption Act are not attracted to its case. Learned counsel on behalf of the applicant has undertaken that there is no possibility of the applicant fleeing from the judicial proceedings and in the light of the judgement of the Apex Court in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat1*** and ***Siddharth Vs. State of Uttar Pradesh and another***2, the applicant may be enlarged on anticipatory bail.

6. Learned Senior Counsel has further argued that the charge-sheet has already

been filed in the matter way back on 31.05.2012 and the applicant has not misused or abused the interim protection granted to him by various courts since then. Much reliance has been placed on the fact that in the charge-sheet filed by the CBI, no prosecution has been initiated against any of the erring officials of the NCL. It has further been argued that no subsidy was involved in the said coal supply as the information supplied by the Coal India Limited to the RTI application filed on behalf of the Company (Annexure-8 to the affidavit annexed with the bail application). Learned Senior Counsel has also stated that the Enforcement Directorate, Allahabad had provisionally attached the Flat No. T-22-06-01, CWG Village, near Akshardham Temple at Noida Crossing located off NH-24, Delhi-110092 to the extent of Rs.70,25,716.40/- which alleged to be the proceeds of the Agreement held in the name of the applicant being the Director of M/s Jai Durga Industries and M/s Drolia Coke Industries Private Limited. The applicant had preferred a Writ Petition bearing No.6314 of 2020 before the High Court of Delhi wherein the High Court directed that the aforesaid provisionally attached property shall be released subjected to the defendants therein depositing Rs.70,25,716.40/- which was the alleged proceeds of the Agreement. Learned Senior Counsel has stated that the applicant had deposited a sum of Rs.70,25,716.40/- before the Registrar General of High Court in compliance of the order dated 15.10.2020 (Annexure-14 to the affidavit annexed with the bail application). Learned Senior Counsel has also stated that as the present subject matter pertains to an amount of Rs.70,25,716.40/- which has already been deposited by the applicant, no cause of action remains in the subject matter. It has further been stated that neither the Coal India Limited nor the NCL has filed any complaint against the applicant at any forum.

7. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI assisted by Sri Akhilendra Singh, Advocate has vehemently opposed the anticipatory bail application on the ground that the applicant had diverted the coal provided to him at the controlled rate to the black market and as per the joint surprise check and the independent technical inspection team, the factory had been found functional partly. As per the records of the EPFO, it had only four employees while it would have needed much more employee i.e. about 100 employees to make the factory operational.

8. Learned Senior Counsel for the applicant has also relied upon the judgement of the Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi)***3, wherein it has been held in paras-63, 69 and 75 which read as under:-

"63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation.

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69. It is important to notice here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the

offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref. Chandra Mohan v. State of Uttar Pradesh). In RBI v. Peerless General Finance and Investment Co. Ltd., the relevance of text and context was emphasized in the following terms:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

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75. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice); likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

9. Learned Senior Counsel for the applicant has also placed reliance on para-91.1 of ***Sushila Aggarwal (Supra)*** which reads as under:-

91.1. Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr.PC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc."

10. On the other hand, Sri Anurag Kumar Singh, learned counsel for the CBI has further placed reliance upon the judgement of Supreme Court in the case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and another***4 and has stated that according to the said judgement, the case of the applicant falls in the Category- B and D, hence, the provisions of Section 438 Cr.P.C. do not apply to the present case but he could not dispute the fact that the amount of Rs.70,25,716.40/- has been deposited by the applicant.

11. Learned Senior Counsel for the applicant has placed much reliance on the order passed by the Apex Court in ***Miscellaneous Application No.1849 of 2021 passed in SLP (Criminal) No. 5191 of 2021, Satender Kumar Antil Vs. Central Bureau of Investigation and another*** dated 16.12.2021, wherein it has been clarified by the Apex Court as under:-

"We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order."

12. It has further been argued by the learned Senior Counsel for the applicant that there are no criminal antecedents of the applicant except two cases instituted against him at the same time.

13. As per the judgment of the Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***5, it has held that the nature and gravity of the accusation and the exact role of the accused must be properly comprehended, the previous criminal antecedents of the applicant whether he has previously undergone imprisonment on conviction, the possibility of applicant to flee and where the accusation has been made only with the object of injuring or humiliating the applicant by arresting him, are the circumstances that are to be taken into account as per Section 438 Cr.P.C.

14. It was observed by V.R. Krishnaiyer, J. in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***6 that:

"1. ..... The issue of (Bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

.... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right."

15. Considering the facts and circumstances of the case and upon hearing the learned counsel for the parties and also perusing all the judgements referred hereinabove, this Court is of the view that the Division Bench of this Court has left open the question to the Court whether to undertake the anticipatory bail application directly at the High Court in ***Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No.1094 of 2020, Ankit Bharti Vs. State of U.P. and another***. Furthermore, as the charge-sheet was filed on 31.05.2012 and the applicant has not misused the liberty granted to him vide various orders, the applicant is entitled to be released on anticipatory bail in this case.

16. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest, let the accused-applicant **Ratan Singh**, be released forthwith in Criminal Case No.10

of 2012 arising out of Case Crime No. R.C.0062011A0008 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station CBI, ACB, District Lucknow, on bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii) that the applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court;

(iv) that the applicant shall not leave India during the pendency of trial without prior permission from the concerned trial Court;

(v) that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

(vi) that it is directed that the trial may be concluded in accordance with law expeditiously, preferably, within a period of one year from the date of this order, independently without being prejudiced by any observations made by this court while considering or deciding the present anticipatory bail application of the applicant;

(vii) that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(viii) that the applicant shall not pressurize/ intimidate the prosecution witness;

(ix) that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

17. In case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

(2022) 10 ILRA 334
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 9963 of 2021

Ratan Singh ...Applicant
Versus
C.B.I. Anti Corruption Branch Lko. ...Opp. Party

Counsel for the Applicant:
Himanshu Hemant Gupta

Counsel for the Respondents:
Anurag Kumar Singh

Criminal Law - Prevention of Corruption Act,1988 -Section 13 (2) r/w 13 (1) (d)- Applicant-director of M/s. Jai Durga Industries, Chandauli-coal linkage was granted-coal supplied to it by the Coal India Limited at notified price-company sold it in open market-black marketing-chargesheet filed on 31.05.2012- Applicant not misused the liberty granted-entitled to be released on Anticipatory Bail.

Application allowed. (E-9)

List of Cases cited:

1. M/s Ashoka Smokeless Vs U.O.I. and in connected matters, (2007) 2 SCC 640

2. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

3. Siddharth Vs St. of U. P. & anr., (2021) SCC Online SC 615

4. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

5. Miscellaneous Application No.1849 of 2021 passed in SLP (Criminal) No. 5191 of 2021, Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2021) SCC Online SC 922

6. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

7. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240

8. Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No.1094 of 2020, Ankit Bharti Vs St. of U.P. & anr.

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Ajit Kumar Sinha, learned Senior Advocate assisted by Sri Himanshu Hemant Gupta, Sri Ashwarya Sinha and Sri Alok Kumar Singh, learned counsels appearing on behalf of the applicant as well as Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation assisted by Sri Akhilendra Singh, Advocate and also perused the material available on record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.12 of 2012 arising out of Case Crime No. R.C.0062011A0006 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station CBI, ACB, District Lucknow, with a prayer to enlarge him on anticipatory bail.

BRIEF FACTS OF THE CASE

3. A coal linkage was granted to M/s Jai Durga Industries, Chandauli in the year 1987. A new coal distribution policy was introduced on 18.10.2007 by the Ministry of Coal, envisaging a new mechanism of coal distribution by way of entering into the Fuel Supply Agreement in compliance with the directions of the Supreme Court in ***M/s Ashoka Smokeless Vs. Union of India and in connected matters***1. As per new policy, the prices were to be fixed by Coal India Limited. Pursuant to the said newly devised system, a Fuel Supply Agreement was entered into between the M/s Jai Durga Industries and the Coal Company. It is alleged in the FIR that the coal supplied was at the notified price fixed by the Coal India Limited to streamline the rates across the country. The applicant is the Director in the Company M/s Jai Durga Industries and the said Company is alleged to have sold the coal supplied to it in the open market, thus, extricated undue gain by black marketing.

RIVAL CONTENTIONS

4. Sri Ajit Kumar Sinha, learned Senior Counsel for the applicant has stated that the applicant is innocent and has nothing to do with the said offence. The matter is of civil nature and the applicant is being harassed by the agency by adding criminal colour to it, thus, no useful purpose would be served by keeping the applicant in custody. There is no apprehension of the applicant fleeing away from the justice or tampering with any

evidence which is in the possession of C.B.I. and E.D.

5. Learned Senior Counsel has placed reliance on Clause-4.4 and 15.5.5 of the Fuel Supply Agreement (Annexure-4 to the affidavit annexed with the bail application) wherein the penalty for diversion of coal in the open market is provided as the forfeiture of security money and termination of the contract. Learned Senior Counsel has further stated that the coal was supplied to it at the notified price fixed by the Coal India Limited as per the new Coal Distribution Policy dated 18.10.2007. He has further argued that on 28.04.2008, the applicant furnished a bank guarantee to the NCL to the tune of Rs.33,12,913/- and an additional bank guarantee of Rs.3,32,363/- on 19.11.2009. Learned counsel has further submitted that the Company represented by the applicant is a private company and the provisions of Prevention of Corruption Act are not attracted to its case. Learned counsel for the applicant has undertaken that there is no possibility of the applicant fleeing from the judicial proceedings and in the light of the judgement of the Apex Court in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***2 and **Siddharth Vs. State of Uttar Pradesh and another**3, the applicant may be enlarged on anticipatory bail.

6. Learned Senior Counsel has further argued that the charge-sheet has already been filed in the matter way back on 31.05.2012 and the applicant has not misused or abused the interim protection granted to him by various courts since then. Much reliance has been placed on the fact that in the charge-sheet filed by the CBI, no prosecution has been initiated against any of the erring officials of the NCL. It has further been argued that no subsidy was involved in the said coal supply as the information supplied by the Coal India Limited to the RTI application filed on behalf of the Company (Annexure-8 to the affidavit annexed with the bail application). It has further been argued by the learned Senior Counsel that during investigation, a total wrongful gain of Rs.77,17,664.64/- has been proved by providing the said coal in black market to M/s Drolia Coke Industries Private Limited. Learned Senior Counsel has also stated that the Enforcement Directorate, Allahabad had provisionally attached the Flat No. T-22-06-01, CWG Village, near Akshardham Temple at Noida Crossing located off NH-24, Delhi-110092 to the extent of Rs.70,25,716.40/- which alleged to be the proceeds of the Agreement held in the name of the applicant being the Director of M/s Jai Durga Industries and M/s Drolia Coke Industries Private Limited. The applicant had preferred a Writ Petition bearing No.6314 of 2020 before the High Court of Delhi wherein the High Court directed that the aforesaid provisionally attached property shall be released subjected to the defendants therein depositing Rs.70,25,716.40/- which was the alleged proceeds of the Agreement. Learned Senior Counsel has stated that the applicant had deposited a sum of Rs.70,25,716.40/- before the Registrar General of High Court in compliance of the order dated 15.10.2020 (Annexure-14 to the affidavit annexed with the bail application). Learned Senior Counsel has also stated that as the present subject matter pertains to an amount of Rs.70,25,716.40/- which has already been deposited by the applicant, no cause of action remains in the subject matter. It has further been argued that neither the Coal India Limited nor the NCL has filed any complaint against the applicant at any forum.

7. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI assisted by Sri Akhilendra Singh, Advocate has vehemently opposed the anticipatory bail application on the ground that the applicant had diverted the coal provided to him at the controlled rate to the black market and as per the joint surprise check and the independent technical inspection team, the factory had not been found functional for the last couple of years. As per the records of the EPFO, it had only one employee while it would have needed much more employee i.e. about 99 employees to make the factory functional.

8. Learned Senior Counsel for the applicant has also relied upon the judgement of the Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi)***4, wherein it has been held in paras-63, 69 and 75 which read as under:-

"63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation.

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69. It is important to notice here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref. Chandra Mohan v. State of Uttar Pradesh). In RBI v. Peerless General Finance and Investment Co. Ltd., the relevance of text and context was emphasized in the following terms:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

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75. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences

mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice); likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

9. Learned Senior Counsel for the applicant has also placed reliance on para-91.1 of ***Sushila Aggarwal (Supra)*** which reads as under:-

91.1. Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr.PC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc."

10. On the other hand, Sri Anurag Kumar Singh, learned counsel for the CBI has further placed reliance upon the judgement of Supreme Court in the case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and another***5 and has stated that according to the said judgement, the case of the applicant falls in the Category- B and D, hence, the provisions of Section 438 Cr.P.C. do not apply to the present case but he could not dispute the fact that the alleged amount has been deposited by the applicant.

11. Learned Senior Counsel on behalf of the applicant has placed much reliance on the order passed by the Apex Court in ***Miscellaneous Application No.1849 of 2021*** passed in ***SLP (Criminal) No. 5191 of 2021, Satender Kumar Antil Vs. Central Bureau of Investigation and another*** dated 16.12.2021, wherein it has been clarified by the Apex Court as under:-

"We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order."

12. It has further been argued by the learned Senior Counsel for the applicant that there are no criminal antecedents of the applicant except two cases instituted against him at the same time.

13. As per the judgment of the Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***6, it has held that the nature and gravity of the accusation and the exact role of the accused must be properly comprehended, the previous criminal antecedents of the applicant whether he has previously undergone imprisonment on conviction, the possibility of applicant to flee and where the accusation has been made only with the object of injuring or humiliating the

applicant by arresting him, are the circumstances that are to be taken into account as per Section 438 Cr.P.C.

14. It was observed by V.R. Krishnaiyer, J. in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***7 that:

"1. ..... The issue of (Bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

.... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right."

15. Considering the facts and circumstances of the case and upon hearing the learned counsel for the parties and also perusing all the judgements referred hereinabove, this Court is of the view that the Division Bench of this Court has left open the question to the Court whether to undertake the anticipatory bail application directly at the High Court in ***Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No.1094 of 2020, Ankit Bharti Vs. State of U.P. and another***. Furthermore, as the charge-sheet was filed on 31.05.2012 and the applicant has not misused the liberty granted to him vide various orders, the applicant is entitled to be released on anticipatory bail in this case.

16. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest, let the accused-applicant **Ratan Singh**, be released forthwith in Criminal Case No.12 of 2012 arising out of Case Crime No. R.C.0062011A0006 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station CBI, ACB, District Lucknow, on bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii) that the applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court;

(iv) that the applicant shall not leave India during the pendency of trial without prior permission from the concerned trial Court;

(v) that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

(vi) that it is directed that the trial may be concluded in accordance with law expeditiously, preferably, within a period of one year from the date of this order, independently without being prejudiced by any observations made by this court while considering or deciding the present anticipatory bail application of the applicant;

(vii) in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(viii) that the applicant shall not pressurize/ intimidate the prosecution witness;

(ix) that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

17. In case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

(2022) 10 ILRA 340
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 12073 of 2021

Yogendra Nath Pandey ...Applicant
Versus
C.B.I. Anti Corruption Branch Lko. ...Opp. Party

Counsel for the Applicant:
K. Saran, Amit Kumar Kaushal, Himanshu Suryavanshi

Counsel for the Respondents:
Anurag Kumar Singh

Criminal Law - Prevention of Corruption Act, 1988 - Section 13 (2) r/w 13 (1) (d)- Applicant-Assistant Manager of DIC, Chandauli--coal linkage was granted to Jai Durga Industries, Chandauli -the officials in connivance with the industry-coal supplied to it by the Coal India Limited at notified price-company sold it in open market-black marketing-chargesheet filed on 31.05.2012- Applicant not misused the liberty granted-entitled to be released on Anticipatory Bail.

Application allowed. (E-9)

List of Cases cited:

1. M/s Ashoka Smokeless Vs U.O.I., (2007) 2 SCC 640

2. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

3. Siddharth Vs St. of U. Pr.& anr., (2021) SCC Online SC 615

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

5. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2021) SCC Online SC 922

6. Miscellaneous Application No.1849 of 2021 passed in SLP (Criminal) No. 5191 of 2021, Satender Kumar Antil Vs Central Bureau of Investigation & anr. dated 16.12.2021

7. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

8. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Himanshu Suryavanshi and Sri Amit Kumar Kaushal, learned counsels appearing on behalf of the applicant as well as Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation assisted by Sri Akhilendra Singh, Advocate and also perused the material available on record.

2. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No. R.C.0062011A0006, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station- CBI, ACB, District- Lucknow, with a prayer to enlarge him on anticipatory bail.

BRIEF FACTS OF THE CASE

3. A coal linkage was granted to M/s Jai Durga Industries, Chandauli in the year 1987. A new coal distribution policy was introduced on 18.10.2007 by the Ministry of Coal, envisaging a new mechanism of coal distribution by way of entering into the Fuel Supply Agreement in compliance with the directions of the Supreme Court in ***M/s Ashoka Smokeless Vs. Union of India and in connected matters***1. As per new policy, the prices were to be fixed by Coal India Limited. Pursuant to the said newly devised system, a Fuel Supply Agreement was entered into between the M/s Jai Durga Industries and the Coal Company.

4. During the course of investigation, it has been found that the coal supplies have been made to M/s. Jai Durga Industries after taking certificate of the operational status from the State Industries Department i.e. District Industries Centre (DIC). After allotment of coal by the concerned coal companies, the coal companies used to write to the units directly for verification and send the copy of the letter to the DICs and the Directorate of Industries. Upon receipt of such letters from the coal companies, the DICs used to verify and send their report directly to the concerned coal companies.

5. It has been alleged that in connivance of unknown officers/officials of DIC, Chandauli and Northern Coal Fields Limited (NCL), Ms. Jai Durga Industries, Chandauli had lifted coal from NCL at an average price of Rs.1700/- per MT during the period of 2010-11 of which the average market price of same grade coal was Rs.4200/- per MT. It has further been alleged that the coal supplied was at the notified price fixed by the Coal India Limited to streamline the rates across the country.

6. As per the charge-sheet submitted by the CBI on 31.05.2012, the co-accused Ramji Singh, the then General Manager of DIC Chandauli and the applicant, who was the Assistant Manager therein, are alleged to have indulged in criminal conspiracy and abused their official position in connivance with Ratan Singh, by issuing forged certificates regarding the existence of unit and its operational status on the basis of which the supplies of coal were made to the alleged companies.

RIVAL CONTENTIONS

7. Sri Himanshu Suryavanshi and Sri Amit Kumar Kaushal, learned counsels appearing for the applicant have stated that the applicant is innocent and has been falsely implicated in the present case. The applicant is just a scapegoat and he was not involved in any illegal activities as alleged against him by the prosecution. The matter is purely civil in nature and the applicant is being harassed by the agency by adding criminal colour to it, thus, no useful purpose would be served by keeping the applicant in custody. There is no apprehension of the applicant fleeing away from the justice or tampering with any evidence which is in the possession of C.B.I. and E.D.

8. Learned counsel for the applicant has also submitted that the applicant is a old aged person and he has had a Cardiac Bypass Surgery on 14.07.2010 and his wife is also suffering from fatal disease of kidney failure. He has further submitted that the charge-sheet has already been filed in the matter way back on 31.05.2012 and the applicant has not misused or abused the interim protection granted to him by various courts since then. Much reliance has been placed on the fact that in the

charge-sheet filed by the CBI, no prosecution has been initiated against any of the erring officials of the NCL. The co-accused Ratan Singh, who is the Director of the alleged erring Company, had preferred a Writ Petition bearing No.6314 of 2020 before the High Court of Delhi wherein the High Court directed that his attached property shall be released subject to depositing of Rs.70,25,716.40/- which was the alleged proceeds of the Agreement. Learned counsel has next submitted that the co-accused Ratan Singh had already deposited the said amount before the Registrar General of Delhi High Court in compliance of the order dated 15.10.2020 passed in OC No.1263 of 2020. Learned counsel has next submitted that as the present subject matter pertains to the amount of Rs.70,25,716.40/- which has already been deposited by the co-accused Ratan Singh, no cause of action remains in the subject matter. It has further been submitted that there is no criminal history of the applicant except two cases instituted by the CBI at a time pertaining to the alleged two coal companies, namely, M/s Jai Durga Industries and M/s Drolia Coke Industries Private Limited. It was directed by the High Court to expedite the trial of the case but the same has proceeded in a snail's pace. It has further been argued that no complaint whatsoever has been lodged by the NCL or the Coal India Limited. The provision of Section 438 Cr.P.C. are attracted to the present case. Learned counsel for the applicant has further undertaken that there is no possibility of the applicant fleeing away from the judicial proceedings and in the light of the judgement of the Apex Court in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***2 and **Siddharth Vs. State of Uttar Pradesh and another**3, the applicant may be enlarged on anticipatory bail.

9. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI assisted by Sri Akhilendra Singh, Advocate has vehemently opposed the anticipatory bail application on the ground that the co-accused Ratan Singh, who is the Director of the alleged Company, with the help of the applicant, who was the Assistant Manager of the DIC, Chandauli, were indulged in diverting the coal at the controlled rate to the black market and extricated undue gain.

10. Learned counsel for the applicant has also relied upon the judgement of the Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi)***4, wherein it has been held in paras-63, 69 and 75 which read as under:-

"63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation.

*****

69. It is important to notice here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in

the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref. Chandra Mohan v. State of Uttar Pradesh). In RBI v. Peerless General Finance and Investment Co. Ltd., the relevance of text and context was emphasized in the following terms:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

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75. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice); likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

11. Learned counsel for the applicant has also placed reliance on para-91.1 of ***Sushila Aggarwal (Supra)*** which reads as under:-

91.1. Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr.PC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc."

12. On the other hand, Sri Anurag Kumar Singh, learned counsel for the CBI has further placed reliance upon the judgement of Supreme Court in the case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and another***5 and has

stated that according to the said judgement, the case of the applicant falls in the Category- B and D, hence, the provisions of Section 438 Cr.P.C. do not apply to the present case but he could not dispute the fact that the amount in question has already been deposited by the applicant.

13. Learned counsel on behalf of the applicant has placed much reliance on the order passed by the Apex Court in ***Miscellaneous Application No.1849 of 2021*** passed in ***SLP (Criminal) No. 5191 of 2021, Satender Kumar Antil Vs. Central Bureau of Investigation and another*** dated 16.12.2021, wherein it has been clarified by the Apex Court as under:-

"We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order."

14. As per the judgment of the Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***6, it has held that the nature and gravity of the accusation and the exact role of the accused must be properly comprehended, the previous criminal antecedents of the applicant whether he has previously undergone imprisonment on conviction, the possibility of applicant to flee and where the accusation has been made only with the object of injuring or humiliating the applicant by arresting him, are the circumstances that are to be taken into account as per Section 438 Cr.P.C.

15. It was observed by ***V.R. Krishnaiyer, J. in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***7 that:

"1. ..... The issue of (Bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

.... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right."

16. Considering the facts and circumstances of the case and upon hearing the learned counsel for the parties and also perusing all the judgements referred hereinabove, this Court is of the view that since the charge-sheet was filed on 31.05.2012 and the applicant has not misused the liberty granted to him vide various orders, he is entitled to be enlarged on anticipatory bail.

17. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest, let the accused-applicant **Yogendra Nath Pandey,** be released forthwith in Case Crime No. R.C.0062011A0006, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station- CBI, ACB, District- Lucknow, on bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly make any inducement, threat

or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii) that the applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court;

(iv) that the applicant shall not leave India during the pendency of trial without prior permission from the concerned trial Court;

(v) that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

(vi) that it is directed that the trial may be concluded in accordance with law expeditiously, preferably, within a period of one year from the date of this order, independently without being prejudiced by any observations made by this court while considering or deciding the present anticipatory bail application of the applicant;

(vii) that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(viii) that the applicant shall not pressurize/ intimidate the prosecution witness;

(ix) that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

18. In case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

(2022) 10 ILRA 345
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.03.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Anticipatory Bail Application No. 12682 of 2021

Ramji Singh ...Applicant
Versus
C.B.I. Anti Corruption Branch Lko. ...Opp. Party

Counsel for the Applicant:
Abhishek Tiwari, Purnendu Chakravarty, Shashank Shekhar Shukla

Counsel for the Respondents:
Anurag Kumar Singh

Criminal Law - Prevention of Corruption Act, 1988 - Section 13 (2) r/w 13 (1) (d)- Applicant-General Manager of DIC, Chandauli- - coal linkage was granted to Jai Durga Industries, Chandauli -the officials in connivance with the industry-coal supplied to it by the Coal India Limited at notified price-company sold it in open market-black marketing-chargesheet filed on 31.05.2012- Applicant not misused the liberty granted-entitled to be released on Anticipatory Bail.

Application allowed. (E-9)

List of Cases cited:

1. M/s Ashoka Smokeless Vs U.O.I. and in connected matters, (2007) 2 SCC 640

2. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

3. Siddharth Vs St. of U. P. & anr., (2021) SCC Online SC 615

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

5. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2021) SCC Online SC 922

6. Bhadresh Bipinbhai Sheth Vs St. of Guj., (2016) 1 SCC 152

7. Gudikanti Narasimhulu & ors. Vs Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240

(Delivered by Hon'ble Krishan Pahal, J.)

1. Learned counsel for the applicant is permitted to make necessary correction in the prayer clause during the course of the day.

2. Heard Sri Purnendu Chakravarti and Sri Shivanshu Goswami, learned counsels appearing on behalf of the applicant as well as Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation assisted by Sri Akhilendra Singh, Advocate and also perused the material available on record.

3. The present anticipatory bail application has been filed on behalf of the applicant in Criminal Case No.12 of 2012 arising out of Case Crime/R.C. No. 0062011A0006 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station- CBI, ACB, Lucknow, District-Lucknow, with a prayer to enlarge him on anticipatory bail.

BRIEF FACTS OF THE CASE

4. A coal linkage was granted to M/s Jai Durga Industries, Chandauli in the year 1987. A new coal distribution policy was introduced on 18.10.2007 by the Ministry of Coal, envisaging a new mechanism of coal distribution by way of entering into the Fuel Supply Agreement in compliance with the directions of the Supreme Court in ***M/s Ashoka Smokeless Vs. Union of India and in connected matters***1. As per new policy, the prices were to be fixed by Coal India Limited. Pursuant to the said newly devised system, a Fuel Supply Agreement was entered into between the M/s Jai Durga Industries and the Coal Company.

5. During the course of investigation, it has been found that the coal supplies have been made to M/s. Jai Durga Industries after taking certificate of the operational status from the State Industries Department i.e. District Industries Centre (DIC). After allotment of coal by the concerned coal companies, the coal companies used to write to the units directly for verification and send the copy of the letter to the DICs and the Directorate of Industries. Upon receipt of such letters from the coal companies, the DICs used to verify and send their report directly to the concerned coal companies.

6. It has been alleged that in connivance of unknown officers/officials of DIC, Chandauli and Northern Coal Fields Limited (NCL), Ms. Jai Durga Industries, Chandauli had lifted coal from NCL at an average price of Rs.1700/- per MT during the period of 2010-11 of which the average market price of same grade coal was Rs.4200/- per MT. It has further been alleged that the coal supplied was at the notified price fixed by the Coal India Limited to streamline the rates across the country.

7. As per the charge-sheet submitted by the CBI on 31.05.2012, the applicant Ramji Singh, the then General Manager of DIC Chandauli in connivance with other co-accused persons, are alleged to have indulged in criminal conspiracy and abused his official position, issuing forged certificates regarding the existence of unit and its operational status on the basis of which the supplies of coal were made to the alleged companies.

RIVAL CONTENTIONS

8. Sri Himanshu Suryavanshi and Sri Amit Kumar Kaushal, learned counsels appearing for the applicant have stated that the applicant who is now old person aged about 70 years, has been falsely implicated in the present case. The applicant was neither named in the FIR lodged by the CBI nor committed any such offence as alleged in the FIR. Absolutely vague allegations have been made against the applicant in the FIR that he has concealed the real fact that the alleged Firm/Company was not functional and has given false status report to the Directors of Industries for onwards transmission of NCL. The matter is purely civil in nature and the applicant is being harassed by the agency by adding criminal colour to it, thus, no useful purpose would be served by keeping the applicant in custody. There is no apprehension of the applicant fleeing away from the justice or tampering with any evidence which is in the possession of C.B.I. and E.D.

9. Learned counsel for the applicant has also submitted that the charge-sheet has already been filed in the matter on 31.05.2012 and the applicant has not misused or abused the interim protection granted to him by various courts since then. Much reliance has been placed on the fact that in the charge-sheet filed by the CBI, no prosecution has been initiated against any of the erring officials of the NCL. The co-accused Ratan Singh, who is the Director of the Company M/s Jai Durga Industries Private Limited, had preferred a Writ Petition bearing No.6314 of 2020 before the High Court of Delhi wherein the High Court directed that his attached property shall be released subject to depositing of Rs.70,25,716.40/- which was the alleged proceeds of the Agreement. Learned counsel has next submitted that the co-accused Ratan Singh had already deposited the said amount before the Registrar General of Delhi High Court in compliance of the order dated 15.10.2020 passed in O.C. No.1263 of 2020. Learned counsel has next submitted that as the present subject matter pertains to the amount of Rs.70,25,716.40/- which has already been deposited by the co-accused Ratan Singh, no cause of action remains in the subject matter. It has further been submitted that there is no criminal history of the applicant except the present case. It was directed by the High Court to expedite the trial of the case but the same has proceeded in a snail's pace. It has further been argued that no complaint whatsoever has been lodged by the NCL or the Coal India Limited. Learned counsel for the applicant has further stated that the provision of Section 438 Cr.P.C. are attracted to the present case and there is no possibility of the applicant fleeing away from the judicial proceedings and in the light of the judgement of the Apex Court in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***2 and **Siddharth Vs. State of Uttar Pradesh and another**3, the applicant may be enlarged on anticipatory bail.

10. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI assisted by Sri Akhilendra Singh, Advocate has vehemently opposed the anticipatory bail application on the ground that the co-accused Ratan Singh, who is the Director of the alleged Company, with the help of the applicant, who was the then the then General Manager of DIC Chandauli, were indulged in diverting the coal at the controlled rate to the black market and extricated undue gain.

11. Learned counsel for the applicant has also relied upon the judgement of the

Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi)***4, wherein it has been held in paras-63, 69 and 75 which read as under:-

"63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation.

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69. It is important to notice here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref. Chandra Mohan v. State of Uttar Pradesh). In RBI v. Peerless General Finance and Investment Co. Ltd., the relevance of text and context was emphasized in the following terms:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

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75. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice);

likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

12. Learned counsel for the applicant has also placed reliance on para-91.1 of ***Sushila Aggarwal (Supra)*** which reads as under:-

91.1. Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr.PC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc."

13 . On the other hand, Sri Anurag Kumar Singh, learned counsel for the CBI has further placed reliance upon the judgement of Supreme Court in the case of ***Satender Kumar Antil Vs. Central Bureau of Investigation and another***5 and has stated that according to the said judgement, the case of the applicant falls in the Category- B and D, hence, the provisions of Section 438 Cr.P.C. do not apply to the present case but he could not dispute the fact that the amount in question has already been deposited by the applicant.

14. Learned counsel on behalf of the applicant has placed much reliance on the order passed by the Apex Court in ***Miscellaneous Application No.1849 of 2021*** passed in ***SLP (Criminal) No. 5191 of 2021***, ***Satender Kumar Antil Vs. Central Bureau of Investigation and another*** dated 16.12.2021, wherein it has been clarified by the Apex Court as under:-

"We are also putting a caution that merely by categorizing certain offences as economic offences which may be non-cognizable, it does not mean that a different meaning is to be given to our order."

15. As per the judgment of the Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat***6, it has held that the nature and gravity of the accusation and the exact role of the accused must be properly comprehended, the previous criminal antecedents of the applicant whether he has previously undergone imprisonment on conviction, the possibility of applicant to flee and where the accusation has been made only with the object of injuring or humiliating the applicant by arresting him, are the circumstances that are to be taken into account as per Section 438 Cr.P.C.

16. It was observed by ***V.R. Krishnaiyer, J. in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***7 that:

"1. ..... The issue of (Bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

.... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right."

17. Considering the facts and circumstances of the case and upon hearing the learned counsel for the parties and also perusing all the judgements referred

hereinabove, this Court is of the view that since the charge-sheet was filed on 31.05.2012 and the applicant has not misused the liberty granted to him vide various orders, he is entitled to be enlarged on anticipatory bail.

18. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest, let the accused-applicant **Ramji Singh,** be released forthwith in Criminal Case No.12 of 2012 arising out of Case Crime/R.C. No. 0062011A0006 of 2011, under Sections 120-B, 420, 467, 468 and 471 IPC and Sections 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988, Police Station- CBI, ACB, Lucknow, District- Lucknow, on bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned with the following conditions:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii) that the applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court;

(iv) that the applicant shall not leave India during the pendency of trial without prior permission from the concerned trial Court;

(v) that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

(vi) that it is directed that the trial may be concluded in accordance with law expeditiously, preferably, within a period of one year from the date of this order, independently without being prejudiced by any observations made by this court while considering or deciding the present anticipatory bail application of the applicant;

(vii) that in case charge-sheet is submitted the applicant shall not tamper with the evidence during the trial;

(viii) that the applicant shall not pressurize/ intimidate the prosecution witness;

(ix) that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

19. In case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

(2022) 10 ILRA 350
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

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

Civil Revision (D) No. 253 of 2015

Sant Kumar Singh ...Revisionist
Versus
Nanku Singh & Ors. ...Opp. Parties

Counsel for the Revisionist:
Sri Sanjeet Kumar Yadav, Sri Avdhesh Kumar Tiwari, Sri Awadhesh Kumar Singh, Dipti Tewari, Sri Gajendra Singh, Sri Shrawan Kumar Pandey, Sri Swatantra Kumar Singh

Counsel for the Opp. Parties:
Sri Kunal Ravi Singh, Manjari Singh

Civil Law- The Limitation Act, 1963- Section 5- Inordinate delay of 15 years- The merits of this order are not of relevance so far as the present application under Section 5 of the Limitation Act is concerned. It must be remarked that there is nothing so startling or shockingly perverse about the order that may impel this Court, by a certain principle of remote resort, to cast aside the bar of a very long delay. There is indeed no mischief to be undone that may require the delay of 15 years in moving the present revision to be condoned. The explanation given by the applicant-revisionist, though involving the death of his Counsel, both father and son, instructed to appear in the case, yet those events too do not explain the long time period of 15 years and more in moving this Court against the order impugned.

Settled law that while considering an application for condonation of delay, where the delay is inordinate ,gross negligence on the part of the counsel or litigant is to be taken note of along with the lack of bonafides, conduct and behaviour of the party and the prejudice caused and merits of the case are not relevant.(Para 21)

Application for condonation of delay and memo of revision accordingly rejected. (E-3)

Case Law/Judgements relied upon:-

1. Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy & ors., (2013) 12 SCC 649

2. Majji Sannemma @ Sanyasirao Vs Reddy Srivedi & ors., 2021 SCC OnLine SC 1260

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

Order on Civil Misc. Delay Condonation Application No.426225 of 2015

1. This is a delay condonation application filed under Section 5 of the Limitation Act seeking to condone the delay in preferring the present Civil Revision under Section 115 of the Code of Civil Procedure.

2. The office has reported a delay of 15 years and 244 days, and by the present application, the applicant-revisionist asks this Court to condone the said delay.

3. The facts leading to this delay condonation application are required to be briefly recounted in order to appreciate whether a sufficient cause is made out to condone the long delay of 15 years and 244 days in preferring the Revision. The defendant is the judgment debtor of Original Suit No. 11 of 1982, which was decreed in favour of the plaintiff-opposite party no.1 on 19.05.1983. The suit was one for specific performance of contract relating to sale of land. The applicant-revisionist and the opposite party no.2 preferred a First Appeal to this Court being First Appeal No. 274 of 1983. The First Appeal aforesaid was partly allowed on 19.12.1997 and this Court directed the plaintiff-opposite party no.1 to deposit Rs.25,000/- within a period of four months. The plaintiff-opposite party no.1 was held entitled to adjustment of Rs.5,000/- while making the deposit, in case he had already made good that amount before the Execution Court.

4. Defendant no.2 to the suit i.e. the applicant-revisionist was ordered to join Dharampal, the defendant-proforma opposite party here, in execution of the sale deed in respect of whatever interest he acquired under the sale deed executed in his favour by Dharampal, subsequent to the suit agreement. It was further provided that in case the plaintiff fails to make good the deposit within the period of four months, it

will be deemed that he is not ready and willing to perform his part of the suit agreement and the suit shall stand dismissed.

5. The plaintiff-opposite party no.1 moved Civil Misc. Time Extension No. 15351 of 1998 before this Court in First Appeal No. 274 of 1983 and prayed for extension of time by two months to deposit the sum of Rs.25,000/-, as directed by this Court. It appears that on 09.10.2003, Civil Misc. Time Extension Application No. 15351 of 1998 was rejected. On 01.07.1998, when Civil Misc. Time Extension Application aforesaid was pending before this Court, the plaintiff-opposite party no.1 moved Execution Case No. 5 of 1998 without depositing the balance consideration of Rs.20,000/-, the sum of Rs.5,000/- having already been deposited.

6. It is the judgment debtor's case that the opposite party did not comply with the judgment dated 19.12.1997 passed by this Court in First Appeal No. 274 of 1983, in consequence whereof his suit stands dismissed, in terms of the judgment and decree passed. It is averred in Paragraph No.10 of the affidavit that all these proceedings taken in appeal before this Court and the Execution Court were not within the applicant-revisionist's knowledge for reason that at the relevant time, the revisionist was a minor aged about six years. However, in the next Paragraph, it is averred that the time extension application was pending before this Court and for the said reason, the applicant-revisionist had no occasion to imagine that the the plaintiff-opposite party no.1 would go to the Execution Court and levy execution. It is also averred that no notice of execution was served upon the applicant-revisionist. There is an averment further that concealing all facts about the pendency of the time extension application and disobeying the orders of this Court dated 19.12.1997, by not depositing the additional sum of money towards consideration, as directed by this Court, the plaintiff-opposite party succeeded in his fraud to secure the impugned order dated 12.01.2000. It is submitted that when the plaintiff-opposite party no.1 came to take possession in the year 2006, the revisionist-judgment debtor became aware for the first time about the order dated 12.01.2000 passed in Execution Case No. 5 of 1998.

7. It is further pleaded that the applicant-revisionist came to know about the order dated 12.01.2000 in the month of December, 2006 and thereupon approached Mr. U.S.M. Tripathi, Advocate, High Court, who assured the revisionist that the order dated 12.01.2000 being one obtained by playing fraud upon the Execution Court, is liable to be set aside. It is also asserted that Mr. U.S.M. Tripathi, Advocate was ill at that time, when the revisionist met him, and he assured the revisionist that once he regains health, he would take appropriate action to get the order dated 12.01.2000 set aside. It is then asserted in Paragraph No.16 that the revisionist lost his son, Prince and himself developed some eye ailment. There are some medical reports annexed in support of the aforesaid averments. It is the revisionist's further case that when no status about the proceedings taken by Mr. U.S.M. Tripathi, Advocate against the order under challenge were intimated to him, he inquired about the current status of the case. The revisionist was informed by the learned Counsel that he had not been able to attend Court in all this while and, therefore, nothing has happened so far. It is asserted further that Mr. U.S.M. Tripathi,

Advocate assured the revisionist that he would take necessary steps in the case at the earliest.

8. There is then a further averment that the applicant-revisionist has become blind in the left eye and met his Counsel, Mr. U.S.M. Tripathi, Advocate asking him to return his papers so that he could engage some other Counsel. It is asserted that on all these occasions that the applicant-revisionist contacted his Counsel, Mr. U.S.M. Tripathi, Advocate, the learned Counsel assured him that on regaining health, he would take the necessary steps. Unfortunately, in the year 2011, Mr. U.S.M. Tripathi, Advocate passed away after a long ailment. The aforesaid facts came to the revisionist's knowledge through a postcard sent by the office of Mr. Satyendra Mani Tripathi, Advocate, who had taken over Mr. U.S.M. Tripathi, Advocate's Chamber. He assured the applicant-revisionist that he would contest the case. The revisionist signed a fresh Vakalatnama, furnishing the necessary power to Mr. Satyendra Mani Tripathi, Advocate.

9. It is the applicant-revisionist's further case that in the month of January, 2013, Mr. Satyendra Mani Tripathi, Advocate filed Civil Misc. Application No. 38991 of 2013, under Article 215 of Constitution before this Court in First Appeal No. 274 of 1983, detailing all irregularities and fraud done by the plaintiff-opposite party no.1 before the Execution Court. The said application, however, was dismissed by this Court on 25.05.2015 with an observation that the applicant has a remedy under the Code of Civil Procedure. Thereupon, the applicant-revisionist was advised to prefer present a Civil Revision against the impugned order dated 12.01.2000 with the assurance that the cause would be pursued as per remedy available under the law.

10. It is stated that the learned Counsel for the applicant-revisionist, Mr. Satyendra Mani Tripathi, Advocate fell seriously ill and medical investigations revealed some serious health problems that prevented him from carrying out his daily routine of life. He underwent treatment at the Tata Memorial Hospital, Mumbai and unfortunately died in the month of September, 2015. The revisionist, hearing of the sad news, went to Mr. Satyendra Mani Tripathi's house in the second week of October, 2015, where his wife met the revisionist and asked him to come over after a week to collect his papers. Thereupon, on 26.12.2015, the applicant-revisionist collected the papers from the late Satyendra Mani Tripathi, Advocate's residence.

11. On 11.11.2015, the applicant-revisionist met Mr. Sanjeet Kumar Yadav, Advocate and left papers with him with a request that he may look into the case. On 16.11.2015, Mr. Sanjeet Kumar Yadav, Advocate advised the revisionist to file a civil revision against the impugned order dated 12.01.2000 before this Court. On 05.12.2015, the applicant-revisionist came over to him with the necessary expenses to institute the present civil revision against the order impugned dated 12.01.2000. Mr. Sanjeet Kumar Yadav, Advocate drafted the revision and upon completion of papers instituted the same on 09.12.2015.

12. It is on the basis of all these facts and events that the applicant-revisionist says that there is sufficient cause to condone the long delay of 15 years and 244 days in preferring the revisionist.

13. Heard Mr. Shrawan Kumar Pandey, learned Counsel for the applicant-revisionist in support of the delay condonation application and Mr. Kunal Ravi, learned Counsel for the respondents.

14. The delay is indeed very huge and the learned Counsel for plaintiff-opposite party no.2 submits that even without a counter affidavit, there is absolutely no cause to condone this mammoth delay of 15 years and much more in preferring the present civil revision.

15. The question about the principles on which a prayer for condonation of delay, particularly long ones, are to be considered and dealt with, were enumerated by the Supreme Court in **Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, (2013) 12 SCC 649**. In **Esha Bhattacharjee (supra)**, it was held:

21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm

of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

16. In **Majji Sannemma alias Sanyasirao v. Reddy Srivedi and others, 2021 SCC OnLine SC 1260**, the Supreme Court very recently reversed an order of the High Court, condoning a delay of 1011 days in filing a second appeal, subject to payment of Rs.2000/- in cost. In **Majji Sannemma alias Sanyasirao (supra)**, it was held:

"20. In the case of Basawaraj (supra), it is observed and held by this Court that the discretion to condone the delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression "sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is observed that each application for condonation of delay has to be decided within the framework laid down by this Court. It is further observed that if courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to legislature.

21. In the case of Pundlik Jalam Patil (supra), it is observed by this Court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Courts help those who are vigilant and "do not slumber over their rights".

22. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and considering the averments in the application for condonation of delay, we are of the opinion that as such no explanation much less a sufficient or a satisfactory explanation had been offered by respondent Nos. 1 and 2 herein - appellants before the High Court for condonation of huge delay of 1011 days in preferring the Second Appeal. The High Court is not at all justified in exercising its

discretion to condone such a huge delay. The High Court has not exercised the discretion judiciously. The reasoning given by the High Court while condoning huge delay of 1011 days is not germane. Therefore, the High Court has erred in condoning the huge delay of 1011 days in preferring the appeal by respondent Nos. 1 and 2 herein - original defendants. Impugned order passed by the High Court is unsustainable both, on law as well as on facts."

17. The sequence of events leading to the impugned order have to be seen in order to ascertain, whether the applicant-revisionist had knowledge of the proceedings and the order impugned order and whether he acted with due diligence, to entitle him to the condonation of delay spanning over a period of more than 15 years.

18. For one, First Appeal No. 274 of 1983 arose out of Original Suit No. 11 of 1982, decided by the District Judge of Fatehpur vide judgment and decree dated 19.05.1983. The applicant-revisionist/ judgment debtor, Sant Kumar was impleaded as a party to the suit as soon as the plaintiff-opposite party no.1, Nanku Singh learnt about execution of the sale deed in favour of Sant Kumar Singh by Dharampal, subsequent to the suit agreement in the plaintiff's favour..

19. The other relevant fact is that Sant Kumar Singh though a minor of six years when the suit was filed, impleading him through his guardian ad litem, Udaibhan Singh, but he came of age pending proceedings. The First Appeal was admitted to hearing on 19.05.1983, but decided on 19.07.1997. By that time, the revisionist, Sant Kumar Singh, who was a party to the First Appeal, must have turned a young man of 20 years. There is no reason why he would not know of the proceedings, after the appellate decree of this Court, including those of the Execution Case. Besides the aforesaid facts, it is beyond cavil that parties to the lis are relatives.

20. It has been recorded by this Court in the judgment rendered in First Appeal No. 274 of 1983 that the plaintiff, Nanaku Singh is admittedly the father-in-law of the defendant, Dharampal's daughter, Kamla. Sant Kumar Singh is the son of another daughter of Dharampal's, to wit, Natthi. In the conspectus of a close relationship between parties, it is difficult to infer lack of knowledge about proceedings taken before the Execution Court. The impugned order passed by the Execution Court is the result of an attempt by the judgment debtor to frustrate the decree, passed by this Court in First Appeal, on the ground that the enhanced sale consideration directed was not deposited within limitation.

21. For whatever reason assigned, the District Judge held that the sum of Rs.20,000/- required to be deposited under the decree of this Court was deposited within time, in terms of this Court's decree. The merits of this order are not of relevance so far as the present application under Section 5 of the Limitation Act is concerned. It must be remarked that there is nothing so startling or shockingly perverse about the order that may impel this Court, by a certain principle of remote resort, to cast aside the bar of a very long delay. There is indeed no mischief to be undone that may require the delay of 15 years in moving the present revision to be condoned. The explanation given by the applicant-revisionist, though involving the

death of his Counsel, both father and son, instructed to appear in the case, yet those events too do not explain the long time period of 15 years and more in moving this Court against the order impugned.

22. In the considered opinion of this Court, there is no sufficient cause made out to condone the delay on the basis of which this Court may exercise its discretion in favour of the applicant-revisionist.

23. The application is, accordingly, dismissed.

Order on CIVIL REVISION DEFECTIVE No. - 253 of 2015

24. The delay condonation application filed in aid of the present belated revision having been rejected by my order of date, the memo of revision is rejected as barred by time.

(2022) 10 ILRA 357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

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

Transfer Application (Civil) No. 425 of 2021

Jabiullah & Anr. ...Applicants
Versus
Sakir ...Respondent

Counsel for the Appplicants:
Sri Hanuman Deen

Counsel for the Respondent:
Sri Sheetala Prasad Pandey

Civil Law – Civil Procedure Code, 1908 - Section 24: - Transfer Application – to transfer the original Suit from district Basti to new district Sant Kabir Nagar – on the ground that the property in question & both the parties of suit are belongs to district Sant kabir Nagar - question of maintainability - suit was instituted in year 1994 at a time when the new district Sant Kabir Nagar had not been exist later on, in year 2008 said new district has been carved out - court find that, the venue of litigation, subject to territorial and other jurisdiction, ought to be convenient to parties - thus, transfer application is succeeds and is allowed - However, since suit is pending since last 27 years - therefore, the Trial Court shall proceed with the suit and shall conclude the trial within four months - direction accordingly.(Para – 6, 7, 9)

Transfer Application Allowed. (E-11)

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

1. This is an application, seeking transfer of Original Suit No.1099 of 1994, Sakir Vs. Ilake and others, from the Court of the Additional Civil Judge (Jr. Div.) Vth, Basti be transferred to the Court of competent jurisdiction at Sant Kabir Nagar.

2. Heard Mr. Hanuman Deen, learned Counsel for the applicants and Mr. Sheetala Prasad Pandey, learned Counsel appearing on behalf of the opposite party.

3. The opposite party has not filed a counter affidavit. As such, the averments in the affidavit remain unrebutted. However, the learned Counsel for the opposite party vehemently opposes the prayer for transfer on ground that will shortly be indicated.

4. According to the applicants, both parties are residents of Sant Kabir Nagar and the property is also located there. The suit was instituted prior to carvation of new District Sant Kabir Nagar in the year 1997. The Court was established later on. The submission is that now the said case ought

to be transferred to the new judgeship of Sant Kabir Nagar.

5. The learned Counsel for the opposite party submits that the ground on which transfer sought is not tenable, because the trial of the suit at Basti is at a fairly advanced stage, where witnesses have been examined.

6. Upon consideration of the entire facts and circumstances, it is evident that the suit was instituted at a time when the new district of Sant Kabir Nagar had not been carved out of the existing District Basti. It is also not in dispute that the new district of Sant Kabir Nagar has been carved out in the year 2008. It is also common ground between parties that the suit property is located in the district of Sant Kabir Nagar now; not Basti. Quite apart, there is an averment in Paragraph No. 7 of the affidavit filed in support of the transfer application that both parties reside at District Sant Kabir Nagar and face much trouble in reaching the Court at Basti. The distance of District Court, Sant Kabir Nagar from the residence of both parties is about 10 kilometers. Moreover, the Courts at District Sant Kabir Nagar are now well established and promptly delivering judgments. It is also the applicants' case that the suit, that was instituted in the year 1994, is pending at Basti for the last 27 years.

7. This Court is of opinion that looking to the entire circumstances, the Court at Sant Kabir Nagar appears to be the Court within the local limits of which the immovable property, subject matter of the suit, is situate. More than that, both parties live in the district of Sant Kabir Nagar at a place that is close by to the new District Court, that has been established there. The venue of litigation, subject to territorial and other jurisdiction, ought to be that which is convenient to parties. The contention of the opposite party that the trial of the suit is at a fairly advanced stage at Basti, would be relevant as a plea against transfer, if and only if the opposite party were able to demonstrate that the Judge at Basti, before whom the witnesses have been examined, is the same learned Judge, who has heard these witnesses. This is neither the pleaded case of the opposite party, who has not filed a counter affidavit in any case nor any material on record pointed out that the ongoing trial at Basti is before a Judge, who has heard all witnesses and can deliver judgment. If some other Judge, different from the one who has heard witnesses at Basti, is to deliver judgment, it is of no consequence, whether the suit is heard at Basti or Sant Kabir Nagar. A Trial Judge gains his peculiar position by the fact that he is the same Judge, who has heard witnesses. If that be not so, the Trial Judge hardly fills the description of one. Since there is nothing to show that the Judge at Basti, who is hearing the matter is indeed the Judge, who has heard all witnesses or a substantial number of them, the Court at Sant Kabir Nagar, that is located closer to the residence of parties and is also the Court of territorial jurisdiction, ought to try the suit.

8. In the circumstances, this transfer application **succeeds** and is **allowed.**

9. Original Suit No.1099 of 1994, Sakir Vs. Ilake and others, is withdrawn from the file of the Additional Civil Judge (Jr. Div.) Vth, Basti and transferred to the District Judge at Sant Kabir Nagar, who shall assign the suit to the Court of competent jurisdiction for trial in accordance with law. In the circumstances

that the suit is pending for the past 27 years, it is ordered that the Trial Court shall proceed with the suit, fixing two dates of effective hearing every week and shall conclude the trial within **four months** next after hearing parties and their witnesses, who have already not been examined. The District Judge, Basti shall cause the records of the case to be transmitted forthwith to the District Judge, Sant Kabir Nagar. .

10. Let a copy of this order be communicated to the Additional Civil Judge (Jr. Div.) Vth, Basti through the learned District Judge, Basti, the District Judge, Basti and the District Judge, Sant Kabir Nagar by the Registrar (Compliance).

(2022) 10 ILRA 359
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Appeal No. 1005 of 2013

Deepak & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Shailendra Kumar Verma, Sri Sheshadri Trivedi, Sri Satish Trivedi(Sr. Adv.)

Counsel for the Opp. Party:
Govt. Advocate

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34, 299, 300(4), 302, 304, 326, 354, 452, 504 & 506, - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989 - Section 3(2)(V), - Indian Evidence Act, 1872 - Sections 32 & 60: - Criminal Appeal – Conviction & Sentence - Life imprisonment – evaluation of evidences - offence of murder - FIR - informant alleged that his niece was killed by both of the accused by pouring kerosene oil on her and set her ablaze - dying declaration is the sole basis of conviction - distinction between 'murder' and 'culpable homicide' - admittedly death of deceased was a homicidal death since she died after 17 days of burning incident - in post mortem-report cause of death was septicaemia shock due to ante mortem flame burning - hence, instant case is falls within ambit of section 304 IPC not under section 302 IPC - quantum of sentence - impugned conviction & sentences u/s 302/34 IPC is liable to be converted into u/s 304(part-1) IPC - since, sentence to undergone more than 10 years of incarceration with remission court maintain the fine and default sentences for section 452 and 354 of IPC - appeal partly allowed.

(Para - 45, 46, 47, 53, 54, 55, 56)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34, 299, 300(4), 302, 304, 326, 354, 452, 504 & 506 - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989 - Section 3(2)(V), - Indian Evidence Act, 1872 - Sections 32 & 60: - Criminal Appeal – Conviction & Sentence - Life imprisonment – evaluation of evidences - offence of murder - dying declaration - principle for accepting dying declaration - if dying declaration is true, reliable and has been recorded in accordance with established practice and principles, its correctness & authenticity cannot be challenged and further, hostility of witnesses of fact cannot demolish the value & reliability of dying declaration of the deceased.

(Para – 29, 30, 31)

(C) Criminal Law – Criminal Procedure Code, 1973 - Section – 161 & 313 - Indian Penal Code, 1860 - Sections 34, 299, 300(4), 302, 304, 326, 354, 452, 504 & 506 - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989 - Section- 3(2)(V), - Indian Evidence Act, 1872 - Sections 32 & 60: - Criminal Appeal – Conviction & Sentence - Life imprisonment -

accused punished offence committed u/s 3(2)(v) SC/ST Act, as well as offence convicted u/s 302/34 IPC - no independence witness or evidence on record shows that accused committed offence on the ground that deceased belongs to a community covered under SC/ST Act - trial court misconstrued the provisions of SC/ST Act - hence, conviction and sentence u/s 3(2)(v) is set aside. (Para – 43, 44)

Appeal Partly allowed. (E-11)

List of Cases cited:

1. Maniben Vs St. of Guj., 2009 Lawsuit SC 1380 : (2009) 8 SCC 796

2. Koli Lakhmanbhai Chandabhai Vs St. of Guj., 1999 (8) SCC 624

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

4. St. of U.P. Vs Ramesh Prasad Misra & anr., 1996 AIR (SC) 2766

5. Lakhan Vs St. of M. P., (2010) 8 SCC 514

6. Krishan Vs St. of Har., (2013) 3 SCC 280

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

8. Ram Das Vs St. of U.P., AIR 2007 SC 155

9. Dharmendra Vs St. of U.P., 2011 Cri LJ 204 (All)

10. St. of Guj. v. Munna, 2016 Cri LJ 4097 (Guj)

11. Vishnu Vs St. of U.P., Criminal Appeal No. 204 of 2021, decided on 28.1.2021

12. St. of U. P. Vs Mohd. Iqram & anr., (2011) 8 SCC 80

13. Bengai Mandal @ Begai Mandal Vs St. of Bihar, (2010) 2 SCC 91

14. Chirra Shivraj Vs St. of Andhra Pradesh, (2010) 14 SCC 444

15. Gautam Manubhai Makwana Vs St. of Guj., Criminal Appeal No.83 of 2008, decided on 11.9.2013

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. The instant Criminal Appeal has been directed against the judgment and order dated 2.3.2013 passed by the Special Judge (SC/ST Act) / Additional Sessions Judge, Ghaziabad in Sessions Trial No. 402 of 2008 (Case Crime No. 230 of 2007), P.S. Babugarh, District Ghaziabad convicting and sentencing the appellants under Section 302 I.P.C. read with Section 34 I.P.C. for life imprisonment and a fine of Rs. 10,000/- each with stipulation of default clause, under Section 354 IPC for one year rigorous imprisonment, under Section 452 IPC for two years rigorous imprisonment and under Section 3 (2)(v) The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (in short "the SC/ST Act') for life imprisonment each and a fine of Rs. 5,000/- with stipulation of default clause.

2. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Sukhpal son of Ram Chandra, resident of village Garhi Hoshiyarpur, Police Station Babugarh, Ghaziabad, at Police Station Babugarh, District Ghaziabad with the averments that on 16.7.2007 at 11.30 a.m. when her niece Km. Laxmi, daughter of Kripal (Julaha), was present in the house, Pintu and Deepak sons of Satpal @ Sattu entered in the house and asked her as to why outstanding rent of Rs. 100/- for the video C.D. was not paid by her. Pintu inquired that many days ago he had given a letter to her and why she had not given answer? To this, niece of the informant objected and started scolding

them. This angered the accused. Deepak brought the canister containing kerosene oil, opened the lid and poured upon the niece of informant at once and Pintu set her ablaze. On her shrieks, informant and other persons reached there and they both ran away. She was severely burnt and sent to Hapur for treatment.

3. On 19.7.2007, dying declaration of the victim (Ext. ka-9) was recorded by the Tehsildar. He also took her signature over the same. Victim was conscious at the time of statement.

4. On the basis of the written report (Ext. ka-1), chik First Information Report (Ext. Ka-5) was registered at Police Station concerned on 16.7.2007 at 12.35 p.m. against the accused appellants as case crime no. 230 of 2007. G.D. entry was also registered at the same time.

5. The F.I.R. was investigated by the Sub-Inspector of the concerned Police Station and subsequently it was investigated by the Station House Officer of the concerned Police Station. During course of investigation, the Investigating Officer recorded the statement of witnesses and victim, prepared site plan, inquest report was prepared and post mortem was performed. The investigation was over and after completing all formalities, charge sheet was submitted against the accused appellants. The learned Magistrate summoned the accused and committed the case to Court of Sessions, as prima facie charges were for the sessions triable offences.

6. The Court of Sessions framed the charges as accused were summoned in commission of the offence under Sections 452, 354, 302/34, 504, 506 IPC and Section 3(2)(v) SC/ST Act. The accused pleaded not guilty and wanted to be tried. Trial started and in support of its case, prosecution examined 14 witnesses, who are as follows:

1	Kripal	PW-1 (father of the deceased)
2	Sukhpal	PW-2 (informant) (uncle of deceased)
3	Mithlesh	PW-3
4	Savitri	PW-4 (aunt of deceased)
5	Kamlesh	PW-5
6	Raju @ Raj Kumar	PW-6
7	Ummed Singh	PW-7
8	Rumal Singh	PW-8
9	Indrajeet	PW-9 (witness of recovery)
10	Praveen Kumar Tyagi	PW-10 (Investigating Officer-II)
11	H.C.P. Rampal Singh	PW-11 (scribe of the F.I.R.)
12	S.I. Bijendra Singh	PW-12 (Investigating Officer-I)
13	Harish Chandra Pandey	PW-13 (Technical Assistant posted in G.T.B. Hospital, Delhi, who proved the writing and signature of Dr R.P. Singh, who performed the

		post mortem of the deceased.
14	Suryabhan Giri	PW-14 (Tehsildar, who recorded the dying declaration of the deceased)

7. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Memo of recovery of vacant canister	Ext. A-2
3	Letter of deceased	Ext. A-3
4	Memo of recovery of cloths of deceased	Ext. A-4
5	Chik F.I.R.	Ext. A-5
6	G.D.	Ext. A-6
7	Post Mortem Report	Ext. A-7
8	Charge sheet	Ext. A-8
9	Dying declaration of the deceased	Ext. A-9

8. Deceased was hospitalised after the occurrence. She died after 17 days of the occurrence during the course of treatment.

9. After conclusion of evidence, statements of accused were recorded under Section 313 of Cr.P.C., in which they pleaded their innocence and false implication. In support of its case defence has examined DW-1 Kajal, DW-2 Pramod Kumar and DW-3 Ashok Kumar.

10. Heard Shri Satish Trivedi, learned Senior Advocate assisted by Shri Sheshadri Trivedi, learned counsel for the appellants and Shri Patanjali Mishra, learned AGA for the State.

11. Learned Senior Advocate appearing for the appellants submitted that accused persons have been falsely implicated in this case. They have not committed the present offence. It is further submitted by learned counsel that all the witnesses of fact have turned hostile and have not supported the prosecution version and on the basis of analysis of their evidence, no guilt against the accused appellants is established and proved. Learned Senior Counsel for the appellants next submitted that in this case there are two dying declarations i.e. one recorded by the Investigating Officer in the form of statement under Section 161 CrPC and the other by the Tehsildar. When two sets of dying declarations are available and same are contrary to each other, the subsequent dying declaration implicating the appellants could not have been believed and accepted and on the basis of the said dying declaration the appellants could not have been held guilty for a serious offence of murder. It is further submitted that the dying-declarations of the deceased were recorded when she was surviving, but the same have no corroboration with any prosecution evidence. All the witnesses of fact have turned hostile and nobody supported the prosecution version. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying-declaration only when it was not corroborated at all. Offence under Section 3(2) (v) SC/ST Act is not made out,

as F.I.R. nowhere states that the deceased was belonging to a particular community. No documentary evidence to prove that the deceased was belonging to Scheduled Caste or Scheduled Tribe, has been produced either before Investigating Officer or Sessions Court.

12. Learned Senior Counsel for the appellants additionally submitted that if, for the sake of argument, it is assumed that appellants have committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 17 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicaemia. As per catena of judgments of Hon'ble Apex Court and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicaemia. Learned Senior Counsel for the appellants also submitted that autopsy report also shows that cause of death was septicaemic shock due to ante mortem flame burning. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat [2009 Lawsuit SC 1380]***, and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court and several other judgments.

13. No other point or argument was raised by the learned Senior Counsel for the appellants and he confined his arguments on above points only.

14. Learned AGA, per contra, vehemently opposed the arguments placed by counsel for the appellants and submitted that conviction of accused can be based only on the basis of dying-declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied upon to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. Offence under Section 3(2)(v) SC/ST Act is clearly made out against the appellants. There is no merit in the appeal and the same may be dismissed.

15. First of all learned counsel for the appellants has raised the issue relating to the hostility of the witnesses. Witnesses of the fact were examined before learned trial court. All the witnesses have turned hostile but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

16. While examining the testimonies of witnesses of fact PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9, it appears that they have denied the fact as to who was the main assailant and who set ablaze the victim and on this point they have been declared hostile by the prosecution and cross-examination has been conducted by the prosecution but it is very significant to note that from the entire deposition of the aforesaid witnesses it is quite clear that they admitted some significant points which are helpful to the prosecution case. They have admitted the burning of the victim, her hospitalization, date, time and place of the occurrence,

hence except the name of the offenders, they have admitted all the facts relating to the occurrence.

17. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** [1999 (8) SCC 624], as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base the conviction upon testimony of such witness if corroborated by other reliable evidence.

18. In ***Ramesh Harijan vs. State of U.P***. [2012 (5) SCC 777], the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

19. In ***State of U.P. vs. Ramesh Prasad Misra and another*** [1996 AIR (Supreme Court) 2766], the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defence.

20. Perusal of impugned judgment shows that learned trial court has scrutinised the evidence on record very carefully.

21. As far as the dying-declaration is concerned, it was recorded by Shri Surya Bhan Giri, Tehsildar, who was examined as PW-14. Dying-declaration was recorded by him after obtaining the certificate of mental-fitness from doctor in the hospital.

22. Learned Senior Counsel for the appellants has argued that in this matter two dying declarations have been recorded and same are doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable.

23. PW-12, the Investigating Officer, who is said to be recorded the statement under Section 161 CrPC of the deceased when she was injured but utter surprise to the Court not a single word has been stated by him in examination-in-chief regarding recording of statement of injured / deceased under Section 161 CrPC (then alive). It is for the first time in his cross-examination, PW-12 has stated whatsoever was stated by the deceased in her statement under Section 161 CrPC (then alive). No doubt statement recorded by the Investigating Officer during course of the investigation of the victim or injured may be treated as dying declaration if subsequently he / she dies so far as it relates to the cause of death but law of evidence requires that such statement

must be proved in the Court in due course of law. The said statement should find place in verbatim in the statement of the Investigating Officer and the relevant portion of the statement should be exhibited before the Court during deposition of the Investigating Officer as prosecution witness. But in the matter in hand the aforesaid procedure has not been followed and that is why whatsoever was stated allegedly by the deceased (then alive) cannot be termed the statement of the victim as dying declaration in strict legal sense. That is why we are bound to opine that in the present case the statement under Section 161 CrPC of the victim recorded by the Investigating Officer cannot be termed as "dying declaration' and as such there is only one dying declaration on record which was recorded by the PW-14.

24. Hon'ble Apex Court has summarized the law relating to dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

25. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration thereof is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

26. Deceased survived for 17 days after the incident took place. Her dying declaration was recorded by PW-14, Tehsildar after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by him as Ext. ka-9. This witness is absolutely an independent witness and has no grudge or enmity to the convicts at all. PW-14 in his deposition has stated that the victim / injured in her statement had narrated that:

"वह दिनांक 16.07.2007 को सुबह 7.30 बजे स्कूल जाने के लिए अपने भाई बहिनों को तैयार कर रही थी। क्योंकि मेरी मां घर पर नहीं थी। वह हमारे पिताजी के पास दिल्ली गयी थी। हमारे पिताजी दिल्ली में मेहनत मजदूरी करते थे। इसलिये उस दिन घर पर नही थी। उसने आगे बताया कि मै अपने भाई बहिनों को तैयार कर स्कूल छोड़कर घर वापस आ गयी, घर वापस आने पर मैं अपने घर पर काम कर रही थी। तभी दीपक व पिन्टू मेरे घर में घूसे और मां के बारे में पूछा तो उसने आगे बताया कि मैंने उन्हें माँ के घर में न होने की बात कही तभी

दोनों पिन्टू व दीपक ने मेरे साथ मेरी इज्जत लूटने के लिए बेइज्जती करने लगे। मैं बहुत छटपटाई और आंह?-2 मैं चिल्लाती रही। मेरे चिल्लाना देखकर उन दोनों ने (पिन्टू व दीपक) ने पास में पड़ी मिट्टी के (कागज फटा) की ढिबरी जिसमें मिट्टी का तेल पड़ा हुआ था (कागज फटा) उपर मिट्टी का तेल उढेलकर आग लगा दी। आग लगते ही जलन को मैं छटपटाने लगी तथा वहां से उठकर मेरे पड़ोस में अपने ताई के घर भाग कर गई, जहां ताई के परिवार वालों ने मेरी आग बुझाई।'

27. In the wake of aforesaid judgment of **Lakhan (supra)**, dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in **Krishan vs. State of Haryana** [(2013) 3 Supreme Court Cases 280] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

28. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** [(2002) 7 SCC 56], the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

29. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

30. In dying declaration of deceased, it is also important to note that it was recorded on 19.7.2007 and the deceased died on 2.8.2007 while the incident took place on 16.7.2007. It means that she remained alive for 14 days after making dying declaration. Therefore, truthfulness

of dying declaration can further be evaluated from the fact that she survived for 14 days after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellants. She only attributed the role of burning to the accused appellants, who were actual culprit.

31. In such a situation, the hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and also of the circumstances leading to her death.

32. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration Ext. ka-9 can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration and convicting the accused-appellants on the basis thereof.

33. Although no specific defence has been taken in their statement under Section 313 CrPC by the convicts / appellants but they have adduced oral evidence and have relied upon the statement of DW-1, DW-2 and DW-3, who stated that the deceased herself set her ablaze at the time of occurrence and there was no fault of the accused persons.

34. DW-1 is the sister of the deceased. In her examination-in-chief she has stated that on the fateful day she was present at her house when the accused persons came over there and demanded Rs. 100/- for C.D. and a quarrel took place; her sister herself poured kerosene over her and set her ablaze herself but in the cross-examination she has admitted that on the day of occurrence, she had gone to her school and does not remember whether the deceased herself set her ablaze or any one else set her ablaze.

35. DW-2 in his examination-in-chief has also stated that there was some letter of the deceased which was in the possession of Bala. Feeling ashamed of this Laxmi herself had set her ablaze by pouring kerosene over her. He was present at the time of occurrence and the accused persons did not set her ablaze. He has also stated that occurrence took place at 11.00-11.30 a.m.. However, in his cross-examination he has admitted that he usually goes to his field in the morning at 7.00 a.m.. He has not clarified this fact in his deposition that as to why he was present on the spot at about 11.00 - 11.30 a.m. when at 7.00 a.m. only he used to go to his field.

36. Hence, DW-1 and DW-2 both are not reliable witnesses and same is the position of the deposition of DW-3 who has admitted that he has reached the spot after the deceased was set ablaze. Hence, he is not the eye witness of the occurrence.

37. Learned trial court has discussed the evidence of DW-1, DW-2 and DW-3

and has opined that the defence gets no help from the depositions of the aforesaid witnesses and we concur with the same.

38. So far as the submission that offence under Section 3(2)(v) SC/ST Act is not made out against the appellants is concerned, in this matter the F.I.R., in the case at hand, was lodged by the brother of the deceased. Whether it can be said that the incident was committed on the ground that the deceased belonged to a particular community falling in the term 'Scheduled Castes' or 'Scheduled Tribes' so as to attract the provision of Section 3 (2) (v) of SC/ST Act, the F.I.R. is silent about this aspect. Documentary evidence showing as to what caste to the deceased belonged, has not been brought on record. For attracting the provisions of Section 3(2) (v) of SC/ST Act, there should be corroboration by way of documentary evidence to prove that the injured / deceased, to whom the act is committed, belongs to 'Scheduled Castes' or 'Scheduled Tribes'. Just because a person belongs to and says so, will it be a piece of evidence? It is nobody's case that the appellants committed this crime on the ground that the deceased belonged to a particular community. Even if we believe that there is no documentary evidence and that the deceased belongs to the community which is alleged then also can it be said that the offence has been committed as she belongs to a particular community? This is moot question which arises before us.

39. In **Ram Das vs. State of U.P., AIR 2007 SC 155** wherein there was rape on woman belonging to Scheduled Caste, it was held that these could be no ground to convict the accused under Section 3 (2) (v) when there was no evidence to support the charge under Section 3 (2) (v) of SC/ST Act. Mere fact that victim happened to be a girl belonging to Scheduled Caste did not attract provisions of SC/ST Act.

40. In **Dharmendra vs. State of U.P., 2011 Cri LJ 204 (All),** the Court has held that there was no evidence on record to show that incident was caused by the accused on the ground that victim belonged to Scheduled Caste. Fact of victim, belonging to Scheduled Caste by itself was not sufficient ground to bring case within the purview of Section 3 (2) (v) of Act. Conviction under Section 3 (2) (v) was improper.

41. In **State of Gujarat v. Munna, 2016 Cri LJ 4097 (Guj),** the Court held as under:

"In the instant case, so far as the charge against the accused for the offence punishable under Section 3 (2) (v) of the Atrocity Act, 1989 was concerned, from the deposition of the witnesses it had not come out that the accused committed the offence against the deceased on the ground that deceased was a member of Scheduled Caste or Scheduled Tribe. In absence of such evidence it could not be said that the original accused had committed the offence punishable under Section 3 (2) (v) of the Atrocity Act, 1989. Under the circumstances on the basis of the evidence of record the accused could not be held guilty for the aforesaid offence."

42. Decision of the Division Bench of this Court in case of Criminal Appeal No. 204 of 2021 (**Vishnu vs. State of U.P.**) decided on 28.1.2021 penned by one of us (Dr. K.J. Thaker, J.) held as under :

"38. Section 3(2)(v) of Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, the FIR

and the evidence though suggests that any one or any act was done by the accused on the basis that the prosecutrix was a member of Scheduled Castes and Scheduled Tribes then the accused can be convicted for commission of offence under the said provision. The learned Trial Judge has materially erred as he has not discuss what is the evidence that the act was committed because of the caste of the prosecutrix. The sister-in-law of the prosecutrix had filed such cases, her husband and father-in-law had also filed complaints. We are unable to accept the submission of learned AGA that the accused knowing fully well that the prosecutrix belongd to lower strata of life and therefore had caused her such mental agony which would attract the provision of Section 3(2)(v) of the Atrocities Act. The reasoning of the learned Judge are against the record and are perverse as the learned Judge without any evidence on record on his own has felt that the heinous crime was committed because the accused had captured the will of the prosecutrix and because the police officer had investigated the matter as a attrocities case which would not be undertaken within the purview of Section 3(2)(v) of Atrocities Act and has recorded conviction under Section 3(2)(v) of Act which cannot be sustained. We are supported in our view by the judgment of Gujarat High Court in Criminal Appeal No.74 of 2006 in the case of ***Pudav Bhai Anjana Patel Versus State of Gujarat*** *decided on 8.9.2015 by Justice M.R. Shah and Justice Kaushal Jayendra Thaker (as he then was).*

39. Learned Judge comes to the conclusion that as the prosecutrix belonged to community falling in the scheduled caste and the appellant falling in upper caste the provision of SC/ST Act are attracted in the present case.

40. While perusing the entire evidence beginning from FIR to the statements of PWs-1, 2 and 3 we do not find that commission of offence was there because of the fact that the prosecutrix belonged to a certain community.

41. The learned Judge further has not put any question in the statement recorded under Section 313 of the accused relating to rape or statement which is against him.

42. In view of the facts and evidence on record, we are convinced that the accused has been wrongly convicted, hence, the judgment and order impugned is reversed and the accused is acquitted. The accused appellant, if not warranted in any other case, be set free forthwith."

43. Initially the case was registered under Sections 452, 326 IPC. Section 3(2)(v) SC/ST Act was added during investigation but on what basis it was added has no where been clarified by PW-12 and PW-10 in their testimonies, who are said to be the I and II Investigating Officers of the case, respectively. It is pertinent to mention here that neither in the F.I.R. nor in the depositions of the witnesses of fact it has been mentioned any where that the deceased belonged to SC/ST community and the offence was committed due to her caste.

44. In the case at hand, no independent witness has been examined who would have deposed that the accused committed the offence on the ground that deceased belonged to a community covered under SC/ST Act. This omission proves fatal to the prosecution in such a vital matter where punishment is for life imprisonment. There is no deeming provision under SC/ST Act. In view of the above, we cannot concur with the learned Sessions Judge as the evidence which has

been laid before the learned judge has been misread by learned Sessions Judge in this context and he has misconstrued the provisions of Section 3 (2) (v) of SC/ST Act. Hence, conviction and sentence under Section 3 (2) (v) SC/ST Act of the accused-appellants is, set aside.

45. Now we come to the point of argument raised by learned Senior Counsel for the appellants that deceased died due to septicaemia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 17 days of incident due to the poisonous infection developed in her burn injuries, which could be avoided by good treatment. There was no intention of the appellants to cause the death of the deceased.

46. It is admitted fact that the deceased died after 17 days of burning and post mortem report goes to show that she died due to septicaemic shock by reason of ante mortem flame burning. Though doctor, who has performed the autopsy of the deceased, could not be examined yet the Technical Assistant posted in G.T.B. Hospital, Delhi, has proved the writing and signature of Dr R.P. Singh before the Court and he has been examined as PW-13. It has been specifically mentioned in the post mortem report that the cause of death was septicaemic shock due to ante mortem flame burning. Hence, the death of the deceased was septicaemial death.

47. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC.

48. In **State of Uttar Pradesh vs. Mohd. Iqram and another**, [(2011) 8 SCC 80], the Apex Court has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

49. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicaemia caused by burn injuries. The accused was convicted and sentenced for life imprisonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a

result of septicaemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

50. In ***Maniben vs. State of Gujarat*** [(2009) 8 SCC 796], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

51. In ***Chirra Shivraj vs. State of Andhra Pradesh*** [(2010) 14 SCC 444], incident took place on 6. Deceased was hospitalised after the occurrence by the accused persons themselves. She died after 4 days of the occurrence during the course of treatment.

52. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (***Gautam Manubhai Makwana Vs. State of Gujarat***) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under

section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

53. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence, the opinion of the Medical Officer, the dying declaration and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC. It is pertinent to note here that the offence under Sections 452 and 354 IPC are also proved beyond reasonable doubt on the basis of dying declaration.

54. From the upshot of the aforesaid discussions it appears that the death caused by the accused persons was not pre-meditated. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

55. In view of the aforesaid discussions, we are of the view that appeal

is liable to be partly allowed and the conviction of the appellants under Section 302 / 34 IPC is liable to be converted into conviction under Section 304 (Part-I) IPC and fine amount is liable to be maintained. The convicts / appellants are in jail for the last more than 12 years. As such they have completed their sentence alongwith the default sentence for Sections 452 and 354 IPC.

56. Accordingly, appeal is partly allowed and the appellants are convicted for the offence under Section 304 (Part-I) IPC and are sentenced to undergo ten years of incarceration with remission. We maintain the fine and default sentence which will be deposited by the appellants within twelve weeks from the date of release.

57. Record and proceedings be sent back to the Court below forthwith.

58. This Court is thankful to learned Advocates and Mr. Mohd. Furkan Khan, Law Clerk (Trainee) of this Court for ably assisting the Court.

(2022) 10 ILRA 373
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Crl. Appeal No. 1818 of 2020

Ram Babu Vishwakarma ...Appellant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Appellants:
Sri Babu Lal Ram, Sri D.M. Tripathi, Sri Dinesh Kumar Tripathi, Sri Durvesh Kumar, Sri Trayambak Nath Mishra

Counsel for the Opp. Party:
G.A., Sri Mahabir Yadav, Sri Ram Awtar

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 164 - Indian Penal Code, 1860 - Sections 376, 504 & 506 - Juvenile Justice (Care and Protection of Child) Act, 2015 - Sections 12, 12(1), 15 & 18(3) - Protection of Children From Sexual Offences Act,2012 - Section - 5, 6, 101, - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989 - Sections 3(2)(5) - Criminal Appeal – against rejection of Bail Application under POCSO Act, - offence of rape & threat - FIR - informant alleged that, his neighbour (accused - appellant) being found her alone forcibly committed rape U.P.on her - court finds that both victim & accused are minor - although remedy for bail is already available to a Juvenile for release on bail under section 12 of the Juvenile Justice Act - However, for achieving the object of both of the Acts i.e. Juvenile Justice Act & Pocso Act, it would be discretion of the court, while averaging the bail application of a juvenile in the age groU.P. of 16-18, to take into account his mental, physical capacity, ability to understand and the gravity of the offence inducing his participation in crime and the circumstances under which he allegedly committed the particular grave and serious offence - since, victim and her family are threatened to meet dire consequences and also that if they disclosed anybody they will not be able to show their face to the society - accordingly bail application rejected - However, court below is directed to conclude the trial expeditiously within a period of two months. (Para - 10, 11, 12)

Appeal Dismissed. (E-11)

List of Cases cited:

Radhika (Juvenile) Vs St. of U.P. Criminal Appeal No. 4418 of 2019, dated 5.8.2019.

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Sri Tryambak Nath Mishra, learned counsel for appellant, Sri L.D. Rajbhar, learned A.G.A. for the State, Sri Mahabir Yadav, learned counsel for opposite party no.2 and perused the record.

2. The instant criminal appeal has been preferred on behalf of appellant-juvenile under Section 101 of POCSO Act against the impugned order dated 19.5.2020 passed by learned Additional District & Sessions Judge/Special Judge (POCSO Act), Allahabad by which the 2nd Bail Application No.1299 of 2020 moved on behalf of father of appellant for releasing him on bail and giving under the custody of his father was rejected.

3. The brief facts necessary for disposal of this appeal is that informant/opposite party no.2 Deep Chand lodged a first information report alleging therein that on 9.8.2019 at about 12:00 "o'clock, his daughter victim X aged about 11 years was alone at the house and rest family members went to the field to plant paddy. His daughter went to take water from the hand pump installed at the Haata of his neighbor Ram Babu Vishwakarma son of Chhote Lal, who called his daughter at his house on the pretext of giving her water, when she went there, he forcibly dragged her into his room and committed rape upon her. She kept on protesting and shouting, while the appellant pacified victim X by pressing her mouth and told her Chamarin quietly go to home otherwise he will kill her and her family members. When the said incident was complained to Bhabhi and mother of appellant, they also abused complainant and said that if she complained about it anywhere, then his family members will not be able to show their faces in the society.

4. The informant supported the prosecution version in his statement recorded under Section 161 Cr.P.C. The wife of informant Smt. Amrawati also supported the incident in her statement recorded under Section 161 Cr.P.C. and also stated that she noticed the blood coming from the private parts of victim X and took her to the doctor, where doctor told her that some bad thing happened with her and advised her mother to ask from the victim X regarding bad deed happened with her. On asking, the victim X narrated the entire incident to her mother and family members, thereafter, she and her husband complained the incident to the Bhabhi and mother of appellant, they banished them after abusing and stated that whatever they liked they can do. The statement of victim X under section 161 Cr.P.C. was recorded during investigation in which she has supported the entire incident. She was medically examined on 15.8.2019 at 03:30 p.m. to 03:40 p.m. At the time of medical examination, the victim X told her age about 11 years. She narrated the entire incident to the doctor that on 9.8.2019 in the noon, she had gone to take water for cows and buffaloes from hand pump situated at the Haata of her neighbor Chhote Lal, where the appellant was present, she asked him to handle the hand pump, thereupon, he told that he will do it after finishing his food. Thereafter, the victim X was returning after taking water then the appellant requested her to give him water for drinking, upon which she gave him water and thereupon the appellant dragged her into the room and tied her legs and hands with lace of saari and forcibly

committed rape upon her. After some time when the Bhabhi and mother of the appellant arrived there, the victim X narrated the entire incident to them, but they threatened her not to disclose the incident to anyone. Next day she also visited to Bhabhi of appellant on noticing that bleeding was continued, she stated to them regarding bleeding, thereupon they abused her and threatened to kill her and advised her to tell her family members that see sustained injury from hand pump. On returning to her house, she narrated to her mother regarding bleeding then her mother took her to the doctor and get her treatment, but she did not get any relief. Upon which, her mother took her to the house of her parents and get her treatment by another doctor, where she came to know that some bad deed happened with her. On inquiry, the victim X narrated the entire incident to her mother and family members. She was treated there for two days, thereafter, the first information report was lodged. The victim X stated that her legs and hands were tied by the appellant with lace of saari. She has also stated to the doctor that threat to kill was extended. She has also stated that sexual intercourse was committed by the appellant. She has also told that the incident was taken place prior to seven days of her medical examination. Abrasion mark on outer surface of labia majora was found. Hymen was found torn, bleeding was present. On ossification test, the age of the victim X was found about 11 years and up to 16 years. The statement of victim X under Section 164 Cr.P.C. was recorded, wherein she has given details of the incident. The appellant was adjudged juvenile by Juvenile Justice Board, Prayagraj and his age was ascertained above 16 years and date was fixed for proceeding under Section 15 of Juvenile Justice Act.

5. It is submitted by learned counsel for the appellant that the date of birth of appellant is recorded as 13.4.2003 in High School Marksheet. It is further submitted that District Probation Officer, Prayagraj found nothing adverse against juvenile in the social report. It is further submitted that at the time of incident the appellant was 16 years 3 months and 28 days. It is further submitted that the Juvenile Justice Board, Prayagraj has adjudged the appellant juvenile vide order dated 13.12.2019 and found his age about 16 years. It is further submitted that in medical examination report of victim, the doctor has reserved his opinion regarding sexual intercourse after receipt of the report of Forensic Science Laboratory. It is further submitted that no spermatozoa was found in pathology report. It is further submitted that medical report of victim X not supported the version of the prosecution. It is further submitted that the appellant is in observation home since 16.8.2019. It is further submitted that the Investigating Officer after investigation has submitted charge-sheet against appellant on 10.10.2019 under Sections 376, 504, 506 I.P.C., 5/6 of POCSO Act and 3(2)(5) of SC/ST Act. It is also submitted that the appellant is a student and due to detention in observation home his entire educational career is being badly affected. It is further submitted that the appellant has no criminal history except the present case. It is further submitted that the opposite party no.2 is father of victim X, who has falsely implicated the appellant in the present case and the appellant is not neighbor of the informant. It is further submitted that according to medical report of victim X no injury has been found on her body. It is further clarified that the first bail application was filed before the court of Special Judge (SC/ST Act), which was

dismissed as not pressed and thereafter the second bail application was moved before the court having jurisdiction of Special Judge (POCSO Act), which was rejected on merit by impugned order dated 19.5.2020. It is further submitted that there is contradiction in the statements of victim X under Sections 161 & 164 Cr.P.C. It is further submitted that from perusal of the first information report and evidence available on record, no case under Sections 376, 504, 506 I.P.C., 5/6 of POCSO Act and 3(2)(5) SC/ST Act is made out. It is further submitted that the juvenile cannot be kept in observation home beyond 3 years.

6. Sri L.D. Rajbhar, learned A.G.A. for the State and Sri Mahabir Yadav, learned counsel for opposite party no.2 have opposed the appeal against rejection of bail application by the court below and submitted that the age of the victim X at the time of occurrence was found about 11 years and up to 16 years. It is further submitted that at the time of medical examination, the victim X in her statements recorded under Sections 161 & 164 Cr.P.C., she has stated her age as 11 years and further stated that she was studying in Class-VIth. It is further submitted that while the appellant was taking food and asked her to give him water, she gave him water on trusting upon him, but he misused her trust and forcibly dragged her into the room and tied her both legs and hands with lace of saari and committed rape upon her forcibly and even on her protest he pressed her mouth and threatened her that if she disclosed the incident to anyone, he will kill her and her family members. It is also submitted that when she complained about incident to the Bhabhi and mother of appellant, they also threatened her not to disclose the incident to anyone. It is further submitted that next day she also visited to the Bhabhi of appellant on noticing of bleeding coming from her private parts and complained them, but they again abused and threatened to kill her and advised her to tell her family members that see sustained injury from hand pump. It is further submitted that under the circumstances, the alleged rape committed by appellant shows that if he is released on bail, it would defeat the ends of justice. It is further submitted that juvenile appellant has committed rape in well-planned manner by tying the hands and legs of the victim X with lace of saari. It is further submitted that in above circumstances the appeal is liable to be dismissed.

7. I have given thoughtful consideration to the contentions raised by learned counsel of the parties and perused the record. In this case the Juvenile Justice Board, Prayagraj has obtained the report from Dr. Pawan Kumar Paswan, MD regarding preliminary assessment into heinous offence by the court under Section 15 of Juvenile Justice (Care and Protection of Children), Act 2015, wherein it is reported that mental and physical ability to understand the consequences of offence by the juvenile is as such that he is able to understand the consequences of this Act. Thereupon, the Juvenile Justice Board has held that his mental and physical capacity is such that he knows the nature of offence and consequences of the Act and circumstances in which he has committed rape and was directed to be produced before the competent court. The Government by notification has invested the power of Children Court to the Special Judge (POCSO Act). The Probation Officer submitted the social inquiry report of the juvenile, copy of which is annexed as Annexure No.7. It is also mentioned in the social report of the juvenile that there was no reason to commit the offence. For the purpose

of deciding this appeal it is necessary to notice the increasing cases of crime committed by children in age group of 16-18 years in recent years and make the evidence that the current provision and system under Juvenile Justice (Care and Protection of Children) Act, 2015 for trial of such juvenile in serious illness offences after the assessment of the mental and physical condition to be tried by children court. Since the appellant is languishing in jail for offence punishable under Section 376, 504, 506 I.P.C., 5/6 of POCSO Act and 3(2)(5) of SC/ST Act, falls within the category of serious and heinous offences. Although remedy is available to juvenile for release on bail under Section 12 of the Act, which provides that the bail should be awarded to the person who are juvenile as a matter of right as the word "shall" has been used in the provision itself, giving a mandatory indication. On the other hand, the delinquent juvenile are allegedly involved in serious offence committed by them who have crossed the age of 16 and after the assessment by the Board with regard to their mental and physical capacity to commit such offence and ability to understand the consequences and the circumstances in which he has allegedly committed the offence has to be tried by Children Court as adult.

8. The relevant portion of Section 18 (3) of Juvenile Justice Act is reproduced herein below:-

"(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

9. As per provision of Section 12 of Juvenile Justice Act, 2015, mandate to release the juvenile on bail except three conditions according to proviso attached to sub-section 1, which follows as under:-

"Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision."

10. In paragraph 4 of the statement of objects and reasons of Juvenile Justice Act (Care and Protection of Children) Act, 2015 it is stated that for the increasing cases of crime committed by children in the age group of 16-18 years in recent years makes it evident that the current provisions and system under the Juvenile Justice (Care and Protection of Children) Act, 2000, are ill equipped to tackle child offenders in this age group. The data collected by the National Crime Records Bureau establishes that crimes by children in the age group of 16-18 years have increased especially in certain categories of heinous offences.

11. The combined reading of Juvenile Justice Act and POCSO Act would be discretion of the Court which shall addition to those proviso provided under Section 12 of Juvenile Justice Act and also to take into account with regard to his mental, physical capacity, ability to understand and the gravity of that offence including his participation in crime and the circumstances under which he allegedly committed the particular grave and serious offence. All these factors are determinative factors while averaging the bail application of juvenile offender in the age group of 16-18, as it would be mockery of legislation

and the object of the legislation would reduce naught. The above legal position is laid down by Single Judge of this High Court in "**Radhika (Juvenile) Vs. State of U.P.**" decided on 5.8.2019 in ***Criminal Appeal No.4418 of 2019***. Although the juvenile in conflict with law is detained in observation home since 16.8.2019, but keeping in view the facts and circumstances of the case and for achieving the object of Juvenile Justice (Care and Protection of Children), Act and the evidence available on the record, I find that if the appellant juvenile is released on bail it would defeat the ends of justice and the object of Act. In this case when the victim X complained to the mother and Bhabhi of appellant, they threatened her to meet dire consequences and also stated that if she disclosed anybody she and her family members will not be able to show their faces to the society. In above circumstances, I do not find it proper to release the juvenile on bail and give in custody of his father due to reasons mentioned above. Accordingly, the instant appeal is dismissed.

12. However, the concerned court below is directed to conclude the trial expeditiously, preferably, within a period of two months from the date of receipt of the certified copy of this order.

13. Let the lower court record be returned back to the concerned court below forthwith.

(2022) 10 ILRA 378
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.10.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

THE HON'BLE SHIV SHANKER PRASAD, J.

Crl. Appeal No. 2424 of 2006

Shyam Babu & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Lallu Singh, Sri Mahesh Kumar Mishra

Counsel for the Opp. Party:
Govt. Advocate

(A) Criminal Law - Criminal Procedure Code, - Sections 313 & 437-A, - Indian Penal Code,1860 - Sections 304-B, 304-B(2) & 498-A, - The Dowry Prohibition Act, 1961 - Sections 2, 3 & 4 : - Criminal Appeal – Conviction & Sentence - Life imprisonment - Evaluation of Evidences - offence of demand of dowry and death - FIR registered by the informant with allegation that his deceased daughter was married with accused husband who has killed his daughter by hanging as he had failed to meet the dowry demand - death caused within four months of marriage - demand of dowry found to be based on evidence available on record - deceased was tortured and strangulated to death - necessary ingredient to attract offence under section 304-B IPC are clearly exist - demand of dowry and consequential implication of accused appellant no. 1 in offences under section 304-B, 498-A IPC & ¾ DP Act is sustained. (Para - 11, 17)

(B) Criminal Law - Criminal Procedure Code, 1973 – Sections 313 & 437-A, - Indian Penal Code, 1860 - Sections 304-B, 304-B(2) & 498-A, - The Dowry Prohibition Act, 1961 - Sections 2, 3 & 4 - Criminal Appeal – Conviction & Sentence - Life imprisonment - Evaluation of Evidences - offence of demand of dowry and death - accused appellant no. 2 & 3 (i.e. *Jeth* & *Jethani)* are having their separate living - accused appellant no. 1 are living with deceased in a new house which was towards the corner of old Abadi where the dead body of the deceased was found - inconsistency in the testimony of the PWs with regards to separate living of Jeth Jethani which corroborated by the specific

defence take by them u/s 313 Cr.P.C. - no specific date, time or manner of demand of dowry are alleged against the appellant no. 2 & 3 - held, trial court has not considered the evidence in correct perspectives - finding in that regards is reversed - thus, at the instance of accused appellant Nos. 2 & 3 the impugned order of conviction & sentence is set aside. **(**Para - 19, 20, 21)

(C) Criminal Law - Criminal Procedure Code, 1973 - Sections – 313 & 437-A, - Indian Penal Code, 1860 - Sections 304-B, 304-B(2) & 498-A, - The Dowry Prohibition Act, 1961 - Sections 2, 3 & 4 : - Criminal Appeal – Conviction & Sentence - Life imprisonment - quantum of punishment - appropriate punishment to be awarded under section 304-B of IPC would be depend U.P.on the facts and circumstances of each case - the death of deceased has occurred on account of strangulation and injury marks, within four months of her marriage - therefore, court find that, this is not a case in which minimum punishment prescribed u/s 304-B IPC ought to be awarded to the appellant no. 1 - since, accused appellant no. 1 has already suffered actual incarceration of more than 23 years which already undergone would adequately meet the end of justice and therefore, sentence of life Imprisonment be modified and be substituted by the sentence already undergone by him - appeal at the instance of accused appellant no. 1 is accordingly allowed in part - all the appellants shall be set at liberty subject to compliance of section 437-A of Cr.P.C. **(Para -** 23, 24)

Appeal Allowed accordingly. (E-11)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This Criminal Appeal arises out of judgment and order of conviction and sentence dated 27.04.2006, passed by the Additional Session Judge, Fast Track Court No.2, Fatehpur in Session Trial No. 72 of 2004 arising out of Case Crime No.161 of 2003, whereby accused appellant no.1 Shyam Babu, appellant no.2 Suresh @ Dhandhu and appellant no.3 Lalli @ Kalawati have been convicted and sentenced to life imprisonment under Section 304B IPC and have also been convicted and sentenced to three years imprisonment under Section 498A IPC with a fine of Rs.1,000/- and in default of fine they have to undergo one year additional imprisonment. They have also been convicted and sentenced to one year imprisonment under section 3/4 of Dowry Prohibition Act with a fine of Rs.2,000/- and in default of fine they have to undergo one year additional imprisonment. All the sentences are directed to run concurrently.

2. Prosecution case, in brief, is that deceased Rupa Devi got married to the accused appellant no.1 on 20.04.2003. On 28.08.2003 the first informant (PW-1), who happens to be the father of the deceased, received an information that the deceased has been killed by the accused appellants by hanging as he had failed to meet the dowry demand. The incident is of 28.08.2003 and a written report scribed by one Ashok Kumar was given on 29.08.2003 on the basis of which a First Information Report was registered as Case Crime No.161 of 2003 under Sections 498A, 304B IPC and 3/4 of Dowry Prohibition Act, Police Station Thariyaon, District Fatehpur.

3. After registering FIR the Investigating Officer came on spot and an inquest was conducted in the presence of inquest witnesses as also in the presence of Naib Tahsildar. The dead body of deceased was found in the house of accused appellant no.1. In the opinion of inquest witnesses the death of deceased was caused on account of hanging as also on account of injuries and, therefore, postmortem was required to be conducted to ascertain the

cause of death. The dead body was accordingly sealed and sent to mortuary where the postmortem was conducted by Dr. Sanjay Gupta (PW-3). In the postmortem report following injuries have been found on the deceased and cause of death has been ascertained as asphyxia as a result of ante-mortem strangulation:-

"(i) Ligature mark all around neck 30cm x 2cm, 7cm below, 5cm each on both side below ear. Groove base is pale margins ecchymosed hard lathery and parchment like. Nylon string with knot present all around the neck cut away from knot preserved sealed and sent to SP Fatehpur.

On internal examination - Muscles of neck ruptured large muscle contused hyoid bone fractured present.

(ii) Contusion on right side of scalp at temporal region size 6cm x 4cm underlying muscles contused, underlying facture parietal bone present.

(iii) Abrasion on left side of abdomen in hypochondrium 9cm above umbilicus size 6cm x 3cm.

(iv) Abrasion on back of left side of chest 5cm left to midline at T 10 level size 3x2cm.

(v) Abrasion 5cm below knee joint size 3x2cm."

4. Upon conclusion of statutory investigation under Chapter XII of the Criminal Procedure Code charge sheet (Ex.Ka.9) came to be submitted against the accused appellants by the Investigating Officer on 29.10.2003. Having taken cognizance of the charge sheet the Magistrate committed the case to the court of session where proceedings were registered as Session Trial No.72 of 2004. On 25.11.2004 the court concerned framed charges against the accused appellants under Sections 498A, 304B IPC and 3/4 of Dowry Prohibition Act. The accused appellants denied the charges levelled against them and demanded trial.

5. In order to bring home the charge the prosecution has adduced oral testimony of PW-1 and PW-2, who are the parents of deceased and are the two witnesses of fact. Oral testimony has also been adduced of Dr. Sanjay Gupta as PW-3 who conducted the postmortem. PW-4 Suresh Kumar was the Naib Tahsildar, who has verified the inquest whereas PW-5 Lal Bahadur Singh is the Investigating Officer. PW-6 Arvind Kumar Yadav is the Circle Officer, who has proved the charge sheet. The prosecution has also adduced documentary evidence including written report as Ex.Ka.1, postmortem report as Ex.Ka.2, inquest report as Ex.Ka.3, charge sheet as Ex.Ka.9 and site plan with index as Ex.Ka.8.

6. The witness of fact namely PW-1 has stated that the marriage of deceased with the accused appellant no.1 was solemnized on 20.04.2003 in which dowry was settled as Rs.7000, 10gm gold, one buffalo and a cycle but he could only give Rs.7000 cash, utensils of Rs.4500 and clothes of Rs.3000 and due to his poor financial condition he could not give 10gm gold, one buffalo and cycle. It was deposed that due to not providing of such dowry articles the deceased was harassed by all the accused appellants and she was physically assaulted from time to time. Every time when the deceased used to visit her parents she was asked to get the remaining dowry. It was also stated that information with regard to unnatural death of deceased was given to PW-1 and PW-2 by one Ashok Kumar and when they came to the house of accused appellant no.1 they

found the dead body on the floor and tied from two sides with a green colour rope. It was further stated that when PW-1 came on spot the accused appellants were not there and written report was given next day after it was scribed by Ashok Kumar.

In the cross-examination PW-1 has admitted that the dead body was found in the new house of accused appellant no.1, although it was alleged that all the accused appellants were living together in the same house. PW-1 has also admitted that prior to this incident he had not made any complaint with regard to demand of dowry or harassment meted out to deceased and that he only tried to counsel the family members not to harass his daughter.

7. PW-2 has also made similar disclosure in her statement. She has also denied the suggestion given to her during cross-examination that house of accused appellant no.1 is separate and distinct from the house occupied by accused appellant nos.2 and 3. PW-2, however, has admitted that last rites of deceased were performed by the accused appellants.

8. PW-3 Dr. Sanjay Gupta, who conducted the postmortem, has clearly stated that the deceased died due to injuries noticed above.

9. PW-5, who is the Investigating Officer, in his cross-examination has noted availability of two houses with the accused appellants' family one of which has been addressed as the house of accused appellant no.1 which is towards end of Abadi and the other referred to the house of appellant nos.2 and 3 within the Abadi. The statement of PW-5, in that regard, is extracted hereinafter:-

"मुलजिम श्यामबाबू का मकान गांव के आवादी के किनारे है उसके मकान के पूर्व मिले हुए खेत है घटना के समय धान की फसल खडी थी।

अभियुक्त झल्ली व श्रीमती लल्ली का माकान जो आबादी के अन्दर है उसे भी देखा है। श्याम बाबू के मकान के दक्षिण की खेत है जिनमें घटना के समय धान की फसल खडी थी।"

10. The incriminating material surfaced during the course of trial against the accused appellants was confronted to them under section 313 Cr.P.C. and the accused appellants have stated that the deceased and accused appellant no.1 were residing in the new house constructed towards the end of Abadi while accused appellant nos.2 and 3 were residing in the old house existing in midst of Abadi. The allegation with regard to demand of dowry or strangulating the deceased have been specifically denied. The postmortem report has been questioned by the accused appellants and it has been stated that the report itself is manipulated.

11. On the basis of evidence brought before the court below in the form of oral testimony and documentary evidence the trial court has come to the conclusion that the deceased was subjected to demand of dowry and her death has occurred within seven years from the date of marriage. It has also been held that the deceased was strangulated and, therefore, her death has occurred in unnatural circumstances and necessary ingredients to attract offence under section 304B IPC are clearly made out. The court below has also returned a finding that the deceased was subjected to demand of dowry and consequently appellants have also been convicted under section 498A IPC and 3/4 D.P. Act.

12. Learned counsel for the accused appellants submits that the appellants were

arrested and sent to jail on 31.08.2003. The accused appellant no.1 has remained in jail ever since then and has been enlarged on bail by this Court vide order dated 08.09.2022 and, therefore, the actual period of incarceration of accused appellant no.1 is 19 years and with remission period of 4 year 3 months 7 days the incarceration would be more than 23 years. So far as the accused appellant nos.2 and 3 are concerned they have been enlarged on bail by this Court vide order dated 13.09.2006.

13. Learned counsel for the accused appellants further contends that the deceased had actually committed suicide and the finding returned by the court below that it was a case of strangulation is unsustainable. It is also argued that the accused appellant no.1 was living separately with the deceased in the new house while accused appellant nos.2 and 3 were residing in old house situated within the Abadi area and as the accused appellant nos.2 and 3 had a separate living they cannot be implicated and convicted for the offence under section 304B IPC. It is also contended that allegations of demand of dowry are vague and general in nature and there is no specific incident asserted by the prosecution in respect of such demand nor any complaint was ever made to the police with respect to alleged demand of dowry. Learned counsel further urges that the manner in which the body has been found with bangles in her hands as per inquest report clearly shows that she has not been tortured prior to her death and even the last rites were performed by the accused appellants. It is also submitted that punishment accorded to appellant no.1 is highly excessive.

14. Sri Arun Kumar Singh, learned A.G.A. for the State submits that the injuries found on the body of deceased together with the fact that the death occurred due to strangulation would clearly show that the offence was committed by more than one person. It is also submitted that the accused appellants have not adduced any defence evidence to show that the accused appellant nos.2 and 3 had a separate living and the positive evidence of PW-1 and PW-2 that accused appellant nos.2 and 3 were living together with deceased in the same house remains unrebutted.

15. We have heard learned counsel for the parties and perused the materials brought on record.

16. The facts as have been noticed above clearly reveal that the marriage of deceased with accused appellant no.1 was solemnized on 20.04.2003 and the incident leading to unnatural death occurred on 28.08.2003 which is nearly four months after the marriage. So far as the allegation with regard to demand of dowry is concerned PW-1 and PW-2 have clearly stated that at the time of marriage it was agreed that in addition to the dowry items given the informant had to give 10gm gold, one buffalo and cycle, which could not be given and the deceased was being consistently harassed for getting such dowry items. The statement of PW-1 and PW-2 in that regard is specific. Although it is admitted to PW-1 and PW-2 that no formal complaint in respect of demand of dowry was lodged by them, yet, their statement that they were attempting to persuade the family members not to harass the deceased by making them personal requests seems credible. It is otherwise natural that parents of bride would make all efforts to ensure peaceful living of their daughter and only if their efforts fail that a

formal complaint would ordinarily be lodged. The gap in the period of marriage and death is only about four months and, therefore, non lodgement of any formal complaint would not mean that there existed no demand of dowry. Except to deny such accusations under section 313 Cr.P.C. the appellants have not produced any evidence to rebut the allegations made by PW-1 and PW-2 with regard to demand of dowry. The finding of the court below that the deceased was subjected to demand of dowry immediately prior to her death is, therefore, found to be based on evidence available on record and we find no infirmity in it.

17. So far as the cause of death of deceased is concerned the postmortem report has been proved by the concerned doctor (PW-3) and from its perusal it is apparent that the deceased was strangulated to death. Hyoid bone of deceased was found fractured. The body of the deceased otherwise had injury marks which clearly supports the prosecution version that the deceased was tortured and she was strangulated to death. The finding by the court below that the deceased died due to unnatural circumstances is thus clearly borne out from the records. We, therefore, find that necessary ingredients to attract offence under section 304B IPC are clearly shown to exist in the facts of the case. The finding of court below with regard to demand of dowry and consequential implication of accused appellant no.1 in offences under section 304B, 498A IPC and 3/4 D. P. Act is, therefore, sustained.

18. So far as the argument advanced on behalf of the accused appellant nos.2 and 3 on the premise that they had a separate living and, therefore, they cannot be convicted for the above offences is now taken up for consideration.

19. The evidence on record about separate or joint living of appellant nos.1 and 2 with the deceased is primarily in the nature of oral statement of witnesses which needs to be examined. PW-2 in her examination-in-chief has stated that father of appellant no.1 had died prior to the marriage of the deceased and that the deceased after marriage was living with her husband together with Jeth and Jethani (appellant nos.2 and 3) in the house of appellant no.2. In her cross-examination she has, however, admitted that dead body of the deceased was found in the house of accused appellant no.1. The statement of PW-2 clearly shows existence of two houses i.e. one belonging to accused appellant no.2 (Jeth) while the other was the house of husband (appellant no.1). PW-5, who is the Investigating Officer, has visited and seen the place of occurrence and in his cross-examination has clearly stated that the house of appellant no.1 is towards corner of Abadi and abuts the paddy field whereas the house of accused appellant nos.2 and 3 is within the Abadi area. The statement of PW-5 therefore clearly corroborates the statement of PW-2 insofar as existence of two houses belonging to accused appellants in the same village is concerned. PW-1 and PW-2 have, however, denied the suggestion that accused appellant nos.2 and 3 were living separately in their house situated within the old Abadi while accused appellant no.1 was living in his new house constructed towards the end of Abadi, but we do not find their statement to be reliable since on this aspect their statement are contradictory and the statement of PW-5, who is an independent person, appears to be more reliable. Inference of two separate houses belonging to Jeth and husband of deceased are clearly discernible from their statements. Existence of two houses, which are specifically

described as house of accused appellant no.1 Shyam Babu and house of accused appellant no.2 Suresh @ Dhandhu together with statement of PW-2 that the deceased alongwith her husband was residing in the house of accused appellant no.2, makes it clear that the appellants family had two houses in the same village. Inconsistency in the statement of PW-2 that all the appellants were living in the house of Jeth whereas body of deceased was found in the house of appellant no.1 coupled with the statement of PW-5 clearly proves that accused appellant no.1 had a separate living with the deceased while appellant nos.2 and 3 were separately residing in the old house within the abadi. The evidence in that regard is corroborated by the specific defence taken by the accused appellants in their statement under section 313 Cr.P.C. that the accused appellant nos.2 and 3 were living separately in old house situated in Abadi.

20. We may, at this stage, notice an additional fact regarding marriage itself was solemnized between the accused appellant no.1 with the deceased. PW-1 has admitted that prior to marriage of deceased the father of appellant no.1 had died and the trial court has also noticed that their marriage was settled on the intervention of mother and Nana of appellant no.1 Shyam Babu. The prosecution witnesses of fact have not included the name of Jeth and Jethani (appellant nos.2 and 3) as the persons instrumental in solemnizing the marriage. This also lends support to the evidence otherwise available on record that Jeth and Jethani (appellant nos.2 and 3) were living separately. Trial court although has noticed this aspect of the matter but has rejected the plea of separate living on the ground that no evidence was led by the appellants to substantiate the plea of separate living. After noticing the existence of two houses belonging to appellants in same village the trial court has observed that either ancestral house within the Abadi has fallen or may have been sold. This remark is based completely on surmises. We are, therefore, not inclined to accept the reasoning assigned by the trial court in coming to the conclusion that despite the existence of two houses in the same village the two families were living in the house of accused appellant no.1. Moreover, as the existence of two houses was clearly admitted and the PW-5 had also indicated that old house within the Abadi was of accused appellant no.2 while the new house belonged to accused appellant no.1 there was no other requirement of adducing any voter list etc. to substantiate the plea of separate living on part of the accused appellant nos.2 and 3.

21. In view of the above deliberations made on the factual aspects we are persuaded to the view that accused appellant nos.2 and 3 had a separate living in their old house within the Abadi. The statement of PW-2 that all the members were living in the house of Jeth (appellant no.2) otherwise cannot be accepted in view of the admitted position that the dead body of the deceased was found in the house of accused appellant no.1. We are, therefore, of the view that the trial court has not considered the evidence in correct perspective and its refusal to accept the plea of separate living of accused appellant nos.2 and 3 cannot be sustained. The finding in that regard is thus reversed. We accept the contention advanced on behalf of the accused appellant nos.2 and 3 that they had a separate living and, therefore, that they cannot be implicated for the offences under section 304B IPC. We further find that the allegations with regard

to demand of dowry by accused appellant no.2 and 3 are clearly vague as no specific date, time or manner of demand of dowry by them has been disclosed by any of the prosecution witnesses, as such we hold that the conviction of accused appellant nos.2 and 3 under sections 498A IPC and ¾ D.P. Act also cannot be sustained.

22. This takes us to the last facet of this appeal i.e. the argument with regard to quantum of punishment awarded to the accused appellant no.1 in the matter. Section 304B defines "dowry death' in following manner:-

"304B. Dowry death. - (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation. For the purposes 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."

23. Upon evaluation of evidence on record we have already returned a finding that the unnatural death of the deceased was on account of demand of dowry and the conviction of appellant no.1 under section 304B has been affirmed. Sub-section (2) of section 304B IPC then provides for punishment of dowry death. The imprisonment for offence under section 304B IPC cannot be less than seven year but it may extend to imprisonment for life. What exactly be the appropriate punishment to be awarded under section 304B IPC would depend upon the facts and circumstances of each case. The death of the deceased in the present case has occurred on account of strangulation and injury marks have otherwise been found on the body of the deceased. The death has otherwise occurred nearly four months of the marriage itself. We are, therefore, of the view that this is not a case in which minimum punishment prescribed under section 304B IPC ought to be awarded to the accused appellant no.1. A harsher punishment would certainly be warranted in the facts of this case. However, we find that accused appellant no.1 has already suffered actual incarceration of more than 19 years and together with remission the total period would extend to more than 23 years. Considering the facts and circumstances of the case and upon overall evaluation of evidence on record we are of the view that the sentence of more than 23 years already undergone by appellant no.1 would adequately meet the end of justice and, therefore, we accept the argument advanced on behalf of appellants that the sentence of life imprisonment awarded to accused appellant no.1 be modified and be substituted by the sentence already undergone by him. Subject to the above modification on the quantum of sentence the conviction of accused appellant no.1 is sustained.

24. The appeal at the instance of accused appellant no.1 is, accordingly, allowed in part and the sentence awarded to him of life imprisonment under section 304B IPC is substituted with sentence

already undergone by him. Judgment and order of the court below dated 27.04.2006 is accordingly modified. Since the accused appellant no.1 is on bail, his sureties and bonds shall stand discharged and he shall be set at liberty, unless is wanted in any other case subject to compliance of section 437A Cr.P.C.

So far as the appeal at the instance of accused appellant nos.2 and 3 is concerned it succeeds and is allowed. Judgment and order dated 27.04.2006, to the extent of appellant nos.2 and 3, is set aside. Since the accused appellant nos.1 and 2 are on bail, their sureties and bonds shall stand discharged and they shall be set at liberty, unless they are wanted in any other case subject to compliance of section 437A Cr.P.C.

(2022) 10 ILRA 386
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Crl. Appeal No. 3379 of 2002

Suresh ...Appellant

Versus

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

Counsel for the Appellants:
Sri S.K. Mishra, Sri Mohd. Raghib Ali, Sri Mohd. Raghib Ali, A.C., Sri Saghir Ahmad, A.C.

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

Criminal Law – Criminal Procedure Code, 1973 - Section - 313, 374 & 437(a) - Indian Penal Code, 1860 - Sections 34 & 302: - Criminal Appeal – Conviction & Sentence - Life imprisonment - offence of murder - FIR - allegations that, accused (appellant) threaten to the informant and thereafter he attacked U.P.on him armed with a knife along with his two brother whom were armed with a bottle of acid and with iron rods, in said attacked wife of informant was injured in knife & acid attack due to which she died while in treatment - Evaluation of Evidence - court finds that, the genesis of crime disclosed by the prosecution is not entirely reliable - as all the eye-witnesses are close relatives - neither knife nor bottle of acid or the sole 'two rU.P.ee note' which was the bone of contention are recovered - no any mark of acid was found on the ground - trial court was not entirely convinced with the prosecution case and granted benefit of doubt to the two co-accused brothers of accused on the basis of same set of evidences - since all the accused were charged u/s 34 therefore, their acquittal on the basis of same set of evidence is also a ground available for the accused appellant to claim benefit of doubt - held - prosecution fails in proving the guilt of accused appellant beyond reasonable doubt - impugned order of conviction & sentence is set aside - appellant shall be set at liberty subject to compliance of section 437-A of Cr.P.C. - Appeal allowed. (Para – 35, 36, 39, 40, 41)

Appeal Allowed. (E-11)

List of Cases cited:

1. Kumar Vs St. Represented by Inspector of Police (2018 (6) JT 85),

2. Ramanand @ Nandlal Bharti Vs St. of U P (Criminal Appeal Nos. 64-65 of 2022, decided on 13.10.2022

3. Raghunath Vs St. of Har., (2003) 1 SCC 398,

4. Khema & ors. Vs St. of U.P. & ors., AIR 2022 SC 3765

5. Vadivelu Thevar Vs St. of Madras, 1957 SCR 981

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. Accused appellant Suresh has been convicted under Section 302 IPC and sentenced to rigorous life imprisonment

alongwith fine of Rs. 1000/- and on failure to pay the fine to undergo six months additional imprisonment; while his two brothers Hansu and Rakesh who were charged under Section 302/34 IPC have been acquitted vide a composite judgment and order of the Additional Sessions Judge (Fast Track Court No. 4), Firozabad, dated 21.6.2002 and 22.6.2002. Thus aggrieved the accused appellant Suresh is before this Court in the present appeal filed under Section 374 of the Code of Criminal Procedure. No appeal is preferred by the State against the acquittal of the two co-accused Hansu and Rakesh, who are the real brothers of accused appellant Suresh.

2. A written report was given by the first informant Harish Kumar Fanda (PW-1) stating that the accused appellant at about 10.30 in the morning came to his shop to purchase Tobacco for Rs. 2.00. The informant refused to accept the tender as the Two Rupee Note offered was torn. The accused appellant went back after threatening that he would see the informant and his family. At about 11.30 accused appellant armed with a knife, his two brothers Hansu armed with a bottle of Acid and Rakesh armed with two iron rods (saria) rushed towards him. The informant out of fear closed the door of the shop. The accused then rushed to enter the adjoining house of the informant, which was objected by the wife of informant Karuna Fanda, when the accused appellant inflicted knife blow below her chest. Accused Hansu is stated to have thrown acid bottle towards Karuna Fanda which ricocheted and the acid got sprinkled on Hansu and Suresh. The informant rushed his wife to the hospital where she died. The incident is said to have been seen by Ram Lal Fanda (PW-2), Sumitra Devi (mother of informant) and Banwari. Sumitra Devi has not been adduced in evidence while Banwari has died. On the basis of such written report scribed by PW-2 the first information report in Case Crime No. 509 of 1995, under Section 302 IPC, Police Station Shikohabad, District - Firozabad, was registered at 12.45 pm on 7.11.1995 in respect of the incident occurring at 11.30 am on the same day.

3. The Investigating Officer recovered two iron rods (saria), edge of one of which was pointed while the other was flat near the place of occurrence vide Exhibit Ka-2. Bloodstained earth from the spot was also recovered vide Exhibit Ka-3. Panchayatnama was conducted at the hospital, where the dead body was kept, and the cause of homicidal death appeared to be the wound six fingers below the chest of the deceased. Panch witnesses were of the view that the deceased has died on account of stab wound. The dead body was accordingly sealed and sent to mortuary where the postmortem was conducted by Dr. R.K. Garg (PW-4). In the postmortem, the cause of death has been determined as shock and bleeding on account of following ante-mortem injury:-

"1. Incised wound 4.0 cm x 1.0 cm x chest cavity deep on (Lt) side front of chest 9.5 cm below and lateral to left nipple at 5 "O' clock position."

4. The investigation proceeded and ultimately a charge sheet (Ex. Ka. 11) was submitted by the police against the accused appellant and his two brothers Rakesh and Hansu. The Magistrate took cognizance and committed the case to the court of sessions where the charges were framed against them. Vide order dated 23.10.1998, the accused appellant was charged of offence under Section 302 IPC, while his two

brothers namely Hansu and Rakesh were charged under Section 302/34 IPC by a separate order. The charges were read out to the accused who denied them and demanded trial.

5. The prosecution in order to establish the charges against accused appellants produced oral testimonies of following witnesses:-

"1. Harish Kumar Fanda PW-1
2. Ram Lal Fanda PW-2
3. Yogesh Kumar PW-3
4. Dr. R.K. Garg PW-4
5. Shiv Charan Pal PW-5
6. Siyaram Sharma CW-1
7. Dr. Lakhan Singh CW-2"

6. Documentary evidences have also been adduced by the prosecution consisting of FIR as Ex.Ka. 12; written report as Ex.Ka.1; recovery memo of Iron "Saria' as Ex.Ka. 2; recovery memo of blood from stairs as Ex. Ka.3; Postmortem Report as Ex.Ka. 10; Panchayatnama as Ex. Ka. 4 and Charge Sheet as Ex. Ka. 11.

7. PW-1 is the first informant who has supported the prosecution case by stating that the accused appellant Suresh is a resident of Punjabi Colony Shikohabad who came to his shop and offered a two rupee torn note for purchasing Kapoori Tobacco and as the note was torn, the informant refused to accept it, on which Suresh threatened the informant that he would see him and his family. After about an hour, on the same day, Suresh armed with a knife alongwith Hansu and Rakesh who had acid bottle and iron rods in their hands rushed towards the shop of the informant. On seeing this PW-1 put the shutters down. The accused then rushed towards the house of the informant hurling abuses. Informant's wife was standing near the gate/shutter and she objected to their entry on which the accused appellant Suresh stabbed her. Acid bottle was also allegedly thrown by Hansu but the acid got sprinkled on Suresh and Hansu. PW-1 has proved the written report (Ex.Ka-1) and has also supported the recoveries of plain earth; bloodstained earth and two iron rods by signing on the memo of recovery.

8. In the cross-examination PW-1 has admitted that accused Suresh, Hansu and Rakesh are the sons of his real uncle, which indicates that the accused and the informant are first cousin. He has also admitted that the lane passing between the house of accused and his house is rather narrow. At the time of incident accused appellant Suresh was not working while Hansu was working in a hotel running a tandoor. He has stated that one of the two iron rods recovered had a sharp edge while the other was flat and these rods were used for preparing chapatis in tandoor. He has stated that these iron rods have not been used for commissioning of offence and there was no scuffle of accused with any of the witnesses. He has shown ignorance about the arrest of Hansu or his medical examination. He has also admitted that no injuries from acid have been caused to first informant or the deceased or any of the witnesses. He has further admitted that at the time of collection of bloodstained earth no empty bottle of acid was found. PW-1 further stated that acid bottles were taken by the accused persons and non mentioning of such facts cannot be explained by him. He has further admitted that acid stained earth have not been recovered from the spot, nor any acid was found and even on the wall or the channel of his gate no stains of acid were found. PW-1 has stated that he saw accused appellant stabbing his wife

while standing at a distance of 4 ft. in the gallery from the place of occurrence. PW-1 denied the suggestion that there was any dispute on account of his father having grabbed the ancestral house of the accused or that Hansu was attacked with knife by informant while he was going for work or that acid was thrown on Hansu by the deceased and the deceased while turning after throwing the acid got accidentally stabbed with the knife in the hands of the informant. He has further denied the suggestion that he did not allow the report of Hansu to be registered when he had gone to the police station or that Hansu was falsely implicated.

9. PW-2 is the father of informant who has similarly supported the prosecution case. In the cross-examination he has stated that he saw the incident from the road in front of the shop of the informant. In cross-examination he has also denied the suggestion that he wanted to grab the ancestral house of the accused or that the incident occurred when his son (PW-1) attempted to stab Hansu and the deceased threw acid and that she got accidentally stabbed while turning back.

10. PW-3 Yogesh Kumar was posted in the concerned Police Station and has proved the panchayatnama as also site plan. He has admitted that he was not the Investigating Officer, but he had made the recoveries on the asking of the SHO. The iron rods recovered, however, have not been produced before the Court.

11. Dr. R.K. Garg is PW-4 who has conducted the autopsy on the deceased. He has stated that there was only one injury on the deceased and her 8th rib was cut. Both sides of injury were sharp. He has also stated that it was not necessary that the weapon of assault in this case be necessarily sharp for causing the aforesaid injury.

12. PW-5 Shivcharan Pal, Investigating Officer, has proved the chargesheet and has stated that PW-3 Yogesh Kumar was orally directed to undertake investigation and that there was no order by him in writing to conduct investigation by him. He has also stated that plain earth was not taken from the place of occurrence and the place from where the bloodstained earth has been taken has also not been specified in the site plan. This witness has clearly stated that neither any acid has been found on the spot, nor the place where bottle of acid fell has been specified. It has also not been specified as to what happened to the acid bottle.

13. Siyaram Sharma, Pharmacist, R.N.M. Hospital, Shikohabad has appeared as CW-1 and has produced the records in respect of the injury caused to Hansu S/o Deshraj. The original register has also been produced by him. Dr. Lakhan Singh has also been adduced as CW-2 who had examined Hansu at 5.15 pm on 7.11.95 and following injuries have been found on him by the concerned doctor:-

''चोट नं0 1 – जलने की चोट (निशान) पूरे चेहरे के आधे हिस्से मे, गर्दन छाती पेट दोनो हाथों के अगले हिस्सो में दोनो जॉघो के अगले हिस्से में ये चोट सुपरफिशियल थी। लगभग 45: शरीर के हिस्से पर थी लाल रंग की थी। फुोले नहीं थे।''

It was, however, opined by the doctor that these injuries were superficial and could be caused by chemical burn. He has also certified that injuries were fresh and could come from acid. The doctor has further stated that Hansu was kept under

observation and although he described the injury as superficial but it could prove fatal since burn percentage was more than 20% and he was referred to the district hospital. The doctor was not informed of any further development in the matter.

14. Trial Court found the testimony of PW-1 and PW-2 to be truthful and reliable and on its basis came to the conclusion that deceased has been stabbed by the accused appellants and consequently convicted the accused appellant for offence under Section 302 IPC. So far as injuries on Hansu is concerned the court below has not given much importance to it as the injuries were allegedly superficial and thus ignored. A finding has been returned that accused persons were present on the spot. The court below however found that prosecution has not been able to prove the guilt of Hansu and Rakesh beyond reasonable doubt and they were acquitted by giving them benefit of doubt.

15. Sri Saghir Ahmad, learned Senior Counsel assisted by Sri Raghib Ali, has appeared as Amicus Curiae for the appellant, and submits that the prosecution has not established the genesis of crime in the manner disclosed by it on the strength of prosecution evidence. He further submits that the cause of death and the manner of death have not been proved. He also argues that injuries of Hansu have not been explained and as the witnesses are interested witnesses their testimony is not reliable and trustworthy and consequently the accused appellant is entitled to benefit of doubt. He further submits that the acquittal of Hansu and Rakesh by the trial court despite offences alleged under section 34 IPC, on the basis of same set of evidence, is also a ground to extend same benefit to the accused appellant. Contention is that PW-1 and PW-2 since are not reliable witnesses and are otherwise interested persons and the injuries on Hansu have not been explained and the weapon of assault i.e. the knife has not been recovered, as such, the conviction of accused appellant is bad in law.

16. Learned AGA, on the other hand states that the ocular evidence matches the postmortem report and since PW-1 and PW-2 have specifically seen the incident, in which solitary stab wound was caused by the accused appellant, as such, the conviction recorded by the court below is valid.

17. Having heard the respective counsels, we have examined the original records of the case in order to determine whether the prosecution has succeeded in establishing the guilt of accused appellant, beyond reasonable doubt?

18. The first information report in the present case has been lodged on the basis of written report wherein the genesis of crime is alleged to be a dispute regarding non acceptance of tender of Rs. 2.00 on the ground that the note was torned. This, according to the prosecution, is the cause of provocation and also the motive on account of which the accused appellant came armed with a knife alongwith his two brothers and attacked the informant with knife, acid and iron rods.

19. The genesis of crime is thus required to be examined in the facts of the present case before adverting to the credibility and reliability of the two eye-witnesses, whose testimony forms the basis of conviction of accused appellant. The FIR version as also the statement in chief of PW-1 suggests that accused is a stranger

and on flimsy premise has stabbed the deceased. This apparent impression, however, is not supported by the evidence on record.

20. Firstly, the dispute regarding non acceptance of two rupee note does not, on its own, constitutes sufficient provocation for the assault on the informant and deceased. Moreover, in the cross-examination of PW-1 it is clearly admitted that the three accused are the uncle's son of informant and, therefore, informant is the first cousin of the three accused. PW-1 moreover has admitted in his cross-examination that the mother of accused has been subsequently murdered wherein the informant is the prime accused.

21. Although there is no defence evidence substantiating any alternative genesis of crime or motive for occurrence of incident or false implication but a suggestion has been given to PW-1 that his father wanted to grab the ancestral house, in which the accused also had a share, which suggestion is nevertheless denied. It is also to be noticed that according to the site plan the accused and informant live in close vicinity and their houses are just across a narrow lane. The close relationship between the parties as also the admission of PW-1 that he is accused of murdering the mother of accused appellant clearly goes to show that relationship between them was not cordial.

22. In the facts of the case there are only two eye-witnesses who are interested witnesses being the husband and father-in-law of deceased. Law is settled that testimony of interested witnesses can always be looked into but only after subjecting it to cautious and careful scrutiny.

23. As we have already seen from the evidence brought on record that the genesis of crime disclosed by the prosecution is not entirely reliable and eye-witnesses are close relatives of the deceased the facts asserted by the prosecution will have to be minutely scrutinized.

24. The prosecution witnesses have stated that the accused appellant alongwith his two brothers rushed towards the informant's shop on account of the motive disclosed i.e. non acceptance of two rupee note. Accused appellant is alleged to have carried a knife which admittedly is neither recovered nor produced before the court. The two rupee torn note, which was the bone of contention as per prosecution and provided the genesis has also not been recovered or produced in evidence. So far as Hansu possessing acid bottle is concerned neither any acid has been found on the ground at the place of crime nor any acid marks were noticed on the nearby walls/shutter. These are circumstances which adds to the cloud on the prosecution case. The further fact that the informant or the deceased did not sustain any chemical burn injuries despite the prosecution case that acid was thrown on them by Hansu also puts a question on the prosecution case.

25. PW-1 has disclosed that Hansu threw acid bottle and the acid fell on Suresh and Hansu. No burn injuries from acid attack is found on Suresh. Such injuries are found only on Hansu. The statement of PW-1 that acid fell on Suresh is thus found incorrect.

26. It is difficult to believe that acid thrown on deceased/informant from close distance would not cause any injuries upon them nor any signs of acid would be

available on the nearby walls/shutter/floor. No acid bottle has been recovered either.

27. Although there is no defence witness on this aspect, yet, it may be worth noticing that the accused Hansu in his statement under section 313 Cr.P.C. has denied that he was carrying acid. Moreover, he has stated that he was going to hotel for work when the deceased threw acid on him and the deceased was hit by knife of informant by which the informant intended to assault him. The reply of Hansu to question no.13 is relevant and is reproduced hereinafter:-

''मै होटल पर काम करने जा रहा था। करूणा फण्डा ने मेरे पर तेजाब डाला था। हरीश चाकू मेरे मार रहा था जो करूणा फण्डा के लगा। मेरा भाई राकेश रिपोर्ट करने मुझे रिपोर्ट करने थाने ले गया पुलिस ने मुझे जली हुई अवस्था में वहीं बैठा लिया तथा रिपोर्ट प्राप्त कर मेरे भाई को दे दी तथा मुझे मेडिकल कराने के नाम पर वहीं बैठा लिया।''

28. Accused appellant has also stated under section 313 Cr.P.C. that deceased was hit by the knife of informant and that the deceased threw acid on Hansu.

29. Dr. Lakhan Singh has appeared as court witness and proved that burn injuries were caused to Hansu on his half face, neck, chest, both hands and thighs which was on 45% of his body. He has opined that such burn injuries could be caused by acid attack. He has further stated that though he recorded the injuries to be superficial but as the burn was above 20% and could be fatal as such the patient was kept under observation and was referred to S.N.M. Hospital, Firozabad.

30. It is not clear whether Hansu was actually referred to S.N.M. Hospital, Firozabad. No complaint/report at the instance of Hansu is otherwise on record. The only explanation furnished under section 313 Cr.P.C. is that Hansu went to police station for lodging the report but he was detained and the report was received by the police.

31. The trial court has ignored the injuries caused to Hansu only on the ground that such injuries were superficial. The statement of Dr. Lakhan Singh that burn was above 20% and could be fatal or that Hansu was referred to the district hospital has been completely overlooked.

32. On the basis of evidence led by the prosecution on the aspect relating to alleged throwing of acid by Hansu, and his sustaining burn injuries as acid also fell/sprinkled on him, we are not impressed by the reasoning assigned by the trial judge for ignoring the injuries caused to Hansu. We are not inclined to accept that burn injuries would be sustained on 45% of the body only because some acid fell/got sprinkled on Hansu while throwing the acid bottle upon the informant or the deceased, particularly when no burn injuries are found on the deceased or the informant, although acid was allegedly thrown on them.

33. Learned Senior Counsel for the appellant submits that where the genesis of crime is suppressed and the injuries on accused are not explained the evidence of prosecution witnesses relating to the incident cannot be treated as true or at any rate not wholly true and cannot be relied upon to convict an accused. Reliance is placed upon a judgment of Supreme Court in Kumar Vs. State Represented by Inspector of Police, 2018 (6) JT 85, wherein the Court observed as under in para 27 to 29 of the report, which is reproduced hereinafter:-

"27. Another point put forth by the learned counsel on behalf of the accused--appellant is that the prosecution has not explained the injuries suffered by the accused and hence prosecution case should not be believed. At the outset, it would be relevant to note the settled principles of law on this aspect. Generally failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true [See : Mohar Rai and Bharath Rai v. The State of Bihar, 1968 CriLJ 1479].

28. In Lakshmi Singh and Ors. v. State of Bihar, 1976 CriLJ 1736 this Court observed:

"Where the prosecution fails to explain the injuries on the accused, two results follow :

(1) that the evidence of the prosecution witnesses is untrue; and

(2) that the injuries probabilise the plea taken by the appellants.

It was further observed that:

In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

29. In the case on hand, admittedly, the accused--appellant was also injured in the same occurrence and he too was admitted in the hospital. But, prosecution did not produce his medical record, nor the Doctor was examined on the nature of injuries sustained by the accused. The trial Court, instead of seeking proper explanation from the prosecution for the injuries sustained by the accused, appears to have simply believed what prosecution witnesses deposed in one sentence that the accused had sustained simple injuries only."

34. Recently, a three judge bench of the Supreme Court in Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh, Criminal Appeal Nos. 64-65 of 2022, decided on 13.10.2022, has again examined the issue and reiterated the law on the subject in paras 111 to 115, which are reproduced hereinafter:-

"111. In Dhananjay Shanker Shetty v. State of Maharashtra, (2002) 6 SCC 596, in paragraph 10 in reference to the circumstantial evidence, in the case of murder, the nonexplanation of injuries on accused by prosecution was held to be significant when there are circumstances which makes prosecution case doubtful. For the relevant purpose, the relevant extract of paragraph 10 is extracted as below:

"10. ....But nonexplanation of injuries assumes significance when there are material circumstances which make the prosecution case doubtful. Reference in this connection may be made to recent decisions of this Court in the cases of Takhaji Hiraji v. Thakore Kubersing Chamansing [(2001) 6 SCC 145 : 2001

SCC (Cri) 1070] and Kashiram v. State of M.P. [(2002) 1 SCC 71 : 2002 SCC (Cri) 68]. In the present case, nonexplanation of injuries on the appellant by the prosecution assumes significance as there are circumstances which make the prosecution case, showing the complicity of the appellant with the crime, highly doubtful."

[Emphasis supplied]

112. In Mohar Rai and Bharath Rai v. State of Bihar, AIR 1968 SC 1281, it was observed:

"6. .....In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

[Emphasis supplied]

113. In another important case Lakshmi Singh and Others v. State of Bihar, (1976) 4 SCC 394, after referring to the ratio laid down in Mohar Rai (supra), this Court observed:

"12. .....where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants....."

114. It was further observed that:

"12. .....in a murder case, the nonexplanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case....."

115. In Mohar Rai (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true, or at any rate, not wholly true. Likewise in Lakshmi Singh (supra) it is observed that any nonexplanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a nonexplanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijay Singh and Ors. v. State of U.P., (1990) CriLJ 1510."

35. It appears that the trial court itself was not entirely convinced with the prosecution case and that is why it granted benefit of doubt to the co-accused Hansu and Rakesh on the basis of same set of evidence. Since the two co-accused were also charged under section 34 IPC, therefore, their acquittal on the basis of same set of evidence is also a ground available for the accused appellant to claim benefit of doubt.

36. Upon overall evaluation of the evidence led in the matter we are not convinced of the genesis of crime as disclosed by the prosecution nor are we satisfied with the explanation offered by the

prosecution regarding injuries sustained by the accused Hansu in the matter. The testimony of the two eye witnesses PW-1 and PW-2, in our considered view, cannot be entirely relied upon to convict the accused appellant when on the same set of evidence two other accused have been acquitted by granting them benefit of doubt.

37. In Raghunath vs. State of Haryana, (2003) 1 SCC 398 the Supreme Court in similar circumstances observed as under in paragraph 22 to 24 and 33, which are reproduced hereinafter:-

"22. As already pointed out, accused Ram Kishan sustained as many as six injuries on his body, Injuries 3 and 4 stated to be grievous in nature. Both the trial court and the High Court accepted the version of PW 2 that the injuries were caused in self-defence. We have already disbelieved the version of PW 2. No explanation whatsoever has been afforded by the prosecution with regard to the injuries on the person of the accused Ram Kishan.

23. The question whether the prosecution is obliged to explain the injuries sustained by the accused in the same occurrence and failure to explain injuries on the accused would construe that the prosecution has suppressed the truth and also the origin and genesis of the occurrence, has been in controversy before this Court in a catena of decisions. A three-Judge Bench of this Court in Ram Sunder Yadav v. State of Bihar [(1998) 7 SCC 365 : 1998 SCC (Cri) 1630] (at SCC p. 366, para 3) referred to another three-Judge Bench decision of this Court in Vijayee Singh v. State of U.P. [(1990) 3 SCC 190 : 1990 SCC (Cri) 378] , SCC at p. 202, para 10, which held as under:

"In Mohar Rai case [Mohar Rai v. State of Bihar, AIR 1968 SC 1281 : 1968 Cri LJ 1479] it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh case [Lakshmi Singh v. State of Bihar, (1976) 4 SCC 394 : 1976 SCC (Cri) 671] also it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case."

24. In the present case, as noticed earlier, the prosecution evidence consists of interested or inimical witnesses. Therefore, non-explanation of the injuries sustained by Ram Kishan may assume greater importance. There is also the defence version which competes in probability with that of the prosecution. In our view, therefore, non-explanation of the injuries sustained by the accused Ram Kishan, which are grievous in nature, renders the prosecution story not wholly true.

33. In the facts and circumstances recited above, we are clearly of the view, that the prosecution has not come up with the true story. It has suppressed the facts. If that be the case, the whole prosecution story would stand on quicksand. The prosecution has failed to establish its case beyond reasonable doubts. It is now a well-settled principle of law that if two views are possible, the one in favour of the accused and the other adversely against it,

the view favouring the accused must be accepted."

38. In Khema and others vs. State of U.P. and others, AIR 2022 SC 3765, the Supreme Court has reiterated the previous judgment of the Court in Vadivelu Thevar vs. State of Madras, 1957 SCR 981, wherein the Court emphasized that well established rule of law is that the Court is concerned with quality and not the quantity of evidence necessary for proving or disproving a fact. Generally speaking, oral testimony may be classified into three categories, namely: (1) wholly reliable, (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In the first category the court may acquit or convict on the testimony of a single witness, if it found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category the court has equally no difficulty in coming to its conclusion. It is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.....

39. On the conspectus of above consideration, we are of the opinion that prosecution has not succeeded in proving the guilt of accused appellant beyond reasonable doubt on the basis of evidence led by it.

40. For the reasons recorded above, this appeal succeeds and is allowed. The accused appellant is held entitled to the benefit of doubt and consequently, the judgment and order dated 21/22.6.2002, passed by the Additional Sessions Judge (FTC-4), Firozabad in Sessions Trial No. 157 of 1997, State Vs. Rakesh and others; whereby the appellant Suresh has been convicted under section 302 IPC in Case Crime No.509/1995, Police Station Shikohabad, District Firozabad and sentenced to rigorous life imprisonment alongwith fine of Rs. 1000/- and on failure to pay the fine to undergo six months additional imprisonment, is set aside.

41. The accused appellant Suresh since is already on bail, his bail bond and sureties shall stand discharged and he shall be set at liberty, unless he is wanted in any other case subject to compliance of Section 437A Cr.P.C.

42. We also record our appreciation for the pro bono services rendered by Sri Saghir Ahmad, learned Senior Counsel, who has appeared as Amicus Curiae for the appellant. Sri Raghib Ali, Advocate, who has assisted the senior counsel shall however be entitled to his fee from the High Court Legal Service Authority.

(2022) 10 ILRA 396
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Crl. Misc. Bail Application No. 2 of 2019
in Re:
Crl Appeal No. 6632 of 2019
alongwith connected cases

Hakim ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sri Sanjay Kumar Dwivedi, Sri Pankaj Kumar Shukla

Counsel for the Respondent:

G.A., Sri Anil Kumar Pandey

Criminal Law - Indian Penal Code, 1860 - Sections302/149 & 148 -Victim shot dead-illegal fire arms-assaulted with blow of Farsa and knives-accused fled away-autopsy report-five injuries-F.I.R. not ante time-testiminy of interested witness not necessarily unreliable-impugned judgment not based on surmise-backlogs of Appeal-not a ground to grant bail.

Bail Application rejected. (E-9)

List of Cases cited:

1. Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675

2. Jalpat Rai Vs St. of Har., (2011) 14 SCC 208

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. Heard Shri Sanjay Kumar Dwivedi, Pankaj Kumar Shukla, Lalit Kumar Shukla, Ashutosh Singh and Jawahar Yadav, learned counsel for the appellant, Shri Deepak Kumar Pandey, learned Amicus Curiae, Shri Anil Kumar Pandey, learned counsel for the informant, learned A.G.A. for the State and perused the record.

2. The aforementioned Criminal Appeal No. 6632 of 2019, Hakim vs. State, has been filed against the judgment and order dated 25.07.2019, passed by the Additional Sessions Judge, Court No. 3 Mathura, in Session Trial No. 803 of 2013, State vs. Hakim Singh & Anr., arising Out of Case Crime No. 06 of 2013, under Sections-148, 302 read with 149 I.P.C., convicting the appellant U/s 148 I.P.C. and sentencing them three years rigorous imprisonment and fine of Rs. 5,000/- in case of default of payment of fine further three months additional imprisonment and U/s 302 read with 149 I.P.C. sentencing them life imprisonment and fine of Rs. 20,000/- and in case of default of payment of fine further one year additional imprisonment and all the sentences were runs concurrently.

Criminal Appeal No. 5907 of 2019, Kishani vs. State of U.P. has been filed against the judgment and order dated 25.07.2019, passed by the Additional Session Judge, Court No. 3, Mathura, in S.T. No. 299 of 2013, State vs. Kishani & Ors, arising out of Case Crime No. 6 of 2013, under Sections-148, 302/149 I.P.C., Police Station-Refinary, District-Mathura, convicting the appellant under Section 148 I.P.C. and sentencing the appellant for three years rigorous imprisonment and imposed fine of Rs. 5,000/- and in default of payment the appellant shall undergo three months additional imprisonment, and under Section 302/149 I.P.C. sentencing the appellant for life imprisonment and fine of Rs. 20,000/- and in default of payment the appellant shall undergo one year additional imprisonment and all the sentences run concurrently.

Criminal Appeal No. 6501 of 2019, Ajay Singh @ Ajju vs. State of U.P., has been filed against the judgment and order dated 25.07.2019, passed by the Additional Session Judge, Court No. 3, Mathura, in S.T. No. 299 of 2013 (leading case), State vs. Kishani & Ors, and S.T. No. 344 of 2014 (State vs. Hakim Singh & Anr.) convicting the appellant under Section 148 I.P.C. and sentencing the appellant for three years rigorous imprisonment and imposed fine of Rs. 5,000/- and in default of payment the appellant shall undergo three months additional imprisonment, and under Section 302/149 I.P.C. sentencing the appellant for life imprisonment and fine of Rs. 20,000/- and in default of payment the appellant shall undergo one year additional imprisonment and all the sentences run concurrently. Criminal Appeal No. 3104 of

2019, Lauki vs. State of U.P., 4 has been filed against the judgment and order dated 25.07.2019 as well as 02.04.2021, passed by the Additional Session Judge, Court No. 3, Mathura, in S.T. No. 344 of 2014 (State vs. Hakim Singh & Anr.) convicting the appellant under Section 148 I.P.C. and sentencing the appellant for three years rigorous imprisonment and imposed fine of Rs. 5,000/- and in default of payment the appellant shall undergo three months additional imprisonment, and under Section 302/149 I.P.C. sentencing the appellant for life imprisonment and fine of Rs. 20,000/- and in default of payment the appellant shall undergo one year additional imprisonment and all the sentences run concurrently.

Jail Appeal No. 151 of 2019, Hakim vs. State of U.P., has been filed against the judgment and order dated 25.07.2019 passed by the Additional Session Judge, Court No. 3, Mathura, in S.T. No. 344 of 2014 (State vs. Hakim Singh & Anr.) convicting the appellant under Section 148 I.P.C. and sentencing the appellant for three years rigorous imprisonment and imposed fine of Rs. 5,000/- and in default of payment the appellant shall undergo three months additional imprisonment, and under Section 302/149 I.P.C. sentencing the appellant for life imprisonment and fine of Rs. 20,000/- and in default of payment the appellant shall undergo one year additional imprisonment and all the sentences run concurrently.

3. All the above noted bail applications arise from a common judgment and order, accordingly are being heard and decided jointly.

4. Brief history of the prosecution unfolds that the informant 5 Bacchu Singh, lodged a First Information Report, being Case Crime No. 5 of 2013, under Sections-147, 148, 149, and 302 I.P.C., at Police Station-Refinery, District-Mathura, on 06.01.2013 at 9.40 a.m. against the appellants/applicants- Hakim Singh S/o Girraj Singh, Lauki, Azad @ Ajju, Kishani, Ravi and Hakim Singh S/o Niranjan Singh. In the First Information Report it is alleged that on 06.01.2013, informant's brother-Suresh Chandra, in the morning went to the village to attend nature's call. Vikram s/o deceased Suresh Chandra and his father Lakkho, also followed him to attend nature's call. His son Suresh Chandra reached to the border line of the field, wherein mustered crop was standing, where all the accused were hiding and waiting for the deceased, suddenly came out of the crop field, and at around 8.30 a.m. they started indiscriminate firing with illegal fire arms, and they also assaulted the deceased with blow of Farsa and knives, and on their reaching, on the spot, all the accused fired in air and fled away from the spot of incident.

5. Informant and others, named above, reached on the spot and found that Suresh Chandra had succumbed to injuries. In the First Information Report it is also noted that the dead body of Sureshdeceased, was lying on the place of occurrence and informant came to Police Station to lodge the First Information Report. During investigation the Investigating Officer collected plain and blood stained soil and the same was sealed separately at the place of occurrence on the same day i.e. 06.01.2013 and also the investigating Officer collected three empty cartridges of .315 bore, and prepared exhibit Ka-11, in the presence of the witnesses. Inquest report, Pradarsh Ka-2, in the presence of witnesses 6 (Panchan) was

also got prepared to ascertain cause of death of the deceased. The dead body, along with police papers, was transmitted to Mortuary for conducting the autopsy on the dead body.

6. Dr. K.K. Gupta, on 06.01.2017 conducted the post mortem on body of the deceased and prepared autopsy report, Ka-7, accordingly. In autopsy report, there are as many as five injuries on the person of the deceased. Out of the injuries, injury nos. 1 and 2 were of fire arm shot, whereas, injury nos. 3 to 5 were found to have been allegedly caused by sharp edged weapons on the vital part of the body of the deceased.

7. In the opinion of Doctor-K.K.Gupta, the cause of death of the deceased was ante mortem injuries due to oozing of excessive blood from the body of the deceased. 8. The investigating Officer collected prima facie evidence under Section 161 Cr.P.C. and submitted charge sheet against all the named accused persons/ appellants. However, during investigation one of the accused/ appellant Kishni could be arrested, whereas the other accused/appellant/applicants, namely Hakim S/o late Girraj, Lauki, Hakim S/o Niranjan, Ajai @ Ajju and Ravi absconded and for ensuring their presence to record their statements under Section 161 Cr.P.C. the Investigating Officer got their properties attached and filed chalan against accused Hakim Singh and four others, during their absconding.

9. Under Sections 147, 148, 149 & 302 I.P.C. after receiving Challan against above accused/appellants/applicants and other relevant materials cognizance under Sections 190 (1) Cr.P.C. for 7 aforementioned offences against all the accused/appellants/applicants, was taken and then the learned Chief Judicial Magistrate committed criminal case to the Court of District and Sessions Judge.

10. In the mean time, accused/appellant/applicants Hakim and four others surrendered before the Court and the Court of Additional Sessions Judge, Court No. 7, Mathura, framed charges under Sections 147, 148, and 302 read with Section 149 I.P.C., vide orders dated 12.06.2014 and 04.01.2014. All the accused/appellant/applicants, on denial of their charges, commenced trial for aforesaid sections.

11. Prosecution produced informant-P.W.-1-Bacchu Singh son of Lakkho, P.W.-2 Vikram, S/o deceased as witnesses of fact, whereas, P.W.-3 to P.W.-7 are formal witnesses. 12. On closure of the evidence on behalf of the prosecution, statements of the accused under Section 313 Cr.P.C. were recorded. All the accused claimed themselves innocent and also explained that in the instant case they have been falsely roped in.

13. Accused Kishni and Hakim in their statements stated that due to enmity Bacchu and Vikram has given evidence against them and their false implication as a result of enmity with the informant and others. However, Ajai @ Ajju, in his statement under Section 313 Cr.P.C. has stated that he had no enmity with the deceased, as such there was no motive against him to commit such incident nor there was any plausible reason for his complicity in the crime and further stated that on the advice of some villagers, who want to sell his property, he has been falsely implicated in this matter. 8

14. All the accused, except accused Ajai @ Ajju, in their statements under Section 313 Cr.P.C. had declined to adduce

evidence in their defence on behalf of the co-accused. D.W.-1 Bhagwan Singh, has been examined.

15. On the conclusion of trial, against all the the accused persons, after considering the entire evidence on record, learned Additional Sessions Judge found clinching evidence against all the accused/appellants under Sections-147, 148, 302, read with 149 I.P.C. and sentenced all the five accused/appellant as noted above. 16. It is clarified that co-accused Ravi on being found juvenile, on the date of alleged occurrence, was tried before the competent Court as his file was got separated by the Court concerned vide order dated 27.07.2013, from the file of aforesaid five accused, against whom the trial, before the learned trial Court, stood concluded.

17. All the aforesaid bail applications are taken together for their disposal by this common order.

18. On behalf of the accused/appellant/applicants it is submitted that during the pendency of their appeals, before the present Court, accused/appellant/applicants be released on bail because the judgment and order dated 25.07.2019 is not sustainable in the eyes of law due to its perversity and the same is also based on false assumptions and surmises and not in the right perspective, the evidence on record, has not been appreciated.

19. Learned counsel for the appellants also submits that First Information Report is anti time and having been lodged at the police Station after post mortem of the body of the deceased, as 9 such, the alleged incident was not seen by the P.W.-1 Bacchu Singh and P.W.-2 Vikram Singh as they were present at the time of alleged occurrence of the incident; thus, FIR was lodged at Police Station after the autopsy of the dead body of the deceased had taken place.

20. In the opinion of P.W.-4, Dr. Gupta, the time of death of the deceased was found 1/3 day old.

21. Learned counsel for the accused/appellant/applicants have also taken us to Post Mortem Report, exhibit-Ka 7, and deposition of P.W.-4 Dr. Gupta and it has been shown that only two fire arm shot injuries were found on the body, whereas, the case of prosecution is that all the accused/appellant/applicants had fired with their fire arm indiscriminately at the deceased; specific role to the accused/appellant/ applicants have also not been assigned; this also goes to show that P.W.-1-Bacchu Singh and P.W.-2 Vikram Singh, were not present at the place of occurrence.

22. It is also the contention of learned counsel for the accused/appellant/applicants that P.W.-4, Dr. Gupta, found only two fire arm injuries on the body of the deceased whereas P.W.-2 Vikram Singh has stated that three accused were having Tamancha and in the first information report it is alleged that all the accused had fired indiscriminately with their weapons at the deceased. As such, the allegations levelled in the First Information Report, depositions of P.W.-1 and P.W.-2 are motivated and not worthy of credit.

23. Out of the witnesses only P.W.-1, Bacchu and P.W.-2 Vikram Singh, who are brother and son of the deceased, respectively, it is 10 urged that they being partisan and interested, have been examined and for want of corroboration of their testimonies by the independent impartial witness/ witnesses, the conviction and sentence of the accused/appellant/applicants is bad and not sustainable; moreover, not only their presence at the place of occurrence is doubtful but their testimonies are contradictory and inconsistent with each other, are not reliable, and, by placing

reliance upon them (P.W.-1 and P.W.-2), learned lower Court has misled itself to err and the standard to prove the prosecution case, set by law, has not been met.

24. Next argument put forth on behalf of the accused/appellant/applicants is that they are detained in judicial custody and it is not certain how many years their pending appeals would see the light of the day.

25. Lastly, it is urged that the appellants are entitled to bail. 26. Per contra, learned A.G.A. vehemently opposes the submissions advanced by the learned counsel for the accused/appellant/applicants and submits that P.W.-1 Bacchu Singh lodged the First Information Report, Exhibit Ka-1, at Police Station promptly and it is not essential for the First Information Report to be an encyclopedia; the allegations of the First Information Report are substantiated by the cogent evidence on record. He also submits that the First Information Report is not anti time and the contention pertaining to rigor mortis is not tenable as the rigor mortis varies from person to person. Moreover, he submits that these are only hyper technical arguments and hold no water.

27. Learned A.G.A. also contradicts the contention of the learned 11 counsel for the appellant/applicants by saying that in the village it is normal practice that in the morning as per their convenience villagers go, to attend nature's call and even few persons together attend nature's call but, it does not mean that they excrete together at one place.

28. Learned A.G.A. also refutes the contention of learned counsel for appellants regarding the medical evidence that P.W.4, Dr. K.K. Gupta, had found half of the bladder filled hence the deceased before his death might have eaten some eatable. He further drew our attention to the evidence of P.W.-4, Dr. K.K. Gupta, wherein he deposed that it is not a hard and fast rule that the bladder of the deceased, if found half, be assumed that deceased had eaten some eatable just before his death.

29. Learned A.G.A. further states there is no major inconsistencies so as to shift the place of occurrence as depicted in the site plan by the investigating officer and corroborated in oral account of witnesses P.W.-1-Bacchu Singh and P.W.-2 Vikram Singh. He submits there is just a minor variance of few feets and therefore, merely on such basis the place of occurrence does not shift. Eventually, he argues that bail applications be rejected.

30. We have perused carefully the material placed on record and also heard learned counsel and learned A.G.A., for both the parties.

31. The First Information Report, exhibit-Ka-1, was lodged, by the informant Bacchu Singh, at the concerned Police Station on 06.01.2013 at 9.40 a.m.; the distance from alleged place of occurrence to concerned police station is noted in the First 12 Information Report Chik, Exhibit-Ka 8, as six kilometers, whereas, P.W.-2, Dr. K.K. Gupta, states in his testimony that the post mortem over the body of the deceased was conducted on 06.01.2013 at 4.10 p.m.

32. P.W.-4, Dr. K.K. Gupta, has also noted in the autopsy report Pradarsh-7Ka, the proximate time of death of deceased was 1/3 day, meaning eight hours before the time of autopsy. As such, as per Dr. K.K. Gupta, time of death of deceased approximately is fixed at 8.10 a.m., whereas, in the First Information Report P.W.-1 Bacchu Singh has stated the time of occurrence around 8.30 a.m. P.W.-1, Bacchu Singh and P.W.-2 Vikram Singh, have not been cross examined on the point whether at the time

of their alleged presence on the spot they had worn wrist watch, nor these witnesses have disclosed that at the time of occurrence any one of them was wearing wrist watch. Considering the material on record we are of the opinion that time of death 8.30 a.m. was approximately noted in the First Information Report, Pradarsh Ka- 1.

33. As there is just a difference of a few minutes about the proximate time of death of the deceased in the alleged First Information Report, Pradarsh-Ka-1 and in oral accounts of two witnesses (P.W.-1 and P.W.-2) and also in the deposition of P.W.- 4, therefore, we do not find that the First Information Report is ante time.

34. From perusal of the testimonies of P.W.-1 and P.W.-2 it is found that their evidence is trustworthy and also their presence in the circumstances of the case was natural at the place of 13 occurrence. Mere non production of Lakkho, does not dismantle prosecution case.

35. In view of the decision of the Supreme Court in ***Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675 & Jalpat Rai v. State of Haryana, (2011) 14 SCC 208***, the law is settled that the testimony of an interested witness is not necessarily unreliable and there is no invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. What is required is that testimony of such a witness should be subjected to careful scrutiny. If, on such scrutiny, the testimony is found to be intrinsically reliable or inherently probable, it may, in the facts and circumstances of a case, form the basis of conviction.

36. Thus the contention of the learned counsel that the evidence adduced by P.W.-1 Bacchu Singh and P.W.-2 Vikram Singh, be thrown out is not tenable.

37. Hon'ble Apex Court in so many cases has reiterated the legal settled position that the testimony of a relative unless proved otherwise cannot be discarded or disbelieved merely on the basis of relation, as such their depositions cannot be treated as unreliable.

38. As far as the contention on behalf of the appellants regarding rigor mortis is concerned, we are of the view that the incident is said to have occurred on 06.01.2013 and the month of January, in north India, is of acute cold and further the deceased at the time of his unnatural death was about 40 years. Generally rigor mortis in the dead body of such an aged person, in the first week of 14 January, starts after three hours after death and process takes about nine hours to complete and its cycle is repeated in a period of further nine hours to end. Recycle to complete the rigor mortis takes further nine hours.

39. Perusal of Post Mortem Report shows that column at serial no. 6A is blank and in this connection P.W.-4 Dr. K.K. Gupta has not been put to cross examination.

40. Hon'ble Apex Court has also consistently laid down in plethora of cases that from a witness of fact it is not expected to remember nitty-gritty of alleged incident, it is not necessary to assign specific weapon of offence to each accused and to remember number of shots and blows.

41. From the perusal of the record, it is evident that the allegations of the First Information Report find support not only from the testimonies of eye witnesses P.W.-1 Bacchu Singh and P.W.-2 Vikram Singh but also from the medical evidence and other depositions of the formal witnesses.

42. It is also pertinent to say that as far as question of process of autopsy on the body of the deceased is concerned, it is a scientific examination to ascertain cause of death of the deceased but the question regarding the probable time of death in the autopsy report, is merely an opinion of the Doctor, which falls within the ambit of Section 45 of the Evidence Act.

43. P.W.-4, Dr. K.K. Gupta, has himself stated in his statement that the exact time of the death cannot be fixed in the post mortem report; time of death 1/3 day is proximate one. Likewise, time of alleged incident in the First Information Report is 15 proximate , because the word "Lagbhag' (about) has been noted in the First Information Report.

44. Learned trial Court has given its verdict with regard to conviction and sentence in view of the material on record and at this stage, we do not find the impugned judgment and order is based on surmises or false assumptions and the learned trial Court does not appear to have erred in appreciation of evidence on record.

45. With regard to final disposal of appeal it is submitted that it will take time, we find this submission as inconsequential because the instant appeals on behalf of the appellants/applicants having been filed in the year, 2019, considering the backlog of the appeals in this Court, it is true that the disposal of present appeals would take time but merely because of above factor, the appellant/ applicants cannot be granted bail.

46. Having due regard to the aforementioned discussion, prosecution evidence and manner in which the alleged incident has occurred, accused/appellant/ applicants have failed to persuade us to disagree with the trial Court judgment and order that it is perverse and suffers from illegalities in the findings arrived at by the learned trial court. Thus, we do not find the accused/appellant/ applicants entitled to obtain bail, as such, all the aforesaid bail applications, as well as, Jail Appeal No. 151 of 2019, are liable to be rejected and is accordingly rejected.

Order on Appeal

Office to prepare Paper book, if not prepared.

List this appeal on its turn.

(2022) 10 ILRA 403
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Crl. Appeal No. 7516 of 2017

Naresh & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Rajendra Kumar, Sri Bhagwan Singh Yadav, Sri Mahesh Prasad Yadav, Sri Shiv Badan, Sri Raj Kumar Sharma

Counsel for the Opp. Party:
G.A.

(A) Criminal Law – Criminal Procedure Code, 1973 - Sections 313 & 374 - Indian Penal Code, 1860 - Sections 299, 300, 302, 304-B, 304 part – I & 304 part – II - Dowry Prohibition Act,1961 - Section - 3/4 - Indian Evidence Act, 1872 - Section - 32 : - Criminal Appeal – Conviction & Sentence - Life imprisonment – quantum of punishment - offence of murder - FIR - informant alleged that his daughter was married with accused husband two year ago whom along with his parents

ablaze her daughter by pouring kerosene oil for not giving additional demand of dowry and in course of treatment she was died due to septicaemia shock - distinction between 'murder' and 'culpable homicide' - court finds that offence is not punishable under section 302 but is culpable under section 304 (part-I) of IPC - quantum of sentence is too harsh - imposition of appropriate punishment - undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system - accused appellants are convicted for the offence punishable under section 304 (part-I) of IPC - criminal appeal partly allowed - order accordingly.(Para - 12, 27, 28, 29, 30)

(B) Criminal Law – Criminal Procedure Code, 1973 - Sections 313 & 374 - Indian Penal Code, 1860 - Sections 299, 300, 302, 304-B, 304 part – I & 304 part – II - Dowry Prohibition Act, 1961 - Section - 3/4 - Indian Evidence Act, 1872 - Section - 32: - Criminal Appeal – Conviction & Sentence - Life imprisonment – offence of murder - Dying declaration - principle for accepting dying declaration - dying declaration could have been acted U.P.on as there is no material contradictions in the same - when taken in, it should be taken in totality. (Para – 14, 15)

Appeal Partly allowed. (E-11)

List of Cases cited:

1. Govindappa & ors. Vs St. of Karn. (2010 vol. 6 SCC 533),

2. Gautam Manubhai Makwana Vs St. of Guj. (Criminal Appeal NO. 83/2008 decided on 11.09.2023),

3. Khokan @ Khokhan Vishwas Vs St. of Chattisgarh (2021 LawSuit SC 80),

4. Anversinh Vs St. of Gujr. (2021 vol 3 SCC 12),

5. Parvat Chandra Mohanty Vs St. of Odisha (2021 vol. 3 SCC 529),

6. Pardeshiram Vs St. of M.P. (2021 vol. 3 SCC 238),

7. Tukaram & ors. Vs St. of Mah.(2011 vol 4 SCC 250),

8. B N Kavatakar & anr. Vs St. of Karn.(1994 SU.P.pl. (1) SCC 304),

9. Veeran & ors. Vs St. of M.P. (2011 vol 5 SCR 300),

10. Mohd. Giasuddin Vs St. of A.P. (AIR 1977 SC 1926),

11. Deo Narain Mandal Vs St. of U.P. (2004 vol 7 SCC 257),

12. Ravada Sasikala Vs St. of A.P. (AIR 2017 SC 1166),

13. Jameel Vs St. of U.P. (2010 12 SCC 532),

14. Guru Basavraj Vs St. of Karn. (2012 vol 8 SCC 734),

15. Sumer Singh Vs Surajbhan Singh (2014 vol 7 SCC 323),

16. St. of Punj. Vs Bawa Singh (2015 vol 3 SCC 441),

17. Raj Bala Vs St. of Har. (2016 vol 1 SCC 463).

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Nalin Kumar Srivastava, J.)

1. Present criminal appeal challenges judgment and order dated 26.10.2017 passed by the Additional Sessions Judge (Fast Track Court), Hamirpur, in Sessions Trial No.27 of 2014 whereby the learned Additional Sessions Judge has convicted the accused-appellants, Naresh & Smt. Rajjan for commission of offence under Section 302 of Indian Penal Code, 1860 (for short 'IPC') and sentenced them to undergo imprisonment for life with fine of Rs.20,000/- and in case of default in payment of fine, further to undergo two year simple imprisonment.

2. Accused-appellant, Naresh, is in jail since 31.10.2013 and Smt. Rajjan is in jail since 26.10.2017.

3. Heard Sri Raj Kumar Sharma, learned counsel for the accused-appellants and learned A.G.A. for the State.

4. Brief facts as culled out from the record are that the mother of the deceased lodges an F.I.R. on 20.10.2013 at about 9.30 a.m. against the accused-appellants and two other family members which is registered as Case Crime No.940 of 2013 under Sections 498A & 307 of Indian Penal Code and Section 3/4 of Dowry Prohibition Act at P.S. Maudaha, District Hamirpur. In the F.I.R. it is alleged that the daughter of the informant namely Rinki was married with accused-appellant No.1, Naresh, two years' ago and the in-laws were given sufficient dowry but after two years of marriage the appellants and other co-accused persons started demanding Rupees Two Lakhs as additional dowry and in the course of said demand on 16.10.2013 they set her daughter ablaze by pouring kerosene oil. She was admitted in the Hospital by the neighbors. During treatment, the deceased breathed her last on 4.11.2013 due to septicemic shock.

5. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate against accused Naresh, Ramadheen and Smt. Rajjan under Sections 498A, 304B of IPC and Section 3/4 of Dowry Prohibition Act.

6. The learned Magistrate summoned the accused and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court. The learned Sessions Judge has framed the charges against the above accused under Sections Sections 498A, 304B of IPC and Section 3/4 of Dowry Prohibition Act and additional charge under Section 302 of IPC.

7. On being summoned, the accused-persons pleaded not guilty and wanted to be tried.

8. The Trial started and the prosecution examined 10 witnesses who are as follows:

1	Budhiya	PW1
2	Ramroop	PW2
3	Lallu	PW3
4	Musaram Tharu	PW
5	Smt. Savitri	PW5
6	Laxmi Prasad	PW6
7	Rubi	PW7
8	Rahim Bax	PW8
9	Dr. R.S. Prajapati	PW9
10	Dhananjay Singh	PW 10

9. In support of ocular version following documents were filed and proved:

1	F.I.R. & G.D.	Ex.Ka.8 & Ex. Ka.9
2	Written Report	Ex.Ka.1
3	Recovery memo	Ex. Ka.12
4	Postmortem Report	Ex.Ka.13
5	Panchayatnama	Ex.Ka.2

6	Dying Declration	Ex. Ka. 7
7	Charge-sheet	Ex. Ka.15
8	Site Plan	Ex.Ka.10

10. At the end of the trial and after recording the statements of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellants as mentioned above.

11. It is submitted by learned counsel for the appellant that the incident occurred on the spur of moment and the accused had not premeditated to do away with the deceased and the death was after couple of days. The cause of death according to doctor who conducted the postmortem of deceased was septicemia.

12. It is further submitted that conviction under Section 302 IPC is not made out as no overt act as per Section 300 IPC is made out. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of incarceration as the death is not a gruesome act on part of accused.

13. Learned counsel for the State has submitted that though it is septicemic death, the dying declaration and evidence of other prosecution witnesses will not permit this Court to show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

14. In the light of the decision in **Govindappa and others Versus State of Karnataka, (2010) 6 SCC 533**, there is no reason for us not to accept the dying declaration recorded by the Magistrate and its evidentiary value under Section 32 of Evidence Act, 1872.

15. Principle for accepting dying declaration will permit us to concur with the finding of the learned Sessions Judge that dying declaration could have been acted upon as there is no material contradictions in the dying declaration. The dying declaration when taken in its totality goes to show that the husband and mother-in-law of deceased had set her ablaze.

16. While considering the evidence of witnesses and the Postmortem report which states that the injuries on the body of the deceased would be the cause of death and that it was was homicidal death, we concur with this finding of the Court below. She died after several days out of septicemic death and, therefore, we are convinced that it is homicidal death but, it would be seen whether it is homicidal death punishable under Section 302 or Section 304 Part I or Part II of IPC?

17. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads 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."

18. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1)with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	KNOWLEDGE
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

19. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat**) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well

as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of

Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

20. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80**, where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

21. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder.

22. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that their act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

23. We come to the definite conclusion that the death was not

premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

24. This takes us to the alternative submission of learned counsel for the appellants that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

25. 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."

26. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

27. 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.

28. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

29. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

30. Therefore, accused-appellants are convicted for the offence punishable under Section 304 (Part I) of IPC and sentenced to period undergone. The fine is reduced to Rs.10,000/-. The accused-appellants be set free if not warranted in any other offence. The fine if they have yet not deposited, will deposit the same within four weeks from the date of release from jail. The jail authority shall see that the accused-appellants are lodged in the jail to re-incarcerate for the default period if fine is not paid after they are released.

31. In view of the above, both the criminal appeals are partly allowed. Record and proceedings be sent back to the Court below forthwith.

(2022) 10 ILRA 411
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 903 of 2022

Randhir Singh Gautam & Anr.
...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kunwar Bhaskar Parihar, Sri R.K, Ojha (Sr. Adv.)

Counsel for the Respondents:
C.S.C, Smt. Archana Singh, Sri Bipin Bihari Pandey

A. Service Law – Termination – Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 - Uttar Pradesh Basic Education Staff Rules, 1973 - Rule 3, 3(vi), 5(3) - Civil Service (Classification, Control and Appeal) Rules 1930 - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - On the conviction of an employee of a criminal charge, the order of punishment cannot be passed unless the conduct which has led to his conviction is also considered. The scrutiny of conduct of an employee leading to his conviction is to be done *ex parte* and an opportunity of hearing is not to be provided for this purpose to the employee concerned. (Para 15)

It is well-settled that Article 311(2) proviso (a) of the Constitution is *pari materia* to Clause (i) of the 4th proviso to Rule 7 of the 1999 Rules empowering the disciplinary authority to impose a major penalty on a person without holding the enquiry on the basis of "conduct which has led to conviction". It is also a settled that **punishment is not automatic and based on the mere conviction but the order imposing punishment must show application of mind on the part of the disciplinary authority** on the conduct which has led to the conviction of the employee and appropriate punishment which he is liable to suffer. (Para 12 to 15)

The Court finds that the impugned orders do not conform to the 1999 Rules in as much as the Basic Shiksha Adhikari, Maharajganj/Respondent No. 3 has not taken into consideration the entire conduct of the petitioners, the gravity of misconduct committed by them, the impact which the misconduct is likely to have etc. and has passed the order simply recording that the petitioners were suspended vide order dated 16.4.2016 on their being convicted in Case No. 186 of 2013, u/Ss. 302/34, 323/34, 504, 506 IPC vide order of the Additional Sessions Judge, Maharajganj. The services of the petitioners are being terminated with immediate effect on their conviction vide order dated 2.4.2016 in compliance of the procedure laid down in the GO dated 12.10.1979 and the U.P. Government Servants (Discipline and Appeal) Rules, 1999. (Para 17)

B. Applicability of the 1999 Rules in place of the 1930 Rules - It is not in dispute that the Civil Services (Classification, Control and Appeal) Rules 1930 stands superceeded by the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999. Although the U.P. Basic Education Staff Rules, 1973 has not been amended and Rule 5(3) continues to refer to the Civil Service (Classification, Control and Appeal) Rules, the Court is of the opinion that the disciplinary proceedings, appeals and representations shall be governed under the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 on the principle of Legislative reference. (Para 8)

Writ petition allowed. (E-4)

Precedent followed:

1. Ziledar Singh Vs St. of U.P. & ors., 2010 (81) ALR 270 (Para 8)

2. U.O.I. Vs Tulsi Ram Patel, [1985 (3) SCC 398] (Para 13)

3. Shyam Narain Shukla Vs St. of U.P., (1988) 6 LCD 530 (Para 14)

4. Sadanand Mishra Vs St. of U.P., 1993 LCD 70 (Para 15)

5. Chandra Bhuwan Tripathi Vs St. of U.P. & ors., Civil Misc. Writ Petition No. 45364 of 2003, decided on 08.12.2006 (Para 16)

Present petition assails order dated 28.10.2021, passed by Basic Shiksha Adhikari, Maharajganj.

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

1. The writ petitioners, who claim to have been appointed as Assistant Teachers in a Primary School run and established by the Basic Shiksha Parishad after facing selection have approached this Court assailing an order dated 28.10.2021 (Annexure Nos.9 & 10 to the writ petition) passed by the Basic Shiksha Adhikari,

Maharajganj/Respondent No.3, whereby services of the petitioners as Assistant Teachers have been terminated.

2. It is the case of the writ petitioners that they have been appointed as Assistant Teachers under the provisions of the Uttar Pradesh Basic Education (Teachers) Services Rules, 1981 after facing selection. The Petitioner No.1 was appointed under the order of the Basic Shiksha Adhikari dated 23.10.2008 and was permitted to join as Assistant Teacher in Urdu in Primary School, Kamhariya Khurd, Block Farenda, District Maharajganj. Later on, the Petitioner No.1 was promoted as Headmaster in Primary School/Assistant Teacher in Junior High School on 26.11.2011 and had been working in such capacity in Purv Madhyamik Vidyalaya Parsia Bujurg Block Farenda, District Maharajganj. Likewise, the Petitioner No.2 was appointed as Assistant Teacher by the order of the Basic Shiksha Adhikari dated 24.10.2008 and joined in Primary School, Sonbarsa Block Farenda, District Maharajganj. The Petitioner No.2 was also promoted as Headmaster in Primary School, Sonbarsa Block Farenda District Maharajganj.

3. In the year 2013, an F.I.R. came to be lodged against the petitioners giving rise to the Case Crime No.907 of 2013 under Sections 302/34, 323/34, 504, 506 I.P.C. and a charge sheet was submitted against the petitioners. The petitioners were arrested and consequently placed under suspension, however, were subsequently released on bail. The petitioners were convicted in the offence in Trial No.186 of 2013 vide conviction order dated 02.04.2016. The petitioners were again arrested and put in jail on their conviction. The conviction order has been assailed in Criminal Appeal No.1712 of 2016 which is pending consideration before this Court and the petitioners have been released on bail. The petitioners were reinstated in service under orders of the District Basic Education Officer, Maharajganj dated 30.06.2018 respectively. However, the order dated 30.06.2018 reinstating the petitioners in service was withdrawn by order dated 28.07.2018 and the petitioners were again placed under suspension. Now by the impugned order dated 28.10.2021 the Basic Shiksha Adhikari has proceeded to terminate the services of the petitioners which order has been impugned in the present writ petition.

4. It is contended by the learned counsel for the petitioners that the petitioners are regular appointee and no enquiry is contemplated under the Uttar Pradesh Basic Education Staff Rules, 1973 read with the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 and as such in the absence of any enquiry the services of the petitioners cannot be terminated.

5. This Court vide order dated 22.03.2022 while entertaining the writ petition had directed the respondents to file counter affidavit. Pursuant to the said order, a counter affidavit has been filed on behalf of the Basic Shiksha Adhikari, Maharajganj, Respondent No.3. Sri R. K. Ojha, learned Senior Counsel assisted by Sri K. B. Parihar, learned counsel for the petitioner submits that he has already filed rejoinder affidavit and further as the issue involved is a legal issue the same can be decided even in the absence of rejoinder affidavit.

6. The short question for adjudication in this writ petition is as to whether the services of a permanent Assistant Teacher

in a Primary School run and established by the Board of Basic Education convicted in an offence under Sections 302/34, 323/34, 504, 506 IPC be terminated without holding an enquiry.

7. There is no dispute that the service conditions of the writ petitioners are governed by the Uttar Pradesh Basic Education (Teachers) Services Rules, 1981 read with the Uttar Pradesh Basic Education Staff Rules, 1973. The 1981 Rules do not provide for punishment and the same is provided under Rule 3 of the 1973 Rules. Rule 3(vi) of the 1973 Rules talks about dismissal from service of the Board which ordinarily disqualifies him from future employment. Rule 5(3) of the 1973 Rules provides that the procedure laid down in Civil Services (Classification, Control and Appeal) Rules as applicable to servants of the Uttar Pradesh Government shall as far as possible be followed in disciplinary proceedings, appeals and representations under the said Rules. When the 1973 Rules were promulgated the Civil Service (Classification, Control and Appeal) Rules 1930 were referred to in the Rules, however, the 1930 Rules have since been repealed and stand superceeded by the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999.

8. It is not in dispute that the Civil Services (Classification, Control and Appeal) Rules 1930 stands superceeded by the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999. Although the U.P. Basic Education Staff Rules, 1973 has not been amended and Rule 5(3) continues to refer to the Civil Service (Classification, Control and Appeal) Rules, the Court is of the opinion that the disciplinary proceedings, appeals and representations shall be governed under the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 on the principle of Legislative reference. The question of the applicability of the 1999 Rules in place of the 1930 Rules was elaborately considered by a Coordinate Bench of this Court in the case of ***Ziledar Singh Vs. State of U.P. and others, reported in 2010 (81) ALR 270***. Para 42 and 43 of the aforesaid decision are being reproduced here under:-

"42. Considering in the light of the principles laid down above, I am of the view that it is "legislation by reference" with respect to procedure prescribed in 1930 Rules with respect to disciplinary proceedings, appeals and representations and its subsequent amendments and supercession, recession by 1999 Rules would also cover the field and would apply to Rule 5 (3) of 1973 Rules. Both the statutes travel in the same field. Since the purpose of referring to 1930 Rules in 1973 Rules is in respect to import procedure of departmental enquiry instead of repeating the same, to my mind the exception referred in P.C. Agarwala (supra) clearly attracted here also and it would be prudent to apply 1999 Rules which supersede 1930 Rules, since the amended and detailed procedure provided in 1999 Rules makes the enquiry more transparent and consistent with the known principles of natural justice. The intent of rule framing authority also does not appear to be otherwise.

43. The subsequent amendment, modification etc. in the statutes would, therefore, also be applicable to 1973 Rules but only and specifically with respect to the procedure for departmental inquiry, appeals and representations and not beyond that. "

9. Rule 7 of the 1999 Rules deals with the procedure for imposing major penalties.

10. A bare perusal of the Rule 5(3) of the 1973 Rules, and Rules 6, 7 & 8 of 1999 would go to show that full fledged procedure has been provided for in the matter of procedure to be adhered to while making departmental enquiry, being in consonance with principles of natural justice and rule of fair play. However, the 4th proviso to Rule 7 of the 1999 Rules provides that the Rule 7 shall not apply in the following cases.

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

11. A perusal of the Clause (i) of the 4th proviso shows that the order contemplates therein is one which can be passed imposing a major penalty on a person on the ground of "conduct which has led to his conviction" on a criminal charge and not mere conviction.

12. The contingencies where a person can be imposed major penalty without any enquiry on the ground of his conviction is no more res integra. It is now well settled that Article 311(2) proviso (a) of the Constitution is pari materia to Clause (i) of the 4th proviso to Rule 7 of the 1999 Rules empowering the disciplinary authority to impose a major penalty on a person without holding the enquiry on the basis of "conduct which has led to conviction". It is also a settled exposition of law that punishment is not automatic and based on the mere conviction but the order imposing punishment must show application of mind on the part of the disciplinary authority on the conduct which has led to the conviction of the employee and appropriate punishment which he is liable to suffer.

13. The question as to whether the order must disclose application of mind on the part of the disciplinary authority that it has considered the question of conduct which has led to conviction of the employee before passing punishment is also no more res integra. The Apex Court in ***Union of India Vs. Tulsi Ram Patel [1985(3) SCC 398]*** while considering the pari materia provisions under Article 311 of the Constitution of India held as under:-

"The second proviso will apply only ***where the conduct of a government servant is such*** *as he deserves the punishment of dismissal, removal or reduction in rank.* ***If the conduct is such as to deserve a punishment*** *different from those mentioned above, the second proviso cannot come into play at all because Article 311(2) is itself confined only to these three penalties.* ***Therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned, government servant is such as justified the penalty of dismissal, removal or reduction in rank.*** *Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an enquiry."*

(Emphasis added)

14. A similar question came up for consideration before a Division Bench of

this Court in **Shyam Narain Shukla Vs. state of U.P. (1988) 6 LCD 530** and this Court held as under:-

"In view of the above decision of the Supreme Court, it has to be held that whenever a Government servant is convicted of an offence, he cannot be dismissed from service merely on the ground of conviction but the appropriate authority has to consider the conduct of such employee leading to his conviction and then to decide what punishment is to be inflicted upon him. In the matter of consideration of conduct as also the quantum of punishment the employee has not to be joined and the decision has to be taken by the appropriate authority independently of the employee who, as laid down by the Supreme Court, is not to be given an opportunity of hearing at that stage.

(Emphasis added)

15. Similarly another Division Bench of this Court in **Sadanand Mishra Vs. State of U.P., 1993 LCD page 70** held that on the conviction of an employee of a criminal charge, the order of punishment cannot be passed unless the conduct which has led to his conviction is also considered. Further, it is held that the scrutiny of conduct of an employee leading to his conviction is to be done ex parte and an opportunity of hearing is not to be provided for this purpose to the employee concerned.

16. The above view was taken by this Court in **Chandra Bhuwan Tripathi Vs. State of U.P. & others (Civil Misc. Writ Petition No. 45364 of 2003)** decided on 8.12.2006. "

17. Now testing the impugned order dated 28.10.2021 on the anvil of the ratio of the aforesaid decisions, the Court finds that the impugned orders do not conform to the 1999 Rules in as much as the Basic Shiksha Adhikari, Maharajganj/Respondent No.3 has not taken into consideration the entire conduct of the petitioners, the gravity of misconduct committed by them, the impact which the misconduct is likely to have etc. and has passed the order simply recording that the petitioners were suspended vide order dated 16.04.2016 on their being convicted in Case No.186 of 2013, under Sections 302/34, 323/34, 504, 506 IPC vide order of the Additional Sessions Judge, Maharajganj. The services of the petitioners are being terminated with immediate effect on their conviction vide order dated 02.04.2016 in compliance of the procedure laid down in the Government Order dated 12.10.1979 and the U.P. Government Servants (Discipline and Appeal) Rules, 1999.

18. In the result, the writ petition is **allowed**. The impugned orders dated 28.10.2021 (Annexure No.9 & 10 to the writ petition) respectively passed by the Basic Shiksha Adhikari, Maharajganj, Respondent No.3 are quashed.

19. However, it shall be open to the Respondent No.3 to pass a fresh order in accordance with law.

(2022) 10 ILRA 416
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 3395 of 2022

C/M Shivaji Inter College Sahson, Prayagraj & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pradeep Kumar Upadhyay

Counsel for the Respondents:
C.S.C., Sri Vibhav Dutt Ojha

A. Service Law – Appointment/Selection - Intermediate Education Act, 1921 - Regulation 101 Chapter III - Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government Orders and any amendment of the rules or the Government Order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. (Para 8)

The vacancy occurred on 30.11.2014 and was advertised on 16.11.2021 and as such selection process was to be governed by the Rules and GOs in existence on the date on which the process was initiated i.e. Regulation 101 Chapter III of the Intermediate Education Act, 1921 existing on that date would govern the field and not the GO dated 25.11.2021. (Para 8, 10)

B. Approval by the DIOS is to be accorded after selection is held and before appointment. The Regulations 101 also contemplate the same stage i.e. after the selection process is over but before making appointment to the post. Prior approval is not required for holding the selection from the DIOS and the selection process cannot be held to be illegal on the score that prior approval had not been obtained.

Therefore, in the present case, the approval to the selection process could not have been denied on the ground that prior permission had not been obtained by the Committee of Management before proceeding with the recruitment. (Para 10)

C. The Court further finds that **the order has been passed behind the back of the petitioners and appears to be ante dated** inasmuch as by an order of even date i.e. 23.3.2022 bearing official index No. 13370 the petitioners were required to furnish certain information and the petitioners also submitted their reply on 2.4.2022 but the impugned order dated 23.3.2022 was passed without considering the reply called for. (Para 12)

Writ petition allowed. (E-4)

Precedent followed:

1. N.T. Devin Katti Vs Karnataka Public Service Commission, 1990 (3) SCC1 57 (Para 8)

2. The Assam Public Service Commission & ors. Vs Pranjal Kumar Sharma & ors., [2019] 14 SCR 1072 (Para 9)

3. Preet Kumar Srivastava Vs St. of U.P. & ors., 2011 (9) ADJ 591 (Para 10)

4. Abhishek Tripathi Vs St. of U.P. & ors., 2015 (4) ADJ 270 (Para 10)

Present petition assails order dated 23.03.2022, passed by District Inspector of Schools.

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

1. Heard Sri Pradeep Kumar Upadhyay, learned counsel for the petitioners and the learned Standing Counsel for the State respondents.

2. The writ petitioners who are the Committee of Management of Shivaji Inter College, Sahson Prayagraj (Allahabad) and its Manger, initially approached this Court seeking the issuance of mandamus commanding the District Inspector of Schools, Prayagraj/respondent No.3 to consider and accord approval to the selection of one Sri Sudhir Kumar Dwivedi

s/o Late Rajmadhi Dwivedi as Assistant Clerk in the Institution in question and ensure the payment of admissible salary alongwith other service benefits to him. During the pendency of the writ petition an order dated 23.3.2022 came to be passed by the District Inspector of Schools, Prayagraj whereby disapproving the appointment and selection of Sri Sudhir Kumar Dwivedi as Assistant Clerk in the Institution. The said order has now been impugned in the writ petition by amending the writ petition.

3. The facts necessary for the adjudication of the controversy involved in the instant writ petition briefly stated are that there is an educational Institution in the name and style of Shivaji Inter College, Sahson, Prayagraj duly recognised and aided. The petitioner No.1 is its Committee of Management while the petitioner No.2 is its Manager. The Institution has an approved teaching / non teaching strength of 01 Principal, 12 lecturers, 25 Assistant Teachers, 01 Head Clerk, 03 Assistant Clerks and 13 peons. The Institution is recognised and duly permitted to run Science and Art streams upto Intermediate level and has a total student strength of 1652 which includes boys and girls. The details of the number of students in each class for the current session have been stated in para-7 of the writ petition. Two posts of Assistant Clerks in the Institution fell vacant on 31.1.2013 and 30.11.2014 on the retirement of Sri Shiyaram Singh and Sri Raj Bahadur Singh. The vacancies were intimated to the respondents vide letters dated 2.3.2019, 2.4.2019 and 15.9.2019 (Annexure-2 to the writ petition). The petitioner Committee of Management also resolved to fill up the post of Assistant Clerk and sought permission to fill up at least 01 post vide letters dated 1.10.2021 and 20.10.2021 (Annexure-3 to the writ petition). No response having been received from the Competent Authorities and considering the emergent situation, the petitioners proceeded to advertise 01 post of the Assistant Clerk in the interest of the Institution and the students in widely circulated Newspaper namely "Hindustan" and "Aaj" on 16.11.2021. The District Inspector of Schools, Prayagraj, respondent No.3 was also intimated about the advertisement vide letter dated 26.11.2021 (Annexure-5 to the writ petition). Thereafter, a duly constituted Committee undertook the selection process and 08 eligible candidates appeared and underwent the selection process which comprised of typing test and computer knowledge test. On the basis of the quality point marks obtained by the candidates one Sri Sudhir Kumar Dwivedi was placed at Serial No.1 with total quality point marks of 139.3, Sri Indra Prakash Tiwari was placed at Serial No.2 with 137.45 quality point marks and Sri Naresh Kumar Nishad was placed at Serial No.3 with 135.10 quality point marks. The petitioner Committee of Management accepted the select panel of the Selection Committee and the requisite papers were forwarded to the respondent No.3 vide letter dated 11.12.2021. When nothing was heard for considerable time from the office of the respondent No.3, the petitioners sent reminders on 30.12.2021, 10.1.2022 and 18.1.2022. Since no response was received from the office of the District Inspector of Schools, Prayagraj / respondent No.3 and the requisite papers submitted with the respondent No.3 on 11.12.2021 was still pending decision, the petitioners were constrained to approach this Court by filing the instant writ petition. During the pendency of the instant writ petition the District Inspector of Schools, Prayagraj / respondent No.3 has proceeded to pass the impugned order declining to

accord approval to the selection of Sri Sudhir Kumar Dwivedi for the post of Assistant Clerk in the Institution on the ground that the procedure prescribed for selection of clerical category / non teaching posts in recognized unaided Inter Colleges by Government Order dated 25.11.2021 has not been followed. Besides the above certain other shortcomings in the process adopted has been pointed out.

4. Learned counsel for the petitioners has assailed the impugned order on the following grounds that:-

(i) the approval to the selection process could not have been denied on the ground that prior permission had not been obtained by the Committee of Management before proceeding with the recruitment as has been held by this Court in the case of ***Abhishek Tripathi vs. State of U.P. and others,*** *reported in* ***2015 (4) ADJ 270*** *and in the case of* ***Jagdish Singh vs. State of U.P. & others****, reported in* ***2006 (4) ADJ 162;***

(ii) the objection that the procedure prescribed by Government Order dated 25.11.2021 had not been followed is misconceived inasmuch as the process of selection had commenced with Advertisement dated 16.11.2021 and as such there was no occasion to follow the procedure laid down under the Government Order dated 25.11.2021;

(iii) the impugned order has been passed behind the back of the petitioners without giving them any opportunity to explain and substantiate their case;

(iv) the impugned order dated 23.3.2022 bearing official index No. 13371/-72 is ante dated inasmuch as by another order dated 23.3.2022 bearing official index No. 13370 the petitioners were required to furnish certain information which order was received on 31.3.2022 and the petitioners in response thereto submitted their reply on 2.4.2022.

5. Learned counsel for the petitioner thus prays that the impugned order is liable to be set aside and the writ petition is liable to be allowed.

6. Learned Standing Counsel appearing for the respondents No. 1 to 3 has resisted the writ petition by submitting that the Government Order dated 25.11.2021 provides for constitution of Selection Committee but the appointing authority did not adopt the proper procedure after constitution of the Selection Committee and hence the selection of Sudhir Kumar Dwivedi as Assistant Clerk is not liable to be approved. The permission was not taken from the Department nor the typing examination was conducted under the supervision of typing specialist of State Industrial Training Centre. In para-7 of the counter affidavit in response to para-14 of the writ petition it has been stated that for transparent and clear selection of clerical grade and non-teaching staff (Class-IV Employees) for a selection and appointment under the selection procedure was under consideration before the competent authority and hence no permission was granted to fill up the post of Assistant Clerk in the Institution. It is also stated that the Advertisement dated 16.11.2021 is bad being issued in contravention of Chapter III Regulation 101 of the U.P. Intermediate Education Act, 1921.

7. Rival contentions fall for consideration.

8. Learned counsel for the petitioners submits that the vacancy was advertised on

16.11.2021 and as such the selection process was to be governed by the Rules and Government Orders in existence on the date on which the process was initiated. Reliance is placed upon the decision of the Apex Court in the case of **N.T. Devin Katti vs. Karnataka Public Service Commission,** reported in **1990 (3) SCC 157** in which it has been held as follows:-

"Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government Orders and any amendment of the rules or the Government Order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amend- ed rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See P. Mahendra & Ors. v. State of Karnataka & Ors., [1989] 4 Judgment Today SC 459."

9. Reliance is also placed upon the decision of the Apex Court in the case of **The Assam Public Service Commission & others vs. Pranjal Kumar Sarma & others**, reported in ***2019 0 Supreme (SC) 1302*** where in para-13 it has been held as under:-

"13. The law with regard to applicability of the Rules which are brought anew during the selection process have been crystalized by this Court. It has been held that the norms selection existing begins, alteration process to the will the unless on control norms the date the would new when process selection not Rules the affect are and the to of the ongoing be given retrospective effect. (See State of Bihar and Others vs. Mithilesh Others Kumar 1). vs. Similarly Karnataka in Public N.T. Devin Service Katti and Commission and Others 2 , this Court held that a candidate has a limited right of with the being Rules considered as they for selection existed in on accordance the date of advertisement and he cannot be deprived of that limited right by amendment of the Rules during the pendency of the selection, unless the Rules are to be applied retrospectively."

10. Learned counsel for the petitioner contends that the vacancy occurred on 30.11.2014 and was advertised on 16.11.2021 and as such the Regulation 101 Chapter III of the Intermediate Education Act, 1921 existing on that date would govern the field and not the Government Order dated 25.11.2021 as being suggested by the respondents and also made basis of the impugned order. Placing reliance upon the decision in the case of **Preet Kumar Srivastava vs. State of U.P. and others (2011 (9) ADJ 591)**, it is contended that the controversy as to what would be the stage of grant of approval by the District Inspector of Schools has been set at rest and it has been held that approval is to be accorded after selection is held and before appointment. The Regulations 101 also contemplate the same stage that is after the selection process is over but before making appointment to the post. A coordinate Bench of this Court has also reiterated the proposition argued by the learned counsel for the petitioner in the case of **Abhishek Tripathi vs. State of U.P. & others, reported in 2015 (4) ADJ 270**. Thus, the Court finds force in the submission of the learned counsel for the petitioner that prior approval was not required for holding the selection from the District Inspector of

Schools and the selection process cannot be held to be illegal on the score that prior approval had not been obtained.

11. The Court also finds substance in the contention of the counsel for the petitioners that the procedure prescribed by the Government Order dated 25.11.2021 which had admittedly been issued after the commencement of the selection process was not liable to be followed in view of the law laid down by the Apex Court in 1990 (3) SCC 157 and 2019 0 Supreme (SC) 1302 referred to hereinbefore.

12. The Court further finds that the order has been passed behind the back of the petitioners and appears to be ante dated inasmuch as by an order of even date i.e. 23.3.2022 bearing official index No. 13370 the petitioners were required to furnish certain information and the petitioners also submitted their reply on 2.4.2022 but the impugned order dated 23.3.2022 was passed without considering the reply called for.

13. It is not borne out from the recitals of the impugned order that any other infirmity was found in the selection process adopted by the petitioners for filling up the vacancy in question.

14. Consequently, in view of the above, the order passed by the District Inspector of Schools dated 23.3.2022 cannot be sustained and is accordingly quashed. The matter is remitted back with a direction to the District Inspector of Schools, Prayagraj to pass a reasoned and speaking order strictly in accordance with the provisions contained in Regulation 101 Chapter III, Intermediate Education Act, 1921 and the observations made herein above, expeditiously preferably within a period of 45 days from the date of service of this order.

15. The writ petition stands **allowed**, accordingly.

(2022) 10 ILRA 421
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 4083 of 2021

Lal Chand ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arun K. Singh Deshwal

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension and other retiral benefits - The Uttar Pradesh Retirement Benefit Rules, 1961- Rule 3(8); The Uttar Pradesh Qualifying Service For Pension And Validation Ordinance, 2020; Constitution of India: Article 14 - Complete service rendered by the petitioner i.e. period of service shall be considered for grant of pensionary benefits. Service rendered against the temporary establishment converted into permanent post shall be considered for qualifying service to grant pension as well as retiral benefits. Ad hoc service rendered by the petitioner shall be considered for reckoning his seniority and other consequential benefits. (Para 15, 16, 17)

B. Words and Phrases – (a) *'Qualifying Service'* - Rule 3(8) of Rules, 1961 is very much clear, which provides that "qualifying service" means service which qualifies for pension in accordance with the provisions of

Article 368 of the Civil Service Regulations and includes continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post.

(b) *'Service'* - Service does not qualify unless the officer holds a substantive office on a permanent establishment. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed. (Para 12, 13)

In the present case, petitioner had continuously worked after his appointment on the post of Cooperative Supervisor (District Ballia on 21.07.1978) and ultimately, he was temporarily promoted on the post of Assistant Development Officer (Cooperative) vide order dated 17.08.1999. Not only this, after retirement, his case was also considered in D.P.C. conducted on 04.01.2017 by U.P. Public Service Commission and his service was regularized against the vacancy of the recruitment year 2007-08. While regularizing his service, no reason has been assigned as to why his service has not been regularized from the date, when service of his juniors were regularized, and ultimately, he was deprived from the pensionary benefits and other retiral benefits, which is absolutely bad in law and in teeth of Rules, 1961 as well as law laid down by the Apex Court and this Court. It is also undisputed that promotion of petitioner was not considered only due to unavailability of A.C.R., for which petitioner was not responsible. (Para 10, 13, 19)

In light of Rule 3(8) of Rules, 1961, qualifying service is derived from Article 368 of the Civil Service Regulations coupled with continuous temporary or officiating service under the Govt. of UP and ultimately, confirmation on the same post or any other post without interruption. Irrespective of the date of promotion/regularization, for the purpose of pension, his all service period has to be considered, if it is in accordance with Rule 3(8) of Rules, 1961 and there cannot be any other interpretation for the same. (Para 19)

While granting him promotion or regularizing his service, petitioner must have been given at least same date of promotion as well as regularization from which juniors to him were promoted/regularized. In the present case, it is very surprising that without any fault on the part of petitioner, he was made to suffer and subjected to litigation on three occasions for payment of his pensionary benefits as well as other post retiral benefits. (Para 13)

Therefore, apart from many other grounds, this alone ground is sufficient to grant full pensionary benefits to the petitioner considering his continuous service started from his appointment on the post of Cooperative Supervisor to his superannuation on the post of Assistant Development Officer (Cooperative). It is required on the part of respondent-authorities to grant notional promotion as well as regularization from the date his juniors were awarded promotion and regularization. (Para 19)

Writ petition allowed. (E-4)

<u>Precedent followed</u>:

1. Bhuneshwar Rai Vs St. of U.P. & ors., 2014 (9) ADJ 4 (DB) (Para 6)

2. St. of U.P. Vs Riyaz Ali, 2015 (8) ADJ 148 (DB) (LB) (Para 6)

3. Love Prasad Dwivedi & ors. Vs State of U.P. & ors., 2015 (5) ADJ 170 (Para 6)

4. Man Singh Vs State of U.P. & ors., 2018 (7) ADJ 679 (Para 6)

5. Writ-A No. 50207 of 2014, Order dated 04.11.2020 (Para 10)

Present petition assails order dated 07.01.2021, passed by Joint Commissioner

and Joint Registrar, Co-operative Azamgarh Region, Azamgarh.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for petitioner and learned standing counsel for State-respondents.

2. Present petition has been filed seeking following reliefs:-

"v) Issue appropriate writ, order or direction in the nature of certiorari quashing the order dated 07.01.2021 passed by respondent No. 4.
vi) Issue appropriate writ, order or direction in the nature of mandamus directing the respondents to treat the service of petitioner from the date of his promotion (17.08.1999) on the post of Assistant Development Office (Co-operative) as qualifying service for pension and release the pension and other retiral benefits of the petitioner."

3. Pleadings are exchanged between the parties. With the consent of counsels for parties, writ petition is being decided at the admission stage.

4. Learned counsel for petitioner submitted that petitioner was appointed on the post of Cooperative Supervisor in District Ballia on 21.07.1978 under Schedule Caste Category. In the seniority list of Cooperative Supervisors, petitioner was at Serial No. 699 while some juniors to petitioner, who were at Serial Nos. 702, 704, 709 & 710 in the same seniority list, were promoted from the post of Cooperative Supervisor to the post of Assistant Development Officer (Cooperative). Petitioner was not promoted in lack of Annual Confidential Report (in short, "A.C.R.') compelling him to file Writ Petition No. 42401 of 1998 before this Court which was disposed of vide order dated 08.01.1999 directing respondent-authorities to consider the grievance of petitioner. Thereafter, petitioner has filed representation, which was considered by respondent-authorities and petitioner was temporarily promoted on the post of Assistant Development Officer (Cooperative) vide order dated 17.08.1999 subject to confirmation of promotion by the Departmental Promotion Committee. It is next submitted that case of petitioner never placed before the Departmental Promotion Committee (hereinafter referred to as "D.P.C.') and petitioner has retired from service on 31.07.2014. On the date of his retirement, order dated 31.07.2014 was passed mentioning therein that service rendered by the petitioner on ad hoc basis cannot be considered for grant of pensionary and other retiral benefits. In the very same order, it is accepted that Officers, who are junior to petitioner have been given the said benefits. Petitioner has challenged the order dated 31.07.2014 by filing Writ-A No. 50207 of 2014, which was disposed of by this Court vide order dated 04.11.2020 with direction to reconsider the case of petitioner in light of fact that juniors to the petitioner have been provided all benefits, which are claimed by the petitioner. During the pendency of Writ-A No. 50207 of 2014, after retirement of petitioner, D.P.C. was conducted on 04.01.2017 by U.P. Public Service Commission and promotion of petitioner was confirmed and his service was also regularized against the vacancy of the recruitment year 2007-08. A direction was also sought vide letter dated 27.02.2019 from respondent No. 2-Registrar Cooperative Societies about the payment of post retiral benefits to the petitioner on the basis of regularization. .

5. In compliance of order of this Court dated 04.11.2020, petitioner moved

representation dated 11.11.2020 along with certified copy of order for release of pensionary and other retiral benefits considering his promotion from the date his juniors were promoted. Complying order dated 04.11.2020 passed in Writ-A No. 50207 of 2014, impugned order dated 07.01.2021 has been passed rejecting the claim of petitioner.

6. Learned counsel for petitioner assailed the impugned order basically on two grounds. He firstly submitted that for the purpose of retiral benefits, service of petitioner is governed by the provisions of The Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as "Rules, 1961'), therefore, qualifying service includes continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation on the same or any other post. Undisputedly, petitioner was continuous in service and ultimately, he was temporarily promoted on the post of Assistant Development Officer (Cooperative) vide order dated 17.08.1999, therefore, for the pensionary benefits, service rendered by the petitioner in temporary or officiating capacity must have been considered while calculating qualifying service. The second ground so taken by learned counsel for the petitioner is that, it is admitted fact that juniors to petitioner who have been promoted in the year 1994 have also been granted all pensionary and post retiral benefits calculating the qualifying service in light of Rule 3(8) of Rules, 1961, therefore, there cannot be a discrimination in the matter of petitioner. In support of his contention, he has placed reliance upon the judgments of this Court passed in ***Bhuneshwar Rai v. State of U.P. and others, 2014(9) ADJ 4(DB), State of U.P. vs. Riyaz Ali; 2015(8) ADJ 148 (DB)(LB), Love Prasad Dwivedi and others vs. State of U.P. and others; 2015(5) ADJ 170 and Man Singh vs. State of U.P. and others; 2018(7) ADJ 679.***

7. Per contra, learned standing counsel opposed the submissions of learned counsel for petitioner, but could not dispute this fact that juniors to petitioner have been given promotion and also all pensionary and retiral benefits given to them, which are claimed by the petitioner. He only submitted that earlier service of petitioner was governed by The Uttar Pradesh Qualifying Service For Pension And Validation Ordinance, 2020 (hereinafter referred to as "Ordinance, 2020') when he was working on the post of Cooperative Supervisor whereas after promotion on the post of Assistant Development Officer (Cooperative), his service was governed by Rules, 1961, therefore, he is not entitled for the pensionary and other retiral benefits as claimed by him.

8. Being confronted by the Court, learned standing counsel could not dispute that service of juniors to petitioner, who were granted promotion earlier, were also governed by the provisions of Ordinance, 2020 as well as Rules, 1961, but they have been given all the benefits. He also admitted that while promotion was granted to the juniors to petitioner, A.C.R. of petitioner was incomplete, for which petitioner is not responsible.

9. I have considered rival submissions advanced by learned counsels for parties and perused the records as well as judgments relied upon.

10. Facts of the case are undisputed. In seniority list, petitioner was higher in rank to the other employees, who have been promoted prior to petitioner. It is also

undisputed that promotion of petitioner was not considered only due to unavailability of A.C.R., for which petitioner was not responsible. In fact, while remanding the matter, this Court vide order dated 04.11.2020 passed in Writ-A No. 50207 of 2014 has considered this fact. Relevant paragraph of judgment and order dated 04.11.2020 is quoted below:-

"10. From perusal of the record, it is clear that though the petitioner was given promotion on the post of Co-operative Inspector Category-II/Assistant Development Officer on 17.08.1999. on ad-hoc basis but the benefits in this regard were not granted to the petitioner. At the relevant time as has been provided to the persons junior to the petitioner, Department Promotion Committee was convened on 04.01.2017 and the claim for promotion of the petitioner has been duly recommended. Since the petitioner has already been superannuated, directions were sought for from respondent No.3 to the respondent No.4 vide letter dated 27.02.2019. It is surprising that in spite of the fact that considerable time has already been lapsed but till date no decision whatsoever has been taken by the respondent No.4 in the matter. "

11. Apart that, Rules 3(8) of Rules, 1961 is very much clear, which provides that qualifying service includes continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation in the same or any other post. Rule 3(8) of Rules, 1961 is quoted below:-

"3(8). "*Qualifying service*" means service which qualifies for pension in accordance with the provisions of Article 368 of the Civil Service Regulations:

Provided that continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruption by confirmation on the same or any other post except-

(i) periods of temporary or officiating service in a non-pensionable establishment;

(ii) periods of service in a work-charged establishment, and

(iii) periods of service in a post, paid from contingencies, shall also count as qualifying service."

12. Regulation 368 and 369 of the Civil Services Regulations are also quoted below:-

"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

369. An establishment, the duties of which are not continuous but are limited to certain fixed periods in each year, is not a temporary establishment. Service in such an establishment, including the period during which the establishment is not employed qualifies but the concession of counting as service the period during while the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed."

13. This fact is also not disputed that petitioner had continuously worked after his appointment on the post of Cooperative Supervisor and ultimately, he was temporarily promoted on the post of Assistant Development Officer (Cooperative) vide order dated 17.08.1999. Not only this, after retirement, his case was also considered in D.P.C. conducted on 04.01.2017 by U.P. Public Service Commission and his service was

regularized against the vacancy of the recruitment year 2007-08. While regularizing his service, no reason has been assigned as to why his service has not been regularized from the date, service of his juniors were regularized. For unavailability of A.C.R., petitioner cannot be responsible and it is upon respondent-authorities to provide A.C.R. and consider the same in the D.P.C. In case of unavailability of A.C.R., petitioner cannot be made to suffer. While granting him promotion or regularizing his service, petitioner must have been given at least same date of promotion as well as regularization from which juniors to him were promoted/regularized. In the present case, it is very surprising that without any fault on the part of petitioner, he was made to suffer and subjected to litigation on three occasions for payment of his pensionary benefits as well as other post retiral benefits.

14. Contention of learned standing counsel that service of petitioner prior to promotion governed by Ordinance, 2020 is also having no force for the reasons that service condition of juniors to petitioner were also governed by Ordinance, 2020 before their promotion on the post of Assistant Development Officer (Cooperative). Later on they have also been put to retirement under the provisions of Rules, 1961 giving full pensionary and retiral benefits. Therefore, the ground so taken by learned standing counsel is very vague and in violation of Article 14 of Constitution of India.

15. Similar issue was also before this Court in the matter of ***Bhuneswar Rai (Supra)*** in which this Court after considering the judgment of Apex Court has held that complete service rendered by the petitioner i.e. period of service shall be considered for grant of pensionary benefits. Relevant paragraph is quoted below:-

"In support of his aforesaid contention, learned counsel for the appellant has relied upon the judgment rendered by the Apex Court in the case of Punjab State Electricity Board and another v. Narata Singh, 2010-Laws (SC)-2-40, which has been relied upon by the learned Single Judge of this Court in the case of Mohd. Mustafa v. State of U.P., (2010) (1) ADJ (All)(LB). Holding that where the petitioner has put in 23 years of service including 113 months and 11 days i.e. 9 years 5 months & 11 days of regular service then denial of pension for not having completed 10 years of regular service, was not proper. In that case, the Court directed the respondents to grant pensionary benefit to the petitioner considering him to have completed 10 years of regular service and pay him regularly every month from the date of retirement. The State of U.P. preferred an appeal against the aforesaid judgment in re: Mohd. Mustafa v. State of U.P. (Special Appeal Defective No. 254 of 2013), State of U.P. and others v. Prem Chandra and others, wherein the Court relying upon the judgment of the Apex Court in Punjab Electricity Board (supra) vide its judgment dated 13.05.2013 held that the provisions of regulation 370 of the U.P. Civil Service Regulation have to be read down in line with the judgment of the Apex Court. Aggrieved, the State of U.P. preferred SLP (Civil) No. CC 22271 of 2013, State of U.P. and others v. Prem Chandra and others, before the Apex Court, which was dismissed vide judgment and order dated 07.01.2014."

16. Similar issue came up before this Court in the matter of ***Love Prasad***

Dwivedi (Supra), in which this Court relying upon the judgment of ***Bhuneshwar Rai (Supra)*** as well as considering the provisions of Rule, 3(8) of Rules, 1961 as well as Regulations 368 & 369, has held that service rendered against the temporary establishment converted into permanent post shall be considered for qualifying service to grant pension as well as retiral benefits. Relevant paragraph Nos. 13 & 14 of the said judgment is quoted below:-

"13. Proviso to Rule 3(8) itself prescribes that continuous temporary service without interruption followed by confirmation shall count as qualifying service. Thus, it is wholly immaterial that the service of the petitioner was regularised on 1.2.2001, as he was continuously working since the date of initial appointment. Though earlier his working was against a temporary establishment, as there was no sanctioned post but after temporary post was sanctioned and later on converted into permanent post, the service so rendered, fully qualifies for being counted for purpose of payment of pension and retiral benefits.

14. For the aforesaid reasons, the Court finds that the petitioners had rendered qualifying pensionary service with effect from the date of his promotion in the year 1988 and which shall be treated as service qualifying for pension."

17. Again, similar issue was came up before Division Bench of this Court in the matter of ***State of U.P. (Supra)*** and Division Bench after relying upon the judgment of Apex Court, has held that ad hoc service rendered by the petitioner shall be considered for reckoning his seniority and other consequential benefits. Relevant paragraph Nos. 5, 8, 9 & 10 are quoted below:-

"5. The law in respect of counting such services for the purposes of seniority has been summarized by Hon'ble Apex Court in the case of Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others, (199) 2 SCC 715. Hon'ble Apex Court in this case has summed up that once an incumbent is appointed to a post according to rule, his seniority is to be counter from the date of his appointment and not from the date of his confirmation. The Apex Court further stated in the said judgment that corollary of the above rule is that where the initial appointment is only adhoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. Hon'ble Apex Court in the said judgment has further observed as under:

"B. If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.'

8. The entire controversy, however, appears to have been set at rest by Hon'ble Apex Court in the case of Secretary, Minor Irrigation Department RES v. Narendra Kumar Tripathi, (2015)2 UPLBEC 1161, wherein the benefit of the principle propounded by Hon'ble Apex Court in para 47 - B in the case of Direct Recruit (supra) has been extended to Narendra Kumar Tripathi who like the respondent No. 1 was also initially appointed on ad-hoc basis and subsequently under the regularization rules, his services were also regularized.

9. The tentative senior list of the Assistant Junior Engineers working in the Rural Engineering Department shows the name of respondent No. 1 at serial No. 88

and his date of substantive appointment has been shown to be 23rd August, 1986. The name of Sri Narendra Kumar Tripathi in the said seniority list is shown at serial No. 172 and his date of substantive appointment has been shown to be 16.12.1989. The date of substantive appointment of respondent No. 1 as well as Sri Narendra Kumar Tripathi as mentioned in the seniority list referred to herein above, are the dates on which their services were regularized under the regularization rules.

10. The controversy raised before Hon'ble Supreme Court in the case of Secretary, Minor Irrigation Department RES (Supra) was akin to the controversy which is engaging the attention of this Court in this case. In the case of Narendra Kumar Tripathi Hon'ble Supreme Court has allowed all the benefits of ad-hoc services rendered by Sri Tripathi for the purposes of reckoning his seniority and other consequential benefits."

18. This Court in the matter of ***Man Singh (Supra)*** has again held that petitioner is entitled for notional promotion as well as all notional benefits. Relevant paragraph No. 17 is quoted below:-

"17. Therefore, after consideration of the entire facts and legal issues involved in this case, the respondent No. 3 is directed to grant notional promotion to the petitioner with effect from the date when his immediate junior, Sri Mahesh Chandra Agnihotri, was regularized on the post of Junior Clerk and subsequently to the higher posts of Clerk, Head Clerk, etc. The petitioner has also stated that his junior employees, Sri Triveni Prasad Dubey, Sri Subhash Chandra Pandey and Paras Nath Gupta were promoted to the post of Office Superintendent on 31.05.2014, when the petitioner retired from service on 31.07.2016, while working on the post of Head Clerk only. The notional benefits of the post of Office Superintendent shall also be calculated and paid to the petitioner. All the notional benefits shall be calculated and paid to the petitioner within a period 2 months from the date of presentation of the certified copy of this order before the respondent No. 3."

19. So far as present case is concerned, it is on much better footing than the cases so relied upon by counsel for petitioner. There is no dispute upon the appointment of petitioner on the post of Cooperative Supervisor in District Ballia on 21.07.1978 coupled with this fact that he was senior to others who have been granted promotion on the post of Assistant Development Officer (Cooperative) and petitioner has not been promoted only due to unavailability of A.C.R., for which he is absolutely not responsible. Further, vide order dated 17.08.1999, petitioner has been granted ad hoc promotion and his service was also regularized vide meeting of D.P.C. dated 04.01.2017 against the vacancy of the recruitment year 2007-08 without assigning any reason as to why he has not given promotion/regularization from the date his juniors were promoted and ultimately, he was deprived from the pensionary benefits and other retiral benefits, which is absolutely bad in law and in teeth of Rules, 1961 as well as law laid down by the Apex Court and this Court. In fact, in light of Rule, 3 (8) of Rules, 1961, qualifying service is derived from Article 368 of the Civil Service Regulations coupled with continuous temporary or officiating service under the Government of Uttar Pradesh and ultimately, confirmation on the same post or any other post without interruption. Irrespective of the date of promotion/regularization, for the purpose

of pension, his all service period has to be considered, if it is in accordance with Rule 3(8) of Rules, 1961 and there cannot be any other interpretation for the same. Therefore, apart from many other grounds, this alone ground is sufficient to grant full pensionary benefits to the petitioner considering his continuous service started from his appointment on the post of Cooperative Supervisor to his superannuation on the post of Assistant Development Officer (Cooperative). There is also no dispute on this point that once petitioner is not at fault, he is fully entitled for all pensionary and other retiral benefits from the date his juniors were promoted. In present case, petitioner has not been promoted due to want of A.C.R., and his service was not regularised, but later on he has been promoted/regularized from a later date from which his juniors were promoted/regularized is bad and cannot be accepted. It is required on the part of respondent-authorities to grant notional promotion as well as regularization from the date his juniors were awarded promotion and regularization.

20. Therefore, under such facts of the case as well as law laid down by this Court, impugned order dated 07.01.2021 is bad and hereby set aside.

21. Accordingly, writ petition is **allowed**.

22. No order as to costs.

23. Respondent-authorities are directed to grant full pensionary and other retiral benefits to the petitioner considering his full service i.e. from the date of appointment to the date of superannuation as qualifying service for grant of retiral benefits. Further, petitioner shall also be entitled for all other financial benefits, which have been granted to his juniors treating him notionally promoted/regularized from the date his juniors were promoted/regularized.

(2022) 10 ILRA 429
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 31858 of 2017

Raj Kumar & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Tejasvi Misra, Sri R.K. Rai

Counsel for the Respondents:
A.S.G.I., Sri Rajnish Kumar Rai, S.C., Sri Shiv Kumar Pal

Civil Law- Juvenile Justice (Care and Protection) Act, 2015- Section 24- From a perusal of the facts as mentioned by the Trial court it is evident that the incident in question leading to the lodging of the FIR was of 31.10.2003, when the petitioner no. 1 Rajkumar was only nine years old. The court had therefore acquitted the accused of the charges levelled against them-It is evident from perusal of Section 24 of the Juvenile Justice Act 2015 that in all cases except cases related to heinous offences, a child in conflict with the law would not suffer any disqualification in the future and for such purposes records relating to the case had to be destroyed after passage of a specified period and in the manner as prescribed under the Rules -Even if a Juvenile is convicted under the provisions of 2015 Act such conviction is not liable to be viewed as disqualification which may otherwise and ordinarily stand attached upon a person being convicted-

The petitioner no.1 being a juvenile at the time of criminal prosecution being concluded against him and having culminated in acquittal deserves to be reinstated in service, the order dated 01.03.2017 is *quashed.*

Implication in a criminal case of a child in conflict will law will not be a ground to disentitle or disqualify the person in future. (Para 28, 32)

Writ Petition allowed. (E-3)

Case law/Judgements relied upon:-

1. Harendra Pawar Vs St. of UP & ors. 2012 (4) ADJ 488"

2. T. S. Vasudevan Naiyar Vs Director of Vikram Sarabhai Space Centre (1998 supplement SCC 795)";

3. GNCT Vs Robin Singh 2015 (118) DLT 168

4. Kaptan Yadav Vs U.O.I & ors.; Special Appeal No. 2435 of 2011(Alld.)

5. Ramakant Prasad & ors. Vs U.O.I & ors.,decided on 07.01.2013

6. Krishna Pratap Yadav Vs U.O.I & ors.,Special Appeal No. 2510 of 2011(Alld.)

7. Jainendra Singh Vs St. of UP & ors. 2012 (8) SCC 748

8. Shivam Maurya Vs St. of UP & ors. 2020 (5) ADJ

9. Avtar Singh Vs U.O.I & ors. 2016 (8) SCC 471

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

1. This writ petition has been filed by two writ petitioners challenging orders of discharge dated 1 March 2017and 18 February 2017 respectively and for issuance of a mandamus commanding the respondents to reinstate the petitioners into service with all consequential benefits.

2. It is the case of the petitioners that in pursuance of Advertisement number 1/2011 issued by the Respondent No.3 for recruitment on the post of Constable (GD) in Railway Protection Special Force (RPSF) the petitioners applied and were selected. Before their training and appointment the petitioners had to submit their attestation forms where in column 12 they had to disclose their character and antecedents and as to whether any criminal case was pending against them or whether they had ever been tried. To this the petitioners answered in the negative as at that point of time no criminal case was pending against them. During the course of training, police verification reports of the petitioners were sought from the District Magistrates of their respective districts. In the police verification reports it came out that FIR was lodged against them individually but they were acquitted. However, since they had not disclosed this fact in the attestation form both the petitioners were discharged from their service .

3. It has been argued by the learned counsel for the petitioner that the petitioner no.1, Rajkumar had submitted his attestation form on 22 June 2014 wherein he did not disclose his character and antecedents in Column 12 with regard to Case Crime No. 131 of 2003 under Sections 323 and 504 I.P.C. He was sent for training at ITBP Training Centre AALO, West Slang, Arunachal Pradesh on 30 October 2014. In the police verification report sought from district Allahabad it was informed that he was prosecuted but acquitted from the Court of ACJM. However, as a result of this verification report he was discharged while undergoing training 31 March 2015. The Respondents had failed to appreciate that the petitioner

no.1 was cleanly acquitted from criminal charges by an order dated 24 September 2007 by the Court of Additional Chief Judicial Magistrate. At the time of filing of his application form and at the time of signing of the attestation form no criminal case was pending. Also, petitioner no.1 was a juvenile at the time when the FIR was lodged against him as he was just nine years old. He was tried in a Regular Court instead of by Juvenile Justice Board and he was 13 years old when he was cleanly acquitted by the Court of ACJM.

4. The petitioner no.1 had moved this Court and by way of Writ Petition No. 57707/2015, "***Rajkumar vs. Union of India and Others***" and this court by an order dated 29 November 2016 had quashed the discharge order and remitted the matter to the respondents for fresh consideration of his candidature in the light of the law laid down by the Supreme Court in the case of Avtar Singh. In pursuance of such order passed by the High Court the petitioner no.1 was called for personal hearing on 28 February 2017 but the Respondent No.4 in his order dated 1 March 2017 again proceeded to cancel the candidature of the petitioner on the ground of intentional suppression of material facts at the time of filling up of the attestation form.

5. It has been argued that the nature of the offence of which the petitioner had been accused along with his family members was trivial involving minor punishment. The petitioner was acquitted not as an outcome of benefit of doubt but he was honourably exonerated. This Court in its Order dated 29.11.2016 had directed the Respondent No.4 to adjudge the suitability of the candidate with reference to the nature of suppression, and the nature of the criminal case. Instead of considering whether the petitioner no.1 was suitable for appointment to the post of Constable the respondent had acted mechanically by holding the petitioner no.1 unfit for the post alleging that he had furnished an affidavit stating incorrect facts at the time of his recruitment.

6. In the case of petitioner no.2, Sasikala, she had submitted her attestation form on 22.06.2014, where she did not disclose in column number 12 Case Crime No. 128A/11/2003 under sections 147, 148, 452, 338, 323, 504, 506 IPC which was lodged after filling up of the application form and was concluded before the attestation form was filed. The petitioner no.2 joined her training at Himachal Pradesh Police Training Centre Palampur, on 17.11.2014. In the police verification report sent from the office of District Magistrate Gorakhpur it was disclosed that she had been tried and acquitted by the Court. However, she was discharged from training on this ground alone on 26.05.2015. Aggrieved by the order of discharge dated 26.05.2015, the petitioner filed Writ Petition No. 45917 of 2015, "***Shashikala Singh vs. Union of India and Others***". This court by its order dated 29.11.2016 quashed the discharge letter and remitted the matter back to the respondents for fresh consideration of her candidature in the light of the law laid down by the Apex Court in *Avtar Singh's* case. In pursuance of such order passed by this Court the petitioner no.2 was called for personal hearing on 17.01.2017. After hearing her the respondent no.5 in his order dated 18 February 2017 reiterated the position and canceled her candidature on the ground of intentional suppression of material facts at the time of filling up of the attestation form.

7. It has been argued by the learned counsel for the petitioner that the petitioner had filed her application form in March, 2011 whereas the FIR was lodged against her on 13.04.2011. She was acquitted by the competent court on 21.01.2014 and therefore it cannot be said that any case was pending at the time of filling up of the application form or at the time of signing of the attestation form by her. It cannot therefore be said that the petitioner no.2 had resorted to suppression of material facts. Moreover, petitioner no.2 being a female never went to the Court for pursuing the case. The case had been slapped on the entire family out of spite, and therefore the elders of the family had pursued it at their end. The petitioner no.2 was acquitted not by giving her benefit of doubt but it was an honourable exoneration from all charges levelled against her.

8. It has been argued that the case of the petitioners are squarely covered by law laid down by this Court in "***Harendra Pawar vs. State of UP and Others 2012 (4) ADJ 488***" where this Court had observed that -

"..mere involvement in a criminal case is not an impediment for appointment to the post of constable. Moreover, stigma attached to a person is obliterated on acquittal and as such the applicant cannot be denied appointment. Moreover a conviction results in ineligibility for appointment in government service but since the applicant had already been acquitted of the criminal charges he is eligible for appointment...".

9. The learned counsel for the petitioner has also placed reliance upon three Judges Bench decision of the Supreme Court in the case of "***T. S. Vasudevan Naiyar vs. Director of Vikram Sarabhai Space Centre (1998 supplement SCC 795)***"; whereby the Supreme Court had set aside order cancelling the offer of appointment of the applicant made because he had not disclosed that during emergency he had been convicted for having shouted slogans against the government on one occasion.

10. It has been argued that in the case of "***Dnyaneshwar Kure vs. Union of India***"; the Bombay High Court by an Order dated 06.05.2016 had quashed the discharge order and remitted the matter to the respondents with a direction that -

"....the respondent no.4 shall objectively assess the suitability of the petitioner for continuance of the petitioner in the services on the basis of verification report received from the Superintendent of Police Nanded, and more particularly having concern to the acquittal recorded in favour of the petitioner in the criminal case against him and take appropriate decision as expeditiously as possible."

11. It has been argued that against the orders passed by the Bombay High Court on 6.05.2016, SLP bearing no. 24195 of 2016 was filed by the respondents but it was dismissed by the Supreme Court on 02.01.2017. Hence the order passed by the Bombay High Court was affirmed and in pursuance of such orders, the respondents had reinstated Dnyaneshwar Kure as Constable RPSF ,having found him to be fit, though at the time when he had been initially appointed and sent for training he had been facing criminal trial and was acquitted later on and his character was not unblemished at the time of filling up of the attestation form.

12. The learned counsel for the petitioner has also referred to the

judgement rendered in the case of ***GNCT vs. Robin Singh 2015 (118) DLT 168***; where the Delhi High Court had observed that every wrong information may not necessarily be a deception.

"A person may be wrong, but under a bona fide belief that he is right, he furnishes the information. This would not be deception though erroneous, the forming of bona fide belief that once he stands acquitted in a criminal case, the same is not required to be mentioned, since the acquittal puts him in the same position as if no FIR had ever been lodged against him. Thus a person under a mistaken legal belief writes or omits to mention something, the charge of deception as lead in the allegation is not sustainable".

13. It has been argued on the basis of said judgement of the Delhi High Court that the application forms and affidavits were filed by the petitioners under a bona fide belief that only if a criminal case is pending, or a person is convicted, the same is required to be mentioned. Therefore the order discharging the services of the petitioners on the sole ground of concealment of their having been tried in the distant past was absolutely unjustified and illegal.

14. In the counter affidavit filed by the Respondents it has been stated that the petitioners had applied for the post of Constable in Railway Protection Force/Railway Protection Special Force under Advertisement No. 1/2011. After qualifying in all selections that were held the petitioners were allotted the respective Zonal Railways and sent for initial training subject to police verification of their character and antecedents. The District Magistrates of the respective districts had informed about the lodging of criminal cases against the petitioners under different Sections of the IPC and their acquittal on different dates.

Consequently, the Chief Security Commissioner had discharged the petitioners from training on the ground of suppression of facts in the attestation form. Consequent to the Writ Petitions being filed by them and their initial order of discharge being quashed, the Zonal Chief Security Commissioner had given personal hearing to the petitioners individually and passed fresh orders which are challenged in the writ petition.

15. It has been argued by the learned counsel for Respondents that in paragraph 9 note (f) of the Advertisement No.1/2011 it had been clearly mentioned that :-

"candidates found to be having an adverse report on their antecedents and character may not be appointed in RPF including RPSF. False declaration is an offence under the law and will lead to disqualification of the applicant, institution of criminal case and also dismissal from service, if appointed".

The petitioners being aware of the warning mentioned in the advertisement, had filled up their application forms. Even in the attestation form in paragraph 1 and 2 of the attestation form it was clearly stated that :-

"if detained, arrested, prosecuted, bound down, fined , Convicted, debarred, acquitted et cetera subsequent to the completion and submission of this form, the details should be communicated immediately to the authority to whom the attestation has been sent earlier, failing

which it will be deemed to be a suppression of factual information."

In paragraph number-3 of the attestation form it had also been mentioned that -

"If the fact, that false information has been furnished or that there has been a suppression of any factual information in the attestation form, comes to notice at any time during the service of a person, his service would be liable to be terminated".

16. It has been pointed out that in the counter affidavit the Respondents have also mentioned Rule 52 of the RPF Rules 1987 which relate to verification. Rule 52.1 provides that

"As soon as the recruit is selected but before he is formally appointed to the force, his character and antecedent shall be got verified in accordance with the procedure prescribed by the Central Government from time to time".

Under Rule 52.2, it is provided that "where after verification, recruit is not found suitable for the Force, he shall not be appointed as a member of the Force."

17. It has been submitted in the counter affidavit that the orders discharging the petitioners have been passed by the Zonal Chief Security Commissioner on the ground of suppression of facts in the attestation form. The petitioners have deliberately suppressed vital information of criminal cases having been lodged against them and they being tried before the competent court.

In the attestation form under column 12, the following information was sought from the applicant/petitioners: -

(A) Have you ever been arrested?

(B) Have you ever been prosecuted?

(C) Have you ever been kept under detention?

(D) Have you ever been bound down?

(E) Have you ever been fined by a court of law?

(F) Have you ever been convicted by a court of law?

(G) Have you ever been debarred from any examination or restricted by any university or any other educational authority/institution?

(H) Have you ever been debarred /disqualified by any public service commission/staff selection commission for any of their examination/selection?

(I) Is any case pending against you in any university or any other educational authority/institution at the time of filling up this form?

(G) Is any case pending against you in any court of law at the time of filling of this form ?

(K) Whether discharge/ expelled/ withdrawn from any training institution under the government or otherwise?

(L) If the answer to any of the above mentioned questions is "yes" give full particulars of the case/arrest/ detention/fine/conviction/punishment/acquittal et cetera as the case maybe, and/or name the university/court/educational authority, etc, where any case is pending at the time of filling up of this form.

18. It has been submitted that the petitioners had suppressed information of the prosecution in the criminal cases as required under column 12 of the attestation form. No matter whether the petitioners were acquitted or not and no criminal cases were pending against them at the time of filling up of the attestation form, since the attestation form required disclosure of past prosecution as well, the Zonal Chief

Security Commissioner has rightly held that the petitioners had deliberately suppressed Vital/factual information Of the prosecution. The Railway Protection Force/Railway Protection Special Force is a paramilitary force of the Union and the petitioner's conduct has become doubtful at the initial stage itself. Honesty and integrity which is of utmost importance for the post applied for, cannot be disregarded. The respondent no.4 four has rightly passed the orders impugned in observance of Rule 67.2 of the RPF Rules 1987 after giving due opportunity of hearing to the petitioners. Also, it is not the question of stigma of registration of criminal case against the petitioners and their acquittal therein, it is a question of deliberate suppression of information with regard to character and antecedents which has led to the competent authority coming to the conclusion that the petitioners are not suitable to be appointed as Constables in RPF/RPSF.Moreover the petitioners have not been discharged from service. They were only sent for training as selected candidates. They were not formally appointed as Constables.

The respondents have emphasized the observations made by the Supreme Court in the case of ***Avtar Singh vs. Union of India*** in paragraph 30.1 where it was observed that - "*information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information."*

Although it is not denied by the petitioners that they were prosecuted before they filed their attestation forms but they have deliberately suppressed vital/critical information from their employers which amounts to wilful misrepresentation and giving of false affidavit and misleading the administration at the very beginning of their career in a Disciplined Armed Forces of the Union. Copies of attestation forms submitted by the petitioners have been filed also as Annexures to the Counter Affidavit.

19. The Respondents have referred to judgement rendered by this Court on 24.02.2015 in Writ Petition No. 27584 of 2009, "***Kaptan Yadav vs. Union of India and Others***"; and in Special Appeal No. 2435 of 2011, "***Ramakant Prasad and Others vs. Union of India and Others***" decided on 07.01.2013; and Special Appeal No. 2510 of 2011, "***Krishna Pratap Yadav vs. Union of India and Others***" decided on 03.04.2014.

20. In the rejoinder affidavit filed by the petitioners they have referred to orders passed by the respondents themselves in the case of one Devendra Singh who had been tried and acquitted under Section 323, 324, 294, 336, 506 (B), and Section 452 IPC on 12.05.2017; speaking order passed in the case of one Bali Ram Kumar who had been tried and acquitted under Section 147, 148, 149, 452, 323, 324,504, 506, 427 IPC on 08.06.2017; and in the case of one Mohit Kumar who had been tried and acquitted under Section 379 IPC on 13.05.2017 and in the case of one Manish Kumar who had been tried under Section 323, 341, 354 and 34 IPC and who was also reinstated on 12.05.2017.

In all such cases the respondents had considered the representation of the candidates and come to the conclusion that at the time of filling up of attestation form the character of the candidate was unblemished. Since the candidate was

acquitted much earlier he did not record so in the attestation form. It was a fact that he had made an incorrect statement of having never been involved in any criminal case in his life but the respondents had observed that they had reason to believe that it must have been done in good faith since the candidate was acquitted in the criminal case long before filling up of the attestation form. The action of the candidate being in good faith, they were reinstated in service. All such orders have been passed by the Inspector General cum Chief Security Commissioner, Railway Protection Force, New Delhi ,after remitting of the matter by the High Court to him for reconsideration.

21. The Division Bench of this Court in *Ramakant Prasad and Others* was considering the order passed by the Chief Security Commissioner, RPF/RPSF, where the appellants had filed their attestation forms when criminal cases were pending against them without disclosing such pendency though acquitted subsequently ,and the offences in which they were involved were of trivial nature. The Division Bench had observed that the appellants had started their career with falsehood, preventing the authority from verifying the character as also their suitability/eligibility for appointment. A candidate is expected to answer the questions without any misrepresentation, suppression or false statement. Such falsehood would demonstrate a conduct and character not befitting of a uniformed Force. Neither the gravity of the offences nor the ultimate acquittal is the prime consideration for their entitlement in service.

The Division Bench in Ramakant Prasad (Supra) observed -

"The point for consideration is not that the petitioners/appellants were involved in trivial criminal cases wherein they have been acquitted prior to the furnishing of details or prior to induction in service. When the question put to them was whether the criminal case was pending against the petitioners/Appellants or they were cleared of the charges or acquitted and the answer was given in the negative, it would amount to suppression of material factual information holding them liable to be prosecuted for the act of perjury and fraud and the employer is empowered to remove them from service on the ground of furnishing false information about their involvement in criminal cases...".

22. In *Krishna Pratap Yadav,* a Division Bench of this Court was considering reliance placed upon judgement rendered by the Supreme Court in the case of ***Commissioner of Police and Others vs. Sandeep Kumar 2011 (2) UPLBEC 1497***; by the counsel for the Appellant. Counsel for the appellant had pointed out that the Appellant honestly disclosed the pendency of criminal case against him at the time of filling up of the attestation form. However the Division Bench relied upon observations made by the Supreme Court in the case of ***Commissioner of Police New Delhi and another vs. Meher Singh 2013 (7) SCC 685***; which reiterated the principle which was laid down in ***Delhi Administration vs. Sushil Kumar 1996 (11) SCC 605; Commissioner of Police vs. Dhaval Singh 1999 (1) SCC 246; Ghurey Lal vs. State of UP 2008 (10) SCC 450***. The Supreme Court had observed in paragraph nos. 34, 35, 36 and 37 as under:-

"34. The respondents are trying to draw mileage from the fact that in their

application and/or attestation form they have disclosed their involvement in a criminal case. We do not see how this fact improves their case. Disclosure of these facts in the application/attestation form is an essential requirement. An aspirant is expected to state these facts honestly.Honesty and integrity are inbuilt requirements of the police force. The respondents should not therefore expect to score any brownie points because of this disclosure. Besides, this has no relevance to the point in issue. It bears repetition to state that while deciding whether a person against whom a criminal case was registered and who was later acquitted or discharged should be appointed to a post in the police force what is relevant is the nature of the offence, the extent of his involvement, whether the acquittal was a clean acquittal or an acquittal by giving benefit of doubt because the witnesses turned hostile or because of some serious flaw in the prosecution, and the propensity of such person to indulge in similar activities in future. This decision in our opinion, can only be taken by the Screening Committee created for that purpose by the Delhi police. If the Screening Committee's decision is not malafide or actuated by extraneous considerations, then it cannot be questioned.

35. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case that acquittal or discharge order will have to be examined to see whether he he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The standing order, therefore has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is malafide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who were likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of trust reposed in it and must treat all candidates with even hand.

36. The Screening Committee''s proceedings have been assailed as being arbitrary, and guided and unfettered. But, in the present case we see no evidence of this. However, certain instances have been pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality (Fuljit Kaur) It is not meant to perpetuate illegality or fraud because it embodies a positive concept. If the Screening Committee which is constituted to carry out the object of the comprehensive policy to ensure that people with doubtful background do not enter the police force, deviates from the policy, makes exception and allows entry of

undesirable persons, it is undoubtedly guilty of committing an act of grave disservice to the police force but we cannot allow that illegality to be perpetuated by allowing the respondents to rely on such cases. It is for the Commissioner of Police , Delhi to examine whether the Screening Committee has compromised the interest of the police force in any case and to take remedial action if he finds that it has done so. Public interest demands an in-depth examination of this allegation at the highest level. Perhaps, such deviations from the policy are responsible for the spurt in police excesses. We expect the Commissioner of Police, Delhi to look into the matter and if there is substance in the allegations to take necessary steps forthwith, so that the policy in the Standing Order is strictly implemented.

37. Our attention is drawn to certain orders of this Court where, according to the respondents, Special Leave Petitions filed by the State arising out of similar fact situations have been dismissed. It is not necessary for us to state that in limine dismissal of Special Leave Petition does not mean that this Court has affirmed the judgement or the action impugned therein. The order rejecting the Special Leave Petition at the threshold without detailed reasons does not constitute any declaration of law or a binding precedent. This submission is, therefore, rejected."

23. The Division Bench of this Court in Krishna Pratap Yadav (supra) noted that the judgement in ***Ram Kumar Vs. State of UP 2011 (4) SCC 644, and Commissioner of Police and Others Vs. Sandeep Kumar 2011 (2) UPLBEC 1497***; had been referred to the Larger Bench by the Supreme Court itself in the case of ***Jainendra Singh Vs. State of UP and Others 2012 (8) SCC 748***; and the judgement in the case of Meher Singh was of a later point in time. It dismissed the appeals following the law settled in Mehar Singh.

24. In the case of Kaptan Yadav, a Coordinate Bench of this Court placed reliance upon observations made by the Supreme Court in the case of J***ainendra Singh Vs. State of UP and Others 2012 (8) SCC 748***; where in paragraph 29 the Supreme Court had after considering judgements rendered by it earlier culled out cardinal principles. In paragraph 29.4 onwards the Supreme Court had observed as under -

"29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5 The purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of required recruitment and suppression of such material information will have a clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7 The standard expected of a person intended to serve in uniform service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 Employee on probation can be discharged from service or maybe refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, in as much as such a situation would make a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service presupposes a higher level of integrity, such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10 The authorities entrusted with the responsibility of appointing constables, are under a duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of constable."

25. Now I shall consider the case of petitioner no. 1 as he was a juvenile at the time criminal proceedings took place against him. I have also carefully gone through the order of acquittal of Raj Kumar the petitioner no. 1 passed by the Additional Chief Judicial Magistrate on 24.09.2001 in Criminal Case No. 1958 of 2007, "*State versus Rajkumar and others'*. From a perusal of the facts as mentioned by the Trial court it is evident that the incident in question leading to the lodging of the FIR was of 31.10.2003, when the petitioner no. 1 Rajkumar was only nine years old. The Court had found that the victim herself had made a statement that she had fallen down in the commotion caused due to a lot many people crowding around her. She had denied having been beaten up by the accused Rajkumar or any of the other accused. The court had therefore acquitted the accused of the charges levelled against them.

26. In ***Shivam Maurya Vs. State of UP and Others 2020 (5) ADJ;*** a Division Bench of this Court had held the cancellation of candidature of the appellant petitioner vitiated. The Appellant had suppressed the information regarding his involvement in criminal case in his attestation form. The Court held that the appointing authority had failed to take into account Section 19 of the Juvenile Justice (Care and Protection of Children) Act 2000; which refers to removal of disqualification attached to conviction and which started with non obstante clause giving it an overriding effect. Discussing the definition of "juvenile in conflict with law" which meant a juvenile who is alleged to have committed an offence and has not completed 18 years of age on the date of commission of such offence, it observed that Section 19 of the Act of 2000 had been included in order to give a juvenile an opportunity to lead his life with no stigma and to wipe out the circumstances of his past. Under Rule 99 of Juvenile Justice (Care and Protection of Children) Rules 2007, the records or documents in respect of a juvenile or child in conflict with the law shall be kept in a safe place for a period of seven years and thereafter were to be destroyed by the Officer in Charge or the Board or the Committee, as the case may be. Section 21 of the Act of 2000 prohibits publication of the name of the juvenile in conflict with law with the object to protect him from adverse consequences on account of his conviction for an offence he committed as a juvenile. Disclosure of name of juvenile in conflict with law is punishable with fine. The Court observed that the Act being a beneficial legislation, concealment of pendency of criminal case

against the appellant petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter have to be obliterated after a specified period of time. The intention of the legislature is clear that in so far as juveniles are concerned their criminal records are not to stand in the way in their lives. The Court set aside the cancellation of candidature of the petitioner appellant as it was contrary to the object sought to be achieved by the Juvenile Justice Act.

27. In a judgment rendered by a Coordinate Bench in Writ Petition No. 38380 of 2017, "Upendra Chauhan Vs. Union of India and 5 Others, decided on 20.02.2019, the candidature of the petitioner had been cancelled on the ground that he had deliberately suppressed the fact of his involvement in two criminal cases. Initially the petitioner's Writ Petition was disposed off requiring the respondents to reconsider the case of the petitioner bearing in mind the principles enunciated by the Supreme Court in the case of ***Avtar Singh Versus Union of India and others 2016 (8) SCC 471***; the respondents thereafter by the impugned order had rejected the candidature of the petitioner again. They admitted that he had declared about criminal cases in his attestation form but observed that because of such criminal cases his character was not unblemished at the time of filling up of the attestation form. The Coordinate Bench had found that the petitioner was tried as a juvenile in those cases under the provisions of Juvenile Justice (Care and Protection of Children) Act 2015, and ultimately the said cases came to a close after the filling up of the form, with the petitioner being released back in the custody of his father, with an advice and warning. The Court considered Section 24 of the 2015 Act where it has been provided that notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of the Act, shall not suffer disqualification, if any, attached to a conviction of an offence under such law with the Proviso making the Sub-section (1) inapplicable in the case of a child who is above the age of 16 years, and is found to be in conflict with the law by the Children's Court under clause (i)of Sub-section (1) of Section 19, which deals with heinous crimes. Under Sub-section (2) of Section 24 the Juvenile Justice Board shall make an order directing the Police, or the Registry of the Children's Court that relevant records of such conviction shall be destroyed after expiry of the period of appeal or as the case maybe, a reasonable period as may be prescribed. In case of heinous offences however, where the child is found to be in conflict with the law under clause (i) of Sub-section (1) of Section 19 the relevant records of the conviction under the Act shall be retained by the Children's Court.

28. It is evident from perusal of Section 24 of the Juvenile Justice Act 2015 that in all cases except cases related to heinous offences, a child in conflict with the law would not suffer any disqualification in the future and for such purposes records relating to the case had to be destroyed after passage of a specified period and in the manner as prescribed under the Rules. The Court had observed that the nature of offences were trivial in character which could be passed off and attributed to the exuberance and intemperance of youth and could not be

viewed as disqualification for entry in government service. The court referred to paragraph 38.6 in the case of Avtar Singh(Supra) where it was left open to the employer's discretion to appoint a candidate who had truthfully declared in the character verification form regarding pendency of a criminal case of trivial nature subject to its final outcome. The Court observed that under Section 24 even if a Juvenile is convicted under the provisions of 2015 Act such conviction is not liable to be viewed as disqualification which may otherwise and ordinarily stand attached upon a person being convicted.

29. The learned counsel for the petitioner has also placed reliance upon judgement rendered by a Division Bench of the Delhi High Court in "***Akhilesh Kumar Vs. Union of India and Others'*** where the petitioner had been selected for the post of constable in Railway Protection Force. He was sent for training before being appointed. He had filled up an attestation form mentioning therein that no criminal case was registered against him however on police verification it was revealed that FIR under Section 323/325/506/504 IPC had been registered against him. On the basis of police verification the respondents discharged the petitioner from training for suppression of facts. The petitioner filed a Writ Petition which was partly allowed. The Court had aside the order of discharge giving liberty to the respondents to reconsider the matter and pass a fresh order in the light of observations made in the case of Avtar Singh(Supra). The representation of the petitioner was considered and rejected on the ground that at the time of filling up of the attestation form he had not mentioned about the registration of criminal case and that it was pending against him although he had been subsequently acquitted in the said case. The attestation form was unequivocally clear, specific and not vague in nature and also bilingual i.e. is it was printed in Hindi and in English. The consequence of suppression of information was reiterated in numerous paragraphs of the attestation form, hence it could not be treated to be a case of ignorance/lack of understanding/error. The petitioner had to serve in a uniformed service and any deliberate statement or omission regarding vital information from a member of the disciplined force is liable to be judged on a higher pedestal. The matter of suppression regarding registration and pendency of a criminal case against him was deliberate and not due to any misconception, thus rendering him unfit for appointment in Railway Protection Force. The petitioner had sought quashing of the order impugned mainly on the ground that on the date of registration of FIR against the petitioner and his family members he was a juvenile, thus entitled to protection under the provisions of Juvenile Justice (Care and Protection) Act 2000.

30. The Delhi High Court observed that it was not disputed that the petitioner was a juvenile at the time of the incident. All the four accused persons including the petitioner were acquitted later on as the complainant did not make any incriminating statement against the petitioner and his family members. The Court observed that in ***Pratap Singh Vs. State of Jharkhand and Another reported in 2005 (3) SCC 551*** a Constitution Bench had held that reckoning date for determination of the age of juvenile is the date of commission of the offence and not the date when he is produced before the Competent Authority or Court. The petitioner a juvenile, was tried along with the adult co-accused persons in a regular

court while denying him the benefit of Juvenile Justice (Care and Protection) Act 2000. The Court observed that Section 19 of the Act of 2000 related to removal of disqualification attached to conviction and it also provided that the relevant records of such conviction would be removed after a period of seven years. The court quoted with approval the observations of the Madhya Pradesh High Court in a case where the petitioner being less than 16 years of age at the time of occurrence of the alleged criminal incident was a juvenile and he could not have been prosecuted except by a Juvenile Board. Hence it held that the prosecution of the petitioner by a court of regular Magistrate was without jurisdiction in terms of the Juvenile Justice Act 1986, which was in force at the time of such trial.

31. The respondents had argued that failure to mention his criminal antecedents by the petitioner needed to be viewed seriously as he was required to serve in a uniformed force. The Court observed on the basis of Section 19 of the Juvenile Justice Act 2000 that the provisions of the Act give an opportunity to the juvenile to lead a life with no stigma and to wipe out the circumstances of his inglorious past. The Court observed that there was no dispute that at the time of the alleged offence the petitioner was only 12 years old. At the time of applying for appointment to the post of constable the case was pending against him before the Juvenile Justice Board which later on was decided in his favour. Even if a conviction had been recorded by the Juvenile Justice Board Section 19 of the Juvenile Justice Act, 2000 stipulated that the juvenile shall not suffer any disqualification attached to such conviction and all relevant records relating to such conviction had to be destroyed after a certain period of time. Section 21 of the Act prohibits publication of the name of the juvenile in conflict with the law. The underlying object of such provision is to protect a juvenile from any adverse consequences on account of conviction for an offence committed as a juvenile. Once the juvenile has been extended a protective umbrella under the said enactment there was no good reason for the respondents to have insisted that the petitioner ought to have disclosed the information relating to the allegation against him pertaining to an offence that was committed during his childhood where he was tried by the Juvenile Justice Board and subsequently acquitted. The Court observed that even when police verification in respect of the petitioner was being conducted on the direction of the respondents, the concerned police officers ought to have refrained from revealing information pertaining to the petitioner since he was a juvenile at that point of time. This was in fact a gross breach of confidentiality contemplated under the act.

32. In view of the observations made by this Court and the Delhi High Court, and the provisions of Juvenile Justice (Care and Protection) Act, 2015 this Court is of the considered opinion that the petitioner no.1 being a juvenile at the time of criminal prosecution being concluded against him and having culminated in acquittal deserves to be reinstated in service, the order dated 01.03.2017 is ***quashed***, the Writ Petition stands ***allowed.*** The petitioner no.1 shall get all consequential benefits of service including seniority and pay fixation except salary for the period he did not work. The order for reinstating him be passed by the respondents within six weeks of production of a copy of this order before them.

(2022) 10 ILRA 443
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-C No. 8018 of 2022

M/s Gaursons India Ltd., New Delhi ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Sanjay Kumar Mishra, Sri Nikhil Agrawal

Counsel for the Respondents:

A. Local body – GO dated 05.12.2019 – Zero period benefit – Entitlement – Plot was allotted, but due to non-construction of the approach road and non-approval of the revised layout plan, the development over the allotted plot could not be carried out – Authority refused to grant zero period benefit – Legality challenged – Held, once the GO dated 05.12.2019 was in existence, the claim of the petitioner was required to be considered in terms of the parameters laid down it – Rejection of the claim of the petitioner for grant of zero period benefit by the impugned order was held wholly unjustified and the petitioner was held entitled for grant of zero period benefit. (Para 10)

Writ petition partly allowed. (E-1)

(Delivered by Hon'ble Pritinker Diwaker, J. & Hon'ble Ashutosh Srivastava, J.)

1. Sri Nikhil Agarwal, learned counsel for the petitioner, Smt. Anjali Upadhyay, learned counsel for the Respondent No.2, 3 & 4 and learned Standing Counsel for the State respondents.

2. The writ petitioner which is a Company incorporated under the Companies Act, 1956, engaged in the business of real estate and development of integrated township, construction and sale of flats etc. is aggrieved by the order dated 23.12.2019 passed by the Additional Chief Executive Officer, Greater Noida Industrial Development Authority, whereby and whereunder the claim of the petitioner for grant of the zero period benefit from the date of allotment dated 25.04.2011 till the date of passing of revised layout plan in respect of FH-02, Agricultural Green, Grater Noida is passed by the Respondent Authority has been rejected. Several other prayers have been made in the writ petition.

3. It is contended on behalf of the petitioner that the Greater Noida floated a scheme on 11.01.2011 for allotment of large group housing/ builders residential plots in which the minimum reserve price of Rs.2600/- per sq. meter was fixed. The bid of the petitioner was accepted @ Rs.2785/- per sq. meter and land ad-measuring 404879 sq. meter was allotted in favour of the petitioner vide allotment letter dated 25.04.2011. A lease deed was executed on 03.11.2012 for a consideration of Rs.112,73,68,000/- payable in 12 installments as per the schedule mentioned in the lease deed. The petitioner was handed over possession of 4,01,710.41 sq. meters of the land out of 4,04,879 sq. meters and balance land of **3168501 sq. meters** was to be handed over later. On getting the possession of the land the petitioner submitted a layout plan which was duly approved by the Competent Authority. The plot allotted to the petitioner was not free from encroachment and was hampering the development work in as much as the land was still occupied by the villagers, there was a public road in the

middle of the plot which was still being used by villagers. The petitioner submitted a revised lease plan and also requested the authority for declaration of zero period form the date of allotment i.e. 25.04.2011 to the date of approval of the revised lease plan and adjust the amount paid by the petitioner till that date against the outstanding principal amount and issue a new payment plan for future installments to be paid by the petitioner. It is further contended that the petitioner requested for issuance of revised lease plan. The Development Authority executed two supplementary lease deeds on 04.12.2015 and 13.01.2017 whereafter the petitioner vide letter dated 23.01.2017 submitted building plans and other required documents for approval of revised sanction of the layout plan upon Plot No. FH-02 Sector Agricultural but no decision upon the revised layout plan submitted has been taken. On account of non-construction of approach road and non approval of revised layout plan submitted the petitioner could not carry out any development or construction actively upon the leased plot.

4. It is next contended that the Respondent Authority in its Board Meeting held on 24.12.2016 (107th Board Meeting) took a decision to grant zero period benefit to the allottees amongst other grounds on the ground that if the authority has delivered possession to the allottee and lease deed was executed but the allottee is unable to access the plot as a result of which development is impossible to commence, the allottee is entitled to the benefit of zero benefit upto the date on which the alternate access is provided. The Authority did not extend the benefit of zero period to the petitioner even though it stood covered by it. The petitioner approached this Hon'ble Court my means of Writ (C) No.21878 of 2018 which was disposed of vide order dated 21.06.2018 directing the authority to decide the representation of the petitioner in accordance with law and the policy decision taken in the 104th Board Meeting dated 14.03.2016 by a reasoned and speaking order. In compliance of the order of this Court dated 21.06.2018 though the petitioner had to invoke the contempt jurisdiction of this Court to ensure its compliance, the Respondent Authority on grounds untenable in law has now rejected the representation of the petitioner by order dated 23.12.2019 harbouring under an erroneous assumption that the petitioner was not entitled to the benefit of zero period as the petitioner had possession of the plot ignoring that there was continuous hindrance created by farmers upon the land and also the approach road was not constructed which led to undue hardship to the petitioner as it could not commence construction on the affected area. It is thus submitted that the denial of the benefit of zero period, as claimed by the petitioner is unjustified, particularly, in view of the fact that in similar circumstances the benefit of zero period was extended to ***M/s Rajhans Infratech Pvt. Ltd.*** writ petitioner of Writ (C) No.12462 of 2020 but the petitioner was denied the benefit.

5. Smt. Anjali Upadhyay, learned counsel representing the Respondent Authority has filed counter affidavit on behalf the Respondents No.2, 3 & 4. In the counter affidavit, it has been averred that the petitioner was allotted Plot No. FH-02, Agriculture Green, Greater Noida, with area of 40,4800 sq. meter at the rate of Rs.2785/- per sq. meter on 25.04.2011. As per the allotment letter, 10% of the premium of the plot i.e. Rs.11,27,36,800/- was to be deposited within 60 days apart from the reservation money of

Rs.6,27,36,800/- which had already been deposited. The remaining 80% of the premium of the plot was to be deposited with an interest of 13% per annum in 12 half yearly equal installments. On 02.11.2012 lease deed in respect of an area of 4,01,710.41 sq. meter was executed and it was mentioned that area of 3168.59 sq. meters would be allotted later. On 27.09.2016, a revised lease plan of 40,4879 sq. meters was again issued which mentioned that the lease plan would be subject to orders passed in Writ Petition No.12300 of 2010, Writ Petition No.12303 of 2010, Writ Petition No.32438 of 2012. Subsequently, a supplementary lease deed was executed. The benefit of zero period was to be considered as per the approved proposal in Item No.103/2014 of the 103rd Board Meeting of the Authority. The counter affidavit states that the policy approved in the 103rd Board Meeting was not effective and hence the matter could not be settled under this policy. The counter affidavit further states that the zero period benefit was allowed for 21.10.2011 to 24.08.2012 as per earlier decision as the allottees plot being in a village other than village Patwari. The petitioner's project falls in village Bisrikh and no ground was found for obstructing the work by farmers on the land of Bisrikh falling under the petitioner's project and the petitioner has undisputed possession of 404879 sq. meters of the allotted land. The Project Department Report has found that the 18 meter road has been included in the layout approved by the Planning Department and the contention of the petitioner that the 18 meter road has been taken out from the middle of the plot is incorrect. The petitioner has physical possession of entire plot and the sub lease deed has also been done by the petitioner for the aforesaid plot. In such view of the matter, the benefit of zero period has been allowed from 21.10.2011 to 24.08.2012 only.

6. In the rejoinder affidavit, the petitioner has controverted the stand of the Respondent Authority taken in the counter affidavit. The petitioner submits that in view of the stand of the Respondent Authority in para 8 of the counter affidavit, the case of the petitioner is established beyond reasonable doubt that the petitioner could not have commenced any activity upon the leased land in view of the admission of the respondents that on 27.09.2016 a revised leased plan of 40,4879 sq. meters was issued by the Project Department where it was mentioned that the lease plan would be subject to High Court order in Writ Petition No.2300 of 2010, Writ Petition No.12303 of 2010 and Writ Petition No.32438 of 2012. A supplementary lease deed was executed in favour of petitioner on 09.01.2017 wherein it has been stated that due to revision in the sector layout plan of Sector Agricultural Greens 18 meter wide road has been incorporated to facilitate the villagers of Bisrakh to reach their cremation grounds straight from the community centre side village road resulting in the execution of the revised lease plan to be executed which has been made subject to the outcome of the writ petitions. The petitioner has been constantly requesting the Authority to remove the obstruction caused by the villagers in commencing actively upon the leased land as ins evident from letters dated 01.11.2013 and 0.08.2014. It is also stated that the State Government vide its order dated 05.12.2019 has evolved the policy for grant of zero period benefit. The Government Order dated 05.12.2019 has been duly adopted by the Respondent Authority in its 117th Board Meeting and an Officer Order dated 03.03.2010 has been

issued. The zero period benefit is required to be given on the parameters laid down under the Officer Order dated 03.03.2020. The respondents are erroneously referring to and relying upon 103rd Board Meeting whereas the Court clearly mentioned 104th Board Meeting. However, now the Respondent Authority has issued the Office Order dated 03.03.2020 regarding grant of zero period benefit which itself is base on the Government Order dated 05.12.2019 the claim of the petitioner was liable to be considered in terms of the Government Order date 05.12.2019. The rejection of the claim vide the impugned order dated 23.12.2019 subsequent to the issue of the Government Order dated 05.12.2019 is thus vitiated.

7. This Court in view of the above factual background is required to examine as to whether the consideration of the zero period benefit by the impugned order dated 23.12.2019 is justified or the same is liable to be interfered in exercise of powers under Article 226 of the Constitution of India.

8. A perusal of the impugned order dated 23.12.2019 passed by the Additional Chief Executive Officer, Greater Noida Industrial Development Authority reveals that the petitioner was allotted Plot No.FH-2 area 404879 sq. meters on 25.04.2011 but lease deed of only an area of 401710.41 sq. meters was got executed on 02.11.2012. Lease of an area of 3168.59 sq. meters was admittedly not got executed. The petitioner soon after execution of the lease deed dated 02.11.2012 appraised the Authority on 09.11.2013 annexing on site photographs that the plot allotted was not free from encroachments of farmers who were preventing the petitioner to construct boundary wall. A supplementary lease deed dated 04.12.2015 was got executed in respect of balance area of 3168.59 sq. meters. On 27.09.2016 a fresh modified lease plan was issued by the Authority which was subject to the outcome of Writ Petition No.12300 of 2010, Writ Petition No.12303 of 2010 and Writ Petition No.32438 of 2012. A fresh lease deed dated 09.01.2017 was got executed which mentioned a 18 meters road across the plot allotted. The impugned order further records that the claim of the petitioner for grant of the zero period benefit was to be considered in terms of the direction of the Court dated 21.06.2018 passed in Writ Petition No.21878 of 2018 according to the prevailing policy of the Authority but the same has not been done.

9. We find that the Authority has proceeded to consider the claim of the petitioner on the basis of the agenda No.103/14 in the 103rd Board Meeting even though the direction in the writ petition No. 21878 of 2018 was to decide as per the policy decision taken in 104th Board Meeting held on 14.03.2014. In fact the authority has proceeded to hold that the claim of the petitioner for grant of the zero period benefit cannot be considered as the policy under the 103rd meeting was not approved by the Government and thus was not effective and the claim is to be considered as per the prevailing policy. However, we find that the authority has not accorded consideration of the claim of the petitioner as per the prevailing policy for grant of zero period benefit rather has proceeded to reject the claim by holding that the claim cannot be considered under the policy under the 103rd Board Meeting. Thus the action of the Development Authority is not in accordance with law.

10. This Court further finds that when the claim of the petitioner for zero period

benefit was pending consideration, the State Government issued Government Order dated 05.12.2019 laying down the parameters for grant of the zero period benefit. The said Government Order was adopted by the authority. Once the Government Order dated 05.12.2019 was in existence, the claim of the petitioner was required to be considered in terms of the parameters laid down in the Government Order dated 05.12.2019. We also take note of the fact that subsequently the authority has issued an office order dated 03.03.2020 adopting the Government Order dated 05.12.2019. This being so, we are of the view that the rejection of the claim of the petitioner for grant of zero period benefit by the impugned order dated 23.12.2019 is wholly unjustified and the petitioner is entitled for grant of zero period benefit.

11. Accordingly, the writ petition is **partly allowed** and the impugned order dated 23.12.2019 rejecting the claim of the petitioner for grant of zero period benefit is set aside. It is held that the petitioner is entitled for grant of zero period benefit from the date of allotment, i.e. 25.04.2011 to till date. The respondents-Authority are also directed to consider the sanctioning of the revised layout plan regarding FH-02, Agricultural Green, Greater Noida, in accordance with law considering the observations made herein-above.

(2022) 10 ILRA 447
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Writ-C No. 12611 of 2022

Sohan Lal Sharma ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ranjeet Asthana

Counsel for the Respondents:
C.S.C., Sri Satyendra Pandey

A. Civil law – Temple property – Status – Title claimed by the successors of Pujari – Duty of Shebait/manager and its successor defined – The Deity 'Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan' as the owner of the land, in question was found proved as per the revenue record – Held, the petitioner has no right, title or interest in deity – It is bounden duty of Shebait or Manager to protect the temple property. He cannot usurp such property for his own gains – If a Pujari or Manager claims proprietary rights over the property of temple, then it is an act of mismanagement. (Para 8, 11 and 12)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Meghmala Vs G. Narasimha Reddy, (2010) 8 SCC 383

2. Bishwanath & anr. Vs Shri Thakur Radhaballabhji & ors; AIR 1967 SC 1044

3. Sri Ganapathi Dev Temple Trust Vs Balakrishna Bhat (D) Thr. Lrs.; (2019) 9 SCC 495

4. St. of M.P. Vs Pujari Utthan Avam Kalyan Samiti, (2021) 10 SCC 222

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Saurabh Srivastava, J.)

1. Heard Sri Ranjeet Asthana, learned counsel for the petitioner and Sri Amit Kumar Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"i) Issue a writ order or direction in the nature of certiorari to quash the order dated 10.04.2022 passed by respondent no.2 which contains a Annexure no.10 to the writ petition.

ii) Issue a writ order or direction in the nature of Mandamus commanding to the respondents no to stop the petitioner for any sale or any kind use pendency of the writ petition.

iii) issue a writ order or direction in the nature of Mandamus commanding to the respondents not to take any action upon the application of the respondent no 5, in the interest of justice;"

3. Learned counsel for the petitioner submits that land of Khevat No.26 measuring 10 acres 14 decimal situated at village Rajpur, was purchased by the ancestor of the petitioner namely Sri Radha Prasad and thus, the petitioner is rightful owner. He further submits that earlier there were 11 plot numbers, which, after consolidation, were converted into one plot number being khasra Plot No.502, Village Rajpur Bangar, Tehsil and District Mathura. He further submits that there is a decree of civil court and the rights of the petitioner in the land in question stand settled and, therefore, the respondents cannot interfere with the rights of the petitioner in the land in question.

4. Learned Additional Chief Standing counsel submits that neither ancestor of the petitioner nor the petitioner is the owner of the land in question. He submits that the land in question was purchased by Sri Thakur Radhamohan Ji Maharaj Virajman Mandir through Manager Radha S/o Makkhan Lal by a registered sale deed dated 28.05.1915. The compromise decree obtained by the father of the petitioner was a collusive decree in which there was no compromise by the Deity which is the actual owner of the property in question. He referred to various papers of the affidavit of compliance/ short counter affidavit dated 07.09.2022 filed today in court on behalf of respondent Nos.2 and 3. He submits that the copy of the aforesaid sale deed dated 28.05.1915 stands admitted to the petitioner inasmuch as he himself has filed it along with **supplementary affidavit dated 05.09.2022**. He further submits that the name of the Deity stands recorded in the revenue records from decades together and the revenue entries particularly Akar Patra 45 and the orders passed by the Assistant Consolidation Officer are in conformity with the sale deed dated 28.05.1915. He further submits that the petitioner is not the owner of the land in question and, therefore, he has no right to sell it.

Discussion and Findings:-

5. We have carefully considered the submissions of the learned counsels for the parties and perused the records of the present writ petition. On 22.08.2022, this court passed the following order:

"Supplementary affidavit filed today is taken on record.

Heard learned counsel for the petitioner, the learned standing counsel for the State respondents and Shri Satyendra Pandey, learned counsel for respondent no.5.

Petitioner and respondent no.5 are the real brothers.

Grievance of the petitioner is that disputed property being khasra plot no.502, Rajpur Bangar is a private property and it

does not belong to the Deity and therefore in terms of the compromise decree dated 26.5.2005 for partition, no interference can be made by any one for sale of his share in the property by the petitioner.

Prima-facie records of this writ petition indicate that the property belongs to the Deity viz. "Thakur Radha Mohn Ji Maharaj Virajman Mandir Baag Agar Bihari, Vrindavan".The petitioner's father was merely a sevayat. Primafacie it appears that petitioner's father and his sons colluded to grab the property belonging to the Deity and for that purpose an Injunction Suit No. 751 of 2003 was filed. After a detailed order dated 16.02.2004 was passed by the Civil Judge (Senior Division), Mathura, they filed a compromise deed between them. There is no whisper in the compromise decree regarding the compromise by the Deity.

Matter is serious and primafacie appears to be a case of grabbing of land belonging to the Deity.

In view of the aforesaid, we direct the District Magistrate, Mathura to cause an inquiry and submit a detailed report regarding all immovable properties of Deity "Thakur Radha Mohn Ji Maharaj Virajman Mandir Baag Agar Bihari, Vrindavan" and submit a detailed report alongwith copies of all relevant revenue records i.e, khatauni and copy of the deed by which the properties, including aforesaid khasra plot no. 502, Rajpur Bangar were endowed. The District Magistrate, Mathura shall also file a true copy/translated copy of the registered sale deed dated 28.5.2019 which has been referred at page 92 of the writ petition. The aforesaid page appears to be part of affidavit of Narayan Prasad Sharma (father of the petitioner) filed by him in Suit No. 657 of 1999. Relevant portion of paragraphs 6, 11 and 15 of the aforesaid affidavit filed as Annexure-8 to the writ petition is re-produced below:-

"पैराग्राफ–6. वास्तव में बात यह है कि ठाकुर राधामोहन जी की स्थापना मुझ शपथकर्ता के बाबा स्वर्गीय की माखन लाल ने अर्सा लगभग 84 वर्ष पूर्व की थी तथा प्रश्नगत सम्पति को ***ठाकुर जी के हक मे रजिस्टर्ड बैनामा दि0 28.5.1915 द्वारा अपने पुत्र यानि मुझ शपथकर्ता के पिता श्री राधा प्रसाद शर्मा के नाम खरीदा था।***

पैराग्राफ 11. पहले प्रारम्भ में यह सम्पति एक महिला मुसम्मात गंगादेवी के नाम मौरूसी काश्तकार के रूप में अंकित थी। प्रतिवादी सं0 1 के द्वारा ठाकुर जी के हितों के प्रति किये गयें सब प्रयासों के कारण उपरोक्त श्रीमती गंगा देवी ने अपने मौरूसी काश्तकारों से सम्बन्धित समस्त अधिकार लगभग 55 वर्ष पूर्व इस्तीफा देकर समाप्त कर दिये। और तभी से मै शपथकर्ता उपरोक्त सम्पत्ति पर ठाकुर जी की ओर से एकमात्र कब्जे में हूँ।

पैराग्राफ– 15. मुझ शपथकर्ता को इस बात का पूर्ण अधिकार प्राप्त है कि मै शपथकर्ता ठाकुर जो की किसी भी सम्पत्ति को ठाकुर जी के हितो के लिए अस्थाई रूप से इस तरह से अन्तरित कर सकूँ जिससे ठाकुर जी के हितों की सुरक्षा भी हो सकें। तथा ***ठाकुर जी को सम्पत्ति की उन्नति होकर ठाकुर जी की सम्पत्ति उनके स्वामित्व में बनी रहे।"***

The respondent nos. 2 and 3 shall ensure that till the next date fixed, no 3rd party right may be created by any one in respect of the properties in question.

Petitioner is also directed to file a Supplementry Affidavit before the next date fixed enclosing therewith complete details relating to the immovable properties of the deity, copy of endowment deed and sale deed etc.

Put up as fresh on 30.8.2022, at 10 A.M."

6. In compliance to the aforequoted order dated 22.08.2022, the respondent Nos.2 and 3 have filed today an affidavit of compliance/ short counter affidavit dated 07.09.2022 in which they have given complete details regarding the property in question. Copies of various documents are khataunies etc. have been filed along with the aforesaid affidavit.

7. Perusal of the **registered sale deed dated 28.05.1915** clearly establishes that the property in question i.e. **land of Khevat No.26 measuring 10 acres 14 decimal was originally owned by Sri Thakur Pulan Bihari Ji Maharaj Virajmaan Mandir** Mohalla Gyan. One Mahant Radha Raman Das was the manager of the aforesaid temple. For the benefit of the aforesaid Deity, **he sold the property in question to "Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag, Agar Bihari Vrindavan through Manager Radha S/o Makkhan Lal". Thus, it stands established on record that the property in question is the property owned by the Deity namely Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag, Agar Bihari Vrindavan.**

8. Along with the aforesaid short-counter affidavit, the respondent Nos.2 and 3 have filed copies of khasra of 1359 Fasli, khataunies of 1360 Fasli, 1363 Fasli to 1365 Fasli, 1366 Fasli to 1369 Fasli, 1373 Fasli to 1375 Fasli, 1376 Fasli to 1378 Fasli, 1379 Fasli to 1381 Fasli, 1382 Fasli to 1387 Fasli, Akar Patra 45 and copy of khatauni of 1426 Fasli to 1431 Fasli. Perusal of these records shows that there appears the name of father of the petitioner namely Narayan Prasad and uncles Govind Prasad, Kishanchand, Premchand, Radhacharan, all sons of Radha Prasad as Manager. In 1360 Fasli, an order in Case No.790 was passed by the Tehsildar, Mathura dated 31.07.1953 whereby the name of Sri Ganga Devi was expunged from the khatauni and in place, the name of the aforesaid persons as Manager of the Deity was entered. This entry continued till 1381 Fasli. As per khatauni 1382 Fasli to 1387 Fasli, there was an order passed by Assistant Consolidation Officer, Vrindavan in Case No.406+407 dated 27.07.1977 which was followed by another order in Case No.771/14.12.1977 whereby the name of the Deity namely "Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan" through Narayan Prasad Sharma S/o Radha Prasad Sharma, was ordered to be entered in the revenue records. The revenue records were accordingly corrected in consolidation proceedings. Since the the Fasli Year 1382-1387 Fasli till today, the name of the Deity, namely Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan is the recorded owner of the property in question as per revenue records. Thus, it stands clearly established that the Deity "Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan" is the owner of the land of Khasra Plot No.502 measuring 2.6340 hectares as per the registered sale deed dated 28.05.1915 and the revenue records. The petitioner has no right, title or interest in the landed property of Khasra Plot No.502. The owner is the aforesaid Deity, namely "Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan." The ancestors of the petitioner have been merely Manager of the temple. Owner is the aforesaid Deity. Therefore, merely because for a very little period in Khasra of 1359 Fasli, the name of the petitioner's ancestors for whatever reasons stood mentioned, it shall not confer any right, title or interest upon the petitioner with respect to the land in question. The compromise decree in O.S. No.751 of 2003 as referred in our aforequoted order dated 22.08.2022, cannot confer any right, title or interest upon the petitioner or his ancestors in respect of the land in question inasmuch as the Deity was not the party to the compromise.

9. Neither any document has been filed along with the writ petition nor any averment has been made in the writ petition by the petitioner which may indicate

ownership of the petitioner or his ancestors in the immovable property in question, i.e. Khasra Plot No.502. On the contrary, copy of the registered sale-deed dated 28.05.1915 executed by the original owner Sri Thakur Pulan Bihari Ji Maharaj Virajmaan Mandir in favour of Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag, Agar Bihari, Vrindavan, filed by the respondent nos.2 and 3, i.e. District Magistrate, Mathura and the Sub-Divisional Magistrate, Mathura dated 07.09.2022 and own supplementary affidavit of the petitioner dated 05.09.2022 annexing therewith a copy of the aforesaid registered sale-deed dated 28.05.1915, leaves no manner of doubt that the aforesaid Deity, namely Sri Thakur Radhamohan Ji Maharaj Virajmaan Mandir Mohalla Baag Agar Bihari Vrindavan is the owner of the immovable property, i.e. Khasra Plot No.502, measuring 2.6340 hectares. Therefore, the alleged compromise decree in O.S. No.751 of 2003 is not binding upon the Deity, i.e. owner of the property in question inasmuch as the Deity was not party to the suit or the compromise.

10. In **Meghmala v. G. Narasimha Reddy, (2010) 8 SCC 383** (paras 28 to 36), Hon'ble Supreme Court has referred to large number of its earlier judgments on the point of fraud and collusion, and its effect and held as under:-

"28. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. "Fraud avoids all judicial acts, ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1) In Lazarus Estates Ltd. v. Beasley, (1956) 1 QB 702 : (1956) 2 WLR 502 : (1956) 1 All ER 341 (CA) the Court observed without equivocation that: (QB p. 712) "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

29. In A.P. State Financial Corpn. v. GAR Re-Rolling Mills, (1994) 2 SCC 647 and State of Maharashtra v. Prabhu, (1994) 2 SCC 481 this Court observed that a writ court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."

30. In Shrisht Dhawan v. Shaw Bros., (1992) 1 SCC 534 it has been held as under: (SCC p. 553, para 20)

"20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

31. In United India Insurance Co. Ltd. v. Rajendra Singh, (2000) 3 SCC 581 this Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi, (1990) 3 SCC 655, Union of India v. M. Bhaskaran, 1995 Supp (4) SCC 100, Kendriya Vidyalaya Sangathan v. Girdharilal Yadav, (2004) 6

SCC 325, State of Maharashtra v. Ravi Prakash Babulalsing Parmar, (2007) 1 SCC 80, Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. (2007) 8 SCC 110 and Mohd. Ibrahim v. State of Bihar, (2009) 8 SCC 751.

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide Vimla (Dr.) v. Delhi Admn., AIR 1963 SC 1572, Indian Bank v. Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550, State of A.P. v. T. Suryachandra Rao, (2005) 6 SCC 149, K.D. Sharma v. SAIL, (2008) 12 SCC 481 and Central Bank of India v. Madhulika Guruprasad Dahir, (2008) 13 SCC 170.

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Chengalvaraya Naidu, (1994) 1 SCC 1, Gowrishankar v. Joshi Amba Shankar Family Trust, (1996) 3 SCC 310, Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319, Roshan Deen v. Preeti Lal, (2002) 1 SCC 100, Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education, (2003) 8 SCC 311 and Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1.

35. In Kinch v. Walcott, 1929 AC 482 : 1929 All ER Rep 720 (PC) it has been held that:

"... mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury".

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

Status of Manager or Shebait:

Deity- A minor, duty of Shebait/Manager to protect interest of Deity and not to usurp property for own gains:-

11. In the present set of facts, the aforesaid Deity is the owner of the property in question on the basis of the title deed dated 28.05.1915. Ancestors of the petitioner have been manager of the temple/Deity. It is bounden duty of Shebait or Manager to protect the temple property. He cannot usurp such property for his own gains. A Shebait,

Manager or Archaka etc. is the person functioning as a manager/trustee of such temple. He is the guardian of the idol and conducts all transactions on its behalf, solely for the benefit of the idol and not otherwise. In the case of **Bishwanath And Anr vs Shri Thakur Radhaballabhji & Ors, AIR 1967 SC 1044**, Hon'ble Supreme Court held that three legal concepts are well settled : (i) An idol of a Hindu temple is a juridical person; (ii) when there is a Shebait, ordinarily no person other than the Shebait can represent the idol; and (iii) worshippers of an idol are its beneficiaries, though only in a spiritual sense. An idol is in the position of a minor; when the person representing it leaves it in the lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power to protect its interest. The aforesaid settled principles have been reiterated by Hon'ble the Supreme Court in large numbers of judgments including the judgment in the case of **Sri Ganapathi Dev Temple Trust vs Balakrishna Bhat (D) Thr. Lrs. (2019) 9 SCC 495 (para 12).**

12. In a recent judgment in the **State of M.P. v. Pujari Utthan Avam Kalyan Samiti, (2021) 10 SCC 222 (Para 23 to 26)**, Hon'ble Supreme Court considered the status of a Pujari with respect to management of the property of the Deity and held that Pujari is only a grantee to manage the property of the Deity. He does not have any right in the land and his status is only that of a manager. Rights of a Pujari or Shebait do not stand on the same footing as that of a Mourushi in the ordinary sense. If a Pujari or Manager claims proprietary rights over the property of temple, then it is an act of mismanagement. Paragraphs 23, 24, 25 and 26 of the aforesaid judgment are reproduced below:-

"23. This question has already been considered by the courts in Panchamsingh v. Ramkishandas Guru Ramdas, 1971 SCC OnLine MP 26, which has further been affirmed by Kanchaniya6. The law is clear on the distinction that the Pujari is not a Kashtkar Mourushi i.e. tenant in cultivation or a government lessee or an ordinary tenant of the muafi lands but holds such land on behalf of the Aukaf Department for the purpose of management. The Pujari is only a grantee to manage the property of the deity and such grant can be reassumed if the Pujari fails to do the task assigned to him i.e. to offer prayers and manage the land. He cannot be thus treated as a Bhumiswami. The Kanchaniya v. Shiv Ram, 1992 Supp (2) SCC 250 further clarifies that the Pujari does not have any right in the land and his status is only that of a manager. Rights of pujari do not stand on the same footing as that of Kashtkar Mourushi in the ordinary sense who are entitled to all rights including the right to sell or mortgage.

24. In a judgment reported as Ramchand v. Janki Ballabhji Maharaj, (1969) 2 SCC 313, it was held that if the Pujari claims proprietary rights over the property of the temple, it is an act of mismanagement and he is not fit to remain in possession or to continue as a Pujari.

25. The contrary view expressed by the High Court in Ghanshyamdas v. State of M.P., 1995 Revenue Nirnaya (RN) 235, Sadashiv Giri v. Commr., 1985 RN 317 and Shrikrishna v. State of M.P., 1995 SCC OnLine MP 161 : (2012) 4 MP LJ 466 does not lay down good law in view of binding precedent of the Division Bench of the High Court in Panchamsingh7 as also of this Court in Kanchaniya6. All these judgments presenting a contrasting view had not noticed the said binding precedents dealing with the rights of priest under the Gwalior Act.

26. Taking into consideration the past precedents, and the fact that under the

Gwalior Act, Pujari had been given the right to manage the property of the temple, it is clear that that does not elevate him to the status of Kashtkar Mourushi (tenant in cultivation)."

13. For all the reasons aforesaid, we do not find any merit in this writ petition. Consequently, **the writ petition is dismissed.**

14. After this judgment was dictated in open court, learned counsel or the petitioner states that the petitioner may be permitted to withdraw this writ petition.

15. We are not inclined to accept the request of learned counsel for the petitioner inasmuch as we have heard at length the writ petition on merit and dictated judgment in open court. After the judgment has been dictated, the request of the petitioner to withdraw the writ petition cannot be accepted. Hence, the request is rejected.

16. Learned Chief Standing Counsel shall intimate this order in writing to the respondent Nos.2 and 3 within ten days, who shall take all steps to protect the aforesaid property of the Deity being Khasra Plot No.502.

(2022) 10 ILRA 454
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 18052 of 2022
connected with Writ -C No. 18053 of 2022

M/s NSOFT(IND.) Services Pvt. Ltd. ...Petitioner

Versus

Purvanchal Vidyut Vitaran Nigam Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ujjawal Satsangi, Sri Shagun K. Saran, Sri Kartikey Dubey, Sri Prashant Chandra (Sr. Adv.)

Counsel for the Respondents:
Udit Chandra

A. Constitution of India – Article 226 – Writ – Judicial review – Show cause notice – Maintainability of writ against it – Held, ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless it is without jurisdiction; however, when a notice is issued with premeditation, writ petition would be maintainable. (Para 15)

B. Civil law – Public contract – Blacklisting of the contractor – No opportunity of hearing – Held, the order of blacklisting involves civil consequences and has the effect of creating a disability by preventing a person from the privilege and advantage of entering into lawful relationship with the government – A fair hearing to the party before being blacklisted thus becomes an essential pre-condition for a proper exercise of the power – The applicability of the principle of *audi alteram partem* and the necessity of issuance of show cause notice also becomes imperative before passing of any such order of blacklisting – However, High Court held the challenge to the show cause notices premature for the reason that the mere indication of the grounds and the penalty proposed, would not give rise to a cause of action – High Court refused to exercise the extraordinary jurisdiction under Article 226 of the Constitution of India to interfere in the matter, leaving it open to the petitioners to submit their response to the show cause notices. (Para 30, 39, 41 and 42)

C. Constitution of India – Article 14 – Principle of natural justice – Principle of

***audi alteram partem* – The principle of *audi alteram partem* has been held to be a *sina qua non* and a basic tenet underlying the principles of natural justice. (Para 33)**

Writ petition disposed of. (E-1)

List of Cases cited:-

1. Siemens Ltd. Vs St. of Mah. & ors.; (2006) 12 SCC 33

2. Oryx Fisheries Pvt. Ltd Vs U.O.I. & ors.; (2010) 13 SCC 427

3. Gorkha Security Services Vs Government (NCT of Delhi) & ors.; (2014) 9 SCC 105

4. St. of U.P. Vs Brahm Datt Sharma; (1987) 2 SCC 179

5. Special Director Vs Mohd. Ghulam Ghouse; (2004) 3 SCC 440

6. U.O.I. Vs Kunisetty Satyanarayana; (2006) 12 SCC 28

7. K.I. Shephard Vs U.O.I.; (1987) 4 SCC 431

8. V.C., Banaras Hindu University Vs Shrikant; (2006) 11 SCC 42

9. Shekhar Ghosh Vs U.O.I.; (2007) 1 SCC 331

10. Rajesh Kumar Vs D.C.I.T.; (2007) 2 SCC 181

11. Khem Chand Vs U.O.I.; AIR 1958 SC 300

12. U.O.I. & anr. Vs Vicco Laboratories; (2007) 13 SCC 270

13. Commissioner of Central Excise, Haldia Vs M/S. Krishna Wax (P) Ltd.; (2020) 12 SCC 572

14. Malladi Drugs and Pharma Ltd. Vs U.O.I.; (2020) 12 SCC 808

15. U.O.I. & ors. Vs Coastal Container Transporters Assc. & ors.; (2019) 20 SCC 446

16. UMC Technologies Private Ltd. Vs Food Corporation of India & anr.; (2021) 2 SCC 551

17. M/s Erusian Equipment & Chemicals Ltd. Vs St. of W. B. & anr.; (1975) 1 SCC 70

18. Raghunath Thakur Vs St. of Bihar & ors.; (1989) 1 SCC 229

19. Gronsons Pharmaceuticals (P) Ltd. & anr. Vs St. of U.P. & ors.; AIR 2001 SC 3707

20. M/s Kulja Industries Ltd. Vs Chief General Manager, W.T. Project, BSNL & ors.; (2014) 14 SCC 731

21. M/s Baba Traders Vs St. of U.P. & ors.; 2019 (11) ADJ 516 (DB)

22. Amit Kumar Vs St. of U.P. & anr.; 2020 (10) ADJ 264 (DB)

23. Re K. (H.) (an infant); [1967] 1 All E.R. 226

24. Kanda Vs Government of Malaya; [1962] AC 322

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The two writ petitions arise out of similar set of facts and seek to raise challenge to notices bearing date 18.6.2022 directing the petitioners to show cause in respect of the proposed action of blacklisting/debarment. Accordingly, with the consent of the parties, the two petitions have been heard and are being disposed of by means of a common order.

2. Heard Sri Prashant Chandra, learned Senior Counsel assisted by Sri Kartikeya Dubey and Sri Ujjawal Satsangi for the petitioners and Sri Udit Chandra, learned counsel for the respondents.

3. Pleadings have been exchanged between the parties in both the petitions.

4. At the very outset, it would be relevant to take notice of the fact that the writ petitioner in **Writ C No. 18053 of 2022 (M/S Bcits Pvt. Ltd vs. Purvanchal Vidhyut Vitaran Nigam Ltd. And Another**) had approached this Court earlier in Writ C No. 15363 of 2022 (M/s Bcits Pvt. Ltd. vs. Purvanchal Vidhyut Vitaran Nigam Ltd. And Another) seeking to challenge notice dated 18.5.2022 whereby the petitioner had been directed to show cause in respect of a proposed action of blacklisting/debarment.

5. The writ court allowed the writ petition by means of a judgement dated 26.5.2022 taking into consideration the fact that in the aforestated notice the authority concerned had already recorded its conclusion with regard to explanation furnished by the petitioner earlier and had found the same to be unsatisfactory. The Court held that since the respondent authority had already expressed its mind, the exercise which was to follow would be an empty formality. Accordingly, the notice was quashed leaving it open to the respondent corporation to issue a fresh notice in accordance with law, if so advised.

6. Against a similarly worded notice bearing same date i.e. 18.5.2022, the petitioner in Writ C No. 18052 of 2022 (M/S Nsoft (India) Services Pvt. Ltd. vs. Purvanchal Vidyut Vitaran And Another) had also preferred an earlier petition being **Writ C No. 17169 of 2022 (M/s Nsoft India Services vs. Purvanchal Vidyut Vitaran And Another)** and following the judgement in Writ C No. 15363 of 2022 (M/s Bcits Pvt. Ltd. vs. Purvanchal Vidhyut Vitaran Nigam Ltd. And Another), the writ petition was disposed of in the same terms by means of a judgment dated 16.6.2022.

7. It is pursuant to the judgments in the earlier round of litigation, referred to above, that the respondent no.2 issued notices dated 18.6.2022 bearing Reference No. 162/PuVVNL(Varanasi)/ Commercial/Billing and Reference No. 161/PuVVNL(Varanasi)/ Commercial/ Billing respectively, against the petitioners in the two writ petitions, in terms of which they were directed to show cause as to why in the light of the facts stated in the notices, the petitioner firms be not blacklisted/debarred for a period of two years.

8. Challenging the aforesaid notices, the present petitions have been filed.

9. Counsel appearing for the respondents has raised a preliminary objection by submitting that the notices dated 18.6.2022 which are sought to be challenged only direct the petitioners to answer the charges which have been levelled against the petitioner firms with a further mention as to why it should not be blacklisted for a period of two years and the decision whether to blacklist the petitioners or not would be taken only after objection to the show cause notices have been submitted by the petitioners and in view thereof, the present petitions are premature and not maintainable.

10. Learned Senior Counsel appearing for the petitioners while assailing the show cause notices dated 18.6.2022 issued by the respondent no.2, submits as under:

10.1 The notices dated 18.6.2022 though stated to be for the purpose of giving the petitioners a show cause, is infact in the nature of an order which has been issued with premeditation with malice writ large in issuing the said notices.

10.2 The notices are founded on incorrect and incomplete facts which have been selectively stated to prejudice the petitioners. The entire exercise sought to be undertaken is arbitrary and opposed to the mandate of Article 14 of the Constitution.

10.3 The show cause notices conveniently conceal the factum of issuance of earlier notices which had been suitably responded by the petitioners. The successive show cause notices issued for the self-same reasons go to show that the respondent authority is proceeding with premeditation to somehow punish the petitioners.

10.4 The tenor of the notices is indicative of the fact that the respondent authority has already made up its mind to pass an order of blacklisting against the petitioners and therefore, the entire exercise which is proposed to be undertaken in furtherance of the notice would be an empty formality and a futile exercise. To support his submission, learned Senior Counsel has placed reliance upon the decisions in **Siemens Ltd. vs. State of Maharashtra & Others1 and Oryx Fisheries Pvt. Ltd vs. Union of India & Others**2.

10.5 An attempt has also been made to draw attention of the Court to the merits of the case and the defence which is sought to be put up by the petitioner firms in response to the imputations made in the show cause notices.

11. The respondents have filed counter affidavits in both the petitions in which it has been categorically averred that the notices dated 18.6.2022 simply call upon the petitioner firms to submit an explanation for violation of the various conditions under the agreement. It is submitted that the notices have been issued strictly in accordance with the liberty granted by this Court in terms of the judgements dated 26.5.2022 and 16.6.2022 passed in the earlier writs being Writ C No. 15363 of 2022 and Writ C No. 17169 of 2022, respectively.

12. It is further submitted that the first part of the notices contains statement of imputations regarding alleged breaches and default committed by the petitioners with specific details having been given so as to enable the petitioners to precisely know the exact case or allegations levelled against them in order to enable them to give a reply to the allegations. The second part of the notices indicates the punishment which is proposed, in case the replies submitted by the petitioners are held to be not satisfactory, and also the quantum of punishment which the respondent authorities propose to impose on the petitioners. It has been averred that in the entire show cause notice there is no whisper of any premeditation as alleged by the petitioners. It has been further averred that the respondent authorities have issued the show cause notice with an open mind calling upon the petitioners to submit reply to the allegations which have been levelled and it is only after reply of the petitioners is submitted that the authority would take a decision whether to drop the show cause notice or to pass an order with regard to blacklisting of the petitioners.

13. On behalf of the respondents, reliance is sought to be placed on the decision in the case of **Gorkha Security Services vs. Government (NCT of Delhi) & Others**3 for the proposition that in order to fulfill the requirements of principles of natural justice, a show cause notice in addition to proposing the penalty/action proposed to be taken is also required to state the materials/grounds on the basis of which the department proposes to take the action.

14. Rival contentions which have been raised across the bar would require appreciation of the parameters under which a show cause notice particularly in reference to a proposed order of blacklisting/debarment may be issued and the circumstances under which the validity of a show cause notice may be assailed in writ jurisdiction.

15. The maintainability of a writ petition against a show cause notice was

subject matter of consideration in the case of Siemens Ltd. wherein it was held that ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless it is without jurisdiction; however, when a notice is issued with premeditation, writ petition would be maintainable. Referring to the earlier decisions in **State of U.P. vs. Brahm Datt Sharma4 Special Director vs. Mohd. Ghulam Ghouse5, Union of India vs. Kunisetty Satyanarayana6, K.I. Shephard vs. Union of India7** and **V.C., Banaras Hindu University vs. Shrikant**8, it was observed as follows:-

"9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P. v. Brahm Datt Sharma, Special Director v. Mohd. Ghulam Ghouse and Union of India v. Kunisetty Satyanarayana, but the question herein has to be considered from a d-ifferent angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India.) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.

10. The said principle has been followed by this Court in *V.C., Banaras Hindu University v. Shrikant, stating*: (SCC p. 60, paras 48-49)

"48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post-decisional hearing given by the High Court was illusory in this case.

49. In K.I. Shephard v. Union of India this Court held: (SCC p. 449, para 16)

"It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.' "

(See also Shekhar Ghosh v. Union of India9 and Rajesh Kumar v. D.C.I.T.10)

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable."

16. The question as to what would be the proper contents of a notice to show cause, so as to be in consonance with the principles of natural justice was considered in the case of **Oryx Fisheries (supra)** and it was observed that the notice directing show cause must state the charges only and not definite conclusions of alleged guilt otherwise the entire proceeding would stand vitiated by unfairness and bias. It was stated thus:-

"24. ... It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show-cause proceeding is meant to give the person

proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like "a reasonable opportunity of making objections" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in Khem Chand v. Union of India11, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

26. S.R. Das, C.J. speaking for the unanimous Constitution Bench in Khem Chand held that the concept of "reasonable opportunity" includes various safeguards and one of them, in the words of the learned Chief Justice, is : (AIR p. 307, para 19)

"(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;"

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

28. Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against.

29. ...

30. ...

31. It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it."

17. The scope of judicial review in matters relating to challenge to show-cause

notice was subject matter of consideration in **Union of India and another Vs. Vicco Laboratories**12, and while holding that non-interference at the stage of issuance of show-cause notice is the normal rule, it was stated that where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The observations made in the judgment in this regard are as follows:-

"31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out."

18. The principle that a writ petition should normally not be entertained against mere issuance of show-cause notice was reiterated in **Commissioner of Central Excise, Haldia Vs. M/S. Krishna Wax (P) Ltd.**13 and it was held that the concerned person must first raise all the objections before the authority which had issued a show-cause notice and the redressal in terms of the existing provisions of law could be taken resort to if an adverse order was passed against such person.

19. A similar view had been taken in a decision in **Malladi Drugs and Pharma Ltd. Vs. Union of India1**4, and the judgment of the High Court dismissing the writ petition against a show-cause notice was upheld.

20. Again in **Union of India and others Vs. Coastal Container Transporters Association and others**15, while examining the scope of powers under Article 226 with regard to quashment of a show-cause notice, it was held that the same would not be permissible unless there is lack of jurisdiction or violation of principles of natural justice.

21. In the two cases before us, the factum of service of the notices dated 18.06.2022 by the respondent-Corporation on the petitioners requiring them to show cause as to why an order of blacklisting be not passed, is not in dispute. It is rather sought to be argued that since the show cause notice specifies the imputations, the same is indicative of the fact that the respondent authority has already made its mind to pass an order of blacklisting against the petitioners and that the notices are, therefore premeditated and the entire exercise proposed to be undertaken in furtherance thereof would be an empty formality.

22. In **Gorkha Security Service**s3 (supra), the question pertaining to the form and content of a show cause notice that is

required to be served before deciding as to whether the noticee is to be blacklisted or not was subject matter of consideration and it was held that it is a mandatory requirement to give such a show cause notice to mention that action of blacklisting is proposed so as to provide adequate and meaningful opportunity to show cause against the same. Accordingly, it was observed that this would require the statement of imputations detailing out the alleged breaches and defaults so that the noticee gets an opportunity to rebut the same. The guidelines laid down as to the contents of show cause notice pursuant to which an order of blacklisting may be passed, in the aforesaid decision, are in the following terms:-

"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

23. The manner in which a show cause notice is to be issued to constitute a valid basis of a blacklisting order in the context of government contracts and tenders was subject matter of consideration in a recent decision in the case of **UMC Technologies Private Ltd. Vs. Food Corporation of India and another**16 and after explaining the principles in regard to the same in detail, it was held that it is essential for the notice to specify the particular grounds on which an action is proposed to be taken so as to enable the noticee to answer the case against him and in the absence of the same a person cannot be said to be granted a reasonable opportunity of being heard. It was stated thus:-

"13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should

be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in Nasir Ahmad v. Custodian General, Evacuee Property [Nasir Ahmad v. Custodian General, Evacuee Property, (1980) 3 SCC 1] has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

14. Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid, particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting take away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person."

24. The adverse impact of an order of blacklisting and the need for strict observance of the principles of natural justice before passing of an order of blacklisting was emphasized in **M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another**17 and it was observed as follows:-

"12...The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

xxx

15...The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

xxx

17...The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

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19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

25. The aforementioned proposition that no order of blacklisting could be passed without affording opportunity of hearing to the affected party was reiterated in the case of **Raghunath Thakur Vs. State of Bihar & Ors**.18 wherein it was stated as follows:-

"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order..."

26. The requirement of grant of opportunity to show cause before blacklisting was restated in the case of **Gronsons Pharmaceuticals (P) Ltd. & Anr. Vs. State of Uttar Pradesh & Ors.**19 and it was held that since the order blacklisting of an approved contractor results in civil consequences, the principle of audi alteram partem is required to be observed.

27. The power to blacklist a contractor was held to be inherent in the party allotting the contract and the freedom to contract or not to contract was held to be unqualified in the case of private parties; however when the party is State, the decision to blacklist would be open judicial review on touchstone of proportionality and the principles of natural justice. The relevant observations made in this regard in the case of **M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL & Ors**.20 are as under:-

"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court."

28. The aforesaid legal position has been recently considered in **M/s Baba Traders Vs. State of U.P. and others21 and Amit Kumar Vs. State of U.P. and another**.22

29. It would therefore be seen that an order of blacklisting has the effect of depriving a person equality of opportunity in the matter of public contract and in a case where the State acts to the prejudice of a person it has to be supported by legality. The activities of the State having the public element quality must be imbued with fairness and equality.

30. The order of blacklisting involves civil consequences and has the effect of creating a disability by preventing a person from the privilege and advantage of entering into lawful relationship with the government therefore fundamentals of fair play would require that the concerned person should be given an opportunity to represent his case before he is put on the blacklist. A fair hearing to the party before being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The applicability of the principle of audi alteram partem and the necessity of issuance of show cause notice also becomes imperative before passing of any such order of blacklisting.

31. It would therefore follow as a legal proposition that in order for a show cause notice to constitute a valid basis for passing of an order of blacklisting, the notice must spell out the imputations specifying the alleged breaches and defaults indicating the intent of the issuer of the notice to blacklist the noticee so as to ensure that the noticee has an adequate informed and meaningful opportunity to rebut the allegations and to show cause against the proposed blacklisting.

32. In order to ensure conformity with the principles of natural justice, a show cause notice is required to specify as to what would be the consequences if the noticee does not satisfactorily meet the grounds on which the action is proposed. The notice apart from being adequate is also required to state the grounds necessitating the action and the penalty

proposed is also required to be mentioned specifically and unambiguously. A show cause notice, particularly in a case where it proposes to impose an order of blacklisting, is required to adhere to the principles of natural justice and for the said reason is to fulfill the twin requirements of stating in unambiguous terms the grounds which according to the department necessitates an action, and also the penalty which is proposed to be taken in case the noticee is unable to furnish an adequate response to the grounds stated in the notice.

33. The principle of *audi alteram partem* has been held to be a sina qua non and a basic tenet underlying the principles of natural justice. In **Re K. (H.) (an infant)**23, **Lord Parker C.J.**, described natural justice as 'a duty to act fairly'. The rule of 'fair hearing' requires that the party which is likely to be visited with adverse consequences is given an opportunity to meet the case against it effectively. Right to 'fair hearing' or 'reasonable opportunity of hearing' casts a sacrosanct obligation on the adjudicatory authority to ensure fairness in procedure and action. It covers within its fold every stage through which an administrative adjudication passes - starting from notice to final determination.

34. Procedural fairness requires that persons liable to be affected by a proposed administrative decision be given adequate notice of what is proposed so that they are not taken unfairly by surprise, and also that they are in a position to make representation against the proposed action; to appear at the hearing or the inquiry; and to effectively answer the charges which they have to meet. A proper hearing must always include an opportunity to know the opposing case. We may refer to the observations of **Lord Denning in Kanda vs. Government of Malaya**24, which are as follows:-

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

35. The right to know and to effectively respond to the charges has been recognized as a fundamental feature of any administrative adjudicatory process. It is a fundamental principle of fairness that a party should have prior notice of the case against him and an opportunity to properly respond to the same. The charges are to be made known specifically and with particularity so as to ensure that the party liable to be affected is not taken by surprise, and has an effective opportunity of putting forward its defence.

36. The contention raised on behalf of the petitioners that the issuance of the show cause notice is an empty formality for the reason that imputations have been stated in the notice which are indicative that the authority concerned has already made up its mind, cannot be accepted for the reason that the grounds/imputations specified in the notice are with a view to elicit the response of the petitioners in respect of the grounds on which the action is proposed. Needless to say, it is open to the petitioners to rebut the allegations specified in the notice by submitting their reply and it would be incumbent upon the respondent authority to accord consideration to the same and thereafter, pass an order affording reasonable opportunity to the petitioners.

37. The respondents have taken a categorical stand in their counter affidavits that the show cause notices have been issued with an open mind calling upon the petitioners to submit reply to the allegations which have been

levelled and it is only after replies of the petitioners are submitted that the authority would take a decision whether to drop the show cause notice or to pass an order with regard to blacklisting.

38. It is legally well settled that mere issuance of show cause notice does not amount to an adverse order, which may be held to affect the rights of the parties. The necessity for issuing a show cause notice and the requirement of specifying the grounds on which the action is proposed is in fact a necessary prerequisite, so as to ensure that the noticee is aware of the grounds on which action is proposed and has an adequate opportunity to rebut the same. If the show cause notice does not specifically state the grounds on which it is being issued and the proposed action, the noticee would be taken by surprise and would not have adequate opportunity to rebut the allegations during the course of inquiry which is to follow.

39. We are of the view that the challenge to the show cause notices in the instant petitions is premature for the reason that the mere indication of the grounds and the penalty proposed, would not give rise to a cause of action, as it is open to the petitioners to present their case and rebut the imputations, whereupon it would be incumbent upon the respondent authority to proceed with the inquiry and pass an appropriate speaking and reasoned order after giving adequate opportunity to the petitioners and ensuring due compliance of the principles of natural justice. The outcome of the inquiry which is proposed in terms of the show cause notice would only be a matter of conjecture at this stage, inasmuch as it is equally possible that after considering the response of the petitioners and holding due inquiry, the respondent authority may drop the proceeding or may reject the reasons given by the noticee. It is only upon conclusion of the proceedings where any order is passed by the respondent authority which is prejudicial to their interest, the petitioners may have cause of action to raise a challenge to the same.

40. Having regard to the aforestated facts and circumstances, we are of the view that the challenge raised to the show cause notices, at this stage, is premature.

41. Accordingly, we are not inclined to exercise our extraordinary jurisdiction under Article 226 of the Constitution of India to interfere in the matter.

42. It would be open to the petitioners to submit their response to the show cause notices dated 18.6.2022, within a period of two weeks from date whereupon the concerned respondent authority would be expected to conclude the proceedings within a further period of two weeks, after affording proper opportunity of hearing to the petitioners and according due consideration to the defence set up by the petitioners in the replies to the show cause notices and pass reasoned and a speaking orders thereupon.

43. The petitions stand **disposed of** accordingly.

(2022) 10 ILRA 466
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-B No. 1613 of 2022

Arun Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pavan Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Rajkishore Singh, Sri Vineet Kumar Singh

Civil Law – Limitation Act,1971 – Section 5 - Delay in filing restoration application - adopting a liberal approach and deciding the delay condonation application does not give a jurisdiction to extend period of limitation on the ground of equity - One Sankata Prasad filed a revision before the Board of Revenue, which was dismissed by an order dated 30.9.1986 - After his death, his sons (the present petitioners) filed a restoration application dated 3.7.2019 - By impugned order the Board of Revenue, Allahabad rejected the highly time barred restoration application dated 3.7.2019 filed against the order dated 30.9.1986 - Held - the original affected person (father of the petitioner), who was alive at the relevant time & died in the year 2018, never made any endeavour to challenge the order and accepted the order passed by the Board of Revenue and the learned Commissioner - Board of Revenue rightly rejected the restoration application of the petitioners on the ground of latches, which was filed without assigning any reliable and cogent reason for inordinate delay (8,9,10)

Dismissed. (E-5)

List of Cases cited:

Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & ors. in Civil Appeal No. 7696 of 2021 dated 16.12.2021, 2021 SCC Online SC 1260

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Pavan Kumar Srivastava, learned counsel for the petitioners, Sri Vineet Kumar Singh, learned counsel for private-respondent no.5 and learned Standing Counsel representing respondent nos. 1 to 4.

2. By way of present writ petition, the petitioners have invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India challenging the order dated 23.9.1975 passed by Commissioner, Allahabad Division, Allahabad and order dated 17.8.2021 passed by Board of Revenue, Allahabad rejecting the highly time barred restoration application dated 3.7.2019 filed against the order dated 30.9.1986 passed in Revision No. 106 of 1975-76/Fatehpur.

3. Facts culled out from the averment made in the writ petition are that proceeding has been initiated for realization of the loan amount as land revenue. The property of Sankata Prasad (father of present petitioners) was sold in auction sale dated 25.7.1974 in favour of Balbir (respondent no.5). Feeling aggrieved against the said auction sale, Sankata Prasad had filed objection under Section 281 of U.P.Z.A. & L.R. Act read with Rules 285-I and 285-J of U.P.Z.A. & L.R. Rules, inter alia, on the grounds that the share of Sankata Prasad is only 1/4 but auction had illegally been taken place showing his half share (1/2) in the property in question. The objection filed by Sankata Prasad was rejected by order dated 23.9.1975 passed by Commissioner, Allahabad Division, Allahabad on the basis of the report of Lekhpal and other documents, showing the ownership of the Sankata Prasad to the extent of half share (1/2) in the property in question, therefore, auction sale dated 25.7.1974 was held valid with respect to his half share. Having been aggrieved against the order dated 23.9.1975, Sankata Prasad had preferred revision being Revision No. 106 of 1975-76/Fatehpur before the Board of Revenue, which was also dismissed vide order dated 30.9.1986. After the death of Sankata Prasad, his sons (the present petitioners) have filed highly belated restoration application dated 3.7.2019,

which was rejected being time barred vide order dated 17.8.2021 passed by Board of Revenue, which is under challenged in the present writ petition.

4. It is submitted by counsel for the petitioners that more than the valid share of Sankata Prasad had been put to auction sale, but the same has illegally been ignored by the court below and unfortunately, restoration application, filed on behalf of present petitioners was rejected on the ground of latches. After the death of Sankata Prasad on 4.11.2018, while the contesting respondent has tried to sell the property in question, petitioners came to know about the entire facts. It is further submitted that the petitioners could not know the previous proceeding, therefore, they could not file the restoration application within time. Orders passed by the Board of Revenue are illegal and suffers from infirmity and irregularity, therefore, these orders should be quashed and one opportunity should be given to the petitioners to defend their case.

5. *Per contra*, learned counsel appearing on behalf of respondent no.5 (auction purchasers) contended that the orders dated 23.9.1975 and 30.9.1986 were passed in the presence of Sankata Prasad (father of the petitioners). It is evident from the perusal of the aforesaid orders, which are annexed as annexure-3 and 5 respectively to the writ petition, that the auction sale has already attained finality in the year 1974 and after such a belated stage there is no justification for challenging said auction proceedings. It is further contended that since 1974, respondent no.5 is in the possession over the property in question and all rights pertains to the subject matter of auction sale, are vested with him. No sufficient ground has been assigned by the petitioners in filing the restoration application at a belated stage. The impugned orders passed by Board of Revenue and Commissioner, Allahabad Division, Allahabad requires no interference by this Court and the present writ petition is liable to be dismissed with cost.

6. Having considered the rival submissions advanced by learned counsel for the parties and pleading on record, it is a admitted position to both the parties that auction proceeding took place for realization of the loan amount, as a land revenue, and the property of Sanakata Prasad was put to auction sale on 25.7.1974. So far as the share of the Sankata Prasad in the subject matter of auction proceeding is concerned, Commissioner and the Board of Revenue, vide their orders dated 23.9.1975 and 20.9.1986 respectively, have recorded concurrent finding that the Sankata Prasad was entitled for half share in the property in question. Finding of facts given by them was supported by the report of the Collector and the Lekhpal. In the sale proclamation half (½) share of Sankata Prasad was stipulated. The Board of Revenue has also emphasized one another aspects of the matter that the other co-sharers in the property in question did not come forward against the auction sale claiming their right and title over the subject matter of auction sale, who may have affected due to auction of property more than the valid share of Sankata Prasad as stated by him. There is nothing on record to show that any other co-sharer of the subject matter of the auction proceeding came forward to contest the case claiming his right/title over the property in question. As per the case of the petitioners, their father was alive from 30.9.1986 to

4.11.2018, but during these long period, he had never made any endeavour to challenge the order dated 30.9.1986 in his life time. This Court note with utmost surprise how affected person (Sankata Prasad) had shown his ignorance when orders passed against him came to this serious and dangerous consequence prejudicing his right and title over the property in question. Prima facie, it appears that after the death of Sankata Prasad (father of present petitioners), dishonesty prevailed in their mind and they deliberately moved a restoration application dated 3.7.2019 at a belated stage on very flimsy grounds. Auction sale dated 25.7.1974 has already attained finality and, at this juncture, there is no justification to interfere in the aforesaid auction proceeding, after such a long time. No sufficient and justifiable ground has been offered to explain such inordinate delay in filing the restoration application at the behest of the petitioners, who are claiming their right/title over the property in question being sons of Sanakata Prasad. On the face of it restoration application appears to be misconceived and devoid of merits.

7. Perusal of the record reveals that there is a gross negligence, recklessness and deliberate inaction at the part of the petitioners who have filed the restoration application at a very belated stage, without sufficiently explaining the inordinate delay, challenging the order dated 30.9.1986 coupled with the validity of the auction proceeding which took place in the year 1974. The highly belated restoration application is nothing but abuse of process of law. It is a sham, illusory and inspired by nefarious and vexatious designs which should be throttled at the threshold.

8. **Hon'ble Supreme Court in** the case of ***Majji Sannemma @ Sanyasirao Vs. Reddy Sridevi & Ors. in Civil Appeal No. 7696 of 2021*** decided on 16.12.2021, reported in ***2021 SCC Online SC 1260***, has expounded that adopting a liberal approach and deciding the delay condonation application does not give a jurisdiction to extend period of limitation on the ground of equity. The relevant paragraph 7, 7.1, 7.2, 7.3, 7.4 and 7.5 of the aforesaid judgment is quoted hereinbelow:

"7. At this stage, a few decisions of this Court on delay in filing the appeal are referred to and considered as under:-

7.1 In the case of Ramlal, Motilal and Chhotelal (supra), it is observed and held as under:-

In construing s. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in ***Krishna v. Chattappan, (1890) J.L.R. 13 Mad. 269****, "s. 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and*

discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant."

7.2 In the case of P.K. Ramachandran (supra), while refusing to condone the delay of 565 days, it is observed that in the absence of reasonable, satisfactory or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly. It is further observed that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. It is further observed that while exercising discretion for condoning the delay, the court has to exercise discretion judiciously.

7.3 In the case of Pundlik Jalam Patil (supra), it is observed as under:-

"The laws of limitation are founded on public policy. Statutes of limitation are sometimes described as "statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based on the maxim "interest reipublicae ut sit finis litium", that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing time-limit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his Jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy."

7.4 In the case of Basawaraj (supra), it is observed and held by this Court that the discretion to condone the delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression "sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is observed that each application for condonation of delay has to be decided within the framework laid down by this Court. It is further observed that if courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to legislature.

7.5 In the case of Pundlik Jalam Patil (supra), it is observed by this Court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Courts help those who are vigilant and "do not slumber over their rights"."

9. Having regard to the facts and circumstances of the present case and dictum of Hon'ble Apex Court, in the conspectus as above, I am of the view that petitioners have not come with clean hands before this Court. A clear cut recklessness and gross negligence is made out at their part in adopting the legal recourse against

the orders dated 30.9.1986 and 23.9.1975. Even, the original affected person, who was alive at the relevant time and died in the year 2018, had never made any endeavour to challenge the said order and kept silent accepting the order passed by the Board of Revenue and the learned Commissioner.

10. Resultantly, for the reason stated above, there is no force in the instant writ petition. I do not find any substance in the submissions advanced by counsel for the petitioners assailing the impugned orders. The Board of Revenue has rightly rejected the restoration application of the petitioners on the ground of latches, which was filed without assigning any reliable and cogent reason for inordinate delay.

11. As such, present writ petition, being misconceived and devoid of merits, is **dismissed**. No order as to costs.

(2022) 10 ILRA 471
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.10.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Application U/S 482 No. 72 of 2020

A.K. Ravi Nedungadi & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Baljeet Singh, Somya Chaturvedi

Counsel for the Opposite Parties:
Govt. Advocate, Sri Ashok Kumar Singh, Sri Kapil Misra, Sri Neelesh Anand

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 406 420, 467, 468, 471 and 120-B - The Companies Act, 2013 - Section 149/150 - Vicarious criminal liability of its Directors and Shareholders would arise provided any provision exists in that behalf in the statute - Individual who has perpetrated commission of offence on behalf of the Company can be made an accused along with the Company, if there is sufficient evidence of his active role coupled with criminal intent - person working in a Company also can be made an accused and implicated if there is specific role/allegation which attracts doctrine of vicarious liability - In absence of any of two aforesaid situations - when the Company is offender, vicarious liability of the Directors cannot be imputed automatically. (Para -33,36)

(B) Criminal Law - vicarious criminal liability - If the petitioners have not been involved in the alleged transactions at any point of time, vicarious criminal liability cannot be fixed upon the petitioners - summoning of an accused in a criminal case is a serious matter - Criminal law cannot be set in motion as the matter of course for alleged offences. (Para -35)

Petitioners being non-executive directors - not involved in operations - relating to production and supply/delivery of goods of the company or in day-to-day business of the company - neither disclosed in FIR nor in Charge sheet - Summoned - Supplementary charge sheet – question - whether petitioners are personally liable for any offence even if the allegations in the FIR and charge-sheet are taken on their face value to be correct in entirety. **(Para - 33)**

HELD:-Petitioners who are/were part time Directors of Company cannot be held responsible for alleged offence committed on behalf of Company. Nothing on record suggest that they were responsible in any manner for receiving the order for supply of beer or alleged evasion of excise duty. Continuance of proceedings against petitioners wholly unjustified and uncalled for.

Impugned proceedings quashed against the petitioners. **(Para - 44)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Sunita Palita Vs M/s Panchami Stone Quarry, (2022) SCC Online SWC 945

2. Shiv Kumar Jatia Vs St. of NCT of Delhi, (2019) 17 SCC 193

3. Ramveer Upadhyay & anr. Vs St. of U.P. & anr. (2022) SCC Online SC 484

4. Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749

5. Sunil Bharti Mittal Vs CBI, (2015) 4 SCC 609

(Delivered by Hon'ble Dinesh Kumar Singh , J.)

1. The present petition under Section 482 Cr.P.C. has been filed seeking quashing of the entire proceedings of Case Crime No.5694 of 2019 (State Vs. United Breweries Limited and others), arising out of FIR No.0260 of 2018 initially registered under Section 406 IPC, Police Station Husainganj, District Lucknow against Akhil Sharda, Branch Manager (Sales) Uttar Pradesh and Uttarakhand, Himanshu Tiwari and Arvind Padhi of M/s United Breweries Limited, office address at 626, 6th Floor, DLF, Tower-B, DDA, District Center, Jasaula, New Delhi-110044 having bond at Chapraula, G.T. Road, Tehsil Dadri, Noida-201301. During the course of investigation, Sections 420, 467, 468, 471 and 120-B IPC were added.

2. A challenge has also been made to the summoning order dated 3.4.2019 issued pursuant to the supplementary charge sheet dated 24.3.2019, upon which the learned Ist Additional Chief Judicial Magistrate, Court No.25, Lucknow took cognizance vide order dated 3.4.2019 and summoned the petitioners for facing the trial.

3. The petitioners have also challenged the judgment and order dated 24.12.2019 passed by the Additional Sessions Judge, Court No.1, Lucknow in Criminal Revision No.379 of 2019 filed by the petitioners against the order of cognizance and summoning dated 3.4.2019 passed by the learned trial court.

4. The facts of the case, in brief, are that the United Breweries Limited (Hereinafter referred to as "the Company") is a company registered under the provisions of the Companies Act, 1956 having its registered office at UB Tower, VB City, 24, Vittal Mallya Road, Bangalure, Karnataka. The company is engaged in manufacture and sale of beer and other alcoholic beverages in India and worldwide. Petitioner Nos.1, 3, 5, 6, 7, 8 and 9 are part-time non-executive Directors, whereas petitioner nos.2 and 4 are former non-executive directors, whose term got completed on 4.9.2019 in the company. The specific stand of the petitioners in paragraph 30 of the petition is that the petitioners being non-executive directors, are not involved in operations relating to production and supply/delivery of goods of the company or in day-to-day business of the company.

5. Petitioner no.10 is the Company Secretary and authorized representative of the company, but he is also not involved in operations relating to production and supply/delivery of the goods of the company. In paragraph 31 of the petition, the particulars of the petitioners such as their designation, nature of work, their dates of appointment in the company as non-executive directors and the company

secretary are given in a tabular form, which would read as under:-

Sl. No.	Name	Designation	Date of Appointment/ Cessation
1.	A.K. Ravi Nedungadi	Non-Executive Director	09.08.2022
2.	Chhaganlal Jain	Former Non-Executive Independent Director	27.01.2003 (04.09.2019)
3.	Sunil Kumar Alagh	Former Non-Executive Independent Director	29.04.2005
4.	Chugh Yoginder Pal	Former Non-Executive Independent Director	29.04.2005 (04.09.2019)
5.	Madhav Narayan Bhatkuly	Former Non-Executive Independent Director	26.10.2009
6.	Kiran Mazumdar Shaw	Former Non-Executive Independent Director	26.10.2009
7.	Stephen Friedhelm Genlich	Former Non-Executive Independent Director	02.07.2010
8.	Christiaan A J Van Steengergen	Non-Executive Director	08.11.2017
9.	Rudolf Gijsbert Servaas Van Den Brink	Non-Executive Director	14.11.2018
10.	Govind Rangrajan Iyengar	Company Secretary	16.05.2022

6. Opposite party no.2 is Manager of Licensee Firm F.L.2B (Beehive Alcoveb) and this firm is engaged in business of sale of Beer etc, after purchasing the same from the company and other manufacturers.

7. As per the contents of the FIR lodged on a complaint of opposite party no.2 at Police Station Husainganj. Lucknow on 15.9.2018 against three employees of the company named in the FIR, the complainant placed an order for three trucks of Beer on 7.9.2018 and on 11.9.2018 through e-mail to Akhil Sharda, Branch Manager (Sales) Uttar Pradesh and Uttarakhand and made payment of Rs.65,66,152/- on 7.9.2028 and Rs.27,32,750/- on 11.9.2018, total amount of Rs.92,98,902/- by his banker, Federal Bank Limited, Cantt. Road, Lucknow. Despite making of the payment for there trucks of Beer, Akhil Sharda did not ensure the supply of the ordered Beer nor any proper reply was being given. The complainant was apprehensive that three employees named in the FIR had no intention to supply the ordered Beer and they wanted to misappropriate the amount paid by the complainant as under the Excise Rules, the supply was to be made within 72 hours of the order.

8. The first charge sheet was filed by the investigating officer on 10.2.2019 against the four accused persons, namely, Akhil Sharda, Himanshu Tiwari, Arvind Padhi and the United Breweries Limited,

the company, under Sections 406, 420, 467, 468, 471 and 120-B IPC alleging that the four accused had prepared forged and fabricated documents in furtherance of the criminal conspiracy, and have caused loss to the excise revenue of the Government of Uttar Pradesh and, they had also cheated the complainant. Thereafter, two supplementary charge sheets dated 24.3.2019 and 27.6.2019 came to be submitted by the investigation officer.

9. In the first supplementary charge sheet dated 24.3.2019, name of the petitioners got figured as accused for committing the offences under Sections 406, 420, 467, 468, 471 and 120-B IPC. It is alleged that the petitioners together and in furtherance of criminal conspiracy had committed financial crime and these accused petitioners are habitual offenders against whom the offences under Sections 406, 420, 467, 468, 471 and 120-B IPC are very well made out on the basis of the evidence collected during the course of investigation.

10. Second supplementary charge sheet came to be filed against Abdul Haque, Happy Arora and Vivek Tiwari of three transport companies, namely, Sical Logistics Limited, New Fatehpur Calcutta Transport Company and Tiwari Transport Company respectively, and against the officers and share holders of the company alleging that they had prepared forged truck numbers and the driving licenses.

11. Petitioner no.5, Rudolf Gijsbert Servaas Van Den Brink was appointed as non-executive director only on 14.11.2018. Petitioner No.8, Christiaan A J Van Steenbergen and petitioner no.9 Stephen F Gerlich are permanently residing abroad.

12. Opposite party no.2 placed a demand order for two trucks load of Beer through e-mail, total 2360 cases to the company on 7.9.2018. This e-mail was also sent to the Assistant Excise Commissioner Web Distillery, Aligarh. As the next two days i.e. Saturday and Sunday were holidays, the process for supply of goods for which order was placed by opposite party party no.2, was initiated on 10.9.2018. In pursuance of the indent/demand order dated 7.9.2018 placed by opposite party no.2, the company directed its transporter Sical Logistics Limited to arrange vehicles for delivery of goods from its godown located at Noida to the Licensee at Lucknow. The transport permit (Form FL-36) was issued by the concerned Excise Officer on 11.9.2018 for supply of Beer by 13.9.2018. The consignment of Beer was dispatched on 11.9.2018 for delivery to the Licensee at Lucknow after payment of excise duty in advance through transporter of the company by Truck Nos.UP32 HN 3209 and UP32 FN 8048.

13. It is the case of the petitioners that the company sent the entire goods/Beer in respect to the demand order dated 7.9.2018 loaded aforesaid two trucks provided by its registered transporter namely, Sical Logistics Limited having GPS system in those trucks as mandated by the Excise Department's Track and Trace Policy. It is further said that Sical Logistics Limited, registered transporter of the company, had arrangement for providing trucks for transportation services with New Fatehpur Calcutta Transport Company, who in turn hires trucks from open market. In this particular transaction, New Fatehpur Calcutta Transport Company had hired Truck Nos.UP32 HN 3209 and UP32 FN 8048 from Tiwari Transport Company for

delivery of consignment of opposite party no.2 at Lucknow.

14. The aforesaid two trucks had to reach the destination on 13.9.2018. On 13.9.2018, location of both the trucks was tracked through GPS upto the outer limit of the Lucknow city, which was near about one and a half kilometer from the hotel Ramada Palace of opposite party no.2 and, thereafter, the GPS device of both trucks lost contact with GPS Tracker Agency, namely, QTS Solutions Private Limited after 11.41 hours on 13.9.2018. QTS Solutions Private Limited sent a message through e-mail on 14.9.2018 at 4.15 PM of one Mr. Dharam Chand, Depot In-charge of the company.

15. It is stated that Ashok Kumar Jaiswal, who manages the business of opposite party no.2, also runs Hotel Ramada, Near Bani Junabganj, Banthara, Lucknow, which is located at a distance of 1.5 Kms. from the place from where the trucks loaded with Beer went missing and which is specifically the same place from where the GPS fitted in the trucks stopped giving the track of the two trucks on 13.9.2018.

16. The Depot In-charge also informed to the officers of the company as well as the transporter, Sical Logistics Limited about the loss of trucks. The officers of the company also inquired about the trucks' location from opposite party no.2 through telephone, but opposite party no.2 informed the company that the trucks had not yet reached the designated place i.e. 18, Station Road, Lucknow.

17. The fact of trucks loaded with Beer from the Depot of the company going missing, was brought to the notice of the District Excise Officer, who directed the company on 14.9.2018 to lodge the FIR at Police Station Badalpur, Gautam Budh Nagar. When the whereabouts of the trucks were not known, on 21.9.2018 the company requested consent of the licensee, opposite party no.2, through e-mail for re-supply of Beer against the order dated 7.9.2018 as the consent was required for issuance of transport permit (FL-36) afresh. The consent for re-supply was given by opposite party no.2 through e-mail on 22.9.2018. The licensee also informed the company that criminal proceedings have already been initiated at Police Station Husainganj, Lucknow with regard to non-supply of Beer and civil proceedings would be initiated for the losses suffered. After consent was given by the licensee on 22.9.2018, fresh Form FL-36 was issued by the concerned Excise Officer on 22.9.2018 itself and Beer was supplied on 22.9.2018 against the order dated 7.9.2018 after payment of excise duty in advance through transporter of the company. The supply of goods/Beer were delivered at the address of the licensee at Lucknow on 24.9.2018, which were accepted by the licensee, however, acknowledgment was not given by the licensee even after receipt of the goods. As the licensee did not acknowledge the delivery of goods, the drivers of the trucks contacted Excise Department and the Excise Inspector was deputed to verify the delivery of beer. The concerned Excise Officer inspected the location of the licensee and submitted his report dated 27.9.2018 that Beer ordered was duly received by the licensee at his premises.

18. The licensee had also placed another order dated 11.9.2018 at 8.30 PM through e-mail for delivery of 1180 cases of Beer at Varanasi. Since the vehicles of transportation of Beer to Varanasi could not

be arranged and the transport Form FL-36 could not be issued, the licensee on 15.9.2018 modified its original order dated 11.9.2018 through e-mail instructing that the ordered beer be delivered at Lucknow instead of Varanasi. After receipt of revised order on 15.9.2018 with changed location, the vehicle was arranged and Form FL-36 was issued by the concerned Excise Officer on 17.9.2018 and on the same day, consignment of beer was dispatched after payment of excise duty in advance through transporter of the company, namely, Buland Logistic Limited by Truck No.UP81 BT 5285 from Aligarh to Lucknow and the consignment of beer was delivered and received by the licensee on 19.9.2018. It is stated that the goods were duly delivered as per the orders dated 7.9.2018 and 11.9.2018.

19. This Court in its detail interim order dated 17.1.2020 has noted the undisputed facts as under:-

"It is undisputed that for re-supply of the Beer, excise duty was duly paid to the Excise department, after which F.L. 36 was issued and the goods were supplied by the Company, which was duly received by the informant's side. It is also undisputed that initially, in Case Crime No. 260 of 2018 (supra), final report was prepared by the Investigating Officer on 13.10.2018. (Conclusion of the final report is appended at page 183 of the application). However, on the request of the Ashok Kumar Jaiswal, investigation was transferred to the Crime branch and charge sheet was prepared by the 2nd Investigating Officer on 10.02.2019 with the observation that there is a loss of U.P. Excise revenue. The charge sheet was prepared against the Company, Akhil Sharda, Arvind Padhi and Himanshu Tiwari with the allegation that by preparing a forged documents, the Company cheated the informant and also cause U.P. excise revenue loss. Thereafter, impugned supplementary charge sheet was prepared against the applicants on 24th March, 2019, which is annexed at pages 55 to 70 of the application."

20. Sri G.S. Chaturvedi, learned Senior Advocate representing the petitioners has submitted that the opposite parties have not denied the averments made in paragraphs 30 and 31 of the petition, and if there is no evidence brought on record to show any involvement of the petitioners in the alleged offence, the criminal liability cannot be fixed only on the allegation that the accused are directors/share holders of the company without disclosing any role played by such a person in the entire transaction, which form part of the offence and subject matter of the FIR, and the charge sheet. He has further submitted that the impugned proceedings against the petitioners are nothing but a sheer abuse of process of law and Court and are manifestly unjust and illegal. The investigation has also been closed, and no further investigation is pending in the offence and the continuation of the proceedings against the petitioners would result only in their further harassment for alleged offences, which are not made out against them inasmuch as there is no evidence against them for their involvement in any manner for commission of alleged offences.

21. Sections 2(47), 149 and 150 deal with the independent directors which read as under :-

"2(47) "independent director" means an independent director referred to in sub-section (6) of section 149;

149. Company to have Board of Directors.__(1) Every company shall have a Board of Directors consisting of individuals as directors and shall have--

(a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and

(b) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution:

Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.

(2) Every company existing on or before the date of commencement of this Act shall within one year from such commencement comply with the requirements of the provisions of sub-section (1).

[(3) Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year:

Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated];

(4) Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Explanation.-- For the purposes of this sub-section, any fraction contained in such one-third number shall be rounded off as one.

(5) Every company existing on or before the date of commencement of this Act shall, within one year from such commencement or from the date of notification of the rules in this regard as may be applicable, comply with the requirements of the provisions of sub-section (4).

(6) An independent director in relation to a company, means a director other than a managing director--

or a whole-time director or a nominee director,

(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(c) who has or had no 2[pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of

his total income or such amount as may be prescribed,] with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

3[(d) none of whose relatives--

(i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year:

Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed;

(ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year;

(iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or

(iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (i), (ii) or (iii);]

(e) who, neither himself nor any of his relatives

(i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

4[Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.]

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(iii) holds together with his relatives two per cent. or more of the total voting power of the company; or

(iv) is a Chief Executive or director, by whatever name called, of any nonprofit organisation that receives twenty-five per cent. or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

(7) Every independent director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).

Explanation.-- For the purposes of this section, nominee director means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

(8) The company and independent directors shall abide by the provisions specified in Schedule IV.

(9) Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

5[Provided that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V.]

(10) Subject to the provisions of section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

(11) Notwithstanding anything contained in sub-section (10), no independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director:

Provided that an independent director shall not, during the said period of three years, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Explanation.-- For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.
(12) Notwithstanding anything contained in this Act,--

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

(13) The provisions of sub-sections (6) and (7) of section 152 in respect of retirement of directors by rotation shall not be applicable to appointment of independent directors.

150. Manner of selection of independent directors and maintenance of data bank in independent directors.__

(1) Subject to the provisions contained in sub-section (6) of section 149, an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any body, institute or association, as may by notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors:

Provided that responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment.

(2) The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.

(3) The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed.

(4) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under section 149."

22. Sri Chaturvedi has further submitted that the petitioners are independent non-executive directors of the company, they are in no manner responsible for day-to-day affairs of the company. Under the scheme of the Companies Act, such directors are engaged in the company for their expertise and special knowledge in a particular discipline and they are not responsible and in-charge of the management of the company. The non-executive director is not involved in the day-to-day affairs of the company or running of its business. Such director is not at all responsible for the day-to-day running of business of the company. There is no evidence collected during the course of investigation to suggest that the petitioners, who are non-executive directors and the secretary of the company, are responsible for conduct of the business of the company. He has, therefore, submitted that continuation of the proceedings against the petitioners is nothing but a gross abuse of process of the Court and to secure the ends of justice, the impugned proceedings are liable to be quashed.

23. In support of his contention, learned counsel for the petitioners has

placed relation upon the recent judgement of the Supreme Court in the case of ***Sunita Palita Vs. M/s Panchami Stone Quarry, (2022) SCC*** Online SWC 945.

24. On the other hand, Sri Prashant Chandra, learned Senior Advocate assisted by Ms. Radhika Singh, learned counsel for opposite party no.2 has submitted that the initial charge sheet filed against Akhil Sharda and three others in the present case, was challenged before this Court in a petition under Section 482 Cr.P.C. being Criminal Misc. Case No.2005 of 2019 and this Court vide judgement and order dated 6.3.2020 quashed the charge sheet. Against the said order dated 6.3.2020, Criminal Appeal Nos.840 and 841 of 2020 were filed before the Supreme Court and the Supreme Court directed for restoration of the proceedings before the trial court. The Supreme Court has observed in its judgment and order dated 11.7.2022 that the High Court has not properly appreciated and/or considered the larger conspiracy and that both the FIR Nos.260 of 2018 and 227 of 2019 relating to disappearance of the trucks loaded with beer and by forging the documents etc. for evasion of excise duty are interconnected. It had come during the investigation that there were other instances of disappearance of the trucks loaded with beer indicating that there was syndicate operating with connivance of the company and its officers and the modus operandi which had been adopted for evasion of the excise duty, was a serious matter. Therefore, involvement of the petitioners would not be ruled out at this stage.

25. Learned counsel for opposite party no.2 has further submitted that considering the judgement and order dated 11.7.2022 passed by the Supreme Court, any interference in the impugned proceedings against the petitioners, would be overreaching the decision of the Supreme Court. He has also submitted that even if it is assumed that there is some distinction in the facts of the present case than the facts of Case Crime No.205 of 2019, the only course open to the petitioners would be to seek an appropriate direction from the Supreme Court. Whether the petitioners have a criminal intent and direct nexus with the alleged offence, is a matter of trial. The responsibility of the director is a matter, which is to be examined only during the trial. There is a charge of criminal conspiracy levelled against all the directors of the company for consistent disappearance of the trucks coupled with evasion of the excise duty, their involvement and the role played by each director can be decided only in a trial.

26. In support of the aforesaid submission, learned counsel for opposite party no.2 has placed reliance upon the judgment of the Supreme Court rendered in the case of ***Shiv Kumar Jatia Vs. State of NCT of Delhi,*** (2019) 17 SCC 193.

27. Learned counsel for opposite party no.2 has further submitted that the reliance placed by the learned counsel for the petitioners on the case of *Sunita Palita* (supra) is not appropriate as the said case was arising out of a complaint and not from the FIR. The necessity to be precise and specific in the complaint, cannot be compared within the generality of an FIR inasmuch as the FIR is not an encyclopedia of facts, and it is not expected from a victim to give every detail of the incident either in the FIR or in the brief history given to the doctor. The said case of Sunita Palita (supra) was a case under Section 141 of Negotiable Instrument Act and the same

is not relevant to the facts of the present case.

28. Learned counsel for opposite party no.2 has further submitted that non-executive director not being a promoter or a team managerial personnel can be held liable in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board proceedings, and with his consent or connivance or where he had not acted diligently as provided under sub-section 12 (ii) of Section 149 of the Companies Act. He has also submitted that the charge sheet discloses the connivance of all the directors and, therefore, to quash the proceedings only on the ground that the petitioners are non-executive directors, would frustrate the very trial. Merely because one or two directors have taken a plea of being far away from the place of incident, all the petitioners cannot be discharged or exempted from facing the trial. The trial alone can determine the extent of involvement and conspiracy for which there cannot be any evidence which can be seen before the commencement of the trial. The complicity is all what is required to be present and this attribute is conspicuously glaring on the face of record. He has further submitted that the Supreme Court consistently has held not to nip the trial in the bud. (paragraph 30 of *Ramveer Upadhyay and another Vs. State of U.P. and another (2022) SCC Online SC 484)*

29. Learned counsel for opposite party no.2 has further submitted that there is a charge of criminal conspiracy under Section 120-B IPC. The doctrine of attribution and imputation has to be applied. The degree of control exercised by a person, can only be determined upon trial. The charge of conspiracy is not amenable to examination under Section 482 Cr.P.C as it is the domain of the trial court to weigh the evidence and come to a conclusion as to the degree of the control exercised by the person and in doing so the principle of alter ego is applied. Here the question is not of vicarious liability inasmuch as all the directors were involved, including the petitioners, and they conspired, which is evident from detailed discussions in the board meetings, in which even the agreement between the tainted transporters and the company had been ratified. The agreement with the transporter was executed with the consent and sanction of all the high officials of the company, including the petitioners. The directors had full knowledge of the repercussions of the conscious decision they had taken on account of which the criminal acts were committed, and in fact were being committed, as is apparent from regular disappearances of trucks loaded with beer. A systematic activity in the company cannot be without the knowledge, consent and connivance of the petitioners-directors. He has further submitted that this Court while exercising the power under Section 482 Cr.P.C., should not weigh the evidence. This Court should allow the trial to proceed in which the complicity of the petitioners can be determined. This Court is not required to interfere by holding a roving inquiry. He has also submitted that in view of the judgement of the Supreme Court dated 11.7.2022, the petition is liable to be dismissed.

30. I have heard Mr. G.S. Chaturvedi, learned Senior Advocate, assisted by Mr. Purnendu Chakravarthy and Mr. Baljeet Singh, appearing for the petitioners, Mr. V.K. Shahi, learned Additional Advocate General and Mr. Anurag Varma, learned Additional Government Advocate, representing opposite party nos.1, 3 and 4,

as well as Mr. Prashant Chandra, learned Senior Advocate, assisted by Ms. Radhika Singh, Advocate, representing opposite party no.2.

31. The powers of the High Court to quash criminal proceedings in exercise of its jurisdiction under Section 482 Cr.P.C. is well-known. The High Court may not enter into determination of the disputed questions of fact at the stage of its exercise of powers under section 482 Cr.P.C, however, the Court may examine and take note of the facts and allegations in order to find out whether the impugned proceedings are in abuse of the process of the court and law and their continuance would result in miscarriage of justice or not.

32. In the present case the facts, as noted above, are not in dispute. The petitioners are/were part-time non-executive Directors of the Company. Neither the FIR nor the charge-sheet would disclose as to how and what manner the petitioners were responsible for the day-to-day conduct of business of the Company or otherwise responsible in its day to day functioning.

33. The question which arises for consideration in the present case is that whether the petitioners are personally liable for any offence even if the allegations in the FIR and charge-sheet are taken on their face value to be correct in entirety. The Company is a body incorporated under the Companies Act. Vicarious criminal liability of its Directors and Shareholders would arise provided any provision exists in that behalf in the statute. The Statute must contain provision fixing such a vicarious liability. Even for the said purpose, it would be obligatory on the part of the complainant and the investigating agency to make requisite allegations and collect evidence in support thereof which would attract provisions constituting vicarious liability.

34. In the facts of the present case, it is not in dispute that order for supply of beer by respondent No.2 was placed through Ahkil Sarda, Depot Manager. The petitioners have no role in receiving the order of effecting the supply. They are the part time Directors based on different locations who have been appointed as independent Directors under the provisions of Section 149/150 of the Companies Act, 2013 having regard to their qualifications, expertise etc. If the petitioners have not been involved in the alleged transactions at any point of time, vicarious criminal liability cannot be fixed upon the petitioners.

35. The Supreme Court in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate,*** (1998) 5 SCC 749 has held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set in motion as the matter of course for alleged offences. It would be apt to take notice of para 28 of the aforesaid judgment which reads as under:-

"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."

36. The petitioners have been made accused with the aid of Section 120B IPC. It is well settled that individual who has perpetrated commission of offence on behalf of the Company can be made an accused along with the Company, if there is sufficient evidence of his active role coupled with criminal intent. A person working in a Company also can be made an accused and implicated if there is specific role/allegation which attracts doctrine of vicarious liability. In absence of any of two aforesaid situations, when the Company is offender, vicarious liability of the Directors cannot be imputed automatically.

37. The Supreme Court in the case of ***Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609*** while dealing with the issue of vicarious liability of the Officers, Directors, Managing Directors, Chairman of the Company in para 42 to 44 has held as under:-

"42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to

the effect that such a person was responsible for the acts committed by or on behalf of the company."

38. While issuing summons against the petitioners, the Magistrate has not recorded his satisfaction by mentioning role played by the petitioners which would bring them within offence allegedly committed on behalf of the Company. It is sine qua non for taking cognizance for an offence, the application of mind by the learned Magistrate and his satisfaction with the allegations that if proved, would constitute an offence. The Magistrate is bound to consider the question while taking cognizance on a complaint or a police report as to whether the same discloses commission of offence against a person who is being summoned.

39. Paragraphs 48 to 50 of the judgment rendered in the case of Sunil Bharti Mittal (supra), which are relevant, read as under:-

"48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not.

49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

50. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (see SWIL Ltd. v. State of Delhi [(2001) 6 SCC 670 : 2001 SCC (Cri) 1205]). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (see Union of India v. Prakash P. Hinduja [(2003) 6 SCC 195 : 2003 SCC (Cri) 1314]). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer."

40. An Officer, Director, Managing Director or Chairman of the Company can be made an accused along with the

Company only if there is sufficient material to prove his active role coupled with criminal intent. Indian Penal Code does not contain any provision for vicarious liability. For Managing Director or Director to be accused and their implications in the offence allegedly committed on behalf of the company, when the accused is a Company, the complaint/FIR or Charge-sheet must contain requisite allegations of commission of the offence by such individual(s).

41. The Supreme Court in the case of Shiv Kumar Jatia (supra) in paras 21 and 22 while dealing with vicarious liability of Managing Director of the Company has held as under:-

"21. By applying the ratio laid down by this Court in Sunil Bharti Mittal [Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609 : (2015) 2 SCC (Cri) 687] it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat, (2008) 5 SCC 668 : (2008) 2 SCC (Cri) 692] this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further held that statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

22. In the judgment of this Court in Sharad Kumar Sanghi v. Sangita Rane [Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781 : (2016) 1 SCC (Cri) 159] while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 CrPC. In the case on hand principally the allegations are made against the first accused company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is Accused 2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are incharge of day-to-day affairs of the company. In the absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned."

42. A Director that too a part time Director and the Secretary are not in charge

or responsible of the conduct of the business of the Company. Even otherwise a full time Director who was not in charge or responsible of conduct of the business of the Company at the relevant time cannot be liable for a criminal offence allegedly committed on behalf of the Company at the relevant time.

43. The Supreme court in recent judgment in the case of Sunita Palita (supra), which was rendered in respect of criminal liability of a part time Director for offence committed under Section 138/141 in respect of liability of Directors has held as under :-

"42. A Director of a company who was not in charge or responsible for the conduct of the business of the company at the relevant time, will not be liable under those provisions. As held by this Court in, inter alia, S.M.S. Pharmaceuticals Ltd. (supra), the liability under Section 138/141 of the NI Act arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, and not on the basis of merely holding a designation or office in a company. It would be a travesty of justice to drag Directors, who may not even be connected with the issuance of a cheque or dishonour thereof, such as Director (Personnel), Director (Human Resources Development) etc. into criminal proceedings under the NI Act, only because of their designation.

43. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs."

44. In view of the aforesaid discussion and the law, this Court is of the considered view that the petitioners who are/were part time Directors of the Company cannot be held responsible for the alleged offence committed on behalf of the Company inasmuch as there is nothing on record which would suggest that they were responsible in any manner for receiving the order for supply of beer or alleged evasion of excise duty. Continuance of the proceedings against the petitioners would be wholly unjustified and uncalled for and end of justice would meet if the impugned proceedings are quashed against the petitioners.

45. In the result, petition is ***allowed*** and the entire proceedings of Case Crime No.5694 of 2019 (State Vs. United Breweries Limited and others), arising out of FIR No.0260 of 2018, under Sections 406, 420, 467, 468, 471 and 120-B IPC,

Police Station Husainganj, District Lucknow, pending in the court of Ist Additional Chief Judicial Magistrate, Court No.25, Lucknow in respect of the petitioners, are hereby quashed.

(2022) 10 ILRA 488
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.03.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482 No. 1294 of 2022

Amit Iqbal Srivastava ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri S.K. Mishra Nagraha, Sri Vashu Deo Mishra

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 406, 504, 506 - proceedings under Sections 200 is qua an inquiry proceeding under Section 202 (1) - if a Magistrate has proceeded or inquired during the investigation under Sections 200 and 202 of Cr.P.C., separate proceeding for inquiry or investigation is not required. (Para -27)

Application under Section 156(3) Cr.P.C. instituted - treated as complaint case - statement recorded under Sections 200 and 202 of Cr.P.C. - applicant resides outside territorial jurisdiction of Magistrate - no inquiry done by Magistrate prior to issuance of process - even Magistrate did not direct police officer for investigation in the matter - Issue - whether, in view of provisions contained in Section 202(1) of Cr.P.C. , inquiry by Magistrate himself or direction for investigation is mandatory requirement. **(Para - 3,23)**

HELD:-Neither Magistrate in proceeding under Sections 200 and 202 Cr.P.C. tried to inquire regarding issue of territorial jurisdiction nor has separately done any inquiry or directed for any investigation. If a thing is to be done in a manner prescribed in a statue, then that has to be done in the same manner not otherwise. Mandate of provision of Section 202 (1) of Cr.P.C. violated. Impugned order not tenable. **(Para -27)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. National Bank of Oman Vs Barakara Abdul Aziz, (2013) 2 SCC 488

2. Pawan Kumar Yadav & other Vs St. of U.P. & ors. , 2014 (1) JIC 221 (All)(LB)

3. Pepsi Foods Ltd. & anr. Vs Special Judicial Magistrate & ors. , 1998 SCC (Crl) 1400

4. Udai Shankar Awasthi Vs St. of U.P. Manu/SC/0018/2013: 2013 (2) SCC 435

5. Vijnay Dhanuka Vs Najima Mamtaz , MANU/SC/0251/2014

6. Manish Kumar Yadav & ors Vs St. of U.P. & ors. , Application u/s 482 No. 1262 of 2020

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Vashu Deo Mishra, learned counsel for the applicant, Sri Anirudh Kumar Singh, learned AGA for the State and perused the record.

2. The instant application under Section 482 Cr.P.C has been instituted, for quashing of the entire proceedings of complaint Case No. 07 of 2021, under Sections 406, 504, 506 IPC, Police Station-Manikpur, District Pratapgarh as well as the

summoning order dated 28.10.2021 passed by Additional Chief Judicial Magistrate, Kunda, District Pratapgarh.

3. Factual matrix of the case is that the complainant who is a managing partner of Anuna Education Pvt. Ltd, had entered into an agreement with the complainant's "NSQF Franchisees". As per the agreement, the complainant has accorded training to the students under the scheme namely Prime Minister Kaushal Vikas Yojana (P.M.K.V.Y.), which runs under the National Skill Development Corporation (N.S.D.C.). The complainant had served but the applicant's company did not pay the full wages as was required to be paid as per terms and conditions of said scheme. Being aggrieved, an application under Section 156(3) Cr.P.C. was instituted before the Magistrate, wherein a date was fixed on 08.12.2020. On 8th February, 2021 it was treated as complaint case for recording statement of complainant under Section 200 Cr.P.C.

4. The statement of the complainant was recorded under Section 200 Cr.P.C. and the statement of witnesses namely Sanjay Kumar and Manoj Kumar were also recorded on 8th March 2021. Allegedly the present applicant resides outside the territorial jurisdiction of the Magistrate concerned and complainant itself arrayed the present applicant as respondent by transcribing the address, which is outside the territorial jurisdiction of the Magistrate concerned.

5. The submission of learned counsel for the applicant is that the mandate of Section 202 Cr.P.C. is very specific with regard to the provisions that as soon, a complaint comes before a Magistrate, he will enquire or pass an order for an investigation, if the accused is residing outside the territorial jurisdiction of the Court concerned.

6. **Provisions of Section 202 Cr.P.C. is read as under:-**

202. Postponement of issue of process.- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

2. In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

3. If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant.

7. Learned counsel for the applicant has drawn attention towards an amendment named as Code of Criminal Procedure (Amendment) Act, 2005 (Central Act 25 of 2005), which came into force w.e.f. 23rd June 2006. He submits that in fact the intent of legislature is to put safeguard to proposed accused, who is not residing in territorial jurisdiction of the Court concerned. While the enactment/amendment, the legislature found that false complaints are being filed against the persons residing at far off place, simply with a view to harass them and in order to see that innocent persons are not harassed by unscrupulous and unwanted persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction, he shall enquire into the case himself or direct for the investigation to be made by a Police Officer or by such other person as he thinks fit; for finding out, whether or not, there was sufficient ground for proceeding against prospective accused.

8. Adding his argument, the learned counsel for the applicant further submits that in fact the Hon'ble Apex Court in the case of **National Bank of Oman vs. Barakara Abdul Aziz, (2013) 2 SCC 488**, has very specifically held that the outside territorial jurisdiction, a Magistrate receiving complaint, follow the due procedure provided under Section 202 of Cr.P.C. (Act 2005). Extract of the judgment reads as under:

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises jurisdiction"

Further the note on clause for abovementioned amendment was also taken into consideration which is read as follows;

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-sections (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire in to the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceedings against the accused"

9. Further contention of learned counsel for the applicant is that Hon'ble Apex Court, after considering abovesaid amendment, held that since the accused was residing outside the jurisdiction of CJM Ambedkar Nagar but the Magistrate did not acknowledge the provisions aforesaid and passed the orders and thus the High Court has rightly quashed the proceeding of complaint as the Magistrate without considering and taking into account the aforesaid amended portion of the Act had proceeded in the matter. He added that the case of the present applicant is squarely covered with the ratio of the above judgment.

10. Learned counsel appearing for the applicant further placed reliance upon the

case of **Pawan Kumar Yadav and other vs State of U.P. and other** reported in **2014 (1) JIC 221 (All)(LB)**, wherein it has been settled that if Magistrate decides to order for investigation, the person to whom, investigation is entrusted, should be clearly mentioned by giving a reasonable time to complete the investigation.

11. He submits that from perusal of the aforesaid finding, it is clear from the mandate of Section 202(1) Cr.P.C. after amending of the Cr.P.C., the Magistrate, prior to issuance of any process, has to look into that whether respondent and the complainant are residing in his territorial jurisdiction or not.

12. Further placing reliance on, the case of **Pepsi Foods Limited and another vs. Special Judicial Magistrate and others** reported in **1998 SCC (Crl) 1400** has drawn attention towards paragraph 28, which is extracted as under;

"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. 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."

13. Referring the abovesaid judgment, he added that ratio, which has been upheld in para 28 of the judgment is to the effect that the criminal cases are always having serious far-reaching consequences and as a matter of course, no criminal proceeding can be set into motion. Summoning of the accused must reflect in the order itself and the Magistrate has to be careful in consideration and may question the complainant and witness to alleged answer to find out the fact.

14. He further contended that there is nothing on record, which reflects that the Magistrate has considered the fact with regard to the territorial jurisdiction. He next submits that since it is up to the Magistrate, while taking the note of the mandate of Section 202 (1) Cr.P.C., to inquire or to direct the investigation and to reach out to the fact that the respondent of the said complaint resides outside the territorial jurisdiction or not.

15. Concluding his argument he submits that from bare perusal of the order dated 28.10.2021 and the statements of the complainant as well as the witnesses, recorded by the learned Magistrate, it reveals that while coming to the conclusion for issuance of process, learned Magistrate shall inquire into the case himself or direct for any investigation to be made by police officers and thus, he has violated the mandate of provision of Section 202(1) Cr.P.C. and, as such, the order dated

28.10.2021 is not sustainable in the eyes of law.

16. On the other hand, learned AGA vehemently opposed the contention and prayer made aforesaid and submits that in fact the process under Section 202 Cr.P.C. is itself an inquiry, as has been held by the Apex Court in several decisions. In support of his contention, he has placed reliance on the decision in the case of **Udai Shankar Awasthi vs State of U.P. Manu/SC/0018/2013: 2013 (2) SCC 435**, the ratio thereof is extracted as follows:

"It is clear that if a prospective accused resides outside the territorial jurisdiction of the Magistrate, the compliance of provisions of Section 202 (1) Cr.P.C. is mandatory before issuance of any process against the prospective accused persons, however, as stated earlier, the examination of witnesses by Magistrate under Section 202 Cr.P.C. also falls within the realm of such inquiry."

17. He submits that in fact it has been held that the proceeding under Section 202 Cr.P.C. is an inquiry as per the definition held by the Hon'ble Apex Court. He also stated that in fact there is no separate inquiry required outside the purview under Section 202 Cr.P.C. He submits that there is no specific inquiry required under any provision of the Cr.P.C., so far as the mandate of Section 202 is concerned.

18. Learned counsel for the applicant has also placed reliance upon the decision rendered in the case of **Vijnay Dhanuka vs Najima Mamtaz** reported in **MANU/SC/0251/2014.** He mainly placed reliance on paragraph 11 and 12 of the said judgment and the same are extracted as under;

11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" was inserted by section 19 of Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23rd of June, 2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

12. The use of the expression "shall' prima facie makes the inquiry or the investigation, as the case may be, by the

Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

19. He submits that while deciding the aforesaid issue the Hon'ble Apex Court has quoted the words "and shall" , in case where the accused residing beyond area exercise his jurisdiction was inserted vide amendment in Code of Criminal Procedure known as (Central Act 25 of 2005) w.e.f. 23rd June 2006. The aforesaid intention of the legislature was essential to the fact that no false complaint is filed against the person to harass them.

20. He further place reliance on the decision in the case of **Manish Kumar Yadav and ors vs State of U.P. and others** decided in **Application u/s 482 No. 1262 of 2020 decided on 14.05.2020** and has drawn attention of Para 17 of the judgment. The same is extract as under;

"17. The next question for consideration is, what does "enquiry" means. The expression has been defined in Section 2(g) of the Code, which means, every enquiry, other than trial, under this code by a Magistrate or "Court." It is evident from the aforesaid provision, every enquiry other than trial conducted by Magistrate or a court is an enquiry, no specific mode or manner is provided viz; 201(1) Cr.P.C. The enquiry envisage U/s 202 Cr.P.C., the witnesses are examined whereas U/s 200 Cr.P.C. examination of complainant is necessary with the option of examining of witnesses present, if any. This exercise by the Magistrate with the sole objective and purpose for deciding whether or not there is sufficient grounds for proceeding against an accused, is nothing but an enquiry envisage U/s 202 Cr.P.C. The under-line idea is that, before exercising power U/s 203/204 Cr.P.C. it is incumbent upon the Magistrate to took into the allegations made in the complaint, statements recorded U/s 200, 202 Cr.P.C. and if there are witnesses to the incident, then take the help of those witnesses while arriving to a particular conclusion. There cannot be a straight jacketed design or formula in holding the enquiry."

21. He submits that in fact the expression "inquiry" has been defined in Section 2(g) of the Code, which means every inquiry other than trial, under this code by a Magistrate or Court. He has pointed out that no specific mode or manner of inquiry has been provided, so far as Sections 200 and 202 are concerned, he submits that ratio of this judgment is that the inquiry is sufficient so far as the magistrate started a proceeding under Section 202 of the Cr.P.C. Thus submission is that order impugned with the instant application is not erroneous or perverse.

22. This Court has taken into consideration the rival submissions made by learned counsel representing the respective parties and have also gone through the records available.

23. The issue, which emerges for consideration and reflect in this case is as to whether, in view of the provisions contained in Section 202(1) of Cr.P.C., the inquiry by the Magistrate himself or the direction for investigation is mandatory requirement, as soon as the fact borne out before the Magistrate concerned is that the accused is residing outside the territorial jurisdiction of the Magistrate concerned.

24. From bare perusal of the order impugned dated 28.10.2021 as well as the statement recorded under Sections 200 and 202 of Cr.P.C., it emerges that no inquiry has been done by the Magistrate prior to issuance of process and even the Magistrate did not direct the police officer for investigation in the matter.

25. Admittedly, prior to the amendment in Cr.P.C. i.e., before the year 2005, this provision was not in existence but, thereafter, vide an amendment of Act No. 25 of 2005, it has been inserted in Section 202(1) of Cr.P.C. This amendment also shows the intent of the legislature that for avoiding the harassment of prospective accused, who is sitting at far-reaching place the instant provision has given effect to.

26. While examining all the proceedings, which was conducted by the Magistrate, there seems to be no whisper regarding the fact that the Magistrate has inquired or get investigated the matter with regard to the fact that applicant is residing outside the territorial jurisdiction or not.

27. Emphasis was also laid that since the proceedings under Sections 200 is qua an inquiry proceeding under Section 202 (1) and therefore if a Magistrate has proceeded or inquired during the investigation under Sections 200 and 202 of Cr.P.C., separate proceeding for inquiry or investigation is not required. In the instant matter, neither the Magistrate in the proceeding under Sections 200 and 202 Cr.P.C. tried to inquire regarding the issue of territorial jurisdiction nor he has separately done any inquiry or directed for any investigation.

28. This Court is of the considered opinion that it is a settled law that if a thing is to be done in a manner prescribed in a statue, then that has to be done in the same manner not otherwise. In the instant matter, it is, prima facie, a case where the mandate of provision of Section 202 (1) of Cr.P.C. has clearly been violated and thus, the order impugned is not tenable.

29. Resultantly, the instant application is **allowed**. The order dated 28.10.2021 passed in Complaint Case No. 07 of 2021 (Shiv Naresh Maurya vs. Amit Iqbal Srivastava and others), is hereby set aside.

30. However, the matter is remitted back to the Magistrate concerned to proceed afresh and pass the order accordingly.

(2022) 10 ILRA 494
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.09.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application U/S 482 No. 6779 of 2022

Rajendra Kumar & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri Tanay Hazari

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - once bail has been granted by a competent court after due consideration of facts and circumstances of the case - same should not be cancelled in a mechanical manner without there being any supervening circumstance(s) which are not conducive to the fair trial - It cannot be cancelled on a prayer or request from the side of the complainant/ investigating agency/ victim, unless and until, it is shown to the satisfaction of the court concerned that the same is being misused and is no longer conducive, in the interest of justice, to allow the accused persons any further to remain on bail - bail can be cancelled only in those discerning few cases where it is established that a person to whom the concession of bail has been granted, is misusing the same.(Para - 10)

Applicants were granted bail - condition - not temper with evidence and shall not intimidate witnesses - applicants threatening witnesses and complainant to desist from prosecuting the case - applicants violated conditions of bail - trial court cancelled bail of applicant - directed to take applicants into custody.**(Para -4,5,6,7)**

HELD:-Impugned order passed by trial court without issuing notice to applicants and without affording them a reasonable and sufficient opportunity of hearing is patently illegal being in flagrant violation of the settled procedure in respect of cancellation of bail. It has caused miscarriage of justice to the applicants. **(Para - 8,16)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Samarendra Nath Bhattacharjee Vs St. of W.B. & anr. , (2004) 11 SCC 165

2. Mehboob Dawood Shaikh Vs St. of Maha. , (2004) 2 SCC 362

3. Gurdev Singh & anr. Vs St. of Bihar & anr. , (2005) 13 SCC 286

4. P.K. Shaji @ Thammanam Shaji Vs St. of Kerala , (2005) 13 SCC 283

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the applicants, learned A.G.A. for the State and perused the entire record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicants praying inter alia the following reliefs:-

"a. Issue and order for quashing the Proceedings and Set aside the Bail Cancellation Order dated 01.09.2022 under the Sessions Trial No. 812/2021 in re: State of U.P. v. Ram Bachan and Ors delivered by the Ld. Sessions Judge annexed as Annexure No. 1.

b. Issue an order directing the Police to release the Applicants from Judicial Custody on Bail."

3. In view of the order which is proposed to be passed today, notice to opposite party No.2 is hereby dispensed with.

4. From the pleadings, it transpires that the applicants were granted bail vide order dated 22.11.2021 passed by the learned Sessions Judge, Raebareli in Bail Application No.2638 of 2021 arising out of Sessions Trial No.812 of 2021 (State vs. Ram Bachan and others).

5. The learned trial court was informed that the witnesses and the

complainant of the aforesaid Sessions Trial No.812 of 2021 are being threatened of dire consequences by the applicants herein. The aforesaid Sessions Trial No.812 of 2021 was fixed on 01.09.2022 for recording evidence of prosecution witnesses. However, taking note of the fact that the present applicants are threatening the witnesses and the complainant to desist from prosecuting the case, the learned trial court kept the application moved to the aforesaid effect on record and a copy of the same was directed to be sent to Superintendent of Police, Raebareli for appropriate action directing him also to provide necessary security to the witnesses by the learned trial court.

6. The learned trial court thereafter found that by the order dated 22.11.2021 passed in the Bail Application No.2683 of 2021, the applicants herein were enlarged on bail, inter alia, on the condition that they shall not temper with the evidence and shall also not intimidate the witnesses. They shall also not seek any adjournment, if the witnesses are present for being examined. In case of seeking adjournment when the prosecution witnesses are present, the same shall be considered as misuse of liberty of bail granted to the applicants. Thereafter, the learned trial court found the aforesaid conduct of the applicants to be violation of conditions of bail subject to which they were enlarged on bail vide order dated 22.11.2021. Therefore, the learned trial court directed to the applicants to be taken into custody and also passed the impugned order dated 01.09.2022 canceling the bail granted to the applicants vide order dated 22.11.2021 passed in Bail Application No.2638 of 2021. Consequently, the applicants were directed to be lodged in the District Jail.

7. In aforesaid factual background, it has been submitted by the learned counsel for the applicants that the impugned order is patently illegal insofar as it has been passed on the basis of vague allegations levelled against the applicants. It has also been submitted that it is settled law that parameters for grant of bail and for cancelling an order granting bail are settled and specified. The cancellation of bail is a serious matter and should be dealt with accordingly as the same concerns, the personal liberty of the persons who have been enlarged on bail.

8. Learned counsel for the applicants has further submitted that in case, there was any grievance to the victim, the complainant or any witness as aforesaid, they were at liberty to move an application for cancellation of bail of the applicants who would have got an opportunity of showing cause by filing a reply to the same and thereafter appropriate order based on the facts and circumstances of this matter, could have been passed by the learned trial court. However, the impugned order has come to be passed in flagrant violation of the settled procedure in respect of cancellation of bail which is not sustainable at all.

9. Per contra, learned A.G.A. has opposed the prayer by stating that the impugned order has been passed by the learned trial court to ensure proper conduct of trial of Sessions Trial No.812 of 2021. However, he has very fairly stated that the same could not have been passed without issuing notice to the opposite party No.2 and without affording a reasonable opportunity of showing cause to the applicants.

10. Having heard the learned counsel for the applicants, learned A.G.A. for the State and upon perusal of record, it requires to be made clear that it is settled law that once bail has been granted by a competent court after due consideration of facts and circumstances of the case, the same should not be cancelled in a mechanical manner without there being any supervening circumstance(s) which are not conducive to the fair trial. It cannot be cancelled on a prayer or request from the side of the complainant/ investigating agency/ victim, unless and until, it is shown to the satisfaction of the court concerned that the same is being misused and is no longer conducive, in the interest of justice, to allow the accused persons any further to remain on bail. No doubt, the bail can be cancelled only in those discerning few cases where it is established that a person to whom the concession of bail has been granted, is misusing the same.

11. The Hon'ble Supreme Court in Samarendra Nath Bhattacharjee vs. State of W.B. and another reported in (2004) 11 SCC 165, has pointed out as to what should be the approach of the court dealing with the matter of cancellation of bail. In the instant case, the High Court cancelled the bail which was earlier granted to the accused. The Hon'ble Supreme Court observed that the High Court has approached the case as if it is an appeal against the conviction by giving findings on factual issues which are yet to be decided. Thus, the Hon'ble Supreme Court found the matter to be too premature which is likely to prejudice the trial. That apart, since the only ground on which the cancellation of bail could have been ordered being the ground of intimidation, the same was not satisfactorily proved. Therefore, in view of the Hon'ble Supreme Court, the High Court erred in cancelling the bail granted to the accused.

12. In the case at hand too, the fact of alleged intimidation or extending threat to the complainant and witnesses, was intimated to the learned trial court. No application stating the facts of such intimidation was moved to the learned trial court. Be that as it may, the learned trial court atleast ought to have provided a reasonable and sufficient opportunity to the applicants/ accused persons to show cause against such an application or prayer made by the prosecution for cancellation of the bail granted to the applicants as the same was likely to affect personal liberty of the applicants/ accused persons adversely.

13. In **Mehboob Dawood Shaikh vs. State of Maharashtra** reported in **(2004) 2 SCC 362**, it has been held by the Hon'ble Supreme Court that the cancellation of bail are never be resorted to lightly.

14. The Hon'ble Supreme Court in **Gurdev Singh and another vs. State of Bihar and another** reported in **(2005) 13 SCC 286,** has held that cancellation of bail cannot done without giving notice to the accused and giving him an opportunity of being heard.

15. In P**.K. Shaji alias Thammanam Shaji vs. State of Kerala** reported in **(2005) 13 SCC 283**, the Hon'ble Supreme Court has again held that the accused must be heard before his bail is cancelled.

16. In view of the aforesaid settled legal propositions, this court finds the impugned order which came to be passed by the learned trial court without issuing notice to the applicants and without affording them a reasonable and sufficient

opportunity of hearing is patently illegal being in flagrant violation of whatever has been held by the Hon'ble Supreme Court in **Samarendra Nath Bhattacharjee's case (supra), Mehboob Dawood Shaikh's case (supra), Gurdev Singh's case (supra) and in P.K. Shaji alias Thammanam Shaji's case (supra)**. it has, thus, caused miscarriage of justice to the applicants.

17. The upshot of aforesaid discussion is that the instant application under Section 482 Cr.P.C. deserves to be allowed and the impugned order dated 01.09.2022 passed by the learned Sessions Judge, Raebareli in Sessions Trial No.812 of 2021 (State vs. Ram Bachan and others) also deserves to be set aside to the extent it concerns cancellation of bail granted to the applicants and taking them into custody as a consequence thereof only.

18. Accordingly, the instant application under Section 482 Cr.P.C. is **allowed.** The impugned order dated 01.09.2022 passed by the learned Sessions Judge, Raebareli in Sessions Trial No.812 of 2021 (State vs. Ram Bachan and others) is hereby set aside as indicated above.

19. The learned trial court is directed to release the applicants after obtaining the fresh personal bonds and two sureties each in the like amount to the satisfaction of the court concerned.

20. It is also made clear that the learned trial court shall be at liberty to issue notice to the applicants stating therein the grounds which are to be considered by it for cancellation of bail granted to the applicants. It shall thereafter decide the same expeditiously in accordance with law after affording reasonable opportunity of hearing to the parties.

(2022) 10 ILRA 498
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.09.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application U/S 482 No. 6781 of 2022

Jwala Prasad Maurya ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Saurabh Yadava, Poonam Maurya

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 323 and 504 - for the purpose of computing the period of limitation under Section 468 CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence.(Para - 18)

(B) Criminal Law - Limitation for taking cognizance of certain offences -The Code of criminal procedure, 1973 - Section 467 - period of limitation , Section 468 - Bar to taking cognizance after lapse of the period of limitation , Section 469 - Commencement of the period of limitation - 'institution of prosecution' - refer to the date of filing of the complaint or registering of the FIR - in a case where the same is within the period of limitation - proceedings cannot be held to be barred by Section 468 - merely for the reason that the order of cognizance or issuance of process is made on a subsequent date.(Para -16)

(B) Words/phrases/Legal maxim - 'nullum tempus aut locus occurrit regi' **- a crime**

never dies - *'vigilantibus et non dormientibus, jura subveniunt'* - policy of law to assist the vigilant and not the sleepy - *actus curiae neminem gravabit'* - act of court shall prejudice no man.(Para - 8)

NCR registered against applicant - under Section 155 (2) Cr.P.C - charge sheet - N.C.R. lodged on same day - charge sheet filed after a lapse of five years, three months and fourteen days from the date of registration of NCR - barred by limitation - no cognizance could have been taken - trial court incompetent to take cognizance of the offence after lapse of period of limitation provided under 468 Cr.P.C. - utter violation of provision contained under Sections 467, 468, 469 Cr.P.C. - passed in flagrant violation of statutory bar - gross abuse of process of Court.**(Para -3,19)**

HELD:-Court does not find any illegality, impropriety and incorrectness in the proceedings under challenge. No abuse of court's process either.**(Para - 21)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Bharat Damodar Kale & anr. Vs St. of A.P., (2003) 8 SCC 559

2. Sarah Mathew Vs The Institute of Cardio Vascular Diseases & ors., (2014) 2 SCC 62

3. Bharat Damodar Kale Vs St. of A.P.,(2003) 8 SCC 559

4. Japani Sahoo Vs Chandra Sekhar Mohanty,(2007)7 SCC 394

5. Darshan Singh Saini Vs Sohan Singh & anr.,(2015) 14 SCC 570

6. Johnson Alexander Vs St. by C.B.I., 2015 0 Supreme (SC) 567

7. Amritlal Vs Shantilal Soni,2022 SCC On Line SC 266

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Sri Saurabh Yadava, learned counsel for the applicant and learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant inter alia praying for following relief:-

(i) Quash the impugned order dated 28.02.2022 passed by the Additional Session Judge Fast Track Court (ADJ FTC 1), Ambedkar Nagar in Criminal Revision No.53/2018, CNR No.UPAN010032102018 "Jwala Prasad Maurya Versus Kasha Prasad Tivari HCP Thana Maharua, District Ambedkar Nagar.

(ii) Quash the impugned order dated 23.06.2018 passed by Civil Judge (J.D.)/Judicial Magistrate, Ambedkar Nagar in the matter of charge sheet no. NIL/2015 dated 30.10.2015 in "State Vs. Jwala Prasad Maurya" in respect of Criminal Case No.239/2018 arising out of NCR No.19/2013, U/s 323, 504 I.P.C., dated 09.03.2013, Police Station Mahrua, District Ambedkar Nagar.

(iii) Quash the impugned charge sheet no. NIL/2015 dated 30.10.2015 in "State Vs. Jwala Prasad Maurya" in respect of Criminal Case No.239/2018 arising out of NCR No.19/2013, U/s 323, 504 I.P.C. dated 09.03.2013, Police Station Mahrua, District Ambedkar Nagar.

3. Learned counsel for the applicant submitted that an NCR No.19/2013 came to be registered against the present applicant on 09.03.2013 under Section 323 and 504 I.P.C. only. The matter was investigated vide order dated 05.04.2013 by means of an application filed by the opposite party no.2 under Section 155 (2) Cr.P.C. The charge

sheet was submitted in the court on 30.10.2015, therefore, his submission is that the learned trial court was incompetent to take cognizance of the offence after lapse of period of limitation provided under 468 Cr.P.C. specially when the complaint / charge sheet came to be filed after a lapse of three years, three months and twenty days and thereafter cognizance of the case was taken after a lapse of five years, three months and fourteen days. His further submission is that while passing impugned order, learned trial court did so in utter violation of provision contained under Sections 467, 468, 469 Cr.P.C. which are part of Chapter XXXVI. Learned trial court could not have taken cognizance of the matter as the same was barred by limitation. He, thus, submits that such order, which has been passed in flagrant violation of statutory bar, is nothing but a gross abuse of process of this Court, which deserves to be quashed.

4. Per contra learned A.G.A. has controverted the aforesaid submissions and has also submitted that in the fact of this case, the impugned order rightly came to be passed by placing reliance on the law laid down by Hon'ble the Supreme Court in ***Bharat Damodar Kale & another vs. State of Andhra Pradesh1.***

5. Having heard learned counsel for the applicant at length, learned A.G.A. for the State and upon perusal of record, it requires to be clarified at the outset that there is no dispute regarding the fact that the alleged incident, in respect of which, an NCR bearing no.19/2013, Police Station Mahrua, District Ambedkar Nagar came to be registered at the behest of opposite party no.3 on 09.03.2013. This is also not in dispute that thereafter the opposite party no.3 moved an application dated 05.04.2013 seeking permission of investigation of this case under Section 155 (2) Cr.P.C. which came to be allowed and the matter was investigated by the Investigating Officer. Thereafter, a charge sheet came to be filed which was actually prepared on 30.10.2015 and the same was forwarded to C.O., Bheeti on 15.06.2016 and charge sheet no.19/2013 was submitted to the court of Civil Judge (J.D.) / Judicial Magistrate-First Class, Ambedkar Nagar on 29.06.2016 i.e. after a period of three years, three months and twenty days from the date of occurrence.

6. At this stage, it deserves to be mentioned that the learned trial court consciously took cognizance of this case vide its order dated 23.06.2018 and since the charge sheet was filed under Section 323 and 504 I.P.C. only, accordingly, the same was directed to be registered as a complaint case keeping in view the provisions contained in Section 2(d) Cr.P.C.

7. The questions which fell for consideration by the Constitution Bench in the case of **Sarah Mathew vs. The Institute of Cardio Vascular Diseases and others2** are as follows :-

"3.1.(i) Whether for the purposes of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of the prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence?

3.2.(ii) Which of the two cases i.e. Krishna Pillai or Bharat Kale (which is followed in Japani Sahoo) lays down the correct law?"

10. The term 'cognizance' in the context of the provisions of the Code and the earlier decisions in the case of Jamuna

Singh Vs. Bhadai Shah6, R.R.Chari Vs. State of U.P.7, Gopal Das Sindhi Vs. State of Assam8, and Chief Enforcement Officer Vs. Videocon International Ltd.9, was discussed and it was observed that 'taking cognizance' is entirely an act of the Magistrate and that the same may be delayed because of several reasons including systematic reasons. The conflicting view points as to whether the date of taking cognizance or the date of filing complaint is material for computing limitation was considered and it was observed as follows:-

"34. Thus, a Magistrate takes cognizance when he applies his mind or takes judicial notice of an offence with a view to initiating proceedings in respect of offence which is said to have been committed. This is the special connotation acquired by the term "cognizance" and it has to be given the same meaning wherever it appears in Chapter XXXVI. It bears repetition to state that taking cognizance is entirely an act of the Magistrate. Taking cognizance may be delayed because of several reasons. It may be delayed because of systemic reasons. It may be delayed because of the Magistrate's personal reasons.

35. In this connection, our attention is drawn to the judgment of this Court in Sharadchandra Dongre. It is urged on the basis of this judgment that by condoning the delay, the court takes away a valuable right which accrues to the accused. Hence, the accused has a right to be heard when an application for condonation of delay under Section 473 CrPC is presented before the court. Keeping this argument in mind, let us examine both the view points i.e. whether the date of taking cognizance or the date of filing complaint is material for computing limitation. If the date on which complaint is filed is taken to be material, then if the complaint is filed within the period of limitation, there is no question of it being time-barred. If it is filed after the period of limitation, the complainant can make an application for condonation of delay under Section 473 CrPC. The court will have to issue notice to the accused and after hearing the accused and the complainant decide whether to condone the delay or not. If the date of taking cognizance is considered to be relevant then, if the court takes cognizance within the period of limitation, there is no question of the complaint being time barred. If the Court takes cognizance after the period of limitation then, the question is how will Section 473 CrPC work. The complainant will be interested in having the delay condoned. If the delay is caused by the Magistrate by not taking cognizance in time, it is absurd to expect the complainant to make an application for condonation of delay. The complainant surely cannot explain that delay. Then in such a situation, the question is whether the Magistrate has to issue notice to the accused, explain to the accused the reason why delay was caused and then hear the accused and decide whether to condone the delay or not. This would also mean that the Magistrate can decide whether to condone delay or not, caused by him. Such a situation will be anomalous and such a procedure is not known to law...

xxx

37. We are inclined to take this view also because there has to be some amount of certainty or definiteness in matters of limitation relating to criminal offences. If, as stated by this Court, taking

cognizance is application of mind by the Magistrate to the suspected offence, the subjective element comes in. Whether a Magistrate has taken cognizance or not will depend on facts and circumstances of each case. A diligent complainant or the prosecuting agency which promptly files the complaint or initiates prosecution would be severely prejudiced if it is held that the relevant point for computing limitation would be the date on which the Magistrate takes cognizance. The complainant or the prosecuting agency would be entirely left at the mercy of the Magistrate, who may take cognizance after the limitation period because of several reasons; systemic or otherwise. It cannot be the intention of the legislature to throw a diligent complainant out of the court in this manner. Besides it must be noted that the complainant approaches the court for redressal of his grievance. He wants action to be taken against the perpetrators of crime. The courts functioning under the criminal justice system are created for this purpose. It would be unreasonable to take a view that delay caused by the court in taking cognizance of a case would deny justice to a diligent complainant. Such an interpretation of Section 468 CrPC would be unsustainable and would render it unconstitutional. It is well settled that a court of law would interpret a provision which would help sustaining the validity of the law by applying the doctrine of reasonable construction rather than applying a doctrine which would make the provision unsustainable and ultra vires the Constitution. (U.P. Power Corporation Ltd. v. Ayodhaya Prasad Mishra)."

(emphasis supplied)

8. Referring to the legal maxim 'nullum tempus aut locus occurrit regi', 'vigilantibus et non dormientibus, jura subveniunt' and actus curiae neminem gravabit', it was observed as follows :-

*"39. As we have already noted in reaching this conclusion, light can be drawn from legal maxims. Legal maxims are referred to in Bharat Kale, Japani Sahoo and Vanka Radhamanohari. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well- known legal maxim 'nullum tempus aut locus occurrit regi', which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim 'vigilantibus et non dormientibus, jura subveniunt'. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have lesser punishment may have serious social consequences. The provision is, therefore, made for condonation of delay.T***reating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim 'actus curiae neminem gravabit' which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant.* *Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles."*

(emphasis supplied)

9. The question as to what would be the relevant date for the purpose of computing the period of limitation under Section 468 was answered by the Constitution Bench judgment in the case of **Sarah Mathew (supra)**, as follows:-

"51. In view of the above, ***we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance.*** *We further hold that Bharat Kale which is followed in Japani Sahoo lays down the correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC."*

(emphasis supplied)

10. It would also be relevant to refer to the decisions in the case of ***Bharat Damodar Kale Vs. State of A.P.3***, and also in the case of ***Japani Sahoo Vs. Chandra Sekhar Mohanty4,*** which were held to have laid down the correct law in the aforementioned decision of the Constitution Bench in the case of ***Sarah Mathew (supra).***

11. The observations made in the case of ***Bharat Damodar Kale, (supra)*** that the limitation prescribed under Chapter XXXVI of the Code is only for filing of the complaint or initiation of prosecution and not for taking cognizance, are quoted hereinbelow :-

"10. On facts of this case and based on the arguments advanced before us, we consider it appropriate to decide the question whether the provisions of Chapter XXXVI of the Code apply to the delay in instituting the prosecution or to the delay in taking cognizance. As noted above, according to the learned counsel for the appellants, the limitation prescribed under the above Chapter applies to taking of cognizance by the court concerned, therefore even if a complaint is filed within the period of limitation mentioned in the said Chapter of the Code, if the cognizance is not taken within the period of limitation the same gets barred by limitation. This argument seems to be inspired by the chapter-heading of Chapter XXXVI of the Code which reads thus: "Limitation for taking cognizance of certain offences". It is primarily based on the above language of the heading of the Chapter, the argument is addressed on behalf of the appellants that the limitation prescribed by the said Chapter applies to taking of cognizance and not filing of complaint or initiation of the prosecution. We cannot accept such argument because a cumulative reading of various provisions of the said Chapter clearly indicates that the limitation prescribed therein is only for the filing of the complaint or initiation of the prosecution and not for taking cognizance. It of course prohibits the court from taking cognizance of an offence where the complaint is filed before the court after the expiry of the period mentioned in the said Chapter. This is clear from Section 469 of the Code found in the said Chapter which specifically says that the period of limitation in relation to an offence shall commence either from the date of the offence or from the date when the offence is detected. Section 470 indicates that while computing the period of limitation, time taken during which the case was being diligently prosecuted in another court or in appeal or in revision against the offender

should be excluded. The said section also provides in the Explanation that in computing the time required for obtaining the consent or sanction of the Government or any other authority should be excluded. Similarly, the period during which the court was closed will also have to be excluded. All these provisions indicate that the court taking cognizance can take cognizance of an offence the complaint of which is filed before it within the period of limitation prescribed and if need be after excluding such time which is legally excludable. This in our opinion clearly indicates that the limitation prescribed is not for ***taking cognizance within the period of limitation, but for taking cognizance of an offence in regard to which a complaint is filed or prosecution is initiated beyond the period of limitation prescribed under the Code. Apart from the statutory indication of this view of ours, we find support for this view from the fact that taking of cognizance is an act of the court over which the prosecuting agency or the complainant has no control. Therefore, a complaint filed within the period of limitation under the Code cannot be made infructuous by an act of court. The legal phrase "actus curiae neminem gravabit" which means an act of the court shall prejudice no man, or by a delay on the part of the court neither party should suffer, also supports the view that the legislature could not have intended to put a period of limitation on the act of the court of taking cognizance of an offence so as to defeat the case of the complainant..."***

(emphasis supplied)

12. The aforementioned view in the case of **Bharat Kale (supra)** was affirmed and followed in the case of **Japani Sahoo (supra)** and it was held that the date relevant for computation of period of limitation under Section 468 is the date when the complaint is filed or criminal proceedings are initiated and not the date when the Court/Magistrate takes cognizance or issues process. Applying the doctrine of "actus curiae neminem gravabit", it was held that taking a contrary view would lead to injustice and defeat the primary object of procedural law. The observations made in the judgment in this regard are as follows :-

"47. We are in agreement with the law laid down in Bharat Damodar. In our judgment, the High Court of Bombay was also right in taking into account certain circumstances, such as, filing of complaint by the complainant on the last date of limitation, non availability of Magistrate, or he being busy with other work, paucity of time on the part of the Magistrate/court in applying mind to the allegations levelled in the complaint, postponement of issuance of process by ordering investigation under sub-section (3) of Section 156 or Section 202 of the Code, no control of complainant or prosecuting agency on taking cognizance or issuing process, etc. To us, two things, namely, (1) filing of complaint or initiation of criminal proceedings; and (2) taking cognizance or issuing process are totally different, distinct and independent.

48. So ***far as complainant is concerned, as soon as he files a complaint in a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter, it is for the Magistrate to consider the matter, to apply his mind and to take an appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over those proceedings.***

49. Because of several reasons (some of them have been referred to in the aforesaid decisions, which are merely illustrative cases and not exhaustive in nature), it may not be possible for the court or the Magistrate to issue process or take cognizance. ***But a complainant cannot be penalized for such delay on the part of the court nor can he be non-suited because of failure or omission by the Magistrate in taking appropriate action under the Code. No criminal proceeding can be abruptly terminated when a complainant approaches the court well within the time prescribed by law. In such cases, the doctrine "actus curiae neminem gravabit" (an act of court shall prejudice none) would indeed apply. (Vide Alexander Rodger v. Comptoir D'Escompte.) One of the first and highest duties of all courts is to take care that an act of court does no harm to suitors.***

50. T ***he Code imposes an obligation on the aggrieved party to take recourse to appropriate forum within the period provided by law and once he takes such action, it would be wholly unreasonable and inequitable if he is told that his grievance would not be ventilated as the court had not taken an action within the period of limitation. Such interpretation of law, instead of promoting justice would lead to perpetuate injustice and defeat the primary object of procedural law.***

51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law, if that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a court of law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of litera legis. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the court may make it unsustainable and ultra vires Article 14 of the Constitution.

52. In view of the above, we hold that for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a court. We, therefore, overrule all decisions in which it has been held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/court and not of filing of complaint or initiation of criminal proceedings."

(emphasis supplied)

13. Learned counsel for the applicant though not disputing the law laid down in the aforesaid authoritative pronouncements

on the question of limitation has tried to carve out a distinction by pointing out that in the case at hand the proceedings have been initiated with the lodging of an FIR and not by way of a criminal complaint. The aforesaid contention cannot be accepted for the reason that the view taken in the Constitution Bench decision is that for the purpose of computing the period of limitation under Section 468 Cr.PC. the relevant date is the date of filing of the complaint or the date of institution of prosecution. The expression 'institution of prosecution' would be wide enough to include within its ambit institution of prosecution - either by filing of a complaint or by lodging of an FIR.

14. The 'institution of prosecution' under the Code can be by giving of information relating to commission of a cognizable offence under Section 154, or by lodging a written complaint before the Magistrate. In this regard reference may be had to the decision in the case of **Darshan Singh Saini Vs. Sohan Singh and another5,** wherein following the law laid down in the case of Sarah Mathew, and noticing the fact that the complainant after repeatedly visiting the police station to lodge his complaint, when the police did not interfere, lodged a written complaint before the Magistrate, within the period of limitation under Section 468, it was held that the bar under the said section would not apply on the basis of cognizance having been taken on a date beyond the prescribed period. The observations made in the judgment, in this regard are as follows :-

"4. It is also apparent from the pleadings of this case, that according to the respondent, the police did not interfere, when the respondent repeatedly visited the police station, to lodge his complaint. It is therefore, that the respondent-Sohan Singh lodged a written complaint on 24-01-2008, before the Learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, Himachal Pradesh.

5. The appellant-Darshan Singh Saini, approached the High Court under Section 482 of the Criminal Procedure Code, when he was summoned by the Judicial Magistrate, First Class, Nalagarh, District Solan, Himachal Pradesh through an order dated 06-02-2009. A perusal of the order dated 06-02-2009 reveals, that the appellant was summoned under Sections 341 and 506, read with Section 34 of the Penal Code, 1860.

6. The High Court, by the impugned order dated 08-04-2010, while partly accepting the prayer of the appellant, quashed the proceedings initiated against the appellant under Sections 341 and 506 of the Penal Code, but arrived at the conclusion, that there was reasonable ground to proceed against the appellant under Section 323 of the Penal Code.

7. It was the vehement contention of the learned counsel for the appellant, that the impugned order passed by the High Court is not acceptable in law, on account of the fact, that cognizance in the matter could not have been taken against the appellant, on account of the period of limitation depicted under Section 468 of the Code of Criminal Procedure. In this behalf, it was the pointed contention of the learned counsel for the appellant, that whilst the instant incident was of 15-01-2008, cognizance thereof was taken on 06.02.2009. This contention of the learned counsel for the appellant was premised on the fact, that though the complaint had

been made on 24-01-2008, cognizance thereof was taken beyond a period of limitation of one year(on 06-02-2009).

8. We have considered the aforesaid contention advanced at the hands of the learned counsel for the appellant. It is apparent from the submissions advanced by the learned counsel for the appellant, that he is calculating limitation by extending the same to the order passed by the Judicial Magistrate, First Class, Nalagarh, on 06.02.2009. The instant contention is wholly misconceived on account of the legal position declared by a Constitution Bench of this Court in Sarah Mathew vs. Institute of Cardio Vascular Diseases, wherein in para 51, this Court has held as under : (SCC p.102)

"51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in Japani Sahoo lays down the correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 CrPC."

9. In the above view of the matter, we are satisfied, that keeping in mind the allegations levelled against the appellant by the respondent, the date of limitation had to be determined with reference to the date of incident and the date when the complaint was filed by the respondent. Since the complaint was filed by the respondent on 24-01-2008, with reference to an incident of 15.01.2008, we are of the view, that Section 468 of the Criminal Procedure Code would not stand in the way of the respondent, in prosecuting the complaint filed by him."

15. Reference may also be had to the case of **Johnson Alexander Vs. State by C.B.I.6** where the proceedings were held to be vitiated, in view of the bar under Section 468 for the reason that there was no application by the prosecution explaining the delay from the date of the alleged occurrence till the date of filing the complaint and registering the FIR.

16. The aforementioned authorities in the case of **Darshan Singh Saini (supra)** and **Johnson Alexander (supra)**, would go to show that 'institution of prosecution' would refer to the date of filing of the complaint or registering of the FIR, and in a case where the same is within the period of limitation, proceedings cannot be held to be barred by Section 468 merely for the reason that the order of cognizance or issuance of process is made on a subsequent date.

17. Thus, the view taken in the judgments in the case of **Bharat Damodar Kale (supra), Japani Sahoo (supra)** and **Sarah Mathew (supra)** to the effect that for the purpose of computing the period of limitation under Section 468 of the Code the relevant date is the date of 'institution of prosecution' and not the date on which the Magistrate takes cognizance, is primarily for the reason that so far as the complainant/informant is concerned, as soon as he files a complaint, he has done everything which is required to be done by him and thereafter he has no control over the proceedings or the delay in taking cognizance which may be for reasons

which are systemic or otherwise cannot be a ground to non-suit a diligent complainant. The aforesaid reason, would also be applicable where the case is instituted with the lodging of an FIR by the informant/complainant diligently and within the period of limitation. In this situation also the complainant/informant cannot be non-suited for any subsequent delay in taking cognizance, issuing process or any other action contemplated under law, for which the informant/complainant has no control.

18. Recently Hon'ble Supreme Court in the case of ***Amritlal v. Shantilal Soni7*** has held as under :-

Therefore, the enunciations and declaration of law by the Constitution Bench do not admit of any doubt that for the purpose of computing the period of limitation under Section 468 CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence. The High Court has made a fundamental error in assuming that the date of taking cognizance i.e., 04.12.2012 is decisive of the matter, while ignoring the fact that the written complaint was indeed filed by the appellant on 10.07.2012, well within the period of limitation of 3 years with reference to the date of commission of offence i.e., 04.10.2009.

19. Adverting to the facts of the present case, it is not disputed that the date of alleged incident mentioned in the N.C.R. bearing No.19/2013 is 09.03.2013 at 17:30 Hours. The said N.C.R. was lodged on the same day i.e. on 09.03.2013 itself. Therefore, in the aforesaid view of the matter, this Court does not find any substance in the argument of learned counsel for the applicant that since the charge sheet came to be filed after a lapse of five years, three months and fourteen days from the date of registration of NCR and the same was barred by limitation and no cognizance on the basis thereof could have been taken.

20. As referred above, the charge sheet under Sections 323 and 504 I.P.C. was submitted by the Investigating Officer upon conclusion of investigation after collecting the credible evidence, therefore, the learned trial Court has rightly taken cognizance of this case and directed the same to be treated as a complaint case keeping in view the provisions contained in Section 2(d) Cr.P.C.

21 . In view of the aforesaid discussion, this Court does not find any illegality, impropriety and incorrectness in the proceedings under challenge. There is no abuse of court's process either.

22. The instant application under Section 482 Cr.P.C. lacks merit, which deserves to dismissed and the same is hereby, **dismissed,** accordingly.

(2022) 10 ILRA 508
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No. 6935 of 2022

Vijay Kumar Banka ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Paavan Awasthi

Counsel for the Opposite Parties:

Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 406, 420 - Magistrate while exercising his power under Section 204 Cr.P.C., has to see the material available on record filed by the complainant - court below obliged to inquire into the case by examining the complainant as well as other witnesses and their statements - court has to proceed on the basis of the material available and if it is found that there is sufficient material, the court can issue process. (Para -22)

Complainant advanced money for purchasing a plot - plot shown to him by applicant was not given to him - complainant was cheated - requested applicant to return money - complainant was threatened - asked not to demand the money - application under Section 156(3) Cr.P.C. - treated as complaint - statement of complainant recorded under Section 200 Cr.P.C. - statement of witnesses recorded under Section 202 Cr.P.C - available before the court - part of enquiry complete - Magistrate himself examined the case - issued summons - hence present application. **(Para - 3,6,7,14,20,22,)**

HELD:-While issuing process court applied his mind. Speaking order passed after recording satisfaction based on the statement under Sections 200/201 Cr.P.C.**.** While issuing process under Section 204 Cr.P.C., magistrate discussed the evidences of the complainant supported by the witnesses, thus he has not committed any error . **(Para -21,22)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr. , (2017) 3 SCC 528

2. Birla Corporation Limited Vs Adventz Investments & Holdings Ltd. & ors. , (2019) 16 SCC 610;

3. Kishan Singh (Dead) Through Lrs. Vs Gurpal Singh & ors. , (2010) 8 SCC 775

4. Pawan Kumar Yadav & ors. Vs St. of U.P. & anr. 2013 SCC OnLine All 13108

5. Vijay Dhanuka & ors. Vs Najima Mamtaj & ors. , MANU/SC.0251/2014

6. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr. , (2017) 3 SCC 528

7. Birla Corporation Limited Vs Adventz Investments & Holdings Ltd. & ors. , (2019) 16 SCC 610

8. Pawan Kumar Yadav & ors. Vs St. of U.P. & anr.

9. Kishan Singh (Dead) Through Lrs. Vs Gurpal Singh & ors.

(Delivered by Hon'ble Brij Raj Singh, J.)

1. Heard Sri Paavan Awasthi, learned counsel for the applicant, Sri Tilak Raj Singh, the learned A.G.A. for the State.

2. The present application U/s 482 Cr.P.C. has been filed with a prayer to quash the proceedings of Complaint Case No. 3219 of 2018 (Satya Prakash Singh Vs. Vijay Kumar Banka and Others), under Sections 406, 420 I.P.C., pending in the court of Chief Judicial Magistrate, Lucknow, with a further prayer to stay the operation and implementation of the order dated 25.03.2022 passed in the aforesaid complaint case.

3. The facts of the case are that Satya Prakash Singh, the complainant filed an application under Section 156(3) Cr.P.C. before C.J.M. Lucknow making allegation that he was looking for a plot in Lucknow measuring an area of 100 sq. ft. and in that regard he met the applicant along with his associates Rajendra Prasad Chaudhary, Pawan Kumar Sharma, Suddhakar Singh and Raghvendra Singh. The complainant

mentioned in the application that he was shown a plot in Tiwari Ganj and was informed that the cost of the plot is Rs.4,50,000/- plus registry expenses and that half of the total amount is required to be deposited in cash and remaining half to be paid as per the convenience of the complainant. It is stated in the complainant that he deposited Rs.2,00,000/- in cash with the applicant and sought 15 days' time to pay the remaining amount. Thereafter, the complainant was contacted by the applicant prior to 15 days' and he was asked to deposit the remaining amount within four days with an instruction that in case of non-payment of remaining amount within four days, the applicants will sell the plot to some other person/customer. The complainant enquired about the plot situate in Tiwari Ganj and he was informed that the plot which was shown to the complainant was not belonging to the applicant, namely, Vijay Kumar Banka.

4. The complainant requested the applicants to refund the amount already deposited by him but the applicant and his associates visited the house of the complainant and offered him another plot situate at different location. As per the complaint, the complainant rejected their offer and asked them to refund the advance of Rs.2,00,000/- paid by him. The applicant and his associates gave assurance to refund the amount and therefore many times the complainant requested to refund the amount on phone but the amount was not refunded back.

5. Fueling the apathy of the complainant that even on repeated request the money was not refunded to him and one day the petitioner and his associates came to the house of the complainant with weapons, abused the complainant and threatened him to kill and refused to refund the money. It is also mentioned in the complaint that the complainant made a report to the concerned police station but his report was not lodged. Thereafter, he also made a complaint to Superintendent of Police, Lucknow but that too in vain. The application under Section 156(3) Cr.P.C. was treated as complaint.

6. The statement of the complainant was recorded under Section 200 Cr.P.C. and he supported the version of the complaint. The statements of Purnamasi Sharma & Mr. Brajendra Kumar, the witnesses of the case, were recorded under Section 202 Cr.P.C. They also supported the statements of fact narrated by the complainant.

7. On the basis of the statement of the complainant recorded under Section 200 Cr.P.C., the Chief Judicial Magistrate, Lucknow passed the impugned order on 25.03.2022, by which the applicant has been summoned under Sections 406, 420 I.P.C. which is being challenged by the applicant in the present application.

8. Counsel for the applicant has submitted that the entire allegation is completely vague and fictitious and no offence as such is made out against the applicant. Counsel for the applicant has submitted that the false and concocted complainant has been filed just to harass and blackmail the applicant and that too after a delay of more than eight years. Counsel for the applicant has further submitted that while issuing summons, the Magistrate committed error and the legal course of Section 202(1) Cr.P.C. has not been followed. According to his argument, as the Section 202(1) Cr.P.C. provides, the Magistrate is required to postpone issuance of process where the accused is residing at

a place beyond the area in which he exercises his jurisdiction and shall enquire into the case himself or directs the investigation to be made by a police officer or by such other person as he thinks fit for the purposes of deciding whether or not there is sufficient ground for proceeding. Counsel for the applicant has vehemently argued that the petitioner is a resident of Gorakhpur but while summoning the applicant enquiry under Section 202(1) Cr.P.C. has not been conducted by the court below and without doing enquiry and investigation by police the impugned order has been passed which is wholly illegal. Counsel for the applicant in support of his submissions/arguments has relied upon the following judgments. ***[I] Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and Another reported in (2017) 3 SCC 528; [II] Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and Others reported in (2019) 16 SCC 610; [III] Kishan Singh (Dead) Through Lrs. Vs. Gurpal Singh and Others reported in (2010) 8 SCC 775 and [IV] Pawan Kumar Yadav and Others Vs. State of U.P. and Another*** reported in ***2013 SCC OnLine All 13108.***

9. On the other hand, Sri Tilak Raj Singh, learned A.G.A. has submitted before this Court that a detailed complaint was filed by the complainant and the statements under Sections 200 and 202 Cr.P.C. of the complainant as well as the witnesses were considered and examined, thereafter summons have been issued. Learned A.G.A. has submitted that in the impugned order, the Chief Judicial Magistrate, Lucknow has applied his mind and while exercising his power, he has discussed the case of complaint in nut shell and thereafter summons have been issued. He has further submitted that the provision of Section 202 Cr.P.C. has been followed while issuing the process against the accused because the Magistrate had got three options: (I) firstly, in case the accused is residing in other jurisdiction of the Magistrate, he will enquire by himself; (ii) secondly, or with the help of police and (iii) thirdly, in any other manner. Sri Singh, the learned A.G.A. has vehemently argued that the Magistrate has applied the first procedure and he himself has enquired about the factum of the case and once the order is speaking and his satisfaction is based on material, this is the enquiry done by the Magistrate because the Magistrate has no other option to enquire about the accused who is residing outside his jurisdiction, he has chosen the first procedure of enquiry that was done by him himself.

10. Now, I have to see the procedure of Section 202 Cr.P.C. as well as the various judgments relied upon by the counsel. In this regard, provisions of Section 202 Cr.P.C. is relavant to be seen which is quoted below:

"**202. Postponement of issue of process.**-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section(1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section(1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

11. Counsel for the applicant Sri Paavan Awasthi has relied upon a judgment rendered by Hon'ble Supreme Court in the case of **Vijay Dhanuka and Others Vs. Najima Mamtaj and Others** reported in MANU/SC.0251/2014 and had drawn the attention of the Court to para -14 of the said judgment, which is quoted below:

"14. It is evident from the aforesaid provision, every inquiry other than a trial conducted by the Magistrate or 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 any inquiry envisaged under Section 202 of the Code. In the present case, as we have stated earlier, the Magistrate has examined the complainant on solemn affirmation and the two witnesses and only thereafter he had directed for issuance of process."

12. Hon'ble Supreme Court in the case of **Vijay Dhanuka (supra)** has observed that no specific mode or manner of inquiry is provided under Section 202 of the Code. The court below is obliged to inquire into the case by examining the complainant as well as other witnesses and their statements. It has observed that the court has to proceed on the basis of the material available and if it is found that there is sufficient material, the court can issue process.

13. Sri Awasthi, counsel for the applicant has further relied upon a judgment rendered in ***Abhijit Pawar Vs. Hemant Madhukar Nimbalkar and Anothe***r reported in ***(2017) 3 SCC 528*** and has relied upon the relevant paragraphs 24 and 25, which paras are extracted hereinbelow:

"24. The essence and purpose of this amendment has been captured by this Court in Vijay Dhanuka v. Najima Mamtaj in the following words: (SCC p. 644, paras 11-12)

"11. Section 202 of the Code, inter alia, contemplates postponement of the issue of the process "in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' and thereafter to either inquire into the case by himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. In the face of it, what needs our determination is as to whether in a case where the accused is residing at a place beyond the area in which the Magistrate exercises his jurisdiction, inquiry is mandatory or not.

12. The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction' were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.'

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

25. For this reason, the amended provision casts an obligation on the Magistrate to apply his mind carefully and satisfy himself that the allegations in the complaint, when considered along with the statements recorded or the enquiry conducted thereon, would prima facie constitute the offence for which the complaint is filed. This requirement is emphasised by this Court in a recent judgment Mehmood Ul Rehman Vs. Khazir Mohammad Tunda (2015) 12 SCC 420 in the following words: (SCC pp.429-30, paras 20 & 22)

"20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when

considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Ltd. [Pepsi Foods Ltd. v. Judicial Magistrate, (1998) 5 SCC 749 to set in motion the process of criminal law against a person is a serious matter.

* * *

22. The steps taken by the Magistrate under Section 190(1)(a) CrPC followed by Section 204 CrPC should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 CrPC when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 CrPC, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 CrPC, the High Court under Section 482 CrPC is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

14. A perusal of the aforesaid extract shows that while exercising power for issuance of process in complaint case, the court has got three options (I) either the court will call report from the police concerned; (ii) or he will inquire himself; (iii) or by such other person as he thinks fit. In the present case the Magistrate himself has examined the case and has issued the summons. He has to apply his mind carefully by considering the statement of the complainant as well as the witnesses.

15. He has further relief upon paras 31 to 35 of the judgment rendered in ***Birla Corporation Limited Vs. Adventz Investments and Holdings Limited and Others reported in (2019) 16 SCC 610,*** which is quoted below:

30. Under the amended sub-section (1) to Section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be

made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

31. By Code of Criminal Procedure (Amendment) Act, 2005, in Section 202 Cr.P.C. of the Principal Act with effect from 23.06.2006, in sub-section (1), the words

"...and shall, in a case where accused is residing at a place beyond the area in which he exercises jurisdiction..."

were inserted by Section 19 of the Criminal Procedure Code (Amendment) Act, 2005. In the opinion of the legislature, such amendment was necessary as false complaints are filed against persons residing at far off places in order to harass them. The object of the amendment is to ensure that persons residing at far off places are not harassed by filing false complaints making it obligatory for the Magistrate to enquire. Notes on Clause 19 reads as under:-

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that the innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

32. Considering the scope of amendment to Section 202 Cr.P.C., in *Vijay Dhanuka and Others v. Najima Mamtaj and Others (2014) 14 SCC 638*, it was held as under:-

"12. ....The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

Since the amendment is aimed to prevent persons residing outside the jurisdiction of the court from being harassed, it was reiterated that holding of enquiry is mandatory. The purpose or objective behind the amendment was also considered by this Court in Abhijit Pawar v. Hemant Madhukar Nimbalkar and Another (2017) 3 SCC 528 and National Bank of Oman v. Barakara Abdul Aziz and Another (2013) 2 SCC 488.

33. 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. The application of mind has to be indicated by disclosure of mind on the satisfaction.

Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint, in Mehmood Ul Rehman, (2015) 12 SCC 420, this Court held as under:-

"22. ....the Code of Criminal Procedure requires speaking order to be passed under Section 203 Cr.P.C. when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 Cr.P.C., the High Court under Section 482 Cr.PC. is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before the criminal court as an accused is serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

(emphasis supplied)

16. **Birla Corporation Ltd. (supra)** has also pronounced the same dictum and the Magistrate has to satisfy himself after considering the statements of the complainant as well as witnesses and thereafter forming opinion whether offence is made out or not. In case the offence is not made out, he would drop the proceeding and if he comes to a conclusion that material constitute offence against the accused, he has to issue the process.

17. Reliance is also placed on the judgment rendered in P**awan Kumar Yadav and Others Vs. State of U.P. and Another** and more emphatically on Paras 12, 13, 14 and 15, which are extracted hereinbelow:

"12.The question for consideration before this Court is;

While discharging its obligation under this mandatory provision court how to act?

13. The perusal of provision give discretion to Magistrate either to enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit. The enquiry contemplated prior to insertion of this provision was limited to the ascertainment of truth or falsehood of the allegations made in the complaint:

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and

(iii) for deciding the question purely from the point of view of the complainant without at all averting to any defence that the accused may have.

14. The insertion of provision was intended to put a safe guard to those proposed accused who are not residing in the territorial jurisdiction of the Court. The legislature found that false complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused.

15. To fulfil the intention of statute the Magistrate before issuing process after invoking this provision should satisfy himself that the complaint filed against the person residing out side jurisdiction of the court is not for his harassment. How the Magistrate satisfy himself must reflect from proceedings conducted by him. Therefore, a conscious decision has to be taken. Specific order is required to be passed regarding postponement of issuing process and for initiation of enquiry either by himself or ordering investigation, as the case may be. If the Magistrate decided to enquire himself he should put necessary questions with the witnesses and also to the complainant, like; identity of accused, acquaintance of complainant and witness with the accused, relationship in between accused and complainant and in between complaint and witnesses etc."

18. **Pawan Kumar Yadav (supra)** is based on same analogy. As per the this judgment, the court has to proceed in accordance with the provisions of Section 202(1) Cr.P.C. and while summoning the accused who is living beyond his jurisdiction, he shall inquire either himself or direct investigation to be made by a police officer or by such other persons as he thinks fit for finding out whether or not there was sufficient ground for proceeding against the accused. The Magistrate while exercising his power under Section 202(1) Cr.P.C. if he chooses to inquire himself about the person residing beyond his jurisdiction then he has to take a conscious decision which should be based on material available on record by a speaking order.

19. Further reliance was placed upon the judgment rendered in **Kishan Singh (Dead) Through Lrs. Vs. Gurpal Singh and Others** and the relevant para 22 is quoted below:

"22. In cases where there is a delay in lodging an FIR, the court has to look for a plausible explanation for such delay. In the absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an afterthought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the civil court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to

be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (Vide Chandrapal Singh v. Maharaj Singh (1982) 1 SCC 466; State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335; G. Sagar Suri v. State of U.P. (2000) 2 SCC 636; and Gorige Pentaiah v. State of A.P. (2008) 12 SCC 531.

20. In the case of **Kishan Singh (supra),** the point of delay has been considered wherein it is provided that frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The proceeding for harassment should not be allowed after long delay. In the present case, the complaint indicates that complainant had advanced money for purchasing a plot and the plot which was shown to him by the applicant was not given to him and the complainant was cheated by applicant. The complainant requested the applicant that the money advanced by him be returned to him but the complainant was threatened and was asked not to demand the money.

21. I have considered the argument advanced by both parties and have gone through the judgment relied upon carefully. I come to a conclusion that while issuing process the court has applied his mind. The court has observed that the complainant - Satya Prakash Singh was examined under Section 200 Cr.P.C. who submitted that the applicant had come to his house along with co-accused Ram Khiladi Yadav and Pawan Kumar Sharma, on 15.12.2010 and took Rs.2,00,000/-. They had further asked the complainant to deposit Rs.2,00,000/- in an account of S.B.I. Bank. When he met the applicant to provide the plot he stated that his partnership had come to an end and he will provide plot to some other site, on which the complainant asked that he will not take plot on other site and he requested to refund his mind. Thereafter, the applicant disappeared. When the complainant filed complaint to police, the applicant consulted him. The complainant requested the applicant to refund his money but the applicant did not return the same. The applicant and the other co-accused intimidated the complainant and asked him not to raise voice for refund of money and keep his mouth shut. The statements of witnesses, namely, Purnamasi Sharma and Brajendra Kumar under Sections 200 Cr.P.C. was also recorded before the court which was also seen and taken into account by the court along with the aforesaid contents of the complaint. The process has been issued after getting satisfaction by the court. It cannot be said that the order is non-speaking rather it has been passed after recording the satisfaction based on the statement under Sections 200/201 Cr.P.C.

22. While court exercises it power under Section 202(1) Cr.P.C., he has opted to inquire the case by himself. In the present case if the Magistrate has proceeded himself then what is the mode by which he can get satisfaction regarding accused residing outside the territorial jurisdiction of the Magistrate. The Magistrate while exercising his power under Section 204 Cr.P.C., has to see the material available on record filed by the complainant. In the present case the statement of the complainant was recorded under Section 200 Cr.P.C. which was

available to the court. Thereafter the statements under Section 202 Cr.P.C. of the witnesses were also available before the court. He has discussed the statements of the complainant supported by the statements of the witnesses under Section 202 Cr.P.C. and therefore the part of inquiry is complete. It cannot be said that he has not made inquiry. While issuing the process under Section 204 Cr.P.C., he has discussed the evidences of the complainant supported by the witnesses, thus he has not committed any error.

23. In view of the aforesaid discussion, I am of the opinion that the order passed by the court below needs no interference. The application is consequently **dismissed.**

(2022) 10 ILRA 519
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.09.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 7188 of 2022

Gaurav Kumar Agrahari @ Gaurav Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sameer Singh, Sri Sakshi Singh

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 498-A, 323, 504, 506 - principles with regard to exercise of powers under Section 482 Cr.P.C. - in case of compromise/settlement between parties - test to be applied - whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue - quashing of the criminal proceedings is an exception than a rule. (Para -10)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - three circumstances under which inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. (Para -10)

Application filed - to quash - entire proceeding, charge sheet and summoning order - applicant filed compromise deed - verified compromise in presence of applicant and opposite party no. 2 **. (Para - 3)**

HELD:-Offence are more particularly a private dispute. Entire proceedings quashed. **(Para - 11,12)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. B.S. Joshi Vs St. of Haryana & ors., 2003 (4) ACC 675

2. Gian Singh Vs St. of Punj., 2012 (10) SCC 303

3. Dimpey Gujral & ors. Vs Union Territory Through Administrator, 2013 (11) SCC 697

4. Narendra Singh & ors. Vs St. of Punj. & ors.., 2014 (6) SCC 466

5. Yogendra Yadav & ors.. Vs St. of Jharkhand, 2014 (9) SCC 653

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

7. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866

8. St. of Haryana Vs Bhajanlal, 1992 SCC (Crl.)426

9. St. of Bihar Vs P.P. Sharma, 1992 SCC (Crl.)192

10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., 2005 SCC (Cri.) 283.

11. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Shri Mohd. Imran Khan, Advocate, has filed vakalatnama on behalf of opposite party No. 2, which is taken on record.

2. Heard Shri Sameer Singh, the learned counsel for applicant, Dr. Gyan Singh, the learned A.G.A. for the State as well as Shri Mohd. Imran Khan, the learned counsel for the opposite party No. 2 and perused the record.

3. This application under Section 482 Cr.P.C. has been filed with the prayer to quash the entire proceeding of Case Crime No. 0050 of 2020, under Sections 498-A, 323, 504, 506 I.P.C., Police Station Mahila Thana, District Lucknow as well as charge sheet dated 25.02.2021 and summoning order dated 01.11.2021 passed by learned Civil Judge (J.D.) F.T.C. Court No. 50, District Lucknow.

4. Learned counsel for the applicant submits that in compliance of the order dated 19.09.2022 passed by a coordinate Bench of this Court in Application under Section 482 Cr.P.C. No. 6426 of 2022, the applicant filed compromise deed dated 09.09.2022 before the court of learned Civil Judge (Junior Division)/ Judicial Magisytrate, F.T.C., Lucknow and the concerned court vide its order dated 27.09.2022 verified the said compromise in presence of the applicant and opposite party no. 2, copy of which is annexed as Annexure-3 to the affidavit filed in support of the present application.

5. Learned counsel for the opposite party No. 2 submits that his client is not interested to contest the case.

6. Learned A.G.A. has submitted that since parties have entered into compromise, which has also been verified by the court below, therefore, no useful purpose would be served if the proceedings of the aforesaid case go on further.

7. Learned counsel for the parties has drawn attention of this Court and placed reliance on the following judgments of Hon'ble Apex Court in support of their case.

(i) B.S. Joshi Vs. State of Haryana & Others 2003 (4) ACC 675.

(ii) Gian Singh Vs. State of Punjab 2012 (10) SCC 303.

(iii) Dimpey Gujral And Others Vs. Union Territory Through Administrator 2013 (11) SCC 697.

(iv) Narendra Singh And Others Vs. State of Punjab And Others 2014 (6) SCC 466.

(v) Yogendra Yadav And Others Vs. State of Jharkhand 2014 (9) SCC 653.

8. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of Parbatbhai Aahir @ Parbatbhai

Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr,; reported in (2017) 9 SCC 641 and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties which emerges from precedent of the subjects as follows:-

i. "Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court.

ii.The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

iv. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

v. The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

vii. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

viii. Criminal cases involving offences which arises from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

ix. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the

disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

x. There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

9. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283.**

10. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

11. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly is private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

12. The present 482 Cr.P.C. application stands **allowed**. Keeping in view the law laid down by the Hon'ble Apex Court in the above referred judgment and in view of the statement/compromise made by the applicant as well as opposite party no.2 and the observation made above, the entire proceedings of Case Crime No. 0050 of 2020, under Sections 498-A, 323, 504, 506 I.P.C., Police Station Mahila Thana, District Lucknow, are hereby quashed.

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

14. 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) 10 ILRA 523
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.10.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application U/S 482 No. 7213 of 2022

Om Prakash Maurya ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sukh Deo Singh, Sri Paritosh Shukla

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 227 - Discharge , Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 323, 324, 504, 506, 308, 304 - At the stage of framing charge , only prima facie case is to be seen, whether case is beyond reasonable doubt is not to be seen - Court has to see if there is sufficient ground for presuming that the accused has committed an offence. (Para - 10)

F.I.R. lodged by first informant/opposite party no.2 - against three accused persons including present applicant - injured died due to head injuries - Section 302 I.P.C. added - applicant named in F.I.R. - all accused persons assigned role of assaulting injured by lathi, danda and knife – discharge application moved by applicant - rejected by Session judge.**(Para -8)**

HELD:- At this stage, only prima facie availability of material warranting framing of charge against the applicant is enough . No roving enquiry is required to ascertain veracity or otherwise of the prosecution's case. No illegality or infirmity in the impugned order under challenge. No abuse of court's process. **(Para -12,13)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. St. of Maha. Vs Som Nath Thapa, AIR 1996 SC 1744

2. Rajbir Singh Vs St. of U.P., AIR 2006 SC 1963

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. In view of the order proposed to be passed, notice to the opposite party no.2 is dispensed with.

3. The instant application under Section 482 Cr.P.C. has been filed for quashing the impugned order dated 29.08.2022 passed by learned Additional Sessions Judge-7, Sultanpur, whereby the application of the applicant under Section 227 Cr.P.C. bearing No.8Kha has been rejected in Sessions Trial No.707/2021 "State vs. Om Prakash Maurya and others" in F.I.R. No.424 of 2020, under Sections 323, 324, 504, 506, 308, 304 I.P.C., Police Station Jamo, District Amethi.

4. It is submitted by learned counsel for the applicant that false first information report came to be lodged against the applicant inter alia stating therein that he along with other accused persons assaulted the injured person and thereafter they fled away from the spot. His further submission is that in fact, due to some injuries in his leg, the applicant was operated and a steel

plate was filled in his leg, due to which, hewas unable to move swiftly. Therefore, this fact itself belies the entire prosecution story that the applicant after allegedly assaulting the deceased ran away from the spot. The learned trial Court failed to appreciate this material aspect of the matter and wrongly held that there was enough material available on record to frame charge. Even otherwise, no material could be collected during investigation which warrants framing of charge against the applicant.

5. In view of the aforesaid, it is further submitted by learned counsel for the applicant that in view of the aforesaid, the impugned order being palpably illegal deserves to be set aside and a direction needs to be issued to learned court below to reconsider the matter afresh.

6. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that in fact the first information report came to be lodged by the first informant/opposite party no.2 bearing no.0424 of 2020 dated 28.11.2020 at 20:31 Hrs. under Sections 323, 324, 504, 506, 308, 304 I.P.C. against three accused persons including the present applicant. It has been stated in the first information report that on 28.11.2020 at about 7 :00 P.M. when the first informant along with his uncle were returning to their home after buying some household articles, they were assaulted by accused persons, who nourished grudge against the first informant and his uncle due to property dispute. In this incident, injured, Surya Lal was assaulted by lathi, danda and knife, who was taken to hospital for medical treatment.

7. Learned A.G.A. has also pointed out that afterwards, injured, Surya Lal succumbed to his injures which led to offence of Section 302 I.P.C. in this matter. Therefore, he submits that at this stage, according to settled legal position availability of prima facie material warranting framing of charge against the applicant is enough. No roving or meticulous enquiry is either stipulated or warranted at this stage. Therefore, learned trial Court, after appreciating the law correctly, had passed the impugned order wherein no interference by this Court is warranted.

8. Having heard learned counsel for the applicant, learned A.G.A. for the State and upon perusal of the record, it transpires that the first information report came to be lodged by the first informant/opposite party no.2 bearing no.0424 of 2020 dated 28.11.2020 at 20:31 Hrs. under Sections 323, 324, 504, 506, 308, 304 I.P.C. against the three accused persons including the present applicant. The injured, Surya Lal died due to head injuries and therefore, Section 302 I.P.C. came to be added in this matter. The applicant is named in the first information report and all the accused persons have been assigned the role of assaulting the injured by lathi, danda and knife.

9. At the stage of framing charge, only prima facie case is to be seen, whether case is beyond reasonable doubt is not to be seen at this stage. If the court comes to the conclusion that the commission of offence is a probable consequence, a case for framing charge exists. At the stage of framing charge, probative value of materials on record cannot be gone into. At this stage, it is not necessary for the prosecution to establish beyond all reasonable doubts that the accusation which they are bringing against the accused

person is bound to be brought home against him. At the stage of framing charge, the Court has to see if there is sufficient ground for presuming that the accused has committed an offence. If the answer is in affirmative, the order of discharge cannot be passed and the accused has to face trial.

10. To substantiate aforesaid proposition, the judgment rendered by Hon'ble the Apex Court in **State of Maharashtra v. Som Nath Thapa, AIR 1996 SC 1744** and **Rajbir Singh vs. State of U.P., AIR 2006 SC 1963** may be usefully referred to.

11. Therefore, in view of the aforesaid settled legal position, at this stage, only prima facie availability of material warranting framing of charge against the applicant is enough and no roving enquiry is required to ascertain veracity or otherwise of the prosecution's case.

12. Thus, on the basis of the aforesaid discussion, this Court does not find illegality or infirmity in the impugned order under challenge. There is no abuse of court's process either.

13. In view of the aforesaid, the instant application under Section 482 Cr.P.C. lacks merit and deserves to be dismissed.

14. Accordingly, the instant application under Section 482 Cr.P.C.is **dismissed.**

(2022) 10 ILRA 525
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C. J.
THE HON'BLE SAMIT GOPAL, J.

Application U/S 482 No. 14443 of 2022
With other Connected Cases

Naresh Kumar Valmiki ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Kumar Singh

Counsel for the Opposite Parties:
Sri Syed Ali Murtaza, A.G.A. For State, Sri Neeraj Kumar Srivastava, Sri Shobhit Yadav, Sri Ankit Srivastava, Sri Kartikey Pandey

(A) Criminal Law - Reference made - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 21 - "Public servant" - Section 21(3) - Judge is also a "public servant" , The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 2 (bg) - "Public servant" , Section 4(2)(b) - duties of "public servant" - registration of a complaint or a First Information Report, Section 14 - Special Court and Exclusive Special Court , second proviso to Section 14 - Special Court so established or specified shall have powers to directly take cognizance of offence under this Act - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 - Rule 7, 8 (via) and (vii),12. (Para - 12,13,14,20,21,)

Applications filed under Section 156 (3) Cr.P.C. - treated as a complaint - summoned - challenging validity and legality of orders - Act (The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989) is a Special Act - overrides any other - Special Court designated under the Act - cannot take cognizance of an offence on itself - by treating an application under Section 156 (3) Cr.P.C. as a complaint - question referred - Whether Special Judge can treat the application under

Section 156(3) Cr.P.C. as a complaint case or not. **(Para -2,5,6)**

HELD:-Special Judge or court so established can treat an application under Section 156(3) Cr.P.C. as a complaint and proceed further in accordance with law. Petitions and appeals be placed before appropriate Bench. **(Para - 23)**

Reference answered. (E-7)

List of Cases cited:-

1. Soni Devi Vs St. of U.P., 2022 (5) ADJ 64

2. Shantaben Bhurabhai Bhuriya Vs Anand Athabhai Chaudhari & ors., AIR 2021 SC 5368

3. Ramveer Upadhyay & anr. Vs St. of U.P. & anr. , 2022 SCC Online SC 484

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

1. This is bunch of 83 cases with different reliefs. The matter has been placed before this Court on the reference made by the learned Single Judge disagreeing with the view taken by another learned Single Judge in the case of **Soni Devi vs. State of U.P.1** Alongwith the main petition, other petitions and appeals have been tagged with similar issues involved.

2. The question of difference between the two learned Judges is on the second question as framed in the case of **Soni Devi's case (supra)** which is in para-15 of the said judgment. It reads as under:

"15. The second question for consideration before this Court is as to whether Special Judge can treat the application under Section 156(3) Cr.P.C. as a complaint case or not."

3. The answer given to the second question is in para-18 of the said judgement which is as follows:

"18. .... Therefore answer to the second question that Special Judge can treat the application under Section 156 (3)Cr.P.C. as a complaint case or not ? Answer is "No" in view of Rule 5(1) of the Amended Act."

4. While giving reasons for differing with the said answer and making a reference, learned Single Judge has referred the question as follows:

"18. Thus, this Court differs with the view taken in the case of Soni Devi (Supra) in its second question as decided as to whether it is correct ?"

5. The petitions are in which applications filed under Section 156 (3) Cr.P.C. have been treated as a complaint and the accused persons therein have been summoned to face trial. The accused persons thus are before this Court challenging the validity and legality of the orders passed against them.

6. Sri Arvind Kumar Singh, learned counsel appearing in the main petition has argued that as per the scheme of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Act") lodging of a first information report is mandatory if an act has been complained of, which is an offence. He argued that since the Act is a Special Act, the same overrides any other Act. The Special Court designated under the Act cannot take cognizance of an offence on itself by treating an application under Section 156 (3) Cr.P.C. as a complaint. Even Rule 12 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as "the Rules") and Schedule (1) of the Rules provide for

payment of compensation to the victim at different stages, starting from lodging of the first information report. It does not makes any provision for payment of compensation in the event the offence as complained of is treated as a complaint case.

7. Sri Geetam Singh, learned counsel appearing in Criminal Appeal No. 4141 of 2022 while referring to Rule 7 of the Rules argued that the same only provides for investigation without any option of enquiry. He further places Rule 8 (via) and (vii) of the Rules and argues that the same also refers to the proceedings of investigation only. He also argued that if the court takes cognizance directly on an application moved under Section 156 (3) Cr.P.C., the benefit of Rule 12 and Schedule (1) of the Rules will not be extended to the victim unless appropriate compensation is directed to be given. It is argued that as such the scheme and the intention of the legislation is only for lodging of a first information report for offences under the Act and not any other remedy.

8. Sri Prateek J. Nagar, learned counsel appearing in Criminal Appeal No. 5974 of 2021 argued that the Act is silent with regards to process, procedure and filing of a complaint and refers to first information report only at every place. He states that as such lodging of the first information report is mandatory and complaint is not maintainable.

9. Per contra, Sri Syed Ali Murtaza and Sri Ankit Srivastava, learned counsels for the State appearing in all the matters argued that the inception of a criminal case is on the basis of a first information report or a complaint. It is argued that Section 4(2)(b) of the Act provides for duties of a public servant, which shall include to register a complaint or a first information report under this Act and other relevant provisions and to register it under appropriate Sections of this Act. It is argued that a public servant is defined under Section 2 (bg) of the Act, which includes persons as defined under Section 21 of the Indian Penal Code (45 of 1860) and thus as per third clause of Section 21 I.P.C. a Judge is a public servant. Thus looking at the provision of Section 4(2)(b) of the Act it is argued that a public servant is under a duty to take cognizance on a complaint or register a first information report under this Act and other relevant provisions as the case may be, thus filing of a complaint and/or treating an application under Section 156 (3) Cr.P.C. as a complaint is not barred. It is further argued that even the second proviso of Section 14 of the Act gives power to the Special Court or Exclusive Special Court so established or specified to directly take cognizance of offences under this Act and as such even taking cognizance under the Act is not prohibited but is expressly provided.

10. Heard Mr. Arvind Kumar Singh, Mohd Zaid, Mr. Prateek J. Nagar, Mr. Geetam Singh, Mr. Shree Prakash Giri, Mr. Anil Kumar, Advocates in their respective matters and Mr. Syed Ali Murtaza, Mr. Neeraj Kumar Srivastava, Mr. Shobhit Yadav, Mr. Ankit Srivastava, Mr. Kartikey Pandey, learned counsels for the State of U.P. and perused the records.

11. Section 14 of the Act reads as follows:-

"14. Special Court and Exclusive Special Court.--(1) For the purpose of providing for speedy trial, the State Government shall, with the

concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet."

12. The second proviso to Section 14 of the Act makes it clear that the Special Court so established or specified shall have powers to directly take cognizance of offence under this Act.

13. The Apex Court in the case of **Shantaben Bhurabhai Bhuriya vs. Anand Athabhai Chaudhari and others2,** in para- 9.1 ruled that in view of insertion of proviso to Section 14 of the Act and considering the object and purpose for which the same has been inserted, it is advisable that the court so established or specified in exercise of powers under Section 14 of the Act for the purpose of providing speedy trial, directly take cognizance of offences under the Atrocities Act. The para 9.1 is quoted herein-below:-

"9.1. On fair reading of Sections 207, 209 and 193 of the Code of Criminal Procedure and insertion of proviso to Section 14 of the Atrocities Act by Act No.1 of 2016 w.e.f. 26.1.2016, we are of the opinion that on the aforesaid ground the entire criminal proceedings cannot be said to have been vitiated. Second proviso to Section 14 of the Atrocities Act which has been inserted by Act 1 of 2016 w.e.f. 26.1.2016 confers power upon the Special Court so established or specified for the purpose of providing for speedy trial also shall have the power to directly take cognizance of the offences under the Atrocities Act. Considering the object and purpose of insertion of proviso to Section 14, it cannot be said that it is not in conflict with the Sections 193, 207 and 209 of the Code of Criminal Procedure, 1973. It cannot be said that it takes away jurisdiction of the Magistrate to take cognizance and thereafter to commit the case to the Special Court for trial for the offences under the Atrocities Act. Merely because, learned Magistrate has taken cognizance of the offences and thereafter the trial / case has been committed to Special Court established for the purpose of providing for speedy trial, it cannot be said that entire criminal proceedings including

FIR and charge-sheet etc. are vitiated and on the aforesaid ground entire criminal proceedings for the offences under Sections 452, 323, 325, 504, 506(2) and 114 of the Indian Penal Code and under Section 3(1)(x) of the Atrocities Act are to be quashed and set aside. It may be noted that in view of insertion of proviso to Section 14 of the Atrocities Act and considering the object and purpose, for which, the proviso to Section 14 of the Atrocities Act has been inserted i.e. for the purpose of providing for speedy trial and the object and purpose stated herein above, it is advisable that the Court so established or specified in exercise of powers under Section14, for the purpose of providing for speedy trial directly take cognizance of the offences under the Atrocities Act. But at the same time, as observed herein above, merely on the ground that cognizance of the offences under the Atrocities Act is not taken directly by the Special Court constituted under Section 14 of the Atrocities Act, the entire criminal proceedings cannot be said to have been vitiated and cannot be quashed and set aside solely on the ground that cognizance has been taken by the learned Magistrate after insertion of second proviso to Section 14 which confers powers upon the Special Court also to directly take cognizance of the offences under the Atrocities Act and thereafter case is committed to the Special Court/Court of Session." (emphasis supplied)

14. The same thus makes it clear that a special court or courts specified can take cognizance directly.

15. The said judgement has been relied upon by the Apex Court subsequently in the case of **Ramveer Upadhyay and another vs. State of U.P. and another 3** and the argument of learned counsel in the said case was that the Additional District and Sessions Judge had no jurisdiction to take cognizance or issue summons or orders, has been held that it cannot be sustained. Paras- 21, 22 and 23 of the said judgement are quoted herein-below:-

"21. Emphasizing Section 14 of the Atrocities Act, Mr. Ranjit Kumar argued that only the Special Judge under the Atrocities Act was competent to pass an order for issuance of summons. He argued that the order of the Additional District and Sessions Judge, Court No.2, Hathras being without jurisdiction the High Court should have quashed the same in exercise of its power under Section 482 of the Cr.P.C. Mr. Ranjt Kumar also argued that Complaint Case No.19/2018 patently a case of malicious prosecution which stemmed from political rivalry and was in gross abuse of the process of Court.

22. In Shantaben Bhurabhai Bhuriya v. Anand Athabhai Chaudhari and others: 2021 SCC Online SC 974, cited by Mr. Siddharth Dave, learned senior counsel, appearing on behalf of the Respondent No.2, this Court rejected the contention that only Special Court could take cognizance of offences under the Atrocities Act and held:

23. Therefore, the issue/question posed for the consideration of this Court is, whether in a case where cognizance is taken by the learned Magistrate and thereafter the case is committed to the learned Special Court, whether entire criminal proceedings can be said to have been vitiated considering the second proviso to Section 14 of the Atrocities Act which was inserted by Act 1 of 2016 w.e.f. 26.1.2016?

24. While considering the aforesaid issue/question, legislative history of the relevant provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, more particularly, Section 14 pre-amendment and post amendment is required to be considered. Section 14 as stood pre-amendment and post amendment reads as under:

.....

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act;

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act."

X X X X

28. Considering the aforesaid legislative history which brought to insertion of proviso to Section 14 of the Atrocities Act, by which, even the Special Court so established or specified for the purpose of providing for speedy trial the power to directly to take cognizance of offences under the Atrocities Act, 1989, the issue/question posed whether in a case where for the offences under Atrocities Act, the cognizance is taken by the learned Magistrate and thereafter the case is committed to the Court of Sessions/Special Court and cognizance is not straightway taken up by the learned Special Court/Court of Session, whether entire criminal proceedings for the offences under the Atrocities Act, 1989 can be said to have been vitiated, as so observed by the High Court in the impugned judgment and order ?

29. On fair reading of Sections 207, 209, and 193 of the Code of Criminal Procedure and insertion of proviso to Section 14 of the Atrocities Act by Act No. 1 of 2016 w.e.f. 26.1.2016, we are of the opinion that on the aforesaid ground the entire criminal proceedings cannot be said to have been vitiated. Second proviso to Section 14 of the Atrocities Act which has been inserted by Act 1 of 2016 w.e.f. 26.1.2016 confers power upon the Special Court so established or specified for the purpose of providing for speedy trial also shall have the power to directly take cognizance of the offences under the Atrocities Act. Considering the object and purpose of insertion of proviso to Section 14, it cannot be said that it is not in conflict with the Sections 193, 207 and 209 of the Criminal Procedure Code, 1973. It cannot be said that it takes away jurisdiction of the Magistrate to take cognizance and thereafter to commit the case to the Special Court for trial for the offences under the Atrocities Act. Merely because, learned Magistrate has taken cognizance of the offences and thereafter the trial/case has been committed to Special Court established for the purpose of providing for speedy trial, it cannot be said that entire criminal proceedings including FIR and charge-sheet etc. are vitiated and on the aforesaid ground entire criminal proceedings for the offences under Sections 452, 323, 325, 504, 506(2) and 114 of the Penal Code, 1860 and under Section 3(1)(x) of the Atrocities Act are to be quashed and set aside. It may be noted that in view of insertion of proviso to Section 14 of the Atrocities Act and considering the

object and purpose, for which, the proviso to Section 14 of the Atrocities Act has been inserted i.e. for the purpose of providing for speedy trial and the object and purpose stated herein above, it is advisable that the Court so established or specified in exercise of powers under Section14, for the purpose of providing for speedy trial directly take cognizance of the offences under the Atrocities Act. But at the same time, as observed herein above, merely on the ground that cognizance of the offences under the Atrocities Act is not taken directly by the Special Court constituted under Section 14 of the Atrocities Act, the entire criminal proceedings cannot be said to have been vitiated and cannot be quashed and set aside solely on the ground that cognizance has been taken by the learned Magistrate after insertion of second proviso to Section 14 which confers powers upon the Special Court also to directly take cognizance of the offences under the Atrocities Act and thereafter case is committed to the Special Court/Court of Session.

30. In support of the above conclusion, the words used in second proviso to Section 14 are required to be considered minutely. The words used are "Court so established or specified shall have power to directly take cognizance of the offences under this Court". The word "only" is conspicuously missing. If the intention of the legislature would have to confer the jurisdiction to take cognizance of the offences under the Atrocities Act exclusively with the Special Court, in that case, the wording should have been "that the Court so established or specified only shall have power to directly take cognizance of offences under this Act". Therefore, merely because now further and additional powers have been given to the Special Court also to take cognizance of the offences under the Atrocities Act and in the present case merely because the cognizance is taken by the learned Magistrate for the offences under the Atrocities Act and thereafter the case has been committed to the learned Special Court, it cannot be said that entire criminal proceedings have been vitiated and same are required to be quashed and set aside."

23. In view of the judgment of this Court in Shantaben Bhurabhai Bhuriya (supra), the Argument of Mr. Ranjit Kumar that the Additional District Judge and Sessions Judge, Court No.4 Hathras had no jurisdiction to take cognizance or issue summons/orders cannot be sustained."

16. As far as other argument of learned counsels with regard to Rule 12 and Schedule Annexure-I is concerned, merely non mentioning of stage for award of compensation in cases where the applications under Section 156(3) Cr.P.C. are treated as a complaint case and also in complaint cases, would not oust the jurisdiction of the courts concerned to award compensation to the victims at the appropriate stage as the case may be.

17. While further dilating the issue it is relevant to look into section 4 of the Act. The same reads as follows:-

"4. Punishment for neglect of duties. -

(1) Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed by him under this Act and the rules made thereunder, shall be punishable with imprisonment for a term which shall

not be less than six months but which may extend to one year.

(2) The duties of public servant referred to in sub-section (1) shall include-

(a) to read out to an informant the information given orally, and reduced to writing by the officer in-charge of the police station, before taking the signature of the informant;

(b) to register a complaint or a First Information Report under this Act and other relevant provisions and to register it under appropriate sections of this Act;

(c) to furnish a copy of the information so recorded forthwith to the informant;

(d) to record the statement of the victims or witnesses;

(e) to conduct the investigation and file charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days, and to explain the delay, if any, in writing;

(f) to correctly prepare, frame and translate any document or electronic records;

(g) to perform any other duty specified in this Act or the rules made thereunder:

Provided that the charges in this regard against the public servant shall be booked on the recommendation of an administrative enquiry.

(3) The cognizance in respect of any dereliction of duty referred to in sub-section (2) by a public servant shall be taken by the Special Court or the Exclusive Special Court and shall give direction for penal proceedings against such public servant.

18. Public servant is defined in Section 2(bg) of the Act which reads as under:-

"2(bg) "public servant" means a public servant as defined under Section 21 of the Indian Penal Code (45 of 1860), as well as any other person deemed to be a public servant under any other law for the time being in force and includes any person acting in his official capacity under the Central Government or the State Government, as the case may be;"

19. At this juncture it is relevant to refer to the definition of the word "public servant" as per Section 21 of the Indian Penal Code, 1860, which reads as under:-

"21. "Public servant".- The words "public servant" denote a person falling under any of the descriptions hereinafter following; namely:-

First.- Omitted

Second.- Every Commissioned Officer in the Military, Naval or Air Forces of India;

Third.- Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

Fourth.- Every officer of a Court of Justice (including a liquidator, receiver or commissioner) whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.- Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.- Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.- Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government;

Tenth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh.- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

Twelfth.- Every person -

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

20. Section 4(2)(b) of the Act referred to the duty of a "public servant" referred to in sub-section (1) which provides for registration of a complaint or a First Information Report under this Act and other relevant provisions and to register it under the appropriate sections of this Act.

21. Third clause of Section 21 of IPC makes it clear that a Judge is also a "public servant".

22. A conjoint reading of Section 4 of the Act, the definition of a "public servant' as per the Act and also the Indian Penal Code, would leave no doubt that a

complaint or a First Information Report, as given, has to be registered. The Act thus draws a distinction in Section 4(2)(b) in the nature of information given by the concerned person, which can be through a complaint or a First Information Report and thus the court concerned has a discretion to look into it and proceed as per its wisdom.

23. In view of our aforesaid discussions, a Special Judge or court so established can treat an application under Section 156(3) Cr.P.C. as a complaint and proceed further in accordance with law.

24. This Court thus answers the reference as referred by learned Single Judge as follows:-

"The view taken in the case of **Soni Devi vs. State of U.P. and others: 2022(5)ADJ 64** that an application under Section 156(3) Cr.P.C. cannot be treated as a complaint case is incorrect. The court concerned while exercising its judicial discretion can treat the said application as a complaint case also."

25. While answering the questions referred to by the learned Single Judge, let the present petitions and appeals be now placed before the appropriate Bench on October 20,2022.

(2022) 10 ILRA 534
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 20095 of 2022

Akhilesh Kumar Gupta & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Vishnu Prakash Srivastava

Counsel for the Opposite Parties:
Govt. Advocate, Sri Vipul Pandey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - 420, 467, 468, 471 and 120-B - "process of law" - ''abused' - if the matter is essentially of civil nature and has been given a cloak of criminal offence, therefore, applying the principles, a High Court can exercise its jurisdiction provided under Section 482 Cr.P.C.- merely to take advantage of a relatively quick relief granted in a criminal case any contrast to a civil dispute - such an exercise is nothing but an abuse of process of law which must be discouraged in its entirety. (Para - 10)

Question of validity of agreement to sale of property - subjudiced before Civil Court - contrary stands taken by parties - Applicants challenging F.I.R., charge sheet, summoning order and entire proceedings - civil dispute given a dark and bright colour of a criminal offence - elements of conspiracy completely absent - proceedings malacious - ingredients of offence prima-facie not made out**. (Para - 4,5,9)**

HELD:-Criminal proceedings initiated against the applicants are a glaring example of ''abuse of process of law' where a dispute of civil nature has been given colour of criminal offence. Prima facie essential ingredients of alleged offence not present. Criminal proceedings itself became vexatious and oppressive. **(Para -14)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. St. of Haryana Vs Bhajan Lal , 1992 Supp (1) SCC 335

2. Zandu Pharmaceutical Works Ltd Vs Mohd Sharaful Haque, (2005) 1 SCC 122

3. Ahmed Ali Quarashi & anr. Vs The St. of U.P. , 2020 SCC Online SC 107

4. Joseph Salvaraja A Vs St. of Guj., (2011) 7 SCC 59

5. Sushil Sethi & anr. Vs The St. of A.P. & ors., (2020) 3 SCC, 240

6. Priti Saraf & Anr Vs St. of NCT of Delhi & anr , 2021 SCC Online SC 206

7. Sau. Kamal Shivaji Pokarnekar Vs The St. of Maha. , (2019) 14 SCC 350

8. St. of Karnataka Vs M. Devendrappa , 2015 (3) SCC 424

9. I.O.C. Vs NEPC India Ltd. & ors., (2006)6 SCC 736

10. M/s Neeharika Infrastructure Pvt. Ltd Vs St. of Maha. & ors. , (2020) 10 SCC 118

11. Ramveer Upadhyay & anr. Vs St. of U.P. & anr. , 2022 SCC Online SC 484

12. Wyeth Ltd. & ors. Vs St. of Bihar & anr., Criminal Appeal No.1224 of 2022 (S. L. P (Crl.) No.10730 OF 2018)

13. I.O.C. Vs NEPC India Ltd. & ors. (2006) 6 SCC 736

14. G. Sagar Suri & anr. Vs St. of U.P. & ors., (2000) 2 SCC 636

15. Mitesh Kumar J. Sha Vs St. of Karn. & ors., 2021 SCC OnLine SC 976

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. To what extent the "process of law" could be "abused' that the criminal proceedings exfacie became vexatious and oppressive and facts of the present case are glaring example of it. It is a legal battle among advocates of a good standing at District Court, Kanpur. Both the applicant/accused as well as opposite party No.2/complainant are advocates. The facts further unfolds that the Lawyers' Association, Kanpur Nagar through its Secretary filed a civil suit bearing No. RS/000/712/216 against some advocates and private persons including one Smt. Renu Nigam to declare an agreement to sale dated 26.03.2008 being void ab initio on the ground being fraud. The said suit is still pending. The applicant No.1 was an advocate for the Association, however, on being certain dispute, he was later on discharged. An F.I.R. was lodged by one advocate on somewhat similar facts wherein opposite party No.2/complainant herein was also an accused. The further proceedings thereof are not on record.

2. Further facts are that the opposite party No.2 posted a letter dated 05.09.2019 by a speed post addressed to the Senior Superintendent of Police, Kanpur Nagar that his neighbour one Renu Nigam in connivance with other persons has filed certain documents in the above referred suit, therefore, inquiry be conducted and criminal action be taken against her. No further proceedings on the said application are placed on record except Renu Nigam submitted duly sworn affidavit dated 10.12.2019 addressed to the A.D.G., Kanpur that the applicant No.1 herein had committed forgery and submitted documents in the above referred suit without her consent. Similarly Renu Nigam also filed an affidavit somewhat on similar averments/allegations duly sworn on 24.02.2021 in the civil suit. There is nothing on record how the opposite party No.2 got possession of the said affidavit submitted before A.D.G., Kanpur and on basis of said affidavit, the present F.I.R.

dated 30.12.2020 was lodged against applicant No.1 and Renu Nigam for committing offence under Sections 420, 467, 468, 471 and 120-B I.P.C. alleging that the applicant No.1 and Renu Nigam hatched conspiracy and prepared forged document in order to grab the property in question.

3. The allegations made by Renu Nigam which are relied upon by the complainant/opposite party No.2 are still subject matter of the suit and only on basis of said document, the F.I.R. was lodged. The police machinery investigated the case and came to a conclusion that a case was made out against applicant No.1 for committing offence under Sections 420, 467, 468, 471, 120-B and 384 I.P.C., and no evidence was found against Renu Nigam and therefore she was exonerated. However, the allegations were found to be true against one other advocate (applicant No.2) for committing the said offences, accordingly, charge sheet was submitted and cognizance was taken.

4. In these circumstances, the applicants are before this Court challenging the F.I.R., charge sheet, summoning order and entire proceedings arising out of Case Crime No. 0356 of 2020 under Sections 420, 467, 468, 471, 120-B and 384 I.P.C., Police Station- Kotwali, District- Kanpur Nagar.

5. Sri Vishnu Prakash Srivastava, learned counsel for applicants has vehemently placed the case of the applicants that civil dispute has been given a dark and bright colour of a criminal offence. The opposite party No.2 has already been made an accused for committing forgery and with malafide intention, the applicant No.1 was discharged from being advocate for the Association in the above referred suit. Initially Renu Nigam was not even a party to the suit but later on by handwriting on plaint she was made party. Renu Nigam has submitted an affidavit which still has to be scrutinized and if necessary subjected to cross examination during the suit proceedings however only on basis of the said document, an F.I.R. was lodged and unfair investigation was conducted and despite no material to support the allegations, a charge sheet was filed against the present applicants. A document which still has to be declared being forged, the criminal proceedings have pre-determined it to be a forged document and in the present case, no forgery or cheating was committed. Consequently, no offence under Section 384 Cr.P.C. can be made out as there was no dishonestly or inducement to deliver any valuable property. The elements of conspiracy are also completely absent. The proceedings are malacious and the ingredients of the offence are prima-facie not made out, therefore, the prayers of this application be allowed.

6. Per contra, Sri Chandan Agarwal, learned A.G.A. for the State and Sri Vipul Pandey, learned counsel for opposite party No.2/complainant have supported the investigation that the applicants being committed cheating and forgery and thus induced to deliver valuable security, therefore, the offences of cheating, forgery and extortion are prima-facie made out. Learned counsel further submitted that since the prima-facie case was made out, therefore, the circumstance does not warrant any interference under inherent jurisdiction.

7. The law in regard to inherent powers under Section 482 Cr.P.C. is discussed hereinafter :-

"Inherent Power of the High Court under Section 482 Criminal Procedure Code 1973 :-

(I) "Inherent Power" of the High Court under Section 482 Cr.P.C., an extraordinary power is with purpose and object of advancement of justice, which is to be exercised "to give effect to any order under the Cr.P.C.", or "to prevent abuse of process of any Court", or "to secure ends of justice", making arena of the power very wide, yet it is to be exercised sparingly, with great care and with circumspection, that too in the rarest of rare case.

(II) It is no more res integra that exercise of inherent power could be invoked to even quash a criminal proceeding/First Information Report/complaint /chargesheet, but only when allegation made therein does not constitute ingredients of the offence/offences and /or are frivolous and vexatious on their face, without looking into defence evidence, however such power should not be exercised to stifle or cause sudden death of any legitimate prosecution. Inherent power does not empower the High Court to assume role of a trial court and to embark upon an enquiry as to reliability of evidence and sustainability of accusation, specifically in a case where the entire facts are incomplete and hazy. Similarly quashing of criminal proceedings by assessing the statements under section 161 Cr.P.C. at initial stage is nothing but scuttling a full fledged trial.

(III) There can not be any straight jacket formula for regulating the inherent power of this Court, however the Supreme Court has summarised and illustrated some categories in which this power could be exercised in catena of judgments. Some of them are ***State of Haryana Vs Bhajan Lal : 1992 Supp (1) SCC 335, Zandu Pharmaceutical Works Ltd Vs Mohd Sharaful Haque: (2005) 1 SCC 122, Ahmed Ali Quarashi and Anr Versus The State of Uttar Pradesh : 2020 SCC Online SC 107, Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59, Sushil Sethi and another Vs The State of Arunachal Pradesh and others (2020) 3 SCC, 240, Priti Saraf and Anr Vs State of NCT of Delhi and Anr : 2021 SCC Online SC 206.*** *Some categories/ circumstances as illustrations but not exhaustive are : allegations made in FIR / complaint, if are taken at their face value and accepted do not prima facie constitute any offence or are so absurd and inherently improbable to make out any case or no cognizable offence is disclosed against the accused, criminal proceedings is maliciously instituted with an ulterior motive and with a view to spite the accused due to private and personal grudge, or where there is a specific legal bar engrafted in any of the provisions of the Code or in the concerned Act to the institution and continuance of the proceedings or when dispute between the parties constitute only a civil wrong and not a criminal wrong, further Courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.*

(IV) In ***Sau. Kamal Shivaji Pokarnekar v. The State of Maharashtra : (2019) 14 SCC 350,*** *the Apex Court has laid emphasis on the principles laid down in two of its previous judgements namely,* ***State of Karnataka v. M. Devendrappa : 2015 (3) SCC 424 and Indian Oil Corporation v. NEPC India Ltd. & Ors.: (2006)6 SCC 736*** *and held that quashing of criminal proceedings is called for only when the complaint does not disclose any offence, or the complaint is frivolous, vexatious, or oppressive and further clarified that defences available during a trial and facts/aspects whose establishment during the trial may lead to acquittal*

cannot form the basis of quashing a criminal complaint. The criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature, if the ingredients of the alleged offence are prima facie made out in the complaint.

(V) The Supreme Court in ***M/s Neeharika Infrastructure Pvt. Ltd Versus State of Maharashtra and Others : (2020) 10 SCC 118,*** *has categorically held that High Court is not justified in passing the order of not to arrest and or no coercive steps either during the investigation or till the final report/ charge sheet is filed under Section 173 Cr.P.C., while dismissing/disposing petition under Section 482Cr.P.C. and/or under Article 226 of the Constitution and even in exceptional cases where High Court is of the opinion that a prima facie case is made out for stay of further investigation,such order has to be with brief reasons, though such orders should not be passed routinely, casually and/or mechanically.*

(VI) Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. (see ***Ramveer Upadhyay & Anr. versus State of U.P. & Anr. 2022 SCC Online SC 484)***

(VII) "A careful reading of the complaint, the gist of which we have extracted above would show that none of the ingredients of any of the offences complained against the appellants are made out. Even if all the averments contained in the complaint are taken to be true, they do not make out any of the offences alleged against the appellants. Therefore, we do not know how an FIR was registered and a charge-sheet was also filed.....It is too late in the day to seek support from any precedents, for the proposition that if no offence is made out by a careful reading of the complaint, the complaint deserves to be quashed." (See, ***Wyeth Limited & others vs, State of Bihar & another, Criminal Appeal No.1224 of 2022 (Special Leave Petition (Crl.) No.10730 OF 2018), decided on 11th August, 2022)."***

(emphasis supplied)

8. I n the abovereferred facts, submissions and discussion of law, this Court proceeds to consider the rival submissions.

9. Undisputedly, the question of validity of agreement to sale of the property is subjudiced before the Civil Court wherein contrary stands have been taken by the parties by way of filing an affidavit and the suit is still pending, therefore, at this stage, to arrive at a conclusion that any forgery had taken place for the purpose of execution of sale deed would not be a correct approach.

10. The police machinery have acted only on the basis of an application of complainant and affidavit of Renu Nigam alleging allegations against the applicant No.1 only. A similar affidavit has also been filed in the suit proceedings. The documents are still to be scrutinized before the Civil Court, therefore, at this stage, the police authorities ought to have kept constraint not to proceed with the investigation as there was no evidence that the documents in question were in fact

forged and the element of deceit was present. There is no bar that on the basis of overlapping facts, both civil and criminal proceedings can go on simultaneously, however, the Supreme Court in the case of I***ndian Oil Corporation v. NEPC India Ltd. & Ors (2006) 6 SCC 736*** has taken a note of growing tendency to convert purely civil dispute into criminal cases with the parties to settle the civil dispute and depreciated such criminal prosecution. Earlier also, in ***G. Sagar Suri and another vs. State of U.P. and others, (2000) 2 SCC 636***, the Supreme Court has held that if the matter is essentially of civil nature and has been given a cloak of criminal offence, therefore, applying the principles, a High Court can exercise its jurisdiction provided under Section 482 Cr.P.C.

11. In recent judgment of ***Mitesh Kumar J. Sha Vs. State of Karnataka and others, 2021 SCC OnLine SC 976***, the Supreme Court held that the Court has enumerable circumstances expressed its disapproval for imparting criminal colour to a civil dispute, merely to take advantage of a relatively quick relief granted in a criminal case any contrast to a civil dispute and further held that such an exercise is nothing but an abuse of process of law which must be discouraged in its entirety.

12. The Court further proceeds to consider whether the ingredients of the alleged offence are prima-facie made out or not. Sections 480, 420 I.P.C. (Cheating and dishonestly induces a person to deliver the property) pre-supposes cheating and thereby dishonestly inducing the person deceived to deliver any property. Such intention would only be satisfied if it is concluded that the "sale deed' is a forged document or executed with fraud. However, the said issue is still pending in the civil suit. Therefore, at this stage, the element of cheating or dishonest cannot be held to be present. Similarly the allegations of forgery i.e. making of any false document with intent to cause damage to any person or to support any claim or title is also one of the subject matter in the civil proceedings and only on the basis of an affidavit submitted by Renu Nigam who is also a party respondent in the suit and also filed her reply thereto cannot be a basis to initiate criminal proceedings when the documents are still to be scrutinized. The element of intention will only be determined once the document is declared to be forged or declared to be void ab-initio on the ground of fraud.

13. The allegations of extortion are presupposed cheating and forgery, therefore, the same is also not made out at the present stage. The investigating officer has rushed to the conclusion only on the basis of allegations and statement that the document was forged without considering that the civil suit is still pending where such issues are still to be addressed and as such in absence of dishonest intention and that the document was forged, the ingredients of the alleged offence are absent. In this regard, paragraph 46 of Mitesh (supra) is relevant :-

"46. Recently, this Court in case of Randheer Singh v.The State of U.P.1, has again reiterated the long standing principle that criminal proceedings must not be used as instruments of harassment. The court observed as under:--

"33. ....There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends

of justice. Whether a complaint discloses criminal offence or not depends on the nature of the allegation and whether the essential ingredients of a criminal offence are present or not has to be judged by the High Court. There can be no doubt that a complaint disclosing civil transactions may also have a criminal texture. The High Court has, however, to see whether the dispute of a civil nature has been given colour of criminal offence. In such a situation, the High Court should not hesitate to quash the criminal proceedings as held by this Court in Paramjeet Batra (supra) extracted above.""

(emphasis supplied)

14. The outcome of the above discussion is that criminal proceedings initiated against the applicants are a glaring example of "abuse of process of law' where a dispute of civil nature has been given colour of criminal offence and further prima facie essential ingredients of alleged offence are not present and therefore, the criminal proceedings itself became vexatious and oppressive.

15. In view of above, the proceedings of Case No. 122095 of 2021 (State vs. Akhilesh Kumar Gupta and another) in Case Crime No. 0356 of 2020 u/s 420, 467, 468, 471, 120-B and 384 I.P.C., Police Station- Kotwali, District- Kanpur Nagar, pending in the Court of learned Chief Metropolitan Magistrate, Kanpur Nagar are hereby quashed.

16. The application stands **allowed.**

(2022) 10 ILRA 540
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482 No. 21400 of 2022

Afsari Akbar Qayyum & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ambreen Masroor,Sr. Advocate

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468, 471 & 120-B - The Code of criminal procedure, 1973 - Section 482 - Inherent power - Section 391 - appellate court is empowered and can call additional evidence , Section 400 - Additional Sessions Judge has empowered to exercise all the powers of Sessions Judge under Chapter XXX thus, the Additional Sessions Judge can call additional evidence , Section 401 - High Court, in its discretion, exercise any of the powers conferred on a court of appeal by Section 386, 389, 390 and 391 - once the High Court is empowered to call the additional evidence, while exercising its revisional power, then Sessions Judge under Section 399(1) of Cr.P.C. by operation of law, is also empowered to call an additional evidence.(Para -18,19)

Applicant filed an application under Section 245(2) of Cr.P.C. - dismissed - by Chief Judicial Magistrate - aggrieved with order - Revision filed by applicants - prayer - certain additional documents and evidence, which may be permitted to file - same may be taken on record for the proper adjudication of the matter - revision rejected by Additional Sessions Judge - ground - Sessions Judge can exercise powers under Section 399 of Cr.P.C. - which is analogous to Section 401 of Cr.P.C., in an event where the Sessions Judge himself has called for the record.**(Para - 3,4,12)**

HELD:-Power of Sessions Judge under Section 399 of Cr.P.C., vest in toto, in an Additional Sessions Judge, when he exercises the powers

under Section 400 of Cr.P.C. Order passed by Additional Sessions Judge in Criminal Revision is erroneous and hence not sustainable. Order set aside. Matter remitted back. **(Para - 19, 20, 21,22)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

Vinod Kumar Vs Smt. Mohrawati , 1990 Crl. LJ 2018

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard learned counsel for the applicants, learned counsel for the State-respondent and perused the record.

2. By instituting the instant application, a prayer has been made for quashing of the order dated 18.06.2022 passed by the learned Additional Sessions Judge, Court No.12, Moradabad in Criminal Revision No.94 of 2020 arising out of Case Crime No.1378 of 2017, under Section 420, 467, 468, 471, 120-B IPC, Police Station-Civil Lines, District-Moradabad, which is pending in the court of learned Additional Sessions Judge, Moradabad.

3. Factual matrix of the case is that, one of the owner of the property Smt. Ram Kali Devi sold out her half of the portion from the land in question to the three persons namely, Vineet Kishore Jain, Sitaram and Shiv Autar Agarwal vide registered sale deed dated 15.03.1990 and out of sale consideration amounting Rs.1,50,000/- Rs.20,000/- was paid at the time of execution of sale deed and remaining amount of Rs.1,30,000/- was agreed to be paid and later on the same was also paid. After receiving the entire sale consideration, Smt. Ram Kali Devi challenged the said sale deed by way of filing a Original Suit No.348 of 1991. Thereafter, written statement was filed on 13.08.1991. The suit was decreed on 13.03.2015, in favour of vendor. Further, another petition was filed by the applicants under Article 227 bearing No.5000 of 2018, which was dismissed by this Court on 18th July, 2018. The vendee, Vineet Kishore Jain filed an application under Order IX Rule 13 of C.P.C. for setting aside the ex parte judgment and decree dated 13.03.2015 and the aforesaid application was allowed and the ex parte judgment was recalled vide order dated 09.01.2022. He submits that an FIR was lodged on 30.11.2017 by one Sunita Singhal, under Sections 420, 467, 468, 471, 506 IPC against the present applicants as the applicants claimed their right in property in question on the basis of "Hibanama". The matter was investigated by the police and charge sheet was filed and thereafter cognizance was taken by the court below. The applicant filed an application under Section 245(2) of Cr.P.C. which was dismissed vide order dated 2.11.2020 by the Chief Judicial Magistrate and fixed the date on 18.11.2020 for framing of charges.

4. Being aggrieved with the order dated 2.11.2020, the applicants filed, Revision No.94 of 2020 on 11.11.2020 in which a prayer was made by the present applicants that there are certain additional documents and evidence, which may be permitted to file and the same may be taken on record for the proper adjudication of the matter. The aforesaid revision was rejected vide order dated 18.06.2022, by Additional Sessions Judge, Court No. 2, Moradabad wherein the following findings have been recorded, which are read as under:-

"उपरोक्त प्रावधानों से स्पष्ट होता है कि माननीय उच्च न्यायालय को द० प्र० सं० धारा

401 की उपधारा *-1* में प्रदत्त शक्ति का प्रयोग सेशन न्यायालय द्वारा धारा *399(1)* द० प्र० सं० के अंतर्गत तभी किया जा सकता है जब अभिलेख सेशन न्यायालय ने स्वयं मंगवाया हो।"

5. The submissions of the learned counsel for the applicants are that, the Additional Sessions Judge can exercise all the powers of Session Judge, given in Chapter XXX of the Cr.P.C. in respect with any case transferred to him by general or special order of the Sessions Judge.

6. He added that under the provision of Section 400 of Cr.P.C., it has specifically been mentioned that an Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge. He next submits that under the mandate of the aforesaid provision, the Additional Sessions Judge while hearing the matter in a revision exercised all the powers of Session Judge which is envisaged under Chapter XXX of Cr.P.C. which are referred to him by an special or general order of the Sessions Judge. In support of his contention he has referred the judgment of **Vinod Kumar Vs. Smt. Mohrawati reported in 1990 Crl. LJ 2018** and submits that in this matter the Court has held that the Sessions Judge can take additional evidence in revision.

7. Placing reliance on the aforesaid judgment, he added that the Court has very categorically held that since the learned Sessions Judge examined the question of taking the additional evidence in view of the powers conferred on him by sub-Section (1) of Section 399 of Cr.P.C. which is the analogous provisions of Section 401 of Cr.P.C., therefore additional evidence in revision can very well be taken by the learned Sessions Judge.

8. He further placed reliance on a judgment in case of Vishram Singh Vs. State of U.P. and another reported in (37326) under Section 482) 2018 and has referred the ratio of the judgment wherein, it has been held that Appellate Court if it thinks fit, can take additional evidence wherever, it is necessary and shall record reasons himself or by directing it to the Magistrate concerned to do so. The relevant paragraph of the aforesaid judgment reads as under:-

"Section 399 of Cr.P.C. deals with Sessions Judge's powers of revision. As per sub-section (1) of Section 399 Cr.P.C. the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401 Cr.P.C. Sub-section (1) of Section 401 Cr.P.C. confers power upon the High Court, while acting in revisional jurisdiction to exercise any of the powers conferred on a Court of Appeal by Section 391 Cr.P.C. As quoted above in sub-section (1) of Section 391 Cr.P.C., the Appellate Court, if it thinks additional evidence to be necessary, shall record its reason and may either take such evidence itself, or direct it to be taken by a Magistrate. A combined reading of above mentioned provisions of Code of Criminal Procedure clearly shows that the power of Sessions Court while acting in revisional jurisdiction is the same as that of High Court with regard to taking additional evidence in revisional jurisdiction. It also becomes so clear that the High Court's powers of revision includes the powers conferred on a Court of Appeal by Section 391 of Code of Criminal Procedure which provides to take

additional evidence while hearing the appeal. That brings the Court of Session and the High Court on the same footing so far as it relates to the power of taking additional evidence during the course of its hearing in revision."

9. Referring the aforesaid judgment, he submits that it has been settled that learned Sessions Judge under Section 399 of Cr.P.C. is having an analogous powers as has envisaged under Section 401 of Cr.P.C. He next submits that in Section 400 of Cr.P.C. the Additional Sessions Judge has empowered to exercise all the powers of Sessions Judge under Chapter XXX thus, the Additional Sessions Judge can call additional evidence. Thus, submission is that the finding recorded by the learned Additional Sessions Judge, under challenge in this application, is perverse and erroneous and is liable to be set aside.

10. On the other hand, learned counsel appearing for the State submitted that the order passed by the learned Additional Sessions Judge is not assailing any illegality or infirmity and, as such, the same he is not liable to be interfered.

11. He added that Section 399 (1) of Cr.P.C. is very clear on this point that Sessions Judge in the case of any proceeding where the record of which has been called by himself can exercise all the powers as the High Court exercise its power under Section 401 of Cr.P.C. He submits that this is not open to the Additional Sessions Judge for calling additional evidence as is evident from the bare perusal of the Section 400 of Cr.P.C.

12. Having heard learned counsel for the parties and after perusal of records, it reveals that Additional Sessions Judge while passing the order dated 18.06.2022 has recorded the finding that Sessions Judge can exercise the powers under Section 399 of Cr.P.C. which is analogous to Section 401 of Cr.P.C., in an event where the Sessions Judge himself has called for the record.

13. Before entering into the question that whether criminal revisional court is empowered to take additional evidence in the revisional proceedings or not, the provisions which attracts i.e., Section 399, 401, 391 of Cr.P.C. are liable to be quoted

"399. Sessions Judge's powers of revision.

(1) In the case of any proceeding the record of which has been called for by himself the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under Sub-Section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under Sub-Section (1), the provisions of Sub-Sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said subsections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

14. Above said section deals with the provisions of regarding power of Sessions

Judge in revision and the analogous power as envisaged under Section 401 of Cr.P.C. in respect with power of revision to the High Court.

15. The revisional power of High Court has been envisaged under Section 401 (1) of Cr.P.C.

(1) In the case of any proceeding the record of which has been called for by it self or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way if revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

16. From bare reading of Section 401 of Cr.P.C. it is evident that High Court may in its discretion exercise any of the power conferred on a court of appeal of Section 386, 389, 390, 391 meaning thereby the High Court while exercising the power under the aforesaid provision, can call for additional evidence, if necessary.

Section 391 of Cr.P.C:-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) to (4) .....

17. When this Court examine the order dated 18.06.2022 passed by the Additional District and Sessions Judge, it reveals that court below is conclusive that the Sessions Judge can exercise the power under Section 399 (1) which is the analogous provision to Section 401 (1) of Cr.P.C. The court below, though is of the aforesaid view but has erred to consider that in Section 401 (1) of Cr.P.C., the High Court is empowered to exercise its discretion which is conferred upon a court of appeal, by virtue of Section 386, 389, 390, and 391 of Cr.P.C.

18. This Court is of considered opinion that as per the provision of Section 391 of Cr.P.C., the appellate court is empowered and can call additional evidence. Further as per the provisions of Section 401, the High Court, in its discretion, exercise any of the powers conferred on a court of appeal by Section 386, 389, 390 and 391. Thus, once the High Court is empowered to call the additional evidence, while exercising its revisional power, then Sessions Judge under Section 399(1) of Cr.P.C. by operation of law, is also empowered to call an additional evidence.

19. So far as the power of Additional Sessions Judge under Section 400 of Cr.P.C. is concerned, bare reading reveals that 'Additional Sessions Judge shall have exercised all the powers of Sessions Judge' under chapter XXX of Cr.P.C. Had their been any intent of the legislature, not to give the power to Additional Sessions Judge equivalent to the Sessions Judge, certainly there would have been overt provisions, in this section. This Court is of considered opinion that the power of Sessions Judge under Section 399 of Cr.P.C., vest in toto, in an Additional Sessions Judge, when he exercises the powers under Section 400 of Cr.P.C.

20. In view of the submissions and discussions aforesaid, the order dated 18.06.2022 passed by the learned Additional Sessions Judge, Court No. 12 Moradabad in Criminal Revision No. 94 of is erroneous and hence is not sustainable.

21. Consequently, the order dated 18.06.2022 in Criminal Revision No. 94 of 2022 is hereby set aside.

22. The matter is remitted back to the court below to proceed in accordance with observations made above.

22. The instant application is **allowed** accordingly.

(2022) 10 ILRA 545
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 22841 of 2022

Rajesh Dayal ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Radhey Shyam Yadav

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power – The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 - Section 14 - Special Court and Exclusive Special Court - proviso clause of Section 14(1) - Special Judge so established under the Act is having jurisdiction to directly take the cognizance - The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1995 - Rule 5 - Criminal Law Amendment Act, 1952 - Section 6, 7 and 8 - provisions of Section 8 (1) of the 1952 Act is akin to the proviso clause of Section 14(1) of the Act - special judge so established under the Act can take cognizance even on private complaint as there is no specific denial to that effect under the Act. (Para - 11,12,32,33)

Application under Section 156(3) Cr.P.C. moved before Special Judge SC/ST Act - direct police station concerned to register case and investigate the matter - court below treated application as complaint - Special Judge SC/ST Act not empowered to take cognizance on private complaint - order illegal - question - whether Special Judge SC/ST Act so established under the Act is having the same power as enjoyed by the Magistrate under the provisions of Section 156(3) Cr.P.C. **(Para - 3,14)**

(B) Criminal Law - The Code of criminal procedure, 1973 - application under Section 156(3) Cr.P.C. - Magistrate having two option - (a) either give a direction to register the case and investigate the matter or (b) to treat the application under Section 156(3) Cr.P.C. as complaint. (Para -13)

HELD:-Special Judge so established under the Act can treat the application moved under Section 156(3) Cr.P.C. as a complaint. No illegality in impugned order passed by Special Judge SC/ST (P.A.) Act**.** Bench taken a different view so matter be placed before Hon'ble The Chief Justice for nomination of appropriate Bench to decide the question. Issue already referred to larger bench.**(Para -36,38,40)**

Connect along with application under section 482 Cr.P.C. No. 14443of 2022. (E-7)

List of Cases cited:-

1. Soni Devi Vs St. of U.P. & ors., 2022 (5) ADJ 64

2. Lalita Kumari Vs Govt. of U.P. & ors., (2014) 2 SCC 1

3. A.R. Antulay Vs Ramdas Sriniwas Nayak & anr., (1984) 2 SCC 500

4. Anand Swaroop Tiwari Vs Ram Ratan Jatav & ors., MANU/MP/0285/1995

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Radhey Shyam Yadav, learned counsel for the applicant and Dr. S.B. Maurya, learned AGA-I for the State.

2. The instant application has been moved on behalf of the applicant with following prayers:-

"It is, therefore, most respectfully prayed the this Hon'ble Court may kindly be pleased to allow this application and quash the order dated 24.06.2022 passed by Special Judge, SC/ST (P.A.) Act, Etah in Criminal Misc. Case No. 239 of 2022, Rajesh Dayal versus Rajpal and others, Police station-Marhara, District-Etah, pending in the court of Special Judge, SC/ST (P.A) Act, Etah.

It is further prayed that this Hon'ble Court may kindly be pleased to direct to court below to pass a fresh, reason and speaking order in accordance with law in Criminal Misc. Case No. 239 of 2022, Rajesh Dayal versus Rajpal and others, Police station-Marhara, District-Etah under Section 156(3) of Cr.P.C. and/or pass such other and further order which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case, otherwise the applicant shall suffer irreparable loss and injury."

3. Learned counsel for the applicant submitted that applicant moved an application under Section 156(3) Cr.P.C. with a prayer to direct the police station concerned to register the case and investigate the matter but instead of doing so, the court below treated the said application as complaint. He next submitted that as Special Judge SC/ST Act is not empowered to take cognizance on private complaint, therefore, order dated 24.06.2022 is illegal. He further submitted that if an application under Section 156(3) Cr.P.C. is moved before Special Judge SC/ST Act then he is having no authority to treat the said application as criminal

complaint and only option before the Special Judge is that either he dismiss the application moved under Section 156(3) Cr.P.C. or direct the local police to register the case and investigate the matter. Learned counsel for the applicant confined his argument only to the extent that the court below is not having any authority to treat the application under Section 156(3) Cr.P.C. as a criminal complaint.

4. Learned counsel for the applicant placed reliance in the case of **Soni Devi Vs. State of U.P. and others 2022 (5) ADJ 64** and submitted that the issue as to whether an application under Section 156(3) Cr.P.C can be treated as complaint or not by Special Judge SC/ST Act is no more res-integra but it has been authoritatively decided by the co-ordinate Bench of this Court in above noted case of Soni Devi (supra) and according to the law laid down in Soni Devi case (supra) an application under Section 156(3) Cr.P.C. cannot be treated as criminal complaint by Special Judge SC/ST Act and only option before the court is to direct for registration of the case and to investigate the matter. Learned counsel for the applicant next submitted that as the impugned order dated 24.06.2022 is contrary to the law laid down by this Court in case of Soni Devi (supra), therefore, it is liable to be quashed as Special Judge SC/ST Act was not having any authority to treat the application moved by applicant under Section 156(3) Cr.P.C. as complaint and he had to pass a direction to register the FIR and to investigate the matter as application moved by the applicant under Section 156(3) Cr.P.C. prima facie disclosed cognizable offences against opposite party nos. 2 to 6.

5. Per contra, learned AGA submitted that there is no illegality in the impugned order dated 24.06.2022 as Special Judge SC/ST Act is having jurisdiction either to direct for investigation under Section 156(3) Cr.P.C. or to treat the application moved under Section 156(3) Cr.P.C. as a criminal complaint. Learned AGA next submitted that by virtue of amendment of 2016 as per Section 14 of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Act' in short), Special Judge SC/ST Act is having power to directly take cognizance of the offence under the provisions of the Act, therefore, Special Judge, SC/ST Act being court of original jurisdiction is having all the powers and law is settled that if any application under Section 156(3) Cr.P.C. is moved then court is not bound to pass a direction to register the FIR and investigate the matter. Learned AGA next submitted that if the court is of the view that there is no necessity to pass such direction under Section 156(3) Cr.P.C. then it can treat the application moved under Section 156(3) as a criminal complaint, therefore, by treating the application moved by applicant under Section 156(3) Cr.P.C. as a complaint, court below did not commit any illegality.

6. I have heard both the parties and perused the record of the case.

7. I have gone through the judgment passed by the co-ordinate Bench of this Court in case of Soni Devi (supra).

8. In the case of Soni Devi (supra) two questions were framed. The first question is not being referred as the same does not relate to the present dispute. The second question as framed therein in paragraph no. 15 is as follows:-

"15. The second question for consideration before this Court is as to

whether Special Judge can treat the application under Section 156(3) Cr.P.C. as a complaint case or not."

9. The answer is given to the second question in paragraph no.18 in Soni Devi case (supra) as follows:-

"18. .... Therefore answer to the second question that Special Judge can treat the application under Section 156 (3)Cr.P.C. as a complaint case or not ? Answer is "No" in view of Rule 5(1) of the Amended Act."

10. As per section 14 of the Act Special court established under the Act for the purpose to provide speedy trial. Section 14 of the Act runs as follows:-

*"**14. Special Court and Exclusive Special Court**.--(1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:*

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet."

11. According to the proviso clause of Section 14(1) of the Act, the special court so established shall have power to directly take cognizance of the offences under the Act.

12. Therefore, from the perusal of the proviso clause of Section 14(1) of the Act, it appears that Special Judge so established under the Act is having jurisdiction to directly take the cognizance.

13. The law is settled that if an application under Section 156(3) Cr.P.C. is moved then the Magistrate is having two option;

(a) either give a direction to register the case and investigate the matter; or

(b) to treat the application under Section 156(3) Cr.P.C. as complaint

(See Mona Panwar Vs. High Court of Judicature at Allahabad (2011) 3 SCC 496).

14. Therefore, the question arises whether Special Judge SC/ST Act so established under the Act is having the same power as enjoyed by the Magistrate under the provisions of Section 156(3) Cr.P.C.

15. In view of the Soni Devi case (supra) the Special Judge so established under the Act is not having any authority to treat the application under Section 156(3) Cr.P.C. as criminal complaint. From the perusal of the judgment of Soni Devi (supra) it reflect that the co-ordinate Bench of this Court in view of the Rule 5(1) of the amended Act held that Special Judge cannot treat the application under Section 156(3) Cr.P.C. as complaint.

16. Rule 5 of The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1995 reads as under:-

"5. (1) Every information relating to the commission of an offence under the Act, if given orally to an officer in-charge of a police station shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the persons giving it, and the substance thereof shall be entered in a book to be maintained by that police station.

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in-charge of a police station to record the information referred to in sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by the police station."

17. Therefore, from the perusal of Rule 5(1) of the amended Act it reflects that it is duty of an officer incharge of police station that he shall lodge the FIR on the basis of every information relating to the commission of offene under the Act even if it given orally.

18. Therefore, the Rule 5(1) of the amended Act is almost similar to Section 154 Cr.P.C., which runs as follows:-

"154. (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 326A, section 326 B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that -

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

19. It is settled law that if any information given to police officer discloses cognizable offences then it is the duty of the police officer to register the case and investigate the matter. The Constitution Bench of the Apex Court in case of **Lalita Kumari Vs. Government of Uttar Pradesh and others (2014) 2 SCC 1** held that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation (See para 120.1).

20. Therefore, in my considered view, the Rule 5(1) of the amended Act does not ousted the jurisdiction of Special Judge to treat the application under Section 156(3) Cr.P.C. as complaint.

21. The issue with regard to the power of Special Judge has come before Constitution Bench of the Apex Court in case of **A.R. Antulay Vs. Ramdas Sriniwas Nayak and another (1984) 2 SCC 500** in respect of Criminal Law Amendment Act, 1952.

22. Section 6, 7 and 8 of Criminal Law Amendment Act, 1952 runs as follows:-

*"**6. Power to appoint special judges**. (1) The State Government may, by notification in the Official Gazette, appoint as many special judges as may be necessary for such area or areas as may be specified in the notification to try the following offences, namely:-*

(a) an offence punishable under section 161, section 165 or section 165A of the Indian Penal Code (Act XLV of 1860) or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (11 of 1947);

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be for qualified for appointment as a special judge under this Act unless he is, or has been, a sessions judge or an additional sessions judge or an assistant sessions judge under the Code of Criminal Procedure 1898 (Act V of 1898).

***7. Cases triable by special judges.-** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) or in, any other law the offences specified in sub-section (1) of section 6 shall be triable by special judges only*

(2) Every offence specified in sub-section (1) of section 6 shall be tried by the special judge or the area within which it was committed, or where there are more special judges than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a special judge may also try any offence other than an offence specified in section 6 with which the accused may, under the Code of Criminal Procedure. 1898, be charged at the same trial.

***8. Procedure and powers of special judges**-(1) A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 18981), for the trial of warrant cases by Magistrates.*

(2) A special judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of sections 339 and 339A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under Sections 338 of that Code.

3. Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898 shall, so far as they are not in consistent with this Act, apply to the proceedings before a special judge; and for the purposes of the said provisions, the court of the special judge shall be deemed to be a court of session trial cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge shall be deemed to be a public prosecutor.

(4) A special judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted."

23. Section 6 of the Criminal Law Amendment Act, 1952 empowers the State Government to appoint as many Special Judges as are necessary to try the specified categories of offences. Section 7 makes it clear that such offences should be tried only by the Special Judges. Section 8 expressly empowers the Special Judge to take cognizance of offences without the accused being committed or tried and that in trying the accused shall follow the procedure prescribed by the Old Code for trial of warrant cases by the Magistrates.

24. From the perusal of A.R. Antulay case (supra) it appears that a private complaint was filed against A.R. Antulay alleging commission of offence triable by Special Judge under the Act of 1952. The Special Judge took cognizance of the offences upon the complaint and adjourned the case for recording evidence of the complainant and on the adjourned day, A.R. Antulay appeared and contended, inter alia, that Special Judge cannot take cognizance upon a private complaint. Section 5-A of the Prevention of Corruption Act, 1947 requires a prior investigation by Police Officer of the designated rank.

25. The Constitution Bench of the Apex Court while discussing the matter observed in para 18 as:-

"It is a well-established canon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience; nor does any canon of construction permit the court to read the section in such manner as to render it to some extent otiose. Sec. 8 (1) says that the special Judge shall take cognizance of an offence and shall not take it on commitment of the accused. The Legislature provided for both the positive and the negative. It positively conferred power on special Judge to take cognizance of offences and it negatively removed any concept of commitment. It is not possible therefore, to read Sec. 8 (1) as eanvassed on behalf of the appellant that cognizance can only be taken upon a police report and any other view will render the safeguard under Section 5A illusory."*

*(*Section 5A Prevention of Corruption Act, 1947)*

26. The Apex Court in case of A.R. Antulay (supra) disapproved the contention that a private complaint is not maintainable in absence of unambiguous provision in Criminal Law Amendment Act, 1952 to that effect. The Apex Court referred the express provision of Section 8 of the Act, 1952 and noticed that these express provisions did not bar initiation of proceedings of a private complaint.

27. The Apex Court at the beginning of paragraph no. 27 stated as:-

"It is, however, necessary to decide with precision and accuracy the position of a Special Judge and the Court over which he presides styled as the Court of a Special Judge because unending confusions have arisen by either assimilating him with a Magistrate or with a Sessions Court."

28. The Apex Court after referring to Section of the old Code according to which, there are four types of criminal

Courts functioning under the High Court, namely, Court of Session, Judicial Magistrate of the First Class, Judicial Magistrate of the Second Class and Executive Magistrate observed as:-

"As already pointed out, there were four types of criminal Courts functioning under the High Court. To this list was added the court of a Special Judge."

29. The Apex Court further observed:-

"Now that a new Criminal Court was being set up, the Legislature took the first step of providing its comparative position in hierarchy of Courts under Section 6, Criminal Procedure Code by bringing it to level more or less comparable to the Court of Session, but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8(1) itself that it is not a Court of Session because it can take cognizance of offences without commitment as contemplated by Section 193, Criminal Procedure Code. Undoubtedly, in Section 8(3), it was clearly laid down that subject to the provisions of sub-sections (1) and (2) of Section 8, the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. In contradistinction to the Sessions Court this new Court was to be a Court of original jurisdiction. The legislature then proceeded to specify which out of the various procedures set out in the Code, this new Court, shall follow for trial of offences before it."

30. Dealing with the question whether Special Judge is a Magistrate or the Court of Session, the Apex Court further observed:-

"This is the fallacy of the whole approach. In fact, in order to give full effect to Section 8(1), the only thing to do is to read Special Judge in Sections 238 to 250 wherever the expression 'Magistrate' occurs. This is what is called legislation by incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate to take cognizance of the offence. Special Judge is Magistrate? What is to be done is that one has to read the expression 'Special Judge' in place of Magistrate, and the whole thing becomes crystal clear. The Legislature wherever it found the gray area clarified it by making specific provision such as the one in sub-section (2) of Section 8 and to leave no one in doubt further provided in sub-section (3) that all provisions of the Criminal Procedure Code so far as they are not inconsistent with the Act apply to the proceedings before a Special Judge. At the time when the 1952 Act was enacted, what was in operation was the Criminal Procedure Code, 1898. It did not envisage any Court of a Special Judge and the Legislature never wanted to draw up an exhaustive Code of Procedure for this new Criminal Court which was being set up. The net outcome is that a new Court of original jurisdiction was set up and wherever a question arose as to what are its powers in respect of specific question brought before it as Court of original criminal jurisdiction, it had to refer to the Criminal Procedure Code undaunted by any designation clantrap. When taking cognizance a Court of Special Judge enjoyed powers under Section 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Session. The

entire argument inviting us to specifically decide whether a Court of a Special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a Special Judge has to be one or the other and must fit in the shot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the Court and must be eschewed. Shorn of all embellishment, the Court of a Special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented, some powers were conferred by the statute setting up the Court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. Under the Code, it will enjoy all powers which a Court of original criminal jurisdiction enjoys, save and except the ones specifically denied."

(Emphasis supplied)

31. Further, the Apex Court in para 28 observed as:-

"Therefore, there is no gainsaying the fact that a new criminal court with a name, designation and qualification of the officer eligible to preside over it with powers specified and the particular procedure which it must follow has been set up under the 1952 Act. The court has to be treated as a court of original criminal jurisdiction and shall have all the powers as any court of original criminal jurisdiction has under the Code of Criminal Procedure, except those specifically excluded."

32. Therefore, from the perusal of the above observation and the law laid down by the Apex Court in the case of A.R. Antulay (supra) it is abundantly clear that Special Judge under the 1952 Act is a Court of original jurisdiction enjoys all the powers except the one specifically denied.

33. The provisions of Section 8 (1) of the 1952 Act is akin to the proviso clause of Section 14(1) of the Act, which clearly states that Special Judge so established under the Act can directly take the cognizance of the offences under the Act and in view of Constitution Bench of the Apex Court special judge so established under the Act can take cognizance even on private complaint as there is no specific denial to that effect under the Act.

34. Therefore, in view of the law laid down by the Constitution Bench of the Apex Curt in case of A.R. Antulay (supra) a Special Judge so established under the Act being the court of original jurisdiction is having all the powers which a court of original jurisdiction enjoys including the power either to direct for registration of the case under Section 156(3) Cr.P.C. or take cognizance on private complaint.

35. It is pertinent to mention here that the Full Bench of Madhya Pradesh High Court (Gwalior Bench) in the case of A**nand Swaroop Tiwari Vs. Ram Ratan Jatav and others MANU/MP/0285/1995** after discussing the Constitution Bench case of A.R. Antulay (supra) concluded as:-

"In the result, we hold as follows :

(a) Special Courts under the Act are not to function as Sessions Court, but as Courts 'of original jurisdiction'.

(b) Proceedings of Special Court are governed by Section 190, Chapters XV, XVI (other than Section 209) as also

Chapters XIX and XX as the case may be and such other provisions of the Code as are not inconsistent with the scheme and provisions of the Act, reading "Special Courts" wherever the expression "Magistrate" occurs.

(c) Section 193 of the Code of Criminal Procedure does not apply to proceedings under the Act and committal orders are not required.

(d) Special Court can take cognizance on private complaints after following the procedure provided in the Code in relation to private complaints.

(e) Where cognizance has already been taken on the basis of committal orders in Police challan cases, it is not necessary for the Courts to retrace their steps or to take cognizance afresh.

(f) Where cognizance has already been taken on the basis of committal orders in private complaint cases, the Special Courts may deal with the cases as if they are dealing with private complaints under Section 200 of the Code."

36. Therefore, from the above discussion, I am of the view that Special Judge so established under the Act can treat the application moved under Section 156(3) Cr.P.C. as a complaint and thus there is no illegality in impugned order dated 24.06.2022 passed by Special Judge SC/ST (P.A.) Act, Etah.

37. Therefore, I am in respectful disagreement with the view taken by co-ordinate Bench of this Court in case of Soni Devi (supra) that Special Judge so established under the Act is having no power or authority to treat the application moved under Section 156(3) Cr.P.C. as complaint.

38. As this Bench has taken a different view from the view taken in the case of Soni Devi (supra) with regard to the second question, therefore, let the matter be placed before Hon'ble The Chief Justice for nomination of appropriate Bench to decide following question:-

"Whether Special Judge so established under the Act is empowered to treat application moved under Section 156(3) Cr.P.C. as criminal complaint or not."

39. Recently, another co-ordinate Bench of this Court in Application under Section 482 Cr.P.C. No. 14443 of 2022 Naresh Kumar Valmiki Vs. State of U.P. and others took a different view from the view taken in the case of Soni Devi (supra) in respect of second question and referred the matter to larger Bench for appropriate decision.

40. As the instant issue has already referred to larger Bench in Application under Section 482 Cr.P.C. No. 14443 of 2022, therefore, in view of the matter connect the instant application along with Application under Section 482 Cr.P.C. No. 14443 of 2022.

41. Since, there is difference of opinion in respect of the view taken in the case of Soni Devi (supra) by co-ordinate Bench of this Court, therefore, prayer for staying the effect and operation of the impugned order is refused.

(2022) 10 ILRA 556
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.08.2022 & 07.09.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Application U/S 482 No. 23143 of 2021

Mohd. Shakib ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mani Shanker Tripathi

Counsel for the Opposite Party:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 451,457 & 482 - Inherent power - - U.P. Cow Slaughter Act, 1955 - Sections 3/5A/8, 5B - provides for confiscation and release of vehicle by which beef or cow and its progeny is transported in violation of the provision of this Act and the relevant rules - The Prevention of Cruelty to Animals Act, 1960 - Section 11 - Treating animals cruelly - no permit is required for transportation of cow or its progeny within the State of Uttar Pradesh.(Para - 12,13)

Applicant transporting cow and its progeny by the vehicle in question - impugned orders passed District Magistrate - confiscating the said vehicle - revision filed before Special Judge (SC/ST Act) - dismissed revision of applicant - are according to law or not – question – whether applicant violated any provision of law or not. **(Para -10)**

HELD:-Transportation of a cow and its progeny within the state of Uttar Pradesh is not a violation of any of the provisions of the Cow Slaughter Act. Seized vehicle in question was not used in violation of Section 5A (1) to (11) or any provisions of the Cow Slaughter Act. Police has no power or jurisdiction to seize or confiscate the vehicle in question. District Magistrate passed confiscation order in contravention of the law & is without jurisdiction. Revisional court not considered relevant provisions of Section 5A of Cow Slaughter Act while dismissing criminal revision of the applicant.**(Para -13)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Sunderbhai Ambalal Desai & C.M. Mudaliar Vs St. of Guj. ,AIR 2003 SC 638 Criminal Revision No. 131 of 2005

2. Kailash Yadav & ors. Vs St. of U.P. & ors., 2008(10) ADJ 623

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Shri Mani Shanker Pandey, learned counsel for the applicant, Shri L.D. Rajbhar, learned A.G.A. for the State-opposite party no.1 and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the impugned order dated 18.08.2021 passed by District Magistrate, Varanasi in Case No. 00054 of 2021 (State vs. Mohammad Shakib), under Section 5A U.P. Cow Slaughter Act, 1955, as well as order dated 13.10.2021 passed by Special Judge (SC/ST Act), Chandauli in Criminal Revision No. 54 of 2021 (Shakib vs. State of U.P.).

3. Brief facts of the case are that applicant is registered owner of vehicle no. UP-70ET/2667 which is duly registered in the Transport Department, U.P, the photostat copy of registration certificate has been annexed as Annexure No.2 to the affidavit. The aforesaid vehicle was insured with Oriental Insurance Company Ltd. for

the period of 15.07.2020 to midnight 14.07.2021, photostat copy whereof has been annexed as Annexure No.3 to the affidavit. The aforesaid vehicle was purchased by the applicant with the financial assistance of MAGMA Fincrop Ltd., 11 MG Habibullah Estate, Hazratganj, Lucknow w.e.f. 21.10.2019 which is endorsed in the registration paper of aforesaid vehicle itself. The vehicle is used to run on the road in transport business by the applicant and monthly installment of the financer of Rs.35,000/- is being paid by the applicant. During the course of business on 12.12.2020 the vehicle was caught by the police of police station Sayaidaraja, District Chandauli at about 20:50 P.M. and was seized in favour of government for illegally carrying the transport business of cow without any legal authority and first information report was lodged under Sections 3/5A/8, 5B of Cow Slaughter Act and Section 11 Prevention of Animal Cruelty Act.

4. As per the first information report, it was informed by the informer that the alleged Truck bearing registration No. UP-70ET/2667 is carrying animals for the purpose of cow slaughtering without valid permission and on that information the concerned police caught the aforesaid vehicle and recovered 16 bullocks, whereas, the driver of the vehicle had ran away. Thereafter, the aforesaid vehicle was taken to police station and first information report was lodged on 12.12.2020 at 22:48 hrs. as Case Crime No. 235 of 2020, under Sections 3/5A/8, 5B Cow Slaughter Act and Section 11 Prevention of Cruelty to Animals Act and seized the aforesaid vehicle in favour of government. The aforesaid vehicle is a heavy vehicle and national permit has also been issued by Transport Department, UP, Allahabad and authorized certificate to national permit is also issued, copies whereof have been annexed as Annexure No.4 to the affidavit. The Pollution Under Control Certificate is also issued by Transport Department, UP, Allahabad till 05.01.2021, copy of the same has been annexed as Annexure No.5 to the affidavit. The aforesaid vehicle is in custody of police authority of Police Station Saiyadraja since 12.12.2020. The concerned police informed the applicant at the time of seizing of the Truck that driver of the Truck had ran away from the spot. Thereafter, applicant produced the driver before the court below who was released on bail by the court below. The applicant was granted anticipatory bail by this Court vide order dated 18.03.2021 passed in Criminal Misc. Anticipatory Bail Application No. 1854 of 2021, the copy of the order has been annexed as Annexure No.6 to the affidavit. The applicant had purchased the aforesaid Truck in the year, 2015 and since then there was no complaint regarding carrying of cow or its progeny. Prior two days of the incident, the driver of the aforesaid Truck had gone to carry paddy in district Chandauli without giving information to the applicant, and thereupon, the aforesaid Truck was caught by the police of police station Saiyadraja who informed the applicant about the seizure of Truck. The aforesaid offence was committed by the driver of Truck without knowledge of the applicant and applicant has no role in this regard. The applicant was unaware about committing of offence by the driver of the Truck. Due to seizure of Truck, the parts and tools of it are damaging and the aforesaid Truck is standing in the open place at concerned police station. In case, the aforesaid Truck is released by this Court, the applicant undertakes not to transfer the Truck to third-party. The applicant had also moved

an application for release of the Truck in question before District Magistrate, Varanasi which was rejected vide impugned order dated 18.08.2021 without considering the release application of the applicant, copy of the impugned order has been annexed as Annexure No.7 to the affidavit. Thereafter, the applicant filed a criminal revision against the impugned order dated 18.08.2021 before District and Sessions Judge, Chandauli on the aforesaid ground which was registered as Criminal Revision No. 54 of 2021, copy of the memo of revision has been annexed as Annexure No.8 to the affidavit. The aforesaid revision was transferred to the court of Special Judge (SC/ST Act), Chandauli and the revisional court also without considering the record of the case in a routine manner rejected the revision vide order dated 13.10.2021, copy whereof has been annexed as Annexure No.9 to the affidavit.

5. In this case no counter affidavit has been filed on behalf of the State-opposite party no.1.

6. Learned counsel for the applicant submits that the applicant has moved release application before the District Magistrate, Varanasi stating therein that applicant is a registered owner of the vehicle in question which is duly registered at Transport Department, UP and is involved in transport business. When the alleged incident took place, the said vehicle was being driven by the driver who was carrying cow and its progeny without the knowledge of applicant. It is further submitted that applicant has no concern with the recovered cow progeny. The release application of the applicant has been rejected by District Magistrate vide order dated 18.08.2021 only on the ground that applicant has not taken reasonable care for the use of vehicle by which cow progeny were being illegally transported and has illegally confiscated the Truck under the proceeding of Section 5A UP Prevention of Cow Slaughter Act, 1955. The revision of the applicant has illegally been rejected vide order dated 13.10.2021. It is further submitted that the impugned orders of District Magistrate as well as of revisional court are illegal and liable to be set-aside and he has placed reliance on the law laid down by the Hon'ble Apex Court in ***Sunderbhai Ambalal Desai and C.M. Mudaliar vs. State of Gujarat [AIR 2003 SC 638]***. Learned counsel of the applicant has also drawn the attention of the Court regarding the provisions of Sections 451 and 457 of Cr.P.C. He has also submitted that the applicant is ready to comply with all the conditions imposed upon him while releasing the vehicle.

7. Learned A.G.A. has vehemently opposed the prayer for release of the vehicle and submitted that before confiscation proceedings applicant has not taken plea that the transport medium (the Truck in question) was used in the commission of crime despite all its precaution and without its knowledge by the driver of the Truck. For the first time, in the present application it has been stated that the Truck was used for transportation of cow and its progeny without his knowledge. It is further submitted by learned A.G.A. that in objection before District Magistrate applicant had denied involvement of his vehicle in transporting of cow and its progeny and had taken the stand that his vehicle was 8falsely implicated in transportation of cow and its progeny. He had pleaded before District Magistrate that transportation of cow and its progeny within the State of UP requires no permit and it does not amount to an

offence. He had further pleaded that he is a registered owner of the vehicle and all papers relating to vehicle are valid and he has no concern with the recovered cow and its progeny from his vehicle, thus, if the vehicle is not released it will get damaged as it is kept in the open space at the concerned police station. Learned A.G.A. has further submitted that cow and its progeny cannot be transported within the State of UP without permit as per Section 5A of Cow Slaughter Act which regulates transport of the cow etc. It is further submitted that by UP Act the sub-clauses (6), (7), (8), (9), (10) and (11) were inserted after sub-clause 5 to Section 5A which deal with the seizure of the cow and transport medium by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by law enforcement officers. The District Magistrate/or Commissioner of the police will do all proceedings of confiscation and release, as the case may be, unless it is not proved that the transport medium used in crime, despite all its precaution and without its knowledge, has been used by some other person for causing the offence.

8. Learned A.G.A. has further submitted that it cannot be alleged by the applicant under the confiscation proceedings before the District Magistrate that despite of all his precaution and without his knowledge, the said vehicle was used by some other person for causing the offence. In above circumstances, the impugned orders passed by the District Magistrate, Varanasi as well as revisional court are according to law, which warrant no interference by this Court.

9. I have given thoughtful consideration to the contentions raised by the counsel of the applicant as well as learned A.G.A. and gone through the file, relevant provisions of Cow Slaughter Act and the provisions of Code of Criminal Procedure.

10. Here the question involved in this case is that whether the applicant has violated any provisions of law in transporting cow and its progeny by the vehicle in question and the impugned orders of the District Magistrate, Varanasi dated 18.08.2021, confiscating the said vehicle and the impugned order passed by Special Judge (SC/ST Act), Chandauli dated 13.10.2021, dismissing the revision of the applicant, are according to law or not.

11. For deciding the instant application under Section 482 Cr.P.C., it is necessary to go through the relevant provisions of UP Cow Slaughter Act. Section 5-A of the Act provides for regulation on transport of cow, etc., which reads as under:-

*"**5-A. Regulation on transport of cow, etc.**- (1) No person shall transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit.*

(2) Such officer shall issue the permit on payment of such fee not exceeding [five hundred rupees] for every cow, bull or bullock as may be prescribed:

Provided that no fee shall be chargeable where the permit is for transport of the cow, bull or bullock for a limited period not exceeding six months as may be specified in the permit.

(3) Where the person transporting a cow, bull or bullock on a permit for a limited period does not bring back such cow, bull or bullock into the State within the period specified in the permit, he shall be deemed to have contravened the provision of sub-section (1).

(4) The form of permit, the form of application therefore and the procedure for disposal of such application shall be such as may be prescribed.

(5) The State Government or any officer authorised by it in this behalf by general or special notified order, may, at any time, for the purpose of satisfying itself, or himself, as to the legality or propriety of the action taken under this section, called for and examine the record of any case and pass such orders thereon as it or he may deemed fit.

[(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.

(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner of Police will do all proceedings of confiscation and release, as the case may be.

(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner will do all proceedings of the confiscation and release, as the case may be.

(9) The expenditure on the maintenance of the seized cows and its progeny shall be recovered from the accused for a period of one year or till the release of the cow and its progeny in favour of the owner thereof whichever is earlier.

(10) Where a person is prosecuted for committing, abetting, or attempting to an offence under Sections 3, 5 and 8 of this Act and the beef or cow-remains in the possession of accused has been proved by the prosecution and transported things are confirmed to be beef by the competent authority or authorised laboratory, then the court shall presume that such person has committed such offence or attempt or abetment of such offence, as the case may be, unless the contrary is proved.

(11) Where the provisions of this Act or the related rules in context of search, acquisition, disposal and seizure are silent, the relevant provisions of the Code of Criminal Procedure, 1973 shall be effective thereto.]"

12. Now, it is to be considered whether permit is required for

transportation of the cow or its progeny within the State of Uttar Pradesh. This question came up for consideration before this Court in ***Criminal Revision No. 131 of 2005 (Kailash Yadav and Others vs. State of U.P. & others, 2008(10) ADJ 623)***, wherein it is held that no permit is required for transportation of cow or its progeny within the State of Uttar Pradesh. Sub-section 5A (6 to 8) provides for confiscation and release of vehicle by which beef or cow and its progeny is transported in violation of the provision of this Act and the relevant rules. Sub-section 5A (6 to 8) reads as follows:-

(6) Where the said conveyance has been confirmed to be related to beef by the competent authority or authorised laboratory under this Act, the driver, operator and owner related to transport, shall be charged with the offence under this Act, unless it is not proved that the transport medium used in crime, despite all its precautions and without its knowledge, has been used by some other person for causing the offence.

(7) The vehicle by which the beef or cow and its progeny is transported in violation of the provisions of this Act and the relevant rules, shall be confiscated and seized by the law enforcement officers. The concerned District Magistrate/ Commissioner of Police will do all proceedings of confiscation and release, as the case may be.

(8) The cow and its progeny or the beef transported by the seized vehicle shall also be confiscated and seized by the law enforcement officers. The concerned District Magistrate/Commissioner will do all proceedings of the confiscation and release, as the case may be.

13. From the perusal of sub-section (1 to 5) of Section 5A of this Act and the law laid down by this Court in ***Kailash Yadav and Others vs. State of U.P. & Others (supra),*** it is abundantly clear that there is no need of permit to transport cow and its progeny within the state of Uttar Pradesh. Therefore, transportation of a cow and its progeny within the state of Uttar Pradesh is not a violation of any of the provisions of the Cow Slaughter Act. Therefore, it cannot be said that the seized vehicle in question was used in violation of Section 5A (1) to (11) or any provisions of the Cow Slaughter Act, and therefore, police has no power or jurisdiction to seize or confiscate the vehicle in question. The District Magistrate, Varanasi has passed the impugned confiscation order dated 18.08.2021 in contravention of the law, as no permit is required to transport cow and its progeny within the state of Uttar Pradesh. In above circumstances, the impugned order dated 18.08.2021 passed by District Magistrate, Varanasi is without jurisdiction and the same is liable to be set-aside. Likewise, the revisional court has not considered the relevant provisions of Section 5A of Cow Slaughter Act while dismissing the criminal revision of the applicant, therefore, the impugned order dated 13.10.2021 passed by Special Judge (SC/ST Act), Chandauli is also against the provisions of law and is liable to be set-aside.

14. Accordingly, the instant application under Section 482 Cr.P.C. is allowed. The impugned orders dated 18.08.2021 passed by District Magistrate, Varanasi and the order dated 13.10.2021 passed by Special Judge (SC/ST Act) are, hereby, set-aside, consequently, the concerned court below is directed to release

the vehicle in question forthwith, in accordance with law.

15. Let a copy of this order be transmitted to the concerned court below for necessary compliance forthwith.

Order on Criminal Misc. Correction Application dated 06.09.2022.

Learned counsel for the applicant prays for and is permitted to make correction of district in the memo as well as in the prayer clause of the Application U/S 482 during the course of the day.

Heard learned counsel for the applicant as well as learned A.G.A. for the State.

The instant correction application has been moved by the applicant with the prayer to correct the District Chandauli in place of District Varanasi in the paragraph nos.2, 10 and 14 of the judgement and order dated 25.08.2022.

In view of the above, the instant correction application is ***allowed.***

Accordingly, the words "District Varanasi" transcribed in paragraph nos.2, 10 and 14 of the judgement and order dated 25.08.2022 be corrected and read as "District Chandauli".

(2022) 10 ILRA 562
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE RAJENDRA KUMAR - IV, J.

Application U/S 482 No. 23342 of 2011

Smt. Madhu Gupta & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri A.K. Updhyaya, Sri Anil Kumar Mishra, Sri Arun Kumar Tripathi, Sri Mohammad Mustafa, Sri Vijay Prakash Chaturvedi, Sri Vinay Kumar Singh Chandel

Counsel for the Opposite Parties:
Govt. Advocate, Sri Rajesh Kumar Chitragupt, Sri Sanjai Kumar Pandey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 419, 420, 467, 468 & 471 - Will is always subject to proof - If it is not proved, it becomes of no importance - a civil dispute should not be given the colour of criminal offence - if there is no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to charge, then proceedings of such cases can be quashed while exercising the power under Section 482 Cr.P.C. - Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. (Para - 9,23,27,28)

Originally property recorded in the name of father of opposite part no. 2 - registered Will deed in favour of applicant no.- 2 and Others - mutation order in favour of applicant no.- 2 - long litigation between Informant and applicant no. 2 - mutation made by Tehsildar in favour of applicant No.3 - objection made by Informant - dispute mainly of civil nature - registered sale-deed in favour of applicant-no. -1 executed by applicant no.3 recorded tenure holder of the property - Informant moved an application, under Section 156(3) Cr.P.C. against applicants - FIR does not disclose any offence against applicants - no whisper of how and in what

manner, applicants are involved in any criminal offence.**(Para -3,31,32)**

HELD:-Opposite party no.2 gave colour of criminal offence to a purely civil dispute. No evidence that registered Will was forged one . Only competent civil court having jurisdiction over the matter could decide the issue whether the Will in dispute was forged one or not . Informant wanted to settle his dispute through criminal proceedings as criminal proceedings can be very easily initiated and can harass the applicants too . Allowing prosecution to continue against the applicants is abuse of process of law and it should be quashed.**(Para -29,32)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Inder Mohan Goswami Vs St. of Uttaranchal, (2007)12 SCC 1

2. Madhavrao Jiwajirao Scindia & Ors. Vs Sambhajirao Chadrojirao Angre & ors., (1988) 1 SCC 692

3. R.P. Kapur Vs St. of Punj., AIR 1960 SC 866

4. St. of Haryana & Ors. Vs Bhajan Lal & Ors., 1992 Supp (1) SCC 335

5. M/s. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha. & ors. , AIR 2021 Supreme Court 1918

6. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr., (2017) 9 SCC 641

7. Kapil Agarwal & ors. Vs Sanjay Sharma & ors., (2021) 5 SCC 524

8. Mohd. Ibrahim Vs St. of Bihar, (2009) 8 SCC 751

9. G. Sagar Suri & anr. Vs St. of U.P. & ors., (2000) 2 SCC 636

10. I.O.C. Vs NEPC India Ltd. & ors., (2006) 6 SCC 736

11. M. Subramaniam & anr. Vs S. Janki & anr., (2020) 16 SCC 728

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

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

2. This application under Section 482 Cr.P.C. has been filed by Smt. Madhu Gupta, Mahesh Chandra Gupta, Dwarika Prasad Jaiswal, Sanjai Singh and Rajneesh with the prayer to quash the charge sheet dated 05.04.2010 and entire criminal proceedings in Criminal Case No. 3609 of 2010, under Section 419, 420, 467, 468 and 471 IPC, Police Station Siddharth Nagar, District Siddharth Nagar with the following prayers : -

"to quash the further proceeding of criminal case no. 3609 of 2010 under section- 419, 420, 467, 468, 471 IPC, Police Station and District Siddharth Nagar pending before Chief Judicial Magistrate, Siddharth Nagar and or may pass such other and further order as this Hon'ble court may deem fit proper under the facts and circumstances of the case, otherwise the applicants shall suffer irreparable loss and injury."

3. Brief facts of the case giving rise to the present application, are as under :-

i. Informant moved an application, under Section 156(3) Cr.P.C. against the applicants herein, alleging them Informant's father Satya Narayan executed a will-deed in favour of Dwarika, Ayodhya sons of Balram, Ashish and Alok sons of Kanhiya Lal on 11.07.1996 in respect of his movable and immovable property. After the Will was made, they stopped serving and caring of Satya Narain, father of Informant, on which Informant and his wife in view of

his father's illness etc., started treating his father with care and medicine, due to which, his father Satya Narain cancelled the first Will executed in favour of Dwarika and others and executed the second Will in favour of his three sons on 25.07.1997. It is further alleged in application that Dwarika Prasad filed an application 156(3) Cr.P.C. before CJM concerned, which came to be dismissed. There against, criminal revision was also filed by him before Sessions Judge, which was also dismissed on 1.12.2005. Saying his failure Dwarika made a sale deed dated 19.5.2009 of Plot No.399 (c) in favour of Madhu Gupta on the basis of Will, to which he had no right. When Informant came to know this fact, he went Police Station to lodge the FIR but no action was taken in the matter.

ii. Upon the application 156(3) Cr.P.C. made by the Informant, an FIR was directed to be lodged, whereupon FIR in Case Crime No. 285 of 2010 was registered in Police Station concerned. Investigating Officer undertook investigation, collected the evidence and filed charge-sheet in the matter, which is under challenge in the present application.

4. Learned counsel for the applicants submits that property was recorded in the name of Satya Narain, who had three sons namely Balram, Kanhaiya and Sriram. Satya Narain, during his life time, had executed a registered will-deed in favour of Ayodhya, Dwarika, Ashish and Alok. As per allegations, Satya Narain himself, during his life time, got cancelled earlier will-deed.

5. Learned counsel next contended that after the death of Satya Narain, name of Dwarika Prasad and others, in whose favour Will was executed, was mutated by revenue authorities, even after the submission of objection of Informant. Thus, name of Dwarika Prasad and others got mutated in the revenue record and they have been recorded tenure holder of the property. Learned counsel further submits that applicant No.1 had purchased the land / plot No. 399 (c) after giving full consideration through registered sale deed and she is a bona fide purchaser. She got her house constructed over the land and she is living peacefully in that house. Matter is of civil nature, cancellation of will-deed is not pending in any court but Informant tried to settle his dispute of civil nature by roping the applicants in criminal case. Prosecution of applicants in criminal case is abuse of process of court, which should not be permitted to continue. Learned counsel further submits that it appears that Dwarika Prasad had moved an application under Section 156(3) Cr.P.C. against the Informant, prior to this application, thus, Informant in retaliation thereto filed present application against the applicants. Learned counsel for applicants referred the some judgments in favour of his contentions.

6. Learned AGA opposed the submissions made by learned counsel for the applicants but conceded the factual submissions made and admitted that it is a case of civil dispute. He could not show the manner in which offence is committed by accused-applicants except saying that applicants are named in the FIR and FIR was registered on the application of 156(3) Cr.P.C. and Investigating Officer submitted charge sheet in the matter. Learned AGA further submits that constitution of any offence may be debated at the time framing charge.

7. It has been mainly stated in the counter affidavit that Tehsildar illegally

decided the mutation in favour of applicant No.3 and other paras of counter affidavit are general in nature denying the contentions of the applicants' affidavit. In paragraph 5 of the counter affidavit, it has been stated that father of Informant Satya Narain executed another Will deed on 25.2.1997 by canceling the earlier will dated 11.07.1996 and all movable and immovable property distributed in his all three sons including the Opposite Party No.2.

8. It is also mentioned in the counter affidavit that unregistered Will deed in favour of Opposite Party No.2 has also been challenged by applicant No.3-Dwarika Prasad but the application filed by Dwarika Prasad under Section 156(3) Cr.P.C. before CJM, Siddharth Nagar has also been dismissed, not finding any offence. Copy of CJM's order dated 12.05.2005 is annexed as Annexure No.2 to the counter affidavit.

9. It is admitted fact by the parties that at the time of alleged sale deed, property was recorded in the name of Dwarika Prasad, applicant Madhu Gupta purchased the plot in question from its recorded owner through registered sale deed after paying a due consideration and from the date of sale deed, she is in possession. Execution of sale deed is neither in question nor disputed. It is also admitted fact that applicant No.2 is the husband of applicant no.1 and applicant nos. 4 and 5 are the marginal witnesses of alleged sale deed. Will deed in favour of Dwarika Prsad was not challenged nor it was cancelled. It is settled law that Will is always subject to proof. If it is not proved, it becomes of no importance.

10. In the instant case, the first information report has been registered under Sections 419, 420, 467, 468 and 471 IPC. The allegations leveled in the first information report are of (1) cheating and (2) forgery. I shall deal with the Section 420 IPC. Cheating is defined in Section 415 IPC and is punishable under Section 420 IPC. Section 415 is set out below:

"415. Cheating. 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.

Section 415 IPC thus requires

1. deception of any person.

2. (a) fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person 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.

On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning.

11. I shall now deal with the ingredients of Section 467 IPC. Section 467 IPC reads as under:

"467. Forgery of valuable security, will etc. Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The following ingredients are essential for commission of the offence under section 467 IPC:

1. the document in question so forged;

2. the accused who forged it.

3. the document is one of the kinds enumerated in the aforementioned section.

The basic ingredients of offence under Section 467 are altogether missing even in the allegations of the FIR against the appellants. Therefore, by no stretch of the imagination, the appellants can be legally prosecuted for an offence under Section 467 IPC.

Even if all the averments made in the FIR are taken to be correct, the case for prosecution under Section 420 and 467 IPC is not made out against the applicants. To prevent abuse of the process and to secure the ends of justice, it becomes imperative to quash the FIR and any further proceedings emanating therefrom.

The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressure the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 Cr.P.C. though wide has to be exercised sparingly,

carefully and with caution and only when it is justified by the tests specifically laid down in the Statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

12. The Supreme Court, **in Inder Mohan Goswami v. State of Uttaranchal, (2007)12 SCC 1**, observed as under :

"The veracity of the facts alleged by the appellants and the respondents can only be ascertained on the basis of evidence and documents by a civil court of competent jurisdiction. The dispute in question is purely of civil nature and respondent no.3 has already instituted a civil suit in the court of Civil Judge. In the facts and circumstances of this case, initiating criminal proceedings by the respondents against the appellants is clearly an abuse of the process of the court. Scope and ambit of courts powers under Section 482 Cr.P.C.

This court in a number of cases has laid down the scope and ambit of courts powers under Section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 Cr.P.C. can be exercised:

(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."

13. The Supreme Court, in **Madhavrao Jiwajirao Scindia and Others v. Sambhajirao Chadrojirao Angre and Others, (1988) 1 SCC 692**, observed as under : -

"The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

14. The three judge Bench of the Apex Court in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** after discussing the power of this Court under Section 561A old code (pari materia with Section 482 Cr.P.C.) observed in paragraph no.6 as:-

"6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under Section 561-Aof the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report

has been filed under Section 173of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no ques- tion of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Xxxxxxx"

(Emphasis supplied)

15. Again Supreme Court discussed the power of this Court under Section 482 Cr.P.C. very elaborately in the case of **State of Haryana and others Vs. Bhajan Lal and others 1992 Supp (1) SCC 335** and in

paragraph 102 enumerated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised by this Court which is quoted below:-

"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 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. Recently the three Judge Bench of the Apex Court in the case of **M/s. Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others** reported in **AIR 2021 Supreme Court 1918** again discussed the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India in

detailed manner and summarised in paragraph-23 as under:-

"23. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the

conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied." (Emphasis supplied)

17. Therefore, Section 482 Cr.P.C. deals with the inherent power of this Court to prevent the abuse of process of any Court or to secure the ends of justice.

18. The three judges Bench of the Apex Court in the case of **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641** held that Section 482 Cr.P.C. is prefaced with an overriding provision and this Court being a superior Court has the inherent power to make such orders as are necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice.

19 . Recently, the Apex Court in the case of **Kapil Agarwal and8 others Vs. Sanjay Sharma and others (2021) 5 SCC 524** observed in respect of power of this court under Section 482 Cr.P.C. as:-

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

20. The Supreme Court, in **Mohd. Ibrahim v. State of Bihar (2009) 8 SCC 751,** observed as under:

"19. To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed, to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

21. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the

first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

22. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Section 417, 418, 419 or 420 of the Code.

23. When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint.

24. The term `fraud' is not defined in the Code. The dictionary definition of `fraud' is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines `fraud' with reference to a party to a contract.

27. The term "fraudulently" is mostly used with the term "dishonestly" which is defined in Section 24 as follows :

"24. Dishonestly'- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing "dishonestly".

28. To `defraud' or do something fraudulently is not by itself made an offence under the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences. These include:

(i) Fraudulent removal or concealment of property (sec.206, 421, 424)

(ii) Fraudulent claim to property to prevent seizure (sec. 207).

(iii) Fraudulent suffering or obtaining a decree (sec. 208 and 210)

(iv) Fraudulent possession /delivery of counterfeit coin (sec.239, 240, 242 and 243).

(v) Fraudulent alteration/ diminishing weight of coin (sec. 246 to 253)

(vi) Fraudulent acts relating to stamps (sec. 255-261)

(vii) Fraudulent use of false instruments/weight/measure (sec.264 to 266)

(viii) Cheating (sec. 415 to 420)

(ix) Fraudulent prevention of debt being available to creditors (sec. 422).

(x) Fraudulent execution of deed of transfer containing false statement of consideration (sec. 423).

(xi) Forgery making or executing a false document (sec. 463 to 471 and 474)

(xii) Fraudulent cancellation/ destruction of valuable security etc.(sec. 477)

(xiii) Fraudulently going through marriage ceremony (sec.496).

It follows therefore that by merely alleging or showing that a person acted fraudulently, it cannot be assumed that he committed an offence punishable under the Code or any other law, unless that fraudulent act is specified to be an offence under the Code or other law.

Section 504 Penal Code

29. The allegations of the complaint do not also make out the ingredients of an offence under Section 504 of the Penal Code. Section 504 refers to intentional insult with intent to provoke breach of peace.

The allegation in the complainant is that when he enquired with accused 1 and 2 about the sale deeds, they asserted that they will obtain possession of land under the sale deeds and he can do whatever he wants. The statement attributed to appellants 1 and 2, it cannot be said to amount to an "insult with intent to provoke breach of peace". The statement attributed to accused, even if it was true, was merely a statement referring to the consequence of execution of the sale deeds by first appellant in favour of the second appellant.

Conclusion

30. The averments in the complaint if assumed to be true, do not make out any offence under Section 420, 467, 471 and 504 of the Code, but may technically show the ingredients of offences of wrongful restraint under Section 341 and causing hurt under Section 323 of IPC."

21. Applying the law laid down by the Apex Court referred to herein-above, now I will proceed to discuss the fact of the present case.

22. The impugned complaint / FIR was filed by opposite party no.2 against the applicants with the allegation that on the basis of forged Will of his father, applicant no.3 got mutated his name while, later on, his father executed unregistered Will in his favour. Admittedly Will in favour of Dwarika was registered one and on the basis of registered Will after hearing both the parties, the mutation court passed the order in favour of applicant No.3 and except the bald allegation, there is no evidence on record on the basis of which, it can be said that the alleged registered Will was forged one.

23. The Apex Court in case of **R.P. Kapur (supra)** observed that if there is no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to charge, then proceedings of such cases can be quashed while exercising the power under Section 482 Cr.P.C.

24. In the present case except bald allegation there is no legal evidence on record which can show that either applicants prepared the forged Will or they executed the forged Will, rather there is order of mutation dated 16.12.2008, which shows that after hearing both the parties, on the basis of registered Will, the name of applicant-Dwarika was mutated and opposite party no.2 did not even challenge the order of mutation, therefore, in view of the law laid down in **R.P. Kapur (supra),** the instant application succeeds.

25. Further, opposite party no.2 did not even challenge the alleged registered Will dated 11.07.1996 in any competent civil court and directly filed impugned FIR. As per FIR/ complaint itself the present dispute is of civil nature, therefore, question arises, whether in such cases, which are purely civil in nature, criminal proceedings should be permitted to continue.

26. The Apex Court in the case of **G. Sagar Suri and another Vs. State of U.P. and others (2000) 2 SCC 636** observed in paragraph no. 8 as:-

"Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code, Jurisdiction- under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

27. The Supreme Court in the case o**f Indian Oil Corporation Vs. NEPC India Limited and others (2006) 6 SCC 736** observed as:-

"13. xxxxx There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged"

28. The three judge Bench of the Apex Court in the case of **M. Subramaniam and another Vs. S. Janki and another (2020) 16 SCC 728** cautioned that a civil dispute should not be given the colour of criminal offence.

29. If I apply the above principles on the facts of the case at hand then I find that opposite party no.2 has given the colour of criminal offence to a purely civil dispute. As per facts, on the basis of Will, the mutation proceeding was ended in favour of the applicant-Dwarika Prasad and there is no evidence that the registered Will was forged one, therefore, only competent civil court having jurisdiction over the matter could decide the issue whether the Will in dispute was forged one or not but opposite party no.2 did not choose to file any suit for cancellation of Will, therefore, it appears that Informant wanted to settle his dispute through criminal proceedings as criminal proceedings can be very easily initiated and can harass the applicants too. Therefore,

from this point of view too, the present application filed on behalf of the applicants can succeed.

30. In this case, it appears that criminal proceedings are being taken recourse to as a weapon of harassment against a purchaser and his marginal witnesses.

31. The FIR does not disclose any offence so far as the applicants are concerned. There is no whisper of how and in what manner, these applicants are involved in any criminal offence. There can be no doubt that jurisdiction under Section 482 of the Cr.P.C. should be used sparingly for the purpose of preventing abuse of the process of any court or otherwise to secure the ends of justice.

32. In view of the facts and circumstances of the present case, rival submissions made, admitted fact that originally property was recorded in the name of Satya Narain, registered Will deed was in favour of Dwarika Prasad and Others, mutation order in favour of Dwarika Prsad, their being a long litigation between the Informant and Dwarika Prasad, mutation made by Tehsildar in favour of the applicant No.3 after ignoring the objection made by Informant and dispute mainly being of civil nature, their being a registered sale-deed in favour of applicant-Madhu Gupta executed by applicant No.3 Dwarika Prasad recorded tenure holder of the property, I am of the considered opinion that allowing the prosecution to continue against the applicants is abuse of process of law and it should be quashed.

33. In view of above, application, under Section 482 Cr.P.C. succeeds and is, accordingly, allowed. Charge-sheet dated 05.04.2010 and entire criminal proceedings in Criminal Case No. 3609 of 2010, under Sections 419, 420, 467, 468 and 471 IPC, arising out of Case Crime No. 285 of 2010, Police Station Siddharth Nagar, District Siddharth Nagar, are hereby quashed.

34. The petition stands disposed of accordingly.

35. Certify the judgment to trial court concerned through District Judge for compliance forthwith.

(2022) 10 ILRA 576
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Application U/S 482 No. 23730 of 2022

Smt. Pinki Gautam @ Geeta Devi & Anr. ...Applicants

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Onkar Nath

Counsel for theOpposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power ,Section 227 - Discharge , Section 228 - framing of charge , Section 239 - When accused shall be discharged - Indian Penal Code, 1860 - Sections 419, 420, 467 & 468 - disputed law of facts cannot be adjudicated upon by Court under Section 482 Cr.P.C. - only prima facie case is to be seen - disputed defence of accused cannot be considered.(Para - 14)

Applicants filed discharge application under Section 239, 227 Cr.P.C. - Chief Judicial Magistrate illegally rejected discharge application without giving any finding - applicants filed criminal revision - dismissed - Court in revision passed a speaking order - no role assigned to accused-applicant No.2 - husband of applicant No.1 - two versions of same question - matter liable to be tried on the basis of evidence recorded during trial **-** accused-applicants filed some documentary evidence in support of their version that both are same person **-** documents not part of investigation or case diary **.(Para -3,4,10)**

HELD:-Courts below have not committed illegality by rejecting discharge application of accused-applicants. While considering discharge application courts below are not expected to go through the documents placed before it in support of their case forming not a part of police report.**(Para - 13)**

Application u/s 482 Cr.P.C. disposed of with a direction. (E-7)

List of Cases cited:-

1. Sunil Kumar Jha & ors. Vs St. of Bihar , Crl. Misc. Case No. 22050 of 1996

2. Smt. Kalawati Vs St. of U.P. , Crl. ,Revision No. 1012 of 1990

3. St. of Orisa Vs Devendra Nath Padhi, 2003 Vol. II SCC 711 Paragarah 11

4. Amit Kapoor Vs Ramesh Chandra & anr., (2012) 9 SCC 460

5. U.O.I. Vs Praful Kumar Samal, 1979 (3) SCC 4

6. R.P. Kapur Vs St. of Punj., A.I.R. 1960 S.C. 866

7. St. of Haryana Vs Bhajan Lal, 1992 SCC (Cr.) 426

8. St. of Bihar Vs P.P.Sharma, 1992 SCC (Cr.) 192

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., 2005 SCC (Cr.) 283

10. Satender Kumar Antil Vs C.B.I. & anr., (2021) 10 SCC 773

11. Brahm Singh & ors. Vs St. of U.P. & ors., 2016 (95) ACC 950

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard learned counsel for the applicants and learned AGA for the State and perused the record.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 28.3.2018 passed by the Judicial Magistrate Etah rejecting the Discharge Application filed by the applicants in Criminal Case No.3125 of 2016 (State vs. Geeta Devi and another) arising out of Case Crime No.0063 of 2015, under Sections 419, 420, 467, 468 I.P.C., P.S. Naya Gaon, District Etah, pending before the Additional Civil Judge, Court No. 26 and also quash the revisional order dated 22.6.2022, passed by the Additional Session Judge, Court No.1, Etah, in Criminal Revision No.64 of 2018, Smt. Geeta @ Pinki and another vs. State of U.P. and another, on grounds taken in affidavit accompanied with the petition.

3. Learned counsel for the applicants submitted that in present case false and fabricated first information report was lodged against the applicants. The applicants filed Criminal Misc. Writ Petition No.18182 of 2015 before this Court for quashing the FIR dated 16.7.2015 and the same was disposed of on 30.7.2015, in which this Court had granted stay order in favour of the applicants till submission of charge-sheet. The investigation was done by the Investigating Officer in perfunctory manner and charge-sheet was submitted illegally against the

applicants. After filing of charge-sheet, the applicants again filed an application Under Section 482 No. 24597 of 2016, which was disposed of on 17.8.2016 with observation that Court below shall proceed in the light of judgment dated 8.7.2016 passed in Criminal Misc. Writ Petition No. 15609 of 2016 (Brahm Singh 2 others vs. Sate of U.P. and 2 others). The applicants filed a discharge application under Section 239, 227 Cr.P.C. before the Chief Judicial Magistrate, stating therein that Pinki Gautam and Geeta Devi are same person and in support of this contention, the applicants have submitted 24 documents but learned Chief Judicial Magistrate concerned illegally rejected the discharge application without giving any finding, on assumption that charge-sheet has been submitted on 1.7.2016 and the applicants have not appeared before the Court ill date whereas applicants were already appeared before the court concerned through their counsel. The applicants had filed a criminal revision before court of session against the order of learned Magistrate rejecting their discharge application. However, the said criminal revision has also been dismissed vide order dated 22.6.2022 by Additional Session Judge, Court No.1, Etah. No case is made out against the applicants under Section 419, 420, 467, 468 I.P.C. on the basis that applicant No.1 is still working as Anganbadi Worker, posted in village Nagla Mai, Village Panchayat Ubhai Asad Nagar, Block Aliganj, District Etah. Applicants are innocent and falsely implicated in the case.

4. In the present case, no role has been assigned to accused-applicant No.2, who is husband of applicant No.1. An enquiry was conducted by District Programming Officer, Etah about applicant No.1, in which it was found that opposite party No.2 has filed false complaint against applicant No.1, prompted by ulterior motive and in that enquiry it has also been found that Pinki and Geeta are same person and complaint of opposite party No.2 was rejected. A copy of enquiry report is filed with the affidavit in the present case. Applicant No.1 had never taken admission in D.A.V. Inter College, Aligarh and her school leaving Certificate of that school is a fake document, fabricated by opposite party No.2 in the name of Geeta Kumari, in which date of birth of applicant No.1 is 7.3.1982. Father of applicant No.1 also submitted affidavit before S.S.P., Etah, wherein he has stated that he is blessed with three sons namely, Anoop, Amit Kumar, Abhishek and three daughters namely, Pinki Gautam @ Geeta, Rinki and Rashmi. District Programming Officer, Etah has reported to District Magistrate, Etah by letter dated 28.12.2015 that the domestic name of Smt. Pinki Gautam is Geeta, who has not filed academic documents of her younger siblings Rinki and Rashmi and she was duly selected as Anganbadi worker on the basis of seniority.

5. On the basis of first information report and material placed on record, factual matrix of the prosecution case is that informant Ajit Pratap Singh lodged FIR with police station concerned on 16.5.2015 on the basis of written report stating therein that her co-villager Geeta Devi had married with Ashok Kumar after elopment with him without knowledge of her father and her father had lodged an FIR in the matter. In the course of time, case was compromised and Ashok Kumar purchased a plot of area 5 bigha in the year 1997 in the name of Geeta Devi and three children born out of the wedlock. In primary school Nagla, the name of mother of elder daughter of Geeta Devi is entered as Smt. Geeta Devi and Gram Panchayat

Namawali-2009 and Parivar Register also her name is entered as Smt. Geeta Devi. She has received education from D.A.V. Inter College, Aligarh up to Class IIX and was selected as Anganwadi Worker in the 2009 and therefore, she projected herself as Pinki Gautam whereas there are only two daughters of Sadhuram i.e. Geeta Devi and Pinki Devi. Husband of Pinki is in military service. Geeta Devi has also changed her name as Pinki Devi in Voter ID Card and in this way, she procured the service of Anganbadi worker by presenting herself as Pinki Devi.

6. Learned A.G.A. submitted that the accused-applicants have not appeared before the court concerned in person. They have moved discharge application before the trial court without surrender and moving bail application and they are still not bailed out. The discharge application cannot be moved by applicants in a serious offence like present one without appearing before the Court and seeking bail. There is no direction of superior Court in this respect that they could move discharge application through counsel. The role of applicant No.2- husband of applicant No.1 is that of facilitator and assisted applicant No.1 in the present case of cheating and forgery. This fact has been stated in the impugned order of revisional court that the accused applicants have moved discharge application without appearing before the court.

7. In the present case, the identity of Geeta Devi and Pinki Gautam is in question. According to the prosecution case version, both are different persons whereas the accused persons tried to established that both are same person and they have placed reliance on the report of District Programming Officer, Etah under whom applicant No.1- Smt. Pinki Gautam wife of Ashok Kumar was working. In sale deed executed by accused applicants in favour of Prateek Kumar dated 8.10.2012, the name of vendor No.2 is mentioned as Geeta Kumari @ Pinki, wife of Ashok Kumar. An FIR at the instance of Pinki Gautam @ Geeta was lodged against the Ajeet Pratap and another unknown, on 16.5.2015 under Sections 332, 353, 354, 504, 506 I.P.C. & 3(I)(XI) of SC/ST Act and the present FIR is said to be counter blast of that FIR. In copy of family register of Sadhuram, name of his three daughters Geeta @ Pinki, Rinki and Rashmi is mentioned.

8. Hon'ble Supreme Court has again discussed the scope of 227 and 228 Cr.P.C. in **Sunil Kumar Jha and Others Vs. State of Bihar in Crl. Misc. Case No. 22050 of 1996** decided on 5.2.1997. Para 6 is herein under:-

"From bare perusal and comparison of the aforesaid two provisions it appears that while in the case of discharge of an accused under Section 227 of the Code it is obligatory for the Judge to record his reasons for doing so. But while framing charge under Section 228 of the Code the provision does not say in a very specific word that the Court msut record reasons. Nevertheless Section 228 provides that while framing charge, the Court must be of the opinion that there is ground for presuming that the accused has committed an offence. In other words, there must be valid reasons and foundation for framing an opinion that the accused has committed an offence."

9. The case decided by Allahabad High Court in **Smt. Kalawati Vs. State of U.P.** decided on 11.7.1990 passed in **Crl. Revision No. 1012 of 1990** wherein it has

been held that though the full statements of the witnesses need not be discussed but prima facie case should be briefly indicated. Para 3 is herein under :

"It is true that for determining prima facie case court need not weigh or sift the evidence or make roving enquiry. It need not give full statements of the witnesses. Evidently for a judicial speaking order it is necessary that the evidence constituting prima facie case should be briefly indicated and should not be substituted by vague words or by conclusion alone."

10. On perusal of impugned order of learned Magistrate, it appears that the prima facie case has been made out for framing of charge. This fact has been cited in discharge application that arrest of the accused persons was stayed by Hon'ble High court till filing of chargesheet. They have not appeared in the court in person. The learned Revisional Court in revision has passed an elaborate order in which the case of both sides have been discussed and Session Judge also passed a judicial speaking order citing the evidence constituting prima facie case against the applicants for framing of charge. He has passed a speaking order while rejecting the revision filed by the accused applicants and dismissing the documentary evidence filed in support of prosecution case alongwith case diary and has observed that it is evident that Geeta Devi and Pinki Gautam are different women. As there are two versions of same question, the matter is liable to be tried as only on the basis of evidence recorded during trial, this disputed question can be finally settled that whether Geeta Devi and Pinki Gautam are same woman or different. The accused-applicants have filed some documentary evidence in support of their version that both are same person. It appears that these documents are not part of investigation or case diary and in this connection the law laid down by Supreme Court in the case of **State of Orisa Vs. Devendra Nath Padhi, 2003 Vol. II SCC 711 Paragarah 11**, although this judgment relates to Prevention of Corruption Act and not applicable although paragraphs No.11 of the said judgment of quoted below:-

Para11:" From the above judgments referred to by the learned counsel for the appellant, it is clear that all the court has to do a the time of framing a charge is to consider the question of sufficiency of ground for proceeding against the accused on a general consideration of the material placed before it by the investigating agency. There is no requirement in law that the court at that stage should either give an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produced at that stage".

11. In **Amit Kapoor vs Ramesh Chandra and Another, (2012) 9 SCC 460,** Hon'ble Apex Court had discussed the extent of scop of power exercisable by High Court under Section 397 independently or read with Section 482 of the Code of Criminal Procedure, 1973 and held that framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the ?record of the case? and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the

accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. 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.

12. In **Union of India Vs. Praful Kumar Samal, reported in 1979 (3) SCC 4** Hon'ble Apex Court had held that by and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

13. Keeping in view the facts and circumstances of the case and the law laid down in above cites cases, this Court is of the considered opinion that the courts below have not committed illegality by rejecting discharge application of accused-applicants as while considering discharge application the courts below are not expected to go through the documents placed before it in support of their case forming not a part of police report.

14. It is well settled law that disputed law of facts cannot be adjudicated upon by this Court under Section 482 Cr.P.C. 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 accused cannot be considered at this stage.

15. The prayer for quashing the entire proceeding of the aforesaid case is refused.

16. Accordingly, the present application is disposed of and trial court is required to frame charges against the accused-applicants in appropriate sections which are made out on the basis of material place on record.

17. As the accused-applicants are admittedly not enlarged on bail, it is directed that in case the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by Apex Court in the cases of **Satender Kumar Antil vs. Central Bureau of Investigation and another, (2021) 10 SCC 773 and Brahm Singh and others vs. State of UP and others, 2016 (95) ACC 950.**

18. For a period of 30 days, no coercive measure shall be taken against the applicants in the aforesaid case.

(2022) 10 ILRA 582
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 25082 of 2022

Bundu & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashok Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Sections 147, 148, 149, 307, 504 & 506 - Court can invoke its jurisdiction u/s 482 Cr.P.C. even in non-compoundable offence - can quash the proceedings on the basis of settlement arrived at between the parties even in the cases of non-compoundable offences - while exercising its jurisdiction Court must consider the fact that whether the proceeding relates to any serious and heinous offences and whether the crime in question has impact over the society - In cases of serious nature which affects the society at large - Court should not exercise its jurisdiction under section 482 Cr.P.C. for quashing the proceedings on the basis of compromise executed between the parties. (Para - 13,22)

Present case relates to offence u/s 307 IPC - 14 accused persons involved - fire arms weapons used - Two persons sustained injuries - injury of one injured found dangerous to life - all applicants with common object participated in commission of crime - offence u/s 307 IPC is serious offence - Such offences have serious impact upon society - prima facie cognizable offence made out against applicants - question - whether on the basis of compromise executed between the parties proceeding of such cases can be quashed. (**Para -11,25)**

HELD:- Offences alleged to have been committed by applicants are crime against the society. It cannot be said that the present dispute is private in nature and does not affect the society at large. Therefore, proceedings of such cases should not be quashed on the basis of settlement arrived at between the parties.**(Para -27)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Gian Singh Vs Punj., (2012)10 SCC 303

2. Nareinder Singh Vs St. of Punj. , (2014) 9 SCC 466

3. Parbatbhai Aahir @ Parbathbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. ,(2017) 9 SCC 641

4. St. of M.P. VS Laxmi Narayan & ors. , (2019) 5 SCC 688

5. Arun Singh & ors. Vs St. of U.P. Through its Secretary & anr. , 2020 (3) SCC 736

6. Ram Gopal & anr. Vs St. of M.P. , 2021 0 Supreme (SC) 529

7. Daxaben Vs The St. of Guj. & ors. ,2022 LiveLaw (SC) 642

8. P. Dharmraj Vs Shanmugam & ors. , Crl. Appeal Nos. 1515-1516 of 2022

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Ashok Kumar Singh, learned counsel for the applicants and Dr. S.B. Maurya, learned AGA for the State-respondent.

2. The instant application has been moved by the applicants with a prayer to

quash the entire proceeding of criminal case no. 1093 of 2020 under sections 147, 148, 149, 307, 504, 506 IPC, pending in the court of Civil Judge (Junior Division)/ Judicial Magistrate, Garhmukteshwar, Hapur District Hapur as well as charge sheet dated 26.8.2020 and cognizance order dated 1.10.2020.

Brief facts of the case

3. Opposite party no. 2 lodged FIR of the present case on 7.5.2020 against the applicants under Sections 147, 148, 149, 307, 504, 506 IPC at P.S. Simbhawali District Hapur and according to the FIR, applicants who are 14 in numbers assaulted with intention to commit murder of Inam and Danish (injured persons of the case) and they opened fire from countrymade pistols and in the incident, Inam and Danish sustained serious injuries. After registration of the FIR, investigation of the matter was commenced and during investigation, Investigating Officer recorded the statements of opposite party no. 2, the informant and injured persons Inam and Danish and also recorded the statement of other eye-witnesses and obtained the injury reports of both the injured and submitted charge sheet against the applicants on 26.8.2020 under sections 147, 148, 149 307, 504, 506 IPC.

4. In the incident two persons Inam and Danish sustained injuries and according to the statement of injured-Inam, applicant no. 2 caused fire arm injury to him and Danish through countrymade pistol. Another injured-Danish in his statement recorded during investigation also stated that applicants assaulted them with intention to commit murder and applicant nos. 2 and 6 opened fire from countrymade pistols and due to fire opened by them he and Inam sustained injuries. Injury reports of both the injured persons, Inam and Danish are on record.

5. From the perusal of the injury report of Inam, it appears that he received a lacerated wound bone deep on the right side of scalp and bleeding was present and Doctor also noted that at the time of his medical examination, three episodes of vomiting and one episode of seizure occurred and was advised to C.T. Scan of head. From the perusal of his C.T. Scan report which is copied by the Investigating Officer in the case diary during investigation which is annexed alongwith annexure-2, it reflects that a hemorrhage in right parietal temporal region and depressed fracture of frontal bone was found and according to Doctor, injury was dangerous to life.

6. Another injured-Danish was also medically examined on 15.5.2020 and according to his injury report he sustained one abrasion of right side of forehead and a contusion of right side of upper back of scapular region and according to the Doctor both the injuries were simple in nature and caused by hard and blunt object.

7. From the perusal of the injury report of both the injured persons, it appears that injured Inam sustained serious fire arm injury which was, according to the Doctor who conducted C.T. Scan, dangerous to his life.

8. It appears that after submission of the charge sheet on 26.8.2022, cognizance was taken and notices were issued to the applicants and during the pendency of the case before committal, applicants, opposite party no. 2-informant and injured persons Inam and Danish compromised the matter and in this regard, they executed a

compromise on 31.5.2022 (annexed as annexure-6 to the affidavit). Applicants want to quash proceedings pending before trial court on the basis of settlement dated 31.5.2022.

Submissions on behalf of the applicants

9. Learned counsel for the applicants submitted that applicants have been made accused in the present case on the basis of false and frivolous allegations and they neither assaulted nor they caused any injury to anyone but in spite of that charge sheet has been submitted against them in the present matter. He next submitted that applicants and opposite party no. 2, the informant and injured persons are residents of same village and locality and they also having some relation, therefore, with the interference of the respected persons of the locality, they have settled their dispute and in this regard, a compromise has been executed between them on 31.5.2022 which is annexed as annexure-6 to the affidavit in support of the present application and therefore, the proceedings pending against the applicants may be quashed on the basis of compromise executed between the parties. He next submitted that he is pressing the instant application only on the basis of compromise executed between the parties and not o

10. Learned counsel further submitted that as both the parties have amicably settled their dispute, therefore, no fruitful result would be served if prosecution will continue as ultimate result of the trial would be the acquittal. He next submitted that if proceeding of the present case is quashed on the basis of the compromise executed between the parties then their relationship would be cordial one and they can live peacefully, therefore, he submits even if, the case is of Section 307 IPC, proceeding pending against the applicants may be quashed on the basis of compromise executed between the parties.

Submissions on behalf of the State

11. Per contra, learned AGA submitted that as there are serious allegations against the applicants and present matter relates to sections 147, 148, 149 307, 504,506 IPC, therefore, on the basis of compromise, proceeding pending against the applicants should not be quashed. He next submitted that although this Court can exercise its power under Section 482 Cr.P.C. to scuttle the proceeding, on the basis of compromise even in non-compoundable offences but where the offences are serious and heinous in nature which affects the society at large then this Court should not quash the proceedings pending against the accused persons on the basis of compromise arrived between the parties. Learned AGA vehemently submitted that there is specific allegation against the applicants who are fourteen in numbers that they attacked upon injured persons, Inam and Danish with intention to commit their murder. Applicant nos. 2 and 6 also opened fire from their respective countrymade pistols and due to the fire opened by them, two persons i.e. Inam and Danish sustained injures and one injury of injured-Inam was on his head which was found dangerous to life, therefore, instant case cannot be said to be a case of private dispute and as applicants attempted to commit murder of two persons with country made pistols, therefore, it is clearly a crime against the society and in such heinous cases, proceedings cannot be nibbed from its bud on the basis of the compromise executed

between the accused persons, informant and injured persons, therefore, the instant application moved by applicants being devoid of merit is liable to be dismissed.

Analysis by the Court

11. I have given my anxious consideration on the rival submissions and perused the record of the case.

The brief facts of the case have already been narrated in previous paragraphs. The gist of the allegation is that applicants who are fourteen in numbers assaulted and tried to commit murder of two persons Inam and Danish and applicant nos. 2 and 6 opened fire from their countrymade pistols and due to the shot made by them, two persons, Inam and Danish sustained injuries. Although injuries sustained by Danish were found simple in nature but injury sustained by Inam on his head was dangerous to life and both the injured persons in their statements, recorded during investigation, categorically stated that all the applicants participated in the incident and according to injured-Inam, applicant no. 2 opened fire while as per injured-Danish, applicant no. 2 and 6 both opened fire from their countrymade pistols and due to the fire opened by them, they sustained injuries. Therefore, from the perusal of the entire evidence available on record, it is apparent that a prima facie cognizable offence under sections 147, 148, 149 307, 504, 506 IPC is made out against the applicants.

12. In case at hand, the question is, whether on the basis of compromise executed between the parties proceeding of such cases can be quashed.

13. The Apex Court in catena of judgements held that this Court can exercise its power vested under section 482 Cr.P.C. beyond the boundaries of Section 320 Cr.P.C. which states that only compoundable offence can be compounded and this Court can even quash the proceedings relate to non-compoundable offences on the basis of the compromise executed between the parties but at the same time Apex Court cautioned that the proceeding of serious and heinous offences which affects the society at large, should not be quashed on the basis of compromise executed between the parties.

14. The three Judges Bench of the Apex Court in ***Gian Singh Vs. Punjab,*** reported in ***(2012)10 SCC 303*** discussed the circumstances very elaborately and held that this Court can quash the proceedings in the cases of non-compoundable offences on the basis of settlement arrived at between the parties and observed as follow:-

"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".*

15. *In* ***Nareinder Singh Vs. State of Punjab reported in (2014) 9 SCC 466****, the Supreme Court held that in case of heinous and serious offences, which are generally to be treated as crime against society, it is the duty of the State to punish the offender. Hence, even when there is a settlement, the view of the offender will not prevail since it is in the interest of society that the offender should be punished to deter others from committing a similar crime.*

16. The Three Judges Bench of the Apex Court in the case o***f Parbatbhai Aahir Alias Parbathbhai Bhimsinhbhai Karmur and Others V. State of Gujrat and Another reported in [(2017) 9 SCC 641],*** after discussing its earlier judgements observed as follows:-

"16. The broad principles which emerge 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 power of the High Court has a wide ambit and

plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

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 of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

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 cause 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 offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanor. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

17. The Three Judge Bench of the Apex Court in ***State of Madhya Pradesh V. Laxmi Narayan & Ors.*** reported in ***(2019) 5 SCC 688*** laid down the following principles:-

15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

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 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;

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/delicate 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 paras 29.6 and 29.7 of the decision of this Court in Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

18. The Apex Court in the case of ***Arun Singh and Others v. State of Uttar Pradesh Through its Secretary and Another*** reported in 2020 (3) SCC 736, held as under:-

"14. In another decision in Narinder Singh v. State of Punjab (supra) it has been observed that in respect of offence against the society it is the duty to punish the offender. Hence, even where there is a settlement between the offender and victim the same shall not prevail since

it is in interests of the society that offender should be punished which acts as deterrent for others from committing similar crime*. On the other hand, there may be offences falling in the category where the correctional objective of criminal law would have to be given more weightage than the theory of deterrent punishment. In such cases, the court may be of the opinion that a settlement between the parties would lead to better relations between them and would resolve a festering private dispute and thus may exercise power under Section 482 CrPC for quashing the proceedings or the complaint or the FIR as the case may be.*

19. The Apex Court in case o***f Ram Gopal & Another Vs. State of Madhya Pradesh*** reported in ***[2021 0 Supreme (SC) 529]*** had occasioned to discuss the issue and observed in paragraph -14 as follows:-

14. In other words, grave or serious offences or offences which involve moral turpitude or have a harmful effect on the social and moral fabric of the society or involve matters concerning public policy, cannot be construed betwixt two individuals or groups only, for such offences have the potential to impact the society at large. Effacing abominable offences through quashing process would not only send a wrong signal to the community but may also accord an undue benefit to unscrupulous habitual or professional offenders, who can secure a "settlement' through duress, threats, social boycotts, bribes or other dubious means. It is well said that "let no guilty man escape, if it can be avoided."

20. The Supreme Court in case of ***Daxaben Vs. The State of Gujarat & others 2022 LiveLaw (SC) 642*** observed as follows:-

"38. However, before exercising its power under Section 482 of the Cr.P.C. to quash an FIR, criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.

39. Orders quashing FIRs and/or complaints relating to grave and serious offences only on basis of an agreement with the complainant, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Furthermore, financially strong offenders would go scot free, even in cases of grave and serious offences such as murder, rape, brideburning, etc. by buying off informants/complainants and settling with them. This would render otiose provisions such as Sections 306, 498A, 304-B etc. incorporated in the IPC as a deterrent, with a specific social purpose.

"40. In Criminal Jurisprudence, the position of the complainant is only that of the informant. Once an FIR and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused. The State has a duty to ensure that law and order is maintained in society. It is

for the state to prosecute offenders. In case of grave and serious non-compoundable offences which impact society, the informant and/or complainant only has the right of hearing, to the extent of ensuring that justice is done by conviction and punishment of the offender. An informant has no right in law to withdraw the complaint of a non-compoundable offence of a grave, serious and/or heinous nature, which impacts society."

21. The Supreme Court in the case of ***P. Dharmraj Vs. Shanmugam and others decided on 8th September 2022 in Crl. Appeal Nos. 1515-1516 of 2022***, after discussing in earlier judgements observed in para-42 as follows:-

"Thus it is clear from the march of law that the Court has to go slow even while exercising jurisdiction under Section 482 Cr.PC or Article 226 of the Constitution in the matter of quashing of criminal proceedings on the basis of a settlement reached between the parties, when the offences are capable of having an impact not merely on the complainant and the accused but also on others."

22. From the decisions noticed above, the law as it stands is that although this Court can invoke its jurisdiction u/s 482 Cr.P.C. even in non-compoundable offence and can quash the proceedings on the basis of settlement arrived at between the parties even in the cases of non-compoundable offences but while exercising its jurisdiction this Court must consider the fact that whether the proceeding relates to any serious and heinous offences and whether the crime in question has impact over the society. In cases of serious nature which affects the society at large this Court should not exercise its jurisdiction under section 482 Cr.P.C. for quashing the proceedings on the basis of compromise executed between the parties.

23. The three Judges Bench of the Supreme Court in case of ***Laxmi Narayan (supra)*** specifically observed that an offence u/s 307 IPC is serious offence which affects the society at large and proceedings of such offence should not be quashed on the basis of compromise executed between the parties, however, the Apex Court also held that considering the nature of injury and weapon used proceedings relate to an offence u/s 307 IPC an also quashed by this Court on the basis of settlement arrived at between the parties.

24. Bearing in mind, the above principles laid down by the Apex Court, I would analyze the fact of the present case.

25. The present case relates to the offence u/s 307 IPC in which as many as fourteen accused persons were involved and fire arms weapons were used. Two persons sustained injuries and injury of one injured was found dangerous to life and after investigation, chargesheet against the applicants has been filed u/s 147, 148, 149, 307, 504, 506 IPC. Thus, prima facie it appears that all the applicants with common object participated in commission of crime. Such offences have serious impact upon the society and trial should continue in the public interest and accused persons of such serious and heinous offences should be punished to deter others from committing similar offences. In the case in hand, offences for which applicants are facing prosecution are neither offences arising out of commercial, financial, mercantile, partnership or such similar transactions or has any element of civil

dispute, therefore, if in such cases settlement even if arrived at between the accused persons and complainant-injured persons, the same cannot constitute a valid ground to quash the charge sheet or proceeding pending against the accused persons.

26. The case in hand is a State case in which after investigation, complicity of the applicants were found correct and charge sheet against them has been submitted, therefore, it has become a matter between the State and the accused and it is the duty of the State to ensure the law and order and to prosecute offender and in such cases, informant or the victim has no right in law to drop the case of non-compoundable offence of serious and heinous nature which badly affects the society.

27. Therefore in my view the offences alleged to have been committed by applicants are crime against the society and it can not be said that the present dispute is private in nature and does not affect the society at large. Therefore, proceedings of such cases should not be quashed on the basis of settlement arrived at between the parties.

28. Therefore, from the above discussion, I find no merit in the argument advanced by learned counsel for the applicants. Accordingly, the instant application is devoid of merit and is, hereby **dismissed**.

(2022) 10 ILRA 591
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 25851 of 2021

Km. Geeta ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ashok Kumar Yadav

Counsel for the Opposite Party:
Govt. Advocate, Sri Deepak Yadav

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 311 - Power to summon material witness, or examine person present - Indian Penal Code, 1860 - Sections 344, 376D, 354, 323, 504, 506, 115 & 34 - fairness of trial has to be seen not only from the point of view of the victim, but also from the point of view of the accused and the society - not possible to lay down precise situations when such power can be exercised - scope of power under Section 311 Cr.P.C. has to be considered from case to case - victim/applicant cannot have the witness recalled for re-examination as a matter of right and extraordinary provision cannot be used as an afterthought to fill the gaps.(Para - 22,23)

(B) Criminal Law - The Code of Criminal Procedure, 1973 - Section 311 - discretionary power vested under Section 311 Cr.P.C. - to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice - should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. (Para -16,20)

Applicant/victim filed an application under Section 311 Cr.P.C. - to summon her for giving further evidence with respect to certain photographs and documents - which were necessary for proper adjudication of case - application rejected by court below - ground - statement of applicant/victim already recorded - all evidences available on record - victim/applicant already examined and cross-examined - filed only for lingering on the trial of the case.**(Para -2,3, 9,21)**

HELD:- Application filed by applicant under Section 311 Cr.P.C., is only for lingering on the trial of the case. Rejection of application under Section 311 Cr.P.C. of applicant under the facts and circumstances of the case are fully sustainable. Trial Court committed no illegality or infirmity. No abuse of process of Court. No evidence on record to satisfy Court that trial would be seriously prejudiced if the victim/applicant is not recalled for re-examination or further examination. **(Para - 21,24)**

Application u/s 482 Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. Raja Ram Prasad Yadav Vs St. of Bihar & anr., (2013)14 SCC 461

2. Mannan SK & ors. Vs St. of W.B. & anr. , AIR 2014 SC 2950

3. V.N. Patil Vs K. Niranjan Kumar & ors. , (2021) 3 SCC 661

4. Vijay Kumar Vs St. of U.P. & anr., 2011 (8) SCC 136

5. Mannan Shaikh & ors. Vs St. of W.B. & anr., 2014 (13) SCC 59

6. Ratanlal Vs Prahlad Jat & ors., 2017 (9) SCC 340

7. Swapan Kumar Chatterjee Vs C.B.I., 2019 (14) SCC 328

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Ashok Kumar Yadav, learned counsel for the applicant, Mr. Deepak Yadav, learned counsel for the opposite party no.2 and Mr. Pankaj Srivastava, learned AGA for the State.

2. The instant application under section 482 Cr.P.C. has been filed for quashing of the order dated 03.09.2021 passed by Additional District and Sessions Judge, Sambhal at Chandausi in S.T. No. 70 of 2019 (State Vs. Devendra Yadav), arising out of Case Crime No.662 of 2017, under sections 344, 376D, 354, 323, 504, 506, 115, 34 IPC, Police Station-Hayatnagar, District-Sambhal by which the application under section 311 Cr.P.C. moved by the applicant has been rejected.

3. Brief facts of the case are that an FIR was lodged on 22.12.2017 by the applicant against as many as five persons under Sections 344, 376D, 354, 323, 506, 115, 34 IPC, Police Station-Hayatnagar, District-Sambhal. After recording the statements of the victim/applicant under Sections 161 and 164 Cr.P.C., the charge sheet has been submitted, pursuant to which, the trial court has proceeded to record the statement of victim/applicant, who has been examined as P.W.-1. Subsequently, on 03.09.2021, the applicant/victim has filed an application under Section 311 Cr.P.C. before the trial court to summon her for giving further evidence with respect to certain photographs and documents, which were necessary for proper adjudication of the case. However, the said application has been rejected by the concerned court below vide order dated 03.09.2021 on the ground that the statement of the applicant/victim has already been recorded on 25.02.2020 and all the evidences are available on record. The victim has also been cross-examined, hence the said application under Section 311 Cr.P.C. has been moved only to delay the trial.

4. Learned counsel for the applicant submits that the order dated 03.09.2021 by which the application moved under section 311 Cr.P.C. was rejected by the court below, has been passed in a mechanical manner without applying judicious mind.

The reason assigned in the application under section 311 Cr.P.C. is that it is necessary to take some photographs and documents on record, which shows that the applicant/victim was kidnapped by the accused as they are necessary for proper adjudication of the trial, but the same has not been considered while rejecting the application.

5. Per contra, learned Additional Government Advocate appearing on behalf of the State-respondent submits that the statement of the applicant/victim has already been recorded on 25.02.2020, therefore, the applicant has moved the application under section 311 Cr.P.C. on 03.09.2021 only with a view to delay the disposal of the trial. The court below has not committed any error in passing the impugned order, therefore, it does not call for any interference by this Court. Hence, he submits that the present application is liable to be rejected.

6. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

7. Before fathoming correctness of the submissions made by the learned counsel for the parties, it will be worthwhile to refer to Section 311 Cr.P.C., 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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

8. Assiduous scrutiny of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness, provided, same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby, applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution, but also from the point of view of the orderly society.

9. 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.

10. 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 jeopardized. 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.

11. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage; but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

12. 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 311of the Code.

13. In Natasa Singh v. C. B. I., reported in (2013) 5 SCC 741, the Apex Court, after referring the various decisions of the Supreme Court, has observed that 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 and such power should be exercised with great caution and circumspection.

14. The scope of Section 311 Cr.P.C. has been dealt in the case of ***Raja Ram Prasad Yadav vs. State of Bihar and another, reported in (2013)14 SCC 461***, wherein the Apex Court has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be relevant to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

15. In this context, I also wish to make a reference to the judgment of the Apex Court in ***Mannan SK and others vs. State of West Bengal and another*** reported in ***AIR 2014 SC 2950***, wherein the the Apex Court Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the

case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

16. Further in the case of ***V.N. Patil vs. K. Niranjan Kumar and Ors. reported in (2021) 3 SCC 661*** wherein the Apex Court has held that the aim of every Court is to discover the truth. Section 311 Cr.P.C. is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

17. The principles related to the exercise of the power under Section 311 Cr.P.C. have been well settled by this Court in ***Vijay Kumar vs. State of Uttar Pradesh and Another,*** reported in ***2011 (8) SCC 136:-***

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

10.

18. This principle has been further reiterated in ***Mannan Shaikh and Others vs. State of West Bengal and Another, reported in 2014 (13) SCC 59*** and thereafter in the case of ***Ratanlal vs. Prahlad Jat and Others, 2017 (9) SCC 340 and Swapan Kumar Chatterjee vs. Central Bureau of Investigation, 2019 (14) SCC 328. The relevant Paras of Swapan Kumar Chatterjee (supra)*** are as under:-

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely: (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and reexamine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and reexamine any such person if his evidence appears to be essential to the just decision of the case.

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 vide power under this section to even recall witnesses for reexamination 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."

19. Aforesaid exposition of law clearly suggests that a fair trial is main object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. The Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

20. The Apex Court, while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311, has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, the Apex Court has held that court should bear in mind that no party in 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.

21. From perusal of the records of the present application and applications filed by the application under Section 311 Cr.P.C. as well as from examining the order impugned, it is an admitted position that the victim/applicant has already been examined and cross-examined. From the application made by the applicant under Section 311 Cr.P.C., it is apparently clear that the same has been filed only for lingering on the trial of the case.

22. The fairness of trial has to be seen not only from the point of view of the victim, but also from the point of view of the accused and the society. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of power under Section 311 Cr.P.C. has to be considered from case to case.

23. The victim/applicant cannot have the witness recalled for re-examination as a matter of right and extraordinary provision cannot be used as an afterthought to fill the gaps.

24. Considering the materials brought on record and keeping the principles laid down by the Hon'ble Supreme Court for exercise of power under section 311 Cr.P.C., this Court is of the opinion that observations and findings recorded by the trial Court in rejecting the application under Section 311 Cr.P.C. of the applicant under the facts and circumstances of the case are fully sustainable. The trial Court has committed no illegality or infirmity in the order impugned by rejecting the application of the applicant. There appears no abuse of process of the Court also. There is no evidence on record to satisfy this Court that trial would be seriously prejudiced if the victim/applicant is not recalled for re-examination or further examination.

25. In view of the above, the application of the applicant having no merit deserves to be rejected. In the result, the application is **rejected.**

26. The office is directed to communicate this order to the court concerned to proceed with the case in accordance with law.

(2022) 10 ILRA 598
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2022

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 28225 of 2021

Sujeet Kumar Vishwakarma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Raj Kumar Sharma

Counsel for the Opposite Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 161,164,173 (8) & 482 - Inherent power - Indian Penal Code, 1860 - Section 302,307 - scope of adjudication and its ambit at the time of framing of the charge - scope to discharge the accused u/s 245(2) Cr.P.C. is extremely limited - only exceptional circumstances which may justify such discharge after passing of the summoning order without any further evidence of such a nature being produced which may completely absolve or exonerate the accused and the charge against them may appear to be groundless. (Para - 10,13,)

F.I.R. for an offence under Section 307 I.P.C. - Marriage of daughter of first informant - solemnized with one – co-accused having an affair with his daughter - enticing away daughter of opposite party no.2- approached High Court - daughter returned and started residing with opposite party no.2 - co-accused came along with his friend on motorcycle - opened fire upon mother of opposite party no.2 - intention to kill her - statement of injured not recorded - critical condition - case converted for an offence under Section 302 I.P.C. **-** supplementary charge sheet - discharge application - rejected in a mechanical manner.**(Para - 3 to 5)**

HELD:- Prima facie case made out against accused. Prayer for quashing or setting aside impugned order refused. No illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. No abuse of court's process perceptible in the same. **(Para -16,17)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. St. of Bihar Vs Ramesh Singh , 1977 (4) SCC 39

2. Superintendent & Remembrancer of Legal Affairs, W.B. Vs Anil Kumar Bhunja , AIR 1980 (SC) 52

3. Palwinder Singh Vs Balvinder Singh , AIR 2009 SC 887

4. Sanghi Brothers (Indore) Pvt. Ltd. Vs Sanjay Choudhary , AIR 2009 SC 9

5. M.E. Shivalingamurthy Vs C.B.I. , (2020) 2 SCC 768

6. P. Vijayan Vs St. of Kerala, (2010) 2 SCC 398

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Raj Kumar Sharma, learned counsel for the applicant and Mr. Amit Singh Chauhan, learned A.G.A. for the State.

2. This application u/s 482 Cr.P.C. has been filed by the applicant with prayer to quash the order dated 24.11.2021 passed by Additional Sessions Judge, Court No.1, Varanasi in Session Trial No.269 of 2020 (State Vs. Neeraj Vishwakarma and others), arising out of Case Crime No.0517 of 2019, under Section 302 I.P.C., Police Station-Sarnath, District-Varanasi as well as entire proceeding, pending before the aforesaid Court.

3. Brief facts of the case are that an F.I.R. was lodged on 08.09.2019 at about 11:17 hours for an offence under Section 307 I.P.C. at P.S. Sarnath, District Varanasi by opposite party no.2 against one Neeraj Vishwakarma and one unknown person, alleging therein that few days ago, marriage of daughter of first informant was solemnized with one Kranti Vishwakarma but the co-accused namely, Neeraj Vishwakarma was having an affair with his daughter, therefore, she was enticed by Neeraj Vishwakarma. It is also alleged that co-accused Neeraj Vishwakarma, after marrying daughter of opposite party no.2, approached the High Court at Allahabad but after passage of sometime, his daughter returned and started residing with opposite party no.2. Annoyed by the same, co-accused Neeraj Vishwakarma, on 08.09.2019 between 5:45 to 6:00 O' clock came along with his friend on a motorcycle and opened fire upon mother of opposite party no.2, who is about 70 years old, with intention to kill her, after firing, both the persons fled away.

4. In the aforesaid case, though the Investigating Officer recorded the statement of first informant but statement of the injured could not be recorded due to her critical condition. Site plan, showing the place of incident was also prepared. In the meantime, on 09.09.2019 injured old mother of opposite party no.2 passed away, therefore, the case was converted for an offence under Section 302 I.P.C., entry in this regard was made by the Investigating Officer vide parcha no.2 in the case diary. On 11.10.2019, Neeraj Vishwakarma was arrested and for the first time name of applicant, Sujeet Kumar Vishwakarma, surfaced in his confessional statement as recorded by the Investigating Officer. Two witnesses namely, Raj Kumar Vishwakarma and Ashish Vishwakarma, were introduced by the Investigating Officer and their statements under Section 161 Cr.P.C. were recorded, in which they also for the first time disclosed the name of the applicant. After coming to know about the fact that applicant has been falsely implicated, he surrendered and has been released on bail. After collecting evidence, charge sheet has been submitted on 14.11.2019. Applicant came to know that the Investigating Officer had received

information that the applicant and another person who were sent to jail, were not in any way involved in the incident, two persons, namely Bache Lal Vishwakarma and his son Ravindra Vishwakarma @ Lucky were the real culprit, therefore, an application was moved by Investigating Officer, before the Senior Superintendent of Police, Varanasi, requesting for permission for further investigation in the matter. After permission being granted, the Investigating Officer proceeded to collect the other evidences like call detail record and also recorded the statements of Rahul Sonkar and Ravindra Vishwakarma under Section 161 Cr.P.C. Statement of first informant was also recorded for the second time, in which he has not supported his earlier version and has also stated that why the name of applicant has been taken by him. On the basis of aforesaid evidences, the Investigating Officer filed Second and Third charge sheet on 01.11.2020 and 10.12.2020. However, the fourth charge sheet was filed on 20.01.2021 wherein the Investigating Officer has mentioned that report regarding involvement of Neeraj Vishwakarma and Sujeet Vishwakarma, was to be placed before the competent Court. The Investigating Officer while submitting the supplementary charge sheet under Section 173(8) Cr.P.C. has stated that as charge sheet has already been submitted against the applicant on 14.11.2019 wherein cognizance has already been taken, therefore, the matter with respect to the applicant will be decided by the competent Court.

5. Learned counsel for the applicant has moved discharge application on 19.02.2021 on the ground that the applicant was not named in the F.I.R., his name surfaced in the confessional statement of named accused. He was not present at the place of incident on that date. There is no evidence against the applicant on the basis of which charge sheet was submitted. He further submits that discharge application has been rejected in a mechanical manner, therefore, the order dated 24.11.2021 as well as the entire proceedings may be quashed.

6. Per contra, learned A.G.A. for the State has opposed the contention raised by the learned counsel for the applicant and states that there is no illegality or infirmity in the order dated 24.11.2021 passed by the concerned court below, by which, discharge application of the applicant has been rejected. He further submits that there is no reliable evidence on record to show that applicant was not present at the place of incident. Therefore, there is no infirmity or perversity in the aforesaid order, which has been passed after considering the evidence available on record. No case is made out for discharge of the applicant, who have to face the trial, inasmuch as, in the facts and circumstances of the present case, their complicity in commission of crime can, prima facie, be inferred and the offence is made out against him.

7. All the contentions raised by the learned counsel for the applicant relates to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by the learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded.

8. Before proceeding to adjudge the validity of the impugned order it may be

useful to cast a fleeting glance to some of the representative cases decided by the Hon'ble Supreme Court which have expatiated upon the legal approach to be adopted at the time of framing of the charge or at the time of deciding whether the accused ought to be discharged. It shall be advantageous to refer to the observations made by the Hon'ble Apex Court in the case of **State of Bihar vs. Ramesh Singh reported in 1977 (4) SCC 39** which are as follows :-

"4. Under S. 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 u/s. 227 or u/s. 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", so enjoined by s. 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) in exclusively triable by the court, he shall frame in writing a charge against the accused," as provided in S. 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 this stage of deciding the matter under s. 227 and 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, if any, cannot show that the accused committed the offence, 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 S. 227 or S. 228, then in such a situation ordinarily and generally the order which will have to be made will be one under S. 228 and not under S. 227."

9. Aforesaid case was again referred to in another judgemnt of the Hon'ble Apex Court's in the case of **Superintendent and Remembrancer of Legal Affairs, West Bengal Versus Anil Kumar Bhunja reported in AIR 1980 (SC) 52** and the Hon'ble Apex Court proceeded to observe as follows:-

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in State of Bihar v. Ramesh Singh, AIR 1977 SC 2018, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

10. In yet another case of **Palwinder Singh Vs. Balvinder Singh reported in AIR 2009 SC 887** the Hon'ble Apex Court had the occasion to reflect upon the scope of adjudication and its ambit at the time of framing of the charge and also about the scope to consider the material produced by the accused at that stage. Following extract may be profitably quoted to clarify the situation: -

"12. Having heard learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned judgment insofar as it entered into the realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. This aspect of the matter has been considered by this Court in state of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568 wherein it was held as under :

"23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's Case holding that the trial Court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

11. The following observations made by the Hon'ble Apex Court in the case of **Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary** reported in **AIR 2009 SC 9** also reiterated the same position of law :-

"10. After analyzing the terminology used in the three pairs of sections it was held that despite the differences there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

11. The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by learned counsel for the appellant, 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. That being so, the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed."

12. In a recent judgment in the case of ***M.E. Shivalingamurthy vs. Central Bureau of Investigation*** reported in ***(2020) 2 SCC 768***, Hon'ble Supreme Court has considered the judgment of ***P. Vijayan vs. State of Kerala, (2010) 2 SCC 398*** and reproduced the principle laid down in aforesaid judgment. Relevant paragraphs 17, 18, 28, 29, 30 and 31 are being quoted below: -

"17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., P. Vijayan v. State of Kerala and another2 and discern the following principles:

17.1 If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

17.2 The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

17.3 The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

17.4 If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial".

17.5 It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6 The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7 At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8 There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused."

"18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 of the Cr.P.C. The expression, "the record of the case", used in Section 227 of the Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the Police."

28. It is here that again it becomes necessary that we remind ourselves of the contours of the jurisdiction under Section 227 of the Cr.PC. The principle established is to take the materials produced by the prosecution, both in the form of oral statements and also documentary material, and act upon it without it been subjected to questioning through cross-examination and everything assumed in favour of the prosecution, if a scenario emerges where no offence, as alleged, is made out against the accused, it, undoubtedly, would enure to the benefit of the accused warranting the Trial Court to discharge the accused."

29. It is not open to the accused to rely on material by way of defence and persuade the court to discharge him.

30. However, what is the meaning of the expression "materials on the basis of which grave suspicion is aroused in the mind of the court's", which is not explained away? Can the accused explain away the material only with reference to the materials produced by the prosecution? Can the accused rely upon material which he chooses to produce at the stage?

31. In view of the decisions of this Court that the accused can only rely on the materials which are produced by the prosecution, it must be understood that the grave suspicion, if it is established on the materials, should be explained away only in terms of the materials made available by the prosecution. No doubt, the accused may appeal to the broad probabilities to the case to persuade the court to discharge him."

13. In fact the scope to discharge the accused u/s 245(2) Cr.P.C. is extremely limited. There are only exceptional circumstances which may justify such discharge after passing of the summoning order without any further evidence of such a nature being produced which may completely absolve or exonerate the accused and the charge against them may appear to be groundless. There may also be such circumstances which may be brought to the notice of the court like the absence of legally required sanction or any such legal embargo which prohibits the continuation of proceedings against accused. Ordinarily it is indeed very hard to succeed in obtaining a discharge successfully on the basis of same set of evidence which was found sufficient by the court for the purpose of summoning the accused to face the trial but because the possibility, however limited it be, does exist to get a discharge even without recording any evidence after summoning that the applications u/s 245(2) Cr.P.C. are moved and are, as they should be, entertained by the courts.

14. Illumined by the case law referred to herein above, this Court has adverted to the entire record of the case.

15. The submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. So far as the argument placed by learned counsel for the applicant that applicant was not involved in any way in the incident, this Court is of the opinion that in the present case, the involvement of the applicant is clear from the narration of facts regarding assistance of Neeraj Vishwakarma in enticing away the daughter of opposite party no.2 in the version of the F.I.R. as well as the statement of the informant.

16. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the complaint, the summoning order and also all other the material available on record makes out a prima facie case against the accused at this stage and this Court does not find any justifiable ground to set aside the impugned order refusing the discharge of the accused. This court has not been able to persuade itself to hold that no case against the accused has been made out or to hold that the charge is groundless.

17 . The prayer for quashing or setting aside the impugned order dated 24.11.2021 is refused as I do not see any illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. There is absolutely no abuse of court's process perceptible in the same. The present matter also does not fall in any of the categories recognized by the Supreme Court which might justify interference by this Court in order to upset or quash them.

18. The present application u/s 482 Cr.P.C. lacks merit and is, accordingly, **dismissed.**

(2022) 10 ILRA 605
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.09.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 9345 of 2021

Kiran Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Diwakar Singh, Alka Singh, Sri Anand Kumar Kaushal, Sri Jitendra Kumar Tripathi, Sri Nadeem Murtaza, Sri Vimal Kishor Singh

Counsel for the Opp. Parties:
G.A., Sri Ashish Kumar Mishra, Sri Pramod Kumar Shukla, SriSri Vijay Prakash Mishra

Criminal Law - Indian Penal Code, 1860 - Section 306-FIR lodged-on instigation of the Applicant-mother-in law-victim committed suicide-no overt act of Applicant.

Application allowed. (E-9)

List of Cases cited:

1. Re:Madan Mohan Singh Vs St. of Guj. & anr. reported in (2010) 8 SCC 628

2. Rajesh Vs St. of Har. reported in (2020) 15 SCC 359

3. Arnab Manoranjan Goswami Vs St. of Mah. & ors. reported in (2021) 2 SCC 427

4. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC online SC 98

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

1. Heard Sri Nadeem Murtaza, learned counsel for the applicant and Sri S.P. Tiwari, learned Additional Government Advocate for the State. No one has appeared on behalf of the complainant nor any adjournment slip has been moved.

2. As per learned counsel for the applicant, the present applicant is apprehending her arrest in FIR No. 111 of 2021, under Section 306 IPC, Police Station Cantt, Lucknow East, District Lucknow.

3. Learned counsel for the applicant has further submitted that the applicant has falsely been implicated in this case as she has not committed any offence, as alleged in the prosecution story.

4. The attention has been drawn towards the impugned FIR which has been lodged on 15.07.2021, wherein the allegation has been levelled against the present applicant that on the basis of instigation of the present applicant, the victim has committed suicide. The basis of such allegation is one suicide note of the victim which was send to the social media. As per the suicide note, the victim has indicated that the responsible person for suicide of the victim is the present applicant who is mother-in-law of the victim.

5. Sri Nadeem Murtaza, learned counsel for the applicant has placed reliance on the judgment of Hon'ble Apex Court in **Re:Madan Mohan Singh Vs. State of Gujrat and Another reported in (2010) 8 SCC 628; Rajesh Vs. State of Haryana reported in (2020) 15 SCC 359; and Arnab Manoranjan Goswami Vs. State of Maharashtra and Others reported in (2021) 2 SCC 427,** by submitting that the basic ingredients of Section 306 IPC are suicidal death and abetment thereof. To constitute abetment, intention and involvement of accused to aid or instigate commission of suicide is imperative. Any severance or absence of any of these constituents would militate against said indictment. For the convenience, Para 10 and 14 in Re: **Madan Mohan Singh (supra)** are being reproduced below:

"10. We are convinced that there is absolutely nothing in this suicide note or the FIR which would even distantly be viewed as an offence much less under Section 306 IPC. We could not find anything in the FIR or in the so-called suicide note which could be suggested as abetment to commit suicide. In such matters there must be an allegation that the accused had instigated the deceased to commit suicide or secondly, had engaged with some other person in a conspiracy and lastly, that the accused had in any way aided any act or illegal omission to bring about the suicide.

14. As regards the suicide note, which is a document of about 15 pages, all that we can say is that it is an anguish expressed by the driver who felt that his boss (the accused) had wronged him. The suicide note and the FIR do not impress us at all. They cannot be depicted as expressing anything intentional on the part of the accused that the deceased might commit suicide. If the prosecutions are

allowed to continue on such basis, it will be difficult for every superior officer even to work." (emphasis supplied)

6. Para 9 in of the judgment of Hon'ble Apex Court in Re: **Rajesh (supra)** is being reproduced herein-below:

"9. Conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC. (See Amalendu Pal alias Jhantu v. State of West Bengal1)." (emphasis supplied)

7. On the basis of aforesaid submissions, Sri Nadeem Murtaza has submitted that in the present case, there is no overt act on the part of the present applicant and unless and until there is any overt act or positive act on the part of the applicant/accused to instigate/abete to commit suicide, the ingredients of Section 306 IPC would not be attracted. Therefore, Sri Murtaza has submitted that in the present applicant may not be implicated under Section 306 IPC.

8. He has further submitted that investigation is going on and the present applicant is willing to participate with the investigation, therefore, her liberty may be protected till completion of the investigation and filing of the chargesheet, if any, under Section 173(2) Cr.P.C.

9. Learned AGA opposed the prayer for anticipatory bail but could not dispute the facts as argued by learned counsel for the applicant.

10. Therefore, without entering into the merits of the issue, considering the arguments of learned counsel for the parties, the dictum of the Hon'ble Apex Court in re; **Madan Mohan Singh (supra), Rajesh (supra)** and **Arnab Manoranjan Goswami (supra),** contents and allegation of the FIR, other material available on record and the undertaking of the applicant that she shall cooperate with the investigation, I find it appropriate that the liberty of the present applicant may be protected till completion of the investigation and filing of the chargesheet, if any, under Section 173(2) Cr.P.C. in view of the dictum of Hon'ble Apex Court in Re: **Sushila Aggarwal vs. State (NCT of Delhi), 2020 SCC online SC 98.**

11. It is directed that in the event of arrest, applicant-**Kiran Singh** shall be released on anticipatory bail in the aforesaid case crime number till conclusion of the trial on her furnishing a personal bond of Rs.50,000/- with two sureties each in the like amount to the satisfaction of the arresting authority/ court concerned with the following conditions:-

1. that the applicant shall make herself available for interrogation by a police officer as and when required;

2. that the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted

with the facts of the case so as to dissuade her from disclosing such facts to the court or to any police officer or tamper with the evidence;

3. that the applicant shall not leave India without the previous permission of the court;

4. that in default of any of the conditions mentioned above, the investigating officer shall be at liberty to file appropriate application for cancellation of anticipatory bail granted to the applicant;

5. that the applicant shall not pressurize/ intimidate the prosecution witness;

6. that the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

7. that in case of breach of any of the above conditions the court below shall have the liberty to cancel the bail.

12. In view of above, the present anticipatory bail application is ***disposed of.***

(2022) 10 ILRA 608
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE AJAI TYAGI, J.

Civil Misc. Review Application No.420 of 2021
In
First Appeal From Order Defective No. 689 of 2016

Anwar Ahmad & Ors. ...Applicants

Versus

Uttarakhand Transport Corp. & Ors. ...Opp. Parties

Counsel for the Applicants:
Sri Rahul Anand Gaur

Counsel for the Opp. Parties:
Sri Satish Chandra Pandey

Civil Law- Code of Civil Procedure, 1908 - Order 47 Rule 1-Motor Vehicles Act 1988- Section 173 - The present review petition raises issue of deduction of personal expenses and calculation of compensation being faulty-Review is not an appeal in disguise - Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered.

Settled law that the power of review cannot be exercised on merits of the case as that is the domain of the appellate court, however the power of review may be exercised only where some mistake or error apparent on the face of the record is found or to prevent miscarriage of justice or to correct grave and palpable errors committed by it and may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made and for any other sufficient reason.

Civil Law - Code of Civil Procedure, 1908 - Order 47 Rule 1-Motor Vehicles Act 1988- Section 173- Here father cannot be said to be dependant as it is not demonstrated that father was dependant. The minor children would take one quotient between two of them and one count for mother hence instead of 1/4 it has to be 1/3 for personal expenses- There is an error apparent on the face of the record in the judgment. The calculation is based on a grave mistake the court instead of considering amount payable has calculated on basis of deduction of personal expenses. In fact, the claimants

should have also filed review application as what has been calculated is considering the amount which was to be deducted as personal expenses instead of considering grantable datum amount- From the date of claim petition till amount is deposited, the amount would carry 7.5% rate of interest. The amount as recalculated be deposited within 8 weeks from today failing which entire amount will carry 9% rate of interest after expiry of the period.

As error apparent on the face of the record has been found in as much as the appellate court has calculated the amount payable on the basis of personal expenses and one-fourth cannot be deducted even if there are more dependents as sisters and brothers and father cannot be said to be dependent on the deceased- Amount therefore recalculated. (11, 14, 16, 17)

Review application allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sube Singh & anr. Vs Shyam Singh (Dead) & ors., 2018 0 Supreme (SC) 126 (cited)

2. Meena Pawaia & ors. Vs Ashraf Ali & ors., 2021 LawSuit (SC) 743 (cited)

3. Suresh Chandra Bagmal Doshi & anr. Vs The New India Assurance Comp. Ltd & ors.,2018 0 Supreme (SC) 357 (cited)

4. Dr. Anoop Kumar Bhattacharya & anr. Vs National Insurance Co. Ltd., 2021 0 Supreme (All) 1277 (cited)

5. Thungabhadra Industries Ltd. Vs The Govt. of A.P., AIR 1964 SC 1372

6. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma 1979 (4) SCC 389

7. Meera Bhanja Vs Nirmala Kumari Choudhury AIR 1995 SC 455

8. Parsion Devi & ors. Vs Sumitri Devi & ors. 1997, (8) SCC 715

9. Rajendra Kumar Vs Rambai, AIR 2003 SC 2095

10. Lily Thomas Vs U.O.I, AIR 2000 SC 1650

11. Inderchand Jain Vs Motilal (2009) 4 SCC 665

12. Kamlesh Verma Vs Mayawati & ors. 2013 (8) SCC 320

13. Chhajju Ram Vs Neki, AIR 1922 PC 112

14. Moran Mar Basselios Catholicos Vs Most Rev. Mar Poulose Athanasius & ors., AIR 1954 SC 526

15. U.O.I Vs Sandur Manganese & Iron Ores Ltd. & ors., 2013 (8) SCC 337.

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Ajai Tyagi, J.)

1. Heard Sri Rahul Anand Gaur, Counsel for the original respondent now applicant for the review petitioner and Sri Satish Chandra Pandey, Counsel for the respondents - original claimants.

2. The present review petition raises issue of deduction of personal expenses and calculation of compensation being faulty. There is no dispute with respect to liability. The age of the deceased is 21 years which is not in dispute.

3. Learned Counsel for the review petitioner has heavily relied on the decisions in ***Sube Singh and another Vs. Shyam Singh (Dead) and others, reported in 2018 0 Supreme (SC) 126.*** *Learned counsel has also relied on the decision titled* ***Meena Pawaia and others Vs. Ashraf Ali and others, published in 2021 LawSuit (SC) 743****; The learned counsel for review petitioner has even placed reliance on* ***Suresh Chandra Bagmal Doshi and***

another Vs. The New India Assurance Company Limited and others, 2018 0 Supreme (SC) 357; and Dr. Anoop Kumar Bhattacharya and another Vs. National Insurance Co. Ltd., 2021 0 Supreme (All) 1277, so as to contend that the deduction for personal expenses of a bachelor has to be only one half and the appeal court under section 173 of Motor Vehicles Act 1988 cannot deduct one-fourth even if there are more dependents as sisters and brothers and father cannot be said to be dependent on the deceased. The learned counsel for review petitioner has contended that this is error apparent on the record and requires to be reviewed.

4. The judgments relied by Sri Gaur appearing for the applicant - respondent are considered by us and the submission that in case of death of bachelor 1/2 and not 1/4th be deducted for personal expenses is not the law propounded. It is normally dependent on how many dependents are on the deceased.

5. It is submitted by the Counsel for the review petitioner that the deceased was a bachelor and the father was an earning member and hence deduction of 1/4th should not have been made, it should have been 50% of the income earned by deceased.

6. While considering the facts, we have categorically mentioned in paragraph no.4 "It is submitted by learned counsel for the appellant that the deceased was 21 years of age survived by his parents and brothers and sister who were minor at the time of accident. He was JCB mechanic. In the year 2014, the Tribunal has assessed the income of the deceased to be Rs.3,000/-, which is on the lower side. Further the Tribunal has not granted any amount under the head of future loss of income. Multiplier of 17 was applied which should be 18. Further amount under the head of non-pecuniary damages has been awarded on lower side. Further rate of interest has been considered to be 7% which should be 9%. Thus, quantum of compensation is required to be enhanced."

7. It is submitted by Counsel for original claimants that the deceased was survived by his parents, brothers and sisters, who are minor at the time of accident. The deceased was bachelor. The family was dependant on him and, therefore, this Court had deducted 1/4th.

8. It is submitted by Sri Gaur, learned counsel for review petitioner that father of the deceased cannot be said to be the dependant on the son. It is submitted that claimants are under a duty to prove that father of deceased was dependent on the income of deceased. There were minor brothers and sisters though are legal representative of the deceased but is not proved that they were dependant on deceased, therefore, this review requires to be allowed in view of the following authoritative pronouncements:-

9. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372**, the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

10. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389** the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

11. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455** while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn (supra),** the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

12. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

13. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095,** the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/ order cannot be disturbed."

14. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650**, the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665.**

15. In **Kamlesh Verma Vs. Mayawati and others 2013 (8) SCC 320,** the Court said:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned

judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in ***Chhajju Ram vs. Neki, AIR 1922 PC 112*** *and approved by this Court in* ***Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526****, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in* ***Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors.,*** **2013 (8) SCC 337.**

22.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived." *(emphasis supplied)*

16. Having heard the learned counsels for the parties We do not disturb the findings as far as monthly income of the deceased as decided by this court. Supreme Court in ***Meena Pawaia (supra)*** has held that if deceased is bachelor but has more family members who are dependant on the deceased

, the deduction can vary. Here father cannot be said to be dependant as it is not demonstrated that father was dependant. The minor children would take one quotient between two of them and one count for mother hence instead of 1/4 it has to be 1/3 for personal expenses in view of discussion in latest judgment in ***Dr. Anoop Kumar (supra).***

17. We even find that there is an error apparent on the face of the record in the judgment. The calculation is based on a grave mistake the court instead of considering amount payable has calculated on basis of deduction of personal expenses. In fact, the claimants should have also filed review application as what has been calculated is considering the amount which was to be deducted as personal expenses instead of considering grantable datum amount. Therefore, we recalculate the amount as under:-

i. Income Rs.4,000/-

ii. Percentage towards future prospects : 40% namely Rs.1,600/-

iii. Total income : Rs. 4,000 + 1,600 = Rs. 5,600/-

iv. Income after deduction of 1/3rd : Rs. 3,733/-

v. Annual income : Rs. 3,733 x 12 = Rs. 44,796/-

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs. 44,796 x 18 = Rs. 8,06,328/-

viii. Amount under non pecuniary heads : Rs. 40,000/-

ix. Total compensation : Rs. 8,46,328/-

18. We have been conveyed by Sri Gaur that no amount has yet been deposited except the amount awarded by the Tribunal. This review petition is filed immediately after the judgment. Hence, the enhanced amount would be deposited with 7.5% interest at flat rate of interest. We even modify paragraph no.10 as no amount has been deposited by the applicant-review petitioner herein and it is not a very old matter.

19. We are thankful to Uttrakhand Transport Corporation for having brought these glaring mistakes to our notice by way of filing this review.

20. The Uttrakhand Transport Corporation should have deposited the amount which was on lower side as there was mistake in calculation which unfortunately overlooked by this court. The amount could have been deposited even under protest but the review petitioner has not deposited the same. May that as it may be, from the date of claim petition till amount is deposited, the amount would carry 7.5% rate of interest. The amount as recalculated be deposited within 8 weeks from today failing which entire amount will carry 9% rate of interest after expiry of the period .

21. The rest of the directions are not altered. The record, if yet not transmitted, be sent to Tribunal. The amount of Rs. 25,000/-, if not transmitted, be transmitted expeditiously.

22. The review petition is partly allowed.

(2022) 10 ILRA 614
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 147 of 2012

Sultan ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Arvind Kumar Mishra, Sri Gaurav Kakkar, Ms. Archana Singh (A.C.)

Counsel for the Opposite Party:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Sections 374(2) & 383 - Indian Penal Code, 1860-Sections 302, 504 - Arms Act,1959 - Section 25-challenge to-conviction-broad day light murder-motive as well as direct evidence of two eye-witnesses available- an altercation took place between deceased and appellant over the relationship of appellant's wife with the deceased-both the eye-witnesses PW-2 and PW-5 were present at the place of occurrence-recovery as well as medical evidence fully supported the prosecution version-PW-1, PW-2 and PW-5 who being real brothers and sister of the deceased are interested witnesses, therefore, their testimony has no value, does not inspire confidence-there is no bar in law on examining family members or any other person as witnesses if they disclose truthful or actual facts leading to the occurrence-It is well settled that interested evidence is not necessarily unreliable evidence-Hence, Trial court rightly convicted the accused.(Para 1 to 46)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Mekala Sivaiah Vs St. of A.P. (2022) SCC Online SC 887

2. Kartik Malhar Vs St. of Bih. (1996) CRL, L.J. 889

3. St. of U.P. Vs Kishan Chand & ors. (2004) 7 SCC 629

4. St. of J & K Vs S. Mohan Singh & ors. (2006) 9 SCC 272

5. Namdeo Vs St. of Mah. (2007) 14 SCC 150

6. Shyam Babu Vs St. of U.P. (2012) AIR SC 3311

7. Kuna @ Sanjaya Behera Vs St. of Ori. (2017) SCC Online SC 1336

8. Suresh Chandra Bahri Vs St. of Bih. (1995) Supp 1 SCC 80

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal is by the appellant-Sultan against the judgment and order dated 5th October, 2011 passed by the First Additional Sessions Judge, Baghpat in Sessions Trial No. 132 of 2008 (State Vs. Sultan) arising out of Crime No. 304 of 2007, under Sections 302, 504 I.P.C., Police Station-Singhawali Aheer, District Baghpat and in Sessions Trial No. 133 of 2008 (State Vs. Sultan) arising out of Crime No. 317 of 2007, under Section 25 Arms Act, Police Station-Singhawali Aheer, District-Baghpat, whereby the accused-appellant has been convicted and sentenced to undergo (i) life imprisonment for the offence under Section 302 I.P.C. with a fine of Rs. 50,000/-, in default thereof, he has to further undergo one year additional

simple imprisonment, (ii) six months imprisonment for the offence under Section 504 I.P.C. and (iii) one year for the offence under Section 25 of the Arms Act, that all the sentences were to run concurrently.

2. We have heard Ms. Archana Singh, learned Amicus Curiae on behalf of the appellant and Mrs. Archana Singh, learned A.G.A. for the State as also perused the entire materials available on record.

3. The prosecution story, as transpired from the records of the present appeal, is as follows:

On the written report (Exhibit-Ka-1) given by the P.W.-1/informant Aflatoon son of Bunddu Darji, a first information report (Exhibit-Ka-4) has been lodged on 3rd November, 2007 at 10:30 a.m. against the accused-appellant, which was registered as Crime No. 304 of 2007 under Sections 302 and 504 I.P.C. In the said report, it has been alleged that on 3rd November, 2007 at about 09:00 a.m. in the morning, when the brother of the informant, namely, Jamil was coming to his house from Gher, on the way the accused-appellant met Jamil and said that he has separated his wife from him and started abusing him. After explaining that he is not responsible for the same, he came to his house. After that when the accused-appellant was on the roof of his house, he asked Jamil to come to his roof stating that his behavior with him earlier was wrong for which he was apologizing. Believing the accused Sultan, the brother of the informant i.e. Jamil reached roof/terrace of one Iliyash and the accused-appellant also came to roof/terrace of Iliyash, where the accused-appellant while talking him, took out a Katta (country-made pistol) and shot Jamil in his neck and fled. The time of occurrence was 09:30 a.m. and at that time the younger sister of the informant, namely, Hazra also went behind his brother Jamil on the terrace. The said incident occurred in her presence. The younger brother of the informant, namely, Vakeel had also seen the incident. The dead body of the informant was lying on the roof covered in blood and he had come to the Police Station for lodging the first information report. On registration of the said case, P.W.-6 Sub-Inspector Rajeev Kumar Kaushik after mentioning the said report in the General Diary, reached the place of occurrence on the identification of the informant. P.W.-6 has also recorded the statement of the informant along with other witnesses and prepared site plan. P.W.-6 has also recovered blood stained and plain earth from the place of occurrence and prepared recovery memo (Exhibit-Ka-12) on the same day i.e. 3rd November, 2007.

4. The inquest of the deceased was conducted on the same day at 1330 hours in the presence of P.W.-6 and the statements of witnesses were taken on the inquest report (Exhibit-Ka-2) by P.W.-6. The inquest witnesses opined that since the cause of death of the deceased was due to gun shot, the post-mortem was necessary.

5. Thereafter the dead body of the deceased was sealed and sent to Mortuary. The autopsy of the deceased was conducted on the same day i.e. 3rd November, 2007 at 04:10 p.m. by Dr. Yatish Kumar (P.W.-3). In the opinion of P.W.-3, the cause of death of deceased Jamil was shock and haemorrhage due to following ante-mortem injuries:

"(1) Gun shot wound of entry of size 1.75 cm. x 1.5 cm. on right side of neck

just above the clavicle right side margins everted, tattooing present on the right side of the face and neck in the area of 13 cm x 11 cm.

(2) Gun shot wound of exist of size 2.5 cm. x 2 cm on the back just medial to right scapula upper inner border margins everted.

Injury no.1 and 2 are correspond to each other by prolong on resection blood vessels of right side of the neck are damaged due to injury no.1"

6. The investigation proceeded and on 21st November, 2007, the accused-appellant was arrested from the tube-well of one Mool Chand Sharma and from whose possession a country-made pistol 315 bore, two live cartridges 315 bore and one empty cartridge of 315 bore have been recovered by the Police and in that regard the arrest-cum-recovery memo has been prepared by P.W.-5 (Exhibit-Ka-11). After completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet dated 2nd January, 2008 (Exhibit-Ka-13) against the accused-appellant. The Magistrate concerned took cognizance of the offence on the charge-sheet and as the case was triable by the court of sessions, committed the case to the court of Sessions Judge resultantly, the same were registered as Sessions Trial No. 132 of 2008 (State Vs. Sultan) arising out of Crime No. 304 of 2007, under Sections 302, 504 I.P.C., Police Station-Singhawali Aheer, District Baghpat and Sessions Trial No. 133 of 2008 (State Vs. Sultan) arising out of Crime No. 317 of 2007, under Section 25 Arms Act, Police Station-Singhawali Aheer, District-Baghpat.

7. On 3rd May, 2008, the learned Trial Court framed following charges against the accused-appellant for the offence under Sections 302 and 504 I.P.C.:

"मै, एस.के.सिंह, प्रथम, अपर सत्र न्यायाधीश, बागपत, आप सुल्तान को निम्न आरोपो से आरोपित करता हूँ:-

1. यह कि दिनांक 03.11.07 को समय 9.30 बजे सुबह, स्थान, ग्राम रामनगर, कस्बा व थाना सिंघावली अहीर, जिला बागपत के क्षेत्राधिकार मे आपने वादी के भाई जमील की गोली मारकर साशय हत्या कारित की और इस प्रकार आपने ऐसा अपराध कार्य किया है, जो कि भा०द०सं० की धारा 302 के अधीन दण्डनीय है और इस न्यायालय के प्रसंज्ञान मे है।

2. यह कि उपरोक्त समय, दिनांक व स्थान पर आपने वादी के भाई जमील को इस साशय से अपमानित किया कि ऐसे प्रकोपन से वह लोक शान्ति भंग करेगा। इस प्रकार आपके द्वारा ऐसा अपराध कारित किया गया है, जो कि भा०द०सं० की धारा 504 के अधीन दण्डनीय है तथा इस न्यायालय के प्रसंज्ञान मे है।

एतद्द्वारा आपको निर्देशित किया जाता है कि आपके विरूद्ध उक्त आरोपों का विचारण इस न्यायालय द्वारा किया जायेगा।"

8. On 3rd May, 2008, the court below has framed charge against the accused-appellant for the offence under Section 25 of Arms Act. For ready reference, the same reads as under:

"यह कि दिनांक 21/11/07 को समय करीब 20.15 बजे, स्थान-ग्राम लुहारा से ग्राम रामनगर कच्चा रास्ता मूल चन्द शर्मा की ट्यूबैल के पास जंगल ग्राम रामनगर, थाना सिंघावली अहीर, जिला बागपत से थाना सिंघावली अहीर की पुलिस द्वारा आप पकडे गये तथा आपके कब्जे से एक तमंचा 315 बोर, दो जिन्दा व एक

खोखा कारतूस 315 बोर के नाजायज बरामद हुये, जिनको अपने पास रखने के लिये आपके पास कोई वैधानिक अधिकार अथवा लाईसेंस नही था। इस प्रकार आपके द्वारा ऐसा अपराध कारित किया गया है, जो कि आयुद्ध अधिनियम की धारा- 25/27 के अधीन दण्डनीय है तथा इस न्यायालय के प्रसंज्ञान में है।

9. In order to prove its case, the prosecution also relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

"i). Written report dated 3rd November, 2007 prepared on the dictation of the informant-P.W.1 has been marked as Exhibit Ka -1 ;

ii). The first information report dated 3rd November, 2007 has been marked as Exhibit Ka-4;

iii). The inquest report dated 3rd November, 2007 has been marked as Exhibit-Ka-2;

iv). The post-mortem/autopsy report dated 3rd November, 2007 has been marked as Exhibit-Ka-3;

v). Recovery memo of blood stained earth and plain earth prepared on 3rd November, 2007 has been marked as Exhibit Ka-12;

vi) Site plan with index;

vii). Recovery memo of country-made pistol, empty cartridge and live cartridges said to have been recovered on 21st November, 2009 has been marked as Exhibit Ka-11; and

viii). Charge-sheet dated 2nd January, 2008 has been marked as Exhibit Ka-13."

10. The prosecution also examined total nine witnesses in the following manner:-

"i). P.W.-1/informant, namely, Aflatoon, brother of the deceased Jamil;

ii). P.W.-2, namely, Vakil elder brother of the deceased and informant, who is alleged to be an eye-witness; ;

iii) P.W.-3, namely, Dr. Yatish Kumar, who conducted autopsy of the deceased;

iv) P.W.-4, namely, Head Constable-90 Ompal Singh, who proved the chik first information;

v). P.W.-5, namely, Smt. Hazara sister of deceased and informant, who is also alleged to be an eye witness of the incident;

vi). P.W.-6, namely, Sub-Inspector Rajiv Kumar Kuashik, who has investigated the case;

vii). P.W.-7, namely, Sub-Inspector Kunwar Pal Singh, who has also investigated the case after P.W.-6;

viii). P.W.-8, namely, Sub-Inspector Kapil Kumar Bhardwaj, who has also investigated the case before P.W.-6; and

ix). P.W.-9, namely, Constable-1048 Kishan Singh, who has proved the original copy of first information report.

11. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant for confronting with the same under Section 313 Cr.PC. In their statement recorded U/s 313 Cr.P.C. the accused appellant denied his involvement in the commissioning of the offence under Sections 302 and 504 I.P.C. Accused appellant Sultan has specifically stated before the trial court that he has been falsely implicated in this case. He has further stated that the statement of the informant-P.W.-1 is false. Since P.W.-2 to P.W.-3, are the family members of the deceased and due to rivalry, they have given false statements against the accused-appellant. He has further stated that since P.W.-3 to P.W.-7 are government employees, therefore, they have given false statements against the accused-appellant. Though it has been stated before the court that evidence shall be produced in support of the plea of the defence that the accused-appellant has been falsely implicated, but no such evidence has been produced before the conclusion of trial. No witness has been adduced from the defence.

12. The trial court after relying upon the evidence adduced by the prosecution and recording its finding, has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that the accused-appellant committed the murder of Jamil on the roof of Iliyash. On the cumulative strength of the aforesaid, the trial court has held that the accused-appellant is guilty of offence punishable under Sections 302 I.P.C. and 504 I.P.C. for the murder of the deceased, namely, Jamil. As such, the trial court convicted and sentenced the accused-appellant for the aforesaid offences. The trial court has also held the accused-appellant guilty of the offence punishable under Section 25 of the Arms Act. It is against this judgment and order of conviction passed by the trial court that the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellant is too severe.

13. Assailing the impugned judgment and order of conviction, Ms. Archana Singh, learned Amicus Curiae appearing for the accused-appellant submits that the entire prosecution version is based upon the statement of P.W.-5. Since P.W.-5 in her examination has stated that she is resident of Police Station and District Baghpat, whereas P.W.-1 who happens to be the real brother of P.W.-5 has stated in his examination that P.W.-5 is resident of District-Ghaziabad, therefore, the recognition of P.W.-5 is doubtful. Further Ms. Singh submits that Nasiruddin, who is an independent eye witness of the incident and could narrate the incident correctly, has not been adduced by the prosecution nor any explanation in that regard has been given by the prosecution. Next submission is that only interested witnesses i.e. P.W.-1, P.W.-2 and P.W.-5, who are real brothers and sister of the deceased have been adduced by the prosecution and no independent witness has been adduced, such evidence of prosecution has no value under the Evidence Act. Argument is that though the Investigating Officer (P.W.-6) has prepared the site plan, but the trial court has not examined the same correctly so as to reach a just conclusion. Further argument is that nobody was present at the place of incident, meaning thereby that neither P.W.-2 nor P.W.5 saw the incident with their own eyes. It is also urged that since the deceased was a person with bad character, as is evident from the cross-

examination of P.W.-1,P.W.2 and P.W.-5, therefore, it is possible that his murder was committed by someone else. There is no single iota of evidence available on record to prove the motive of the case.

On the cumulative strength of the aforesaid, learned counsel appearing for the accused-appellant submits that the impugned judgment and order of conviction cannot legally be sustained and is liable to be quashed.

14. On the other-hand, Mrs. Archana Singh, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused person; there is clinching evidence to support the prosecution's case; the incident in which the deceased Jamil is alleged to have been murdered by the accused-appellant, occurred at 09:30 a.m. i.e. in broad day light; there are two eye witnesses of the alleged incident; the places of occurrence has not been disputed by the defence; and the accused-appellant has strong motive and the same has also been explained by the evidence of prosecution. Therefore, the prosecution has proved the charge levelled against the accused-appellant beyond reasonable doubt.

15. To bolster the aforesaid submissions, learned A.G.A. has invited the attention of the Court to the latest judgment of the Apex Court in the case of Mekala Sivaiah vs. State of Andhara Pradesh reported in 2022 SCC Online SC 887, whereby the Apex Court in paragraph nos.25 and 26 has held as follows:

"25. The facts and evidence in present case has been squarely abefornalyzed by both Trial Court as well the High Court and the same can be summarized as follows:

i. The prosecution has discharged its duties in proving the guilt of the appellant for the offence under Section 302 I.P.C. beyond reasonable doubt.

ii. When there is ample ocular evidence corroborated by medical evidence, mere non-recovery of weapon from the appellant would not materially affect the case of the prosecution.

iii. If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony.

iv. The deceased has been attacked by the appellant in broad daylight and there is direct evidence available to prove the same and the motive behind the attack is also apparent considering there was previous enmity between the appellant and PW-1.

26. Having considered the aforesaid facts of the present case in juxtaposition with the judgments referred to above and upon appreciation of evidence of the eyewitnesses and other material adduced by the prosecution, the Trial Court as well as the High Court were right in convicting the appellant for the offence under Section 302 I.P.C. Therefore, we do not find any ground wa*rranting interference with the findings of the Trial Court and the High Court."*

(Emphasis added)

On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegally and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellants who committed heinous crime by murdering the deceased Jamil, is liable to be dismissed.

16. We have considered the submissions made by the learned counsel for the parties and have examined the original records of the court below as well as the impugned judgment and order of conviction challenged before us.

17. The only question which is required to be addressed and determined in this jail appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

18. Before entering into the merits of the case set up by the learned counsel for the appellant and the learned A.G.A. for the State qua impugned judgment and order of conviction passed by the trial court referred to above, it is desirable for us to record statements of the prosecution witnesses in brief.

19. P.W.-1/Informant, namely, Aflatoon brother of the deceased has reiterated the same facts as have been narrated in the first information report and in the statement recorded under Section 161 Cr.P.C. In his examination he has stated that he did not see the incident, after hearing gunshots he reached the place of occurrence, where he saw that the deceased was lying dead on the roof. He has further stated that at the time of incident, P.W.-2 was standing on the ground below the roof of Iliyash and P.W.-5 was standing on the roof of her house. They saw the incident with their own eyes. He has also stated that the altercation which took place between the accused-appellant and the deceased at 09:00 a.m. on the same day was seen by him. It has also been stated that the name of the wife of the accused-appellant is Hasina. The accused-appellant has three children. The accused-appellant got divorced from his wife eight to nine months before the incident. There is no relationship with Hasina either of his family or himself nor is there any reconciliation between their family. He has also stated in his cross-examination that the Iliyash has two houses. Iliyash lives in another house and in the house of which roof the incident occurred, he keeps his buffaloes. The house of the accused is adjacent to the said house of Iliyash. The roof of Iliyash's house is below the roof of the accused's house but the roofs of porches of their houses are same in the height. In the cross-examination, P.W.-1 has stated that it is wrong to say that Jamil used to flirt with Ilyash's wife and because of that flirting, Iliyash got Jamil killed by unknown people.

20. P.W.-2 Vakil has stated that the deceased Jamil was his younger brother. Accused-appellant is his cousin brother (son of sister of his father). The accused appellant was having quarrel with his wife Haseena. There was no relation between the deceased Jamil and Haseena but the accused-appellant used to think that his wife Haseena had illegitimate relation with the deceased. On 21st October, 2007, the deceased got married and in the said marriage Rukhsana, brother in law's wife (sarhaj) of his brother Ali Sher had come.

The accused-appellant thought that she is his wife Haseena. On 02.11.07, the accused-appellant came to his house and asked his father to get his wife Haseena and in reply the father of P.W.-2 told him that when he has divorced his wife six to eight months ago, why would she come now. After that the accused-appellant went back to his house. On 03.11.07, the brother of P.W.-2, namely, Jamil was going to his house, then on the way the accused-appellant met him and asked the deceased to get his wife or else it will not be good. On the persuasion of the deceased, the accused-appellant went back. However, at 9:30 a.m. in the morning, when P.W.-2, the deceased and P.W.-5 were standing on the vacant land in front of their house the accused-appellant came on his terrace and told the deceased that as the deceased was son of his maternal uncle and he misbehaved with him, he asked the deceased to come on his terrace expressing remarks. Hearing this, the deceased went to the roof of accused-appellant. When the deceased was two steps away from accused-appellant, he took out the country made pistol (katta) while threatening. Seeing the pistol, the deceased tried to turn back and run away, then the accused-appellant shot the deceased which hit him in the back of the neck and he died on the spot. On hearing the sound of bullet, when he reached the terrace, and that he saw the accused-appellant running away after shooting him. The accused-appellant stepped out of his house and ran away. In the cross-examination, P.W.-2 has stated that about the incident, his statement has been recorded by the Investigating Officer. He has further stated that the accused-appellant thought that the deceased had illegitimate relations with his wife Haseena. P.W.-2 has also denied in his cross-examination that the deceased was murdered by unidentified persons because of his vagabondage and that the accused-appellant has been falsely implicated with the intention of grabbing money.

21. P.W.-3 who conducted the autopsy of the deceased, has stated that the injury No.2- found on the body of the deceased was gunshot wound of exit of size 2.5cm x 2cm on the back just medial to scapula upper inner border, margins everted. He has further stated that inquiry No.1 and No.2 are correspond to each other. Blood vessels of right side of the neck are found to be damaged at the incision of the wound. Further he has submitted that on internal examination, large vessels of blood were found mutilated on the right side of the neck of the dead body. The cause of death of the dead body is likely to be about (6) six hours before the time of post-mortem due to excessive trauma and bleeding. P.W.3 has proved the autopsy report which has been marked as Exhibit-Ka-3. Lastly, P.W.-3 has stated that the deceased was hit by the bullet from the front right side.

22. P.W.-4 Head Constable-90 Ompal Singh has stated that he has written the first information report and he has also proved the chik first information report before the court below.

23. P.W.-5 Hazara has stated in her examination that on the day of the incident, at around nine o'clock in the morning, the accused-appellant had called his brother i.e. deceased from his terrace and the deceased went to Iliyas's terrace and that she also went there with him. The accused-appellant had also come from his roof to the terrace of Iliyas. After coming there, the accused-appellant said the deceased that due to his behaviour he suffered a lot earlier but will

not suffer more. After saying this, the accused-appellant took out a country made pistol and shot the deceased and that the deceased had died after being shot. He was shot in the lower part of his right neck and after shooting him, Sultan fled from the spot. P.W.-5 has further stated that she used to go to her maternal home mostly for a day or two as her children were in school. She has further stated that she and the deceased were present at home for almost an hour on the day of the incident. When the accused-appellant called her brother i.e. the deceased from the terrace, she did not stop him. She was two steps away from the deceased when he was shot. The accused-appellant shot the deceased from a distance of two steps. The deceased was standing with his hands folded when the bullet was fired. The accused-appellant had shot saying that earlier he (deceased) was saved and he will not leave him today. The deceased had fallen as soon as he was shot. P.W.-5 could not save him as she was behind while shooting. The deceased died after falling. The head of the deceased was towards the west and the feet were towards the east. The deceased was wearing a grey colored pant. P.W.-5 has also stated that her brother i.e. informant went to Baghpat on the day of the incident. She has also stated that her statement has been recorded by the Investigating Officer. P.W.-5 has again stated that the accused-appellant from a height of one yard, shot the deceased.

24. P.W.-6 Sub-Inspector Rajiv Kumar Kaushik, who has initially investigated the case, has stated that on an information of an informer, he along with other Police personnels and informant reached the Tube-well of one Mool Chand Sharma, where the accused-appellant was hiding and arrested him. P.W.-6 has further stated that one country-made pistol of 315 bore, one empty cartridge and two live cartridges of 315 bore have also been recovered from his possession. P.W.-6 has also prepared Arrest and Recovery memo which has been marked as Exhibit-Ka-11. He has further stated that the recovery memo of plain and blood stained soil collected from the spot by him has been prepared by him as Exhibit-Ka 12. P.W.-6 has also proved the site plan prepared by him. He has then stated that the roofs of the accused-appellant and the house Iliyas have been found to be adjoining.

25. P.W.-7 Sub-Inspector Kunwar Pal Singh who has investigated the case after P.W.-6, has proved the charge-sheet. P.W.-8 Sub-Inspector Kapil Kumar Bhardwaj, who has investigated the case under Section 25 Arms Act and submitted the charge-sheet before the court below and proved the same as P.W.8.

26. From the testimony of the aforesaid nine prosecution witnesses, it is apparently clear that there are two eye witnesses of murder of the deceased Jamil, namely, Vakil (P.W.-2) and Smt. Hazra (P.W.-5) and they have fully supported the prosecution version. It is no doubt true that they being brother and sister of informant and deceased, are interested witnesses but their consistent statements made under Section 161 Cr.P.C., in their examination-in-chief as well as in their cross-examination, cannot be discredited only on the ground that they are interested witnesses. The same is required to be read as a whole prosecution evidence i.e. autopsy report, police reports including recovery memo of arrest of the accused-appellant, country-made pistol of 315 bore, one empty cartridge and two live cartridges of 315 bore from his possession and the site plan of the spot etc.

27. For examining the correctness or otherwise of the judgment and order of conviction, the version of prosecution as well as defence and the submissions made by the learned counsel for the parties, it is necessary for us to refer certain case laws laid down by the Apex Court on the subject.

28. In the case of **Kartik Malhar V State of Bihar** reported in *1996 CRL. L.J. 889,* the Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case, AIR 1953 SC 364 in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses."

29. The Apex Court in the case of **State of U.P. Vs. Kishan Chand & Others** reported in *(2004) 7 SCC 629,* has opined that just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise, their testimony inspire confidence. (Reference-paragraph nos. 9 and 10 of the aforesaid judgment of the Apex Court).

30. The Apex Court in the case of **State of Jammu and Kashmir vs. S. Mohan Singh & Others** reported in *(2006) 9 SCC 272,* the Apex Court has observed that it is well settled that in a murder trial, merely because a witness is interested or inimical, his evidence cannot be broadly discarded unless the same is otherwise found to be not trustworthy. In the said case, the view of the Apex Court was that the evidence of these two witnesses is credible more so when witness Ram Lal received injuries. For ready reference, relevant paragraph of the said judgment reads as follows:

"Other two eyewitnesses are the informant Ram Lal and his brother Babu Ram. Ram Lal is father of deceased Yush Paul Singh whereas witness Babu Ram is uncle of deceased Yush Paul Singh. These two witnesses have supported the prosecution case disclosed in the first information report in all material particulars and consistently stated that respondent No. 1 caught hold of the deceased and respondent No. 2 inflicted injuries upon him with knife. We have been taken through the evidence of these two eyewitnesses in extenso. Their evidence is quite consistent, natural and both the witnesses have stood the test of lengthy cross-examination broadby the defence. Out of these two witnesses, Ram Lal was the informant and an injured witness as the doctor who examined him on the date of occurrence itself found that he received injuries by hurling of stone. Nothing could be pointed out on behalf of defence to show that the evidence of these two eyewitnesses is not credible, excepting this that they were interested witnesses. The High Court was not justified in disbelieving them on the sole ground that they were interested persons. ***It is well settled that in a murder trial, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be not trustworthy. In the present case, we are of the view that the evidence of these two witnesses is credible more so when witness Ram Lal received injuries.....****"*

(Emphasis added.)

31. Further in **Namdeo V State of Maharashtra**, reported in *(2007) 14 SCC 150*, the Apex Court held as under:-

"In the leading case of Shivaji Sahebrao vs. State of Maharashtra, (1973) 2 SCC 793, this Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."In Anil Phukan Vs. State of Assam, (1993) 3 SCC 282 : JT 1993 (2) SC 290, the Court observed; "Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect."

32. In the case of **Shyam Babu V State of UP** reported in **AIR** *2012 SC 3311*, The Apex Court has held as under:-

"Where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. There is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend etc"

33. It has again been observed by the Apex Court in the case of **Kuna @ Sanjaya Behera V State of Orrisa,** reported in *2017 SCC Online Supreme Court 1336* that the conviction can be based on the testimony of single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important.

34. From the above mentioned pronouncements of the Apex Court, it is apparently clear that the evidence of interested or inimical witnesses is to be scrutinised with care but can not be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in relying on the said evidence. It is well settled that interested evidence is not necessarily unreliable evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. Thus, the evidence

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

35. It is settled law that in case of direct evidence the motive would not be relevant and only in case of circumstantial evidence, motive assumes great significance. In a case in which the evidence is clear and unambiguous and the circumstances proved the guilt of the accused, the same would not get weakened even if the motive is not a very strong one. The motive loses all its importance in a case where direct evidence of eye witnesses is available.

36. In **Suresh Chandra Bahri Vs. State of Bihar** reported in *1995 Supp (1) SCC 80,* the Apex Court has opined that a motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with.

37. In the present case motive as well as direct evidence of two eye witnesses i.e. P.W.-2 and P.W.5 are available. From the records, it is apparent that before half an hour i.e. at about 09:00 a.m. on the date of incident, an altercation took place between the deceased Jamil and the accused-appellant in which the accused-appellant also abused Jamil on the ground that the accused-appellant suspected that his wife Haseena had love affair with the deceased and that is why she took divorce from him and the said relationship between his wife and the deceased was still continued. For the said reason the accused-appellant was angry with the deceased and wanted to take revenge from him. Therefore, it is clear that the accused-appellant had the motive to murder the deceased.

38. Before coming to the conclusion, it is necessary for us to deal with the submissions made by the learned Amicus Curiae, appearing for the accused-appellant and the learned A.G.A. for the State for litmus test. The first submission that the presence of P.W.-5 sister of deceased and informant is doubtful when as a matter of fact, the entire prosecution case is based on her statement, does not appeal to us. We may record that in the examination in chief as well as in the cross-examination, P.W.-5 has stated that she used to go to her maternal home mostly for a day or two days as her children were studying in school. The said submission has also been supported by P.W.-2. She has further stated that at the time of incident, informant was not present as he went to Baghpat and just after the incident, he reached the spot. The same version is also reiterated by P.W.-2. The other evidence also supports the presence of P.W.-5 at the time and place of incident.

39. The next submission made by the learned counsel for the appellant that one Nasiruddin who is an independent witness of incident, who could narrate the correct facts regarding incident, has not been adduced by the prosecution nor any explanation has given for the same by the prosecution, also does not appeal to us. If it is assumed as per the defence that that Nasiruddin is an independent witness of the incident but if he does not want to testify then he cannot be compelled to testify. Even if the defence believed that Nasiruddin was an independent witness

who could give correct information about the incident, during the course of trial, the defence should have adduced him as defence witness but it failed to do the same.

40 The submission of the learned Amicus Curiae that since the P.W.-1, P.W.-2 and P.W.-5, who being real brothers and sister of the deceased, are interested witnesses, therefore, their testimony has no value, does not inspire confidence. It is no doubt true that the informant-P.W.-1 and eye witnesses i.e. P.W.-2 and P.W.-5 are real brothers and sister of the deceased but where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such related or friendly witnesses. There is no bar in law on examining family members or any other person as witnesses.

41. The next contention advanced by the learned Amicus Curiae that neither P.W.-2 nor P.W.5 was present at the time and place of occurrence counsel, does not impress us. From the prosecution evidence, the presence of P.W.-2 and P.W.5 has been proved.

42. The last submission made by the learned Amicus Curiae is that since the deceased was a vagabond person, therefore, it was quite possible that deceased was murdered by unidentified persons because of his vagabondage and that the accused-appellant has been falsely implicated with the intention of grabbing money, does not impress us. No evidence or material has been led by the defence to prove that the deceased was a vagabond person and as to why the accused-appellant has been falsely implicated.

43. From the aforesaid facts, which have been noted herein above, we find substance in the submissions made by the learned A.G.A. that this is a case of direct and clinching evidence like two eye witnesses of the incident, namely, P.W.-2 and P.W.-5.The medical evidence fully supports the prosecution evidence. The incident occurred in broad day light i.e. at 09:30 a.m. The first information report lodged by the informant is prompt, which was lodged within a hour of the incident i.e. 3rd November, 2007. The accused-appellant had also motive to commit such offence. The incident and the place of incident were not disputed by the defence side.

44. As already discussed above, we find that both the eye-witnesses i.e. P.W.-2 and P.W.5 have satisfactorily explained about their presence at the places of occurrence. They were subjected to lengthy cross-examination but nothing could be elicited to discredit their testimony. The police documents and statements of Investigating officer including arrest of accused-appellant and recovery of country-made pistol along with cartridges from his possession as well as medical evidence fully support the prosecution version.

45. Taking cumulative effect of the evidence, we are of the view that the trial court was fully justified in convicting the appellant. Accordingly, we confirm the order of trial court.

46. The appeal has no substance and the same is **dismissed.** The appellant is reported to be on bail. His bail bonds stand cancelled and he be taken into custody for serving the remaining sentence.

47. The dismissal of this criminal appeal however shall not prejudice the

rights of the accused-appellant to apply for remission, which shall be dealt with in accordance with law on merits.

48. We record out appreciation for the able assistance rendered in the case by Ms. Archana Singh, learned Amicus Curiae, who would be entitled to her fee from the High Court Legal Service Authority.

49. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Baghpat, who shall transmit the same to the Jail Superintendent concerned for information of the accused-appellant henceforth.

(2022) 10 ILRA 627
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Jail Appeal No. 331 of 2021

Sagar ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Anshul Nigam, Sri Ashfaq Ahmed Ansari (A.C.)

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2)/383 - Indian Penal Code, 1860-Sections 304-challenge to-conviction-circumstantial evidence-accused was last seen by PW-1, 2, 4, 5-only on the basis of last seen he was awarded life imprisonment-they were habitual drinker does not mean the chain is complete-the chain of events as per circumstances should point out the guilt of the accused alone-Conviction on the basis of last seen is a very weak piece of evidence-accused remained in custody for almost 10 years -hence, on the scanty evidence he is not required to confine anymore-The sentence is upturned.(Para 1 to 26)

B. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.(Para 19 to 21)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Jaideep Neogi Vs St. of W.B. (2010) 68 ACC 227

2. Kalu @ Laxmi Vs St. of M.P. (2019) 10 SCC 211

3. Ravindra Singh Vs St. of Punj. (2022) 7 SCC 581

4. Mohd. Giasuddin Vs St. of A.P.(1977) AIR SCC 1926

5. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

6. Jameel Vs St. of U.P. (2010) 12 SCC 532

7. Guru Basavraj Vs St. of Karn. (2012) 8 SCC 734

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

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon'ble Nalin Kumar Srivastava, J.)

1. This appeal has been preferred by the appellant- Sagar against the judgment and order dated 9.5.2013, passed by Additional Sessions Judge, Court No.3, Saharanpur, in Session Trial No.45 of 2012 *(State vs. Sagar son of Rajendra)* arising out of Case Crime No.347 of 2011 under Section 304 IPC, Police Station-Behat, District-Saharanpur, whereby the accused was convicted and awarded sentence under Section 304 IPC for life

2. The facts giving rise to this appeal are that on 9.9.2011 complainant- Shyam Singh has given a typed written-report (Ext. ka-03) at the police station stating that on the day of Rakshabandhan on 13.8.2011 at about 10:00 o'clock when his brother Vinod s/o Peerdiyaa alongwith Sagar had gone somwhere from the home, On the way, they were followed by Sumit. When his brother Vinod did not come back home, he searched for him at the relatives and other friends place. On not being found, information was given at the police station on 17.8.2011. On 25.8.2011 at 6:00 p.m. dead body of Vinod was recovered from the canal which is around 3 km from Baraut Police Chowki. On receiving information, the informant and others reached Baraut and identified the dead body of Vinod. His postmortem was conducted in Baghpat itself. Thereafter his funeral was conducted. The complainant was fully assure that Sagar had thrown the dead body in canal after committing murder due to enmity. Pappu s/o Rulha and Aman s/o Ridkaram of his village were the witnesses of the said incident. .

3. On the basis of this information, chik report was prepared by registering the C.C. No.347/11, u/s 302 IPC on 9.9.2011 at 21:40 o'clock by C/- clerk Shri Ram Kashyap wherein the time of incident has been recorded on 13.8.2011 at 11:00 a.m. The distance of the place of occurrence from the police station has been shown to be 5 Km. away. Entry of this report was made in report no.46 of the GD at the same time and on the same day. The investigation of the case was handed over to investigating officer R.S. Bhagor. The investigating officer on 9.9.2011 recorded copy of chik, copy of report complainant's statement and Sumit's statement. On 10.9.2011 the statement of the complainant was again recorded. Statements of witnesses namely Pappu and Aman were recorded as per Section 161 of Cr.P.C. Site plan and recovery memo of slippers of the deceased were prepared after inspection of the spot. On 15.9.2011, inquest report as well as other documents of the deceased was enclosed with the case diary. The Investigation Officer again recorded the statement of the complainant on 19.9.2011.

4. After completing the investigation, charge-sheet was submitted against accused appellant-Sagar, under Sections 304 IPC. The case being exclusively triable by court of session same was committed to the court of session for trial.

5. Learned trial court framed charges against appellant under Sections 304 IPC. Charges were read over to the accused, who denied the charges and claimed to be tried.

6. To bring home the charges, following witnesses were examined by the prosecution:

1.	Shyam Singh	PW1
2.	Aman Kumar	PW2
3.	Rajesh Kumar	PW3
4.	Sumit	PW4
5.	Pappu	PW5
6.	Dr. Ashok Kumar	PW6
7.	SI Rajbeer Singh	PW7
8.	Constable Shreeram Kashyap	PW8

7. Apart from oral evidence, following documentary evidence were produced by prosecution and proved by leading the evidence:

1.	Panchayatnama	Ex. Ka.1
2.	Fard	Ex. Ka.2
3.	Tahreer	Ex. Ka.3
4.	Postmortem report	Ex. Ka.4
5.	Site plan	Ex. Ka.5
6.	FIR	Ex. Ka.6
7.	Site plan	Ex. Ka.7
8.	Charge sheet	Ex. Ka.8

8. After recording of evidence the accused-appellant was examined under Section 313 Cr.P.C. and evidence led by prosecution against him was put to him. Accused stated that false evidence has been led against him. Accused did not examine any witness in his defence.

9. We have heard Sri Anshul Nigam, learned Amicus Curiae appearing for the appellant, learned AGA for the State and perused the record.

10. Learned counsel for the appellant submitted that appellant has been falsely implicated in this case. He is innocent. The custody certificate would show that the accused is in jail for more than 10 years. In the alternative it is submitted that if the accused is held guilty, he be given sentence of undergone namely twelve years,three months and ten days with remission and the fine be reduced.

11. Per contra, learned AGA submitted that appellant is named in FIR . The learned Court below has already shown mercy and has convicted the accused appellant under Section 304 IPC. The dead body was thrown in a canal is proved.

12. Before coming to the conclusion that the accused is the perpetrator, we have to evaluate the evidence on record if he hold him guilty of the commission of offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters.

13. The fact that the evidence which has been on record only shows that the accused was last seen with the deceased. However, except this the chain which the learned Judge has mentioned does not satisfy the test for punishing an accused

where the matter hinges on circumstantial evidence. Conviction on the basis of last seen is a very weak piece of evidence. In our case the chain which is set to be pointing the finger at the accused are very feeble. The learned Judge has held that the following are the instances which complete the chain namely the accused and the deceased were habituate to drink liquor. Just because the deceased was seen with the accused and just because his dead body was immediately recognized by the family members cannot mean that the chain is complete. The judgment in **Jaideep Neogi Vs. State of West Bengal, 2010 (68) ACC 227** which was relied by the counsel for the accused before the court below which would apply in the facts of the case.

14. The chain of events as per the circumstances should point out to the guilt of the accused and the accused alone. The decision of Apex Court in **Kalu @ Laxmi Versus State of Madhya Pradesh, 2019(10) SCC 211** will also have to looked into. Can a man be convicted for commission of offence under Section 302 of IPC on the basis of last seen together only without any other corroborative evidence.

15. The chain of events which the learned Judge has narrated is not such which would be full proof for Court to concur with the learned Trial Judge about the guilt of the accused. The burden of proof lies on the State which has miserably failed to the adverse interference that the deceased and the accused used the drink of liquor together would not compelling circumstances on neither is it a chain in the chain of events.

16. There are no other incriminating circumstances against the accused even under Section 27 of Evidence Act, 1872 will not permit this Court to concur with the finding of facts by the learned Judge. There are several inconsistencies and contradiction making it impossible to sustain the conviction. We are supported in our view by the recent judgment of the Apex Court report in **Ravindra Singh Vs. State of Punjab, (2022)7 SCC 581.**

17. Even if we consider the other aspects it is not proved that he was the person who had committed the offence. There is no recovery from the accused. There is nothing incriminating except the confessional statement to one of the witnesses which is not proved to the hilt and could not have been acted upon .

18. In the alternative even if we concur with the court below whether the punishment of life imprisonment is justified for which we will have to go by the facts which we have narrated herein-above. This Court would refer to the following precedents, namely, **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into

criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

19. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

20. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166, t**he Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

21. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an

opportunity of reformation in order to bring them in the social stream.

22. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

23. The accused is in custody for nine years one month and seventeen days as on date of the report sent by the Office which would mean that the undergone period would be 3507 days and the total sentence including remission is twelve years three months and eighteen days on 23.6.2022 and we are in the month of October, 2022. However, on the scanty evidence he is not required to be confined anymore and the sentence is upturned.

24. The facts that it was homicidal death is the fact from record. The decision cited by learned counsel for accused which was not accepted by the Court below would apply to the fact of this case also. He was last seen by PW-1, 2, 4 and 5. Only on the basis of last seen, he has been convicted for commission of offence Section 304 of IPC for life imprisonment which cannot be sustained.

25. Rs.15,000/- as honorarium be paid by Allahabad Legal Service Committee to learned amicus curiae for his valuable service.

26. Accordingly, the appeal is **partly allowed**, as modified above.

(2022) 10 ILRA 632
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

Criminal Appeal No. 487 of 2020

Krishna Veer @ Pinkoo ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Durgesh Kumar Singh, Sri Anshu Chaudhary

Counsel for the Respondents:
Sri A.N. Mulla, Sri G.P. Singh, Sri Narain Mishra, A.G.A.'s

A. Criminal Law-Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code, 1860-Section 302 - SC/ST Act, 1989 - Section 3(2)(v) -Challenge to-Conviction-murder-All the three eye witnesses (PW's 1,2,4) have become hostile, PW-1 and 4 clearly denied the presence on spot while PW2 stated that he had not seen who fired shot-appellant convicted while the co-accused acquitted on the similar set of evidence, which is illegal-no evidence regarding intentional insult to the deceased, no offence is made out under SC/ST Act-person who was the cause of incident was not examined-motive not proved-two shots were fired but only one empty cartridge was recovered-deceased was sitting on Chabutra after having dinner while in post morterm report, no solid material found inside the intestine, this also makes the prosecution case doubtful-Moreso, in the present case, mandatory provision of

Section 313 CrPC was not complied with-Hence, Prosecution failed to prove its case beyond reasonable doubt.(Para 1 to 34)

B. The examination of accused u/s 313 CrPC is not a mere formality. it prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. it imposes duty on the Court to question the accused properly and fairly so as to bring home to him to the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.(Para 25)

The appeal is allowed. (E-6)

List of Cases cited:

1. Veer Singh Verma Vs St. of U.P. CRLA NO. 154 of 2019,

2. Nar Singh Vs St. of Har. (2015) 1 SCC 496

3. Asharfi Vs St. of U.P. (2018) 1 SCC 742

4. Radha Mohan Singh @ Lal Saheb & ors. Vs St. of U.P. (2006) 2 SCC 450

5. Krishna Govind Patil Vs St. of Mah. (1963) AIR SC1413

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Durgesh Kumar Singh and Sri Anshu Chaudhary for the appellant and Sri A.N. Mulla / Sri G.P. Singh / Sri Shri Narain Mishra, learned A.G.A's for the State.

2. This appeal has been preferred against the judgment and order dated 17.12.2019 passed by the Special Judge (S.C./S.T.) Act, Mathura in Sessions Trial No.239/2003 (State vs. Krishna Veer and Others), arising out of Case Crime No.130/2001, under Section 302 I.P.C. and 3(2)(v) of the S.C./S.T. Act, Police Station-Baldev, District Mathura, convicting and sentencing the accused-appellant under Section 302 IPC for life imprisonment and fine of Rs.30,000/-, in default of payment of fine, they have to further undergo imprisonment of one year and under Section 3(2)(v) of S.C./S.T. Act, rigorous life imprisonment and fine of Rs.30,000/-, in default of payment of fine, they have to further undergo imprisonment of one year, both the sentences will run concurrently.

3. The prosecution case as per the First Information Report lodged by Ram Khilari (P.W.-1) is that applicant is resident of Laxmi Nagar, Police Station Jamunapar, District Mathura. On 5.6.2001, applicant had come to his brother's village - Darghata, Police Station Baldeo, District Mathura who lives in his in-law's house. On 5.6.2001, applicant's brother and sister-in-law Smt. Sukhdevi were sitting on the platform outside the house after taking food. One Krishna Veer @ Pinkoo son of Maharaj Singh Jaat, resident of village Darghata, Police Station Baldeo, District Mathura came to the house of Vimla Devi, wife of late Devjeet who is neighbour of applicant's brother Mohan Lal, at about 9.30 P.M., with a bad intention, then Vimla Devi raised a noise, the applicant's brother Mohan Lal saw Krishna Veer is coming out from her house, he interrupted him then Krishna Veer told to applicant's brother *"sale dhar"*, you sit silent otherwise I will kill you. There was exchange of talk between them then Maharaj Singh, son of Deep Chandra Jatt who is father of Krishna Veer came running with country-made pistol in his hand and started abusing him and commented on his caste then applicant's brother told that why you are abusing me, in between Maharaj Singh fired shot upon applicant's brother Mohan

Lal from country-made pistol which passed from his side then Maharaj Singh told his son Krishna Veer @ Pinkoo to fire shot upon him then Krishna Veer took out his country-made pistol from his side and fired shot upon applicant's brother which hit his chest and Mohan Lal died on spot. Bengali son of Katila and Atar Singh son of Shiv Lal witnessed the incident. Dead body of applicant's brother is lying on the spot. Legal action be taken by writing a report.

4. On the basis of written report, Case Crime No. 130/2001 under Sections 302 IPC and section 3(2)(v) SC/ST Act was registered against accused Krishnaveer Singh and Maharaj Singh on 5.06.2001 at 10:45 PM and investigation of the case was handed over to station Officer who went to the place of incident. Panchnama of the dead body was conducted and after completing the formalities, dead body was sent for postmortem, the spot map of the place of incident was prepared, one empty cartridge was recovered by the police from the place of incident, the memo was accordingly prepared. Investigation Officer submitted charge-sheet against accused Krishanveer Singh under section-320 IPC and section 3(2)(v) SC/ST Act. No charge-sheet has been sent against Maharaj Singh. Charges were framed against accused Krishanveer Singh under section-320 IPC and section 3(2)(v) SC/ST Act to which he denied and claimed trial.

5. The prosecution in order to prove its case, produced as many as 9 witnesses whose particulars are as follows:

P.W.1 Ram Khilari son of Shri Ram (First informant and alleged eye-witness)

P.W.2 Atar Singh son of Shiv Lal (alleged eye-witness)

P.W.3 Dr. Subhash Chandra Chief Medical Officer

P.W.4 Sukh Devi wife of late Mohanlal (allege eye-witness)

P.W.5 Veer Singh son of Khazan singh (I.O. of Case Crime No.130/2001)

P.W.6 Gauri Shankar son of Hari Singh (witness of inquest)

P.W.7 Jhinguria son of Puran Singh (witness of inquest)

P.W.8 S.I. Mahendra Giri

P.W.9 C.I.S. Jagmohan Shukla son of late Awadh Narain Shukla (IO of Case Crime No- 130/01)

6. In support of the occular testimony of the witnesses, prosecution filed following documentary evidence:

1. FIR dated 5.6.2001 (Ex Ka-1)

2. Chik (Ex Ka-4)

3. Site plan (Ex Ka-3)

4. Panchnama dated 5.6.2001 (Ex Ka-6)

5. Postmortem report dated 6.6.2001 (Ex Ka-2)

6. G.D.No. 35 (Ex Ka)

7. Recovery Memo of Empty Cartridge (Ex Ka-7)

8. Photo Lash (Ex Ka-9)

9. Letter to CMO (Ex Ka -11)

10. Charge-sheet dated 15.4.2021 (Ex Ka-8)

7. The accused - appellants in their statements recorded under Section 313 Cr.P.C denied the prosecution case and disputed the veracity of the evidence adduced by the prosecution.

8. P.W.1 Ram Khilari has stated in his examination-in-chief took place on 12.05.2008 as follows:-

Accused persons Krishnaveer and Maharaj Singh belong to Jaat caste and they are residents of Dagheta Police station Baldev. His brother Mohanlal's in-laws home is situated at Dagheta. He has been visiting there before the occurrence of this incident that is why he was acquainted with the accused persons. His brother was residing at village Dagheta. He had gone to his brother's in-laws home at Dagheta on 05/06/01. His brother Mohanlal, sister-in-law Sukhdevi and he were sitting on the raised platform after taking food. His brother's in-laws' neighbour Vimla came in the house of Late Devjeet at 9.30 pm and Krishnaveer had also come with her and entered in the house of Vimla with malafide intention. Vimla shouted. His brother Mohanlal saw Krishnaveer coming out of Vimla's house. His brother objected Krishnaveer, then Krishnaveer said, "Saale, shut your mouth otherwise I will kill you." Verbal fight occurred between them. Krishnaveer's father Maharaj Singh came carrying country-made pistol uttering caste based word to Mohanlal, Maharaj Singh opened fire at him with intent to kill him. But this fire passed by the side of Mohanlal. Then Maharaj Singh asked his son Krishnaveer to kill him. Then Krishnaveer took out country-made pistol from his side and opened fire at Mohanlal with intent to kill him which hit on his chest due to which he succumbed on the spot. Atar Singh Bangali belongs to that village came on the spot and saw the incident. It was moonlight in which he had seen the incident. He got the report of this case written by Atar Singh. Atar Singh read over to him and he heard the report.

In the cross examination P.W.1 has stated as follows:- There was no enmity between his brother Mohanlal and accused Krishnaveer and there was no friendship between them. Krishnaveer belongs to Jaat caste and he belong to Jatav caste. Colony of Jatav is separate and colony of Jaat is also separate. He and his brother Mohan Lal had taken meal containing a dish of potato and brinjal, and chapatis at around 8:00 o' clock. The platform (chabutra), where they were sitting, is adjacent to the home in the east. He further stated that he is acquainted with Vimla for many years. Vimla's house is 8-10 steps away from his brother's house to the west. No house falls in-between them, rather there is a vacant land which belongs to them. When Vimla raised alarm, Atar Singh Bengali and his sister-in-law (elder brother's wife) Sukhdevi had also arrived there. He fruther stated that Vimla must be around 35-40 years old.

In the examination in chief took place on 15.04.20017 P.W.1 has stated as follows:-

He lives in Lakshmi Nagar, PS Jamuna Nagar, Mathura. His elder brother Mohan Lal would reside with his in-laws at Village Dagheta, PS Baldev where Mohan

Lal was shot dead on the night of 05.06.2001. He had got the report/complaint of this incident being ext. ka-1 written through Atar Singh, a resident of Dagheta against the accused persons Krishnaveer and Maharaj Singh and had submitted the same at PS Baldev. He got to know about the said incident on an information sent by his sister-in-law (bhabhi) in Lakshmi Nagar. He immediately left the village. He reached PS Baldev where many persons from the village were present. Atar Singh was also there. Atar Singh had prepared this report/complaint as stated by the villagers. He had made his signature on the report/complaint. He had directly reached to his brother's in-laws' place Dagheta after making his signature on the report/complaint. The situation there was sorrowful. He found his sister-in-law disturbed there. They could not speak with each other. He had heard from the villagers that it was a murder case and there was a rumour in the village that the accused persons Krishnaveer and Maharaj Singh were involved in this incident. He was not present in Village Dagheta at the time of the incident. He was in Lakshmi Nagar. Earlier he had given his statement on the basis of that very information. Consequent to this, the witness was declared hostile on request by ADGC and opportunity was granted for cross-examination.

In the cross examination P.W.1 has stated as follows:-

In connection with this incident, his statement had been recorded in the court earlier as well. It is correct that in the said statement, he had stated that Krishnaveer and Maharaj Singh had shot Mohan Lal due to which Mohan Lal had died. Volunteered to state today that he had given his statement in line with the case diary at the instance of the police. It is wrong to say that on 05.06.2001 at 9:30 pm, he had witnessed the murder of Mohan Lal by the aforesaid Krishnaveer and Maharaj Singh of Dagheta by way of shooting him with a country made pistol while his brother Mohan Lal was sitting on a platform in the village within PS Baldev. It is also wrong to suggest that he was present in village Dagheta at the time of the incident and had given his previous statement on the basis of witnessing the entire incident. He is Jatav by caste. Accused persons are Jat by caste. It is also wrong to say that he has, in collusion with the accused persons or out of fear, today retracted his earlier statement to save them in this case. No police officer had recorded his statement in connection with this incident. The witness, on hearing his statement u/s 161 Cr.P.C., stated, "I did not give such a statement to the police. I cannot tell any reason as to how they recorded my statement."

9. P.W.2 Atar Singh has stated in his examination in chief took place on 11.01.2011 as follows:-

That on 05.06.2001, he drafted the complaint in this case at the instance of Ram Khiladi, s/o Shri Shriram Jatav, r/o Lakshmi Nagar Bagheecha, Jamunapar, which is available on the record and is before him. It is in his handwriting bearing his signature and marked as ext. ka-1. He further submitted that he has made his signature on the Panchnama 'Paper No. 04 Aa/10'. The Panchnama is related to the deceased Mohan Lal. **The deceased Mohan Lal died from bullet injury, but who fired the bullet, it was not seen.** On being shown the affidavit (Paper No. 4A/50) submitted by him, the witness said that the photograph affixed on it was his,

but whose signature it was, he could not recognise.

In the cross Examination P.W.2 has stated as follows:-

That he did not give any affidavit to CBCID on his own free will. He cannot state if he had given his photos for the card or any other purpose. He can't state who has signed the affidavit. He hasn't seen any occurrence.

10. P.W.3 Dr. Subhash Chandra in his examination-in-chief took place on 02.05.2012 has stated as follows:-

That on 6.6.2001, he was posted as Orthopaedist in the District Hospital, Mathura. On the said date, at 3:40 p.m., He had conducted the post-mortem on the body of Mohan Lal s/o Shri Ram, aged about 50 years, resident of Village - Dagheta, PS - Baldev, District - Mathura. The dead body was brought by Constable - 1090 Vimlesh and Constable - 1174 Munesh, PS - Baldev in a sealed condition along with 08 police papers. He had perused the police papers. The deceased was average build. The effect of rigor mortis from the neck of the deceased had passed after death, but its effect was present in the hands and feet.

He had found the following ante-mortem injury on the body -

The firearm wound of entry, 2 cm x 1.5 cm x chest cavity deep, 100 cm below the nipple at 6 O'clock position. There was blackening, tattooing and scorching on the wound.

The direction of the wound was from left to right and upwards.

On internal examination, the ninth rib bone on the left side of the chest was found to be broken. The right lung and its membrane were found to be ruptured. A metal bullet was recovered from the right chest cavity. The heart and its membranes were ruptured. There was about two litres of blood in the chest cavity. There was about 100 grams of fluid inside the stomach. Fluid and gas were present in the small intestine. Faecal matter and gas were present in the large intestine. The deceased died due to haemorrhage and shock. The death of the deceased occurred about 3/4 (18 hours) - 1 day before the post-mortem examination. He had prepared post-mortem report at the time of post-mortem of the deceased "Paper No. 4A/20', which is in his writing and signature.

In the cross examination P.W.3 has stated as follows:-

That it is possible that the deceased might have been hit with firing from a distance of 01 to 03 feet. The barrel of the firearm was to the left of the deceased at the time of the occurrence. He was saying this on the basis of the direction of injury. The barrel of the firearm must have been slightly upward at the time of the occurrence. There was no solid food in the stomach of the deceased. 100 grams of fluid was present in the stomach. It usually takes about 04 hours for the solids to pass from the stomach to the small intestine. **The deceased must have eaten something about 04 hours before the occurrence.** For this reason, some digested fluid was found in the small intestine. The said liquid cannot be alcohol. It can be water, tea, cold drink.

11. P.W. 4 Sukh Devi wife of Late Mohan Lal in her examination-in-chief

took place on 21.03.2013 has stated as follows:-

That the incident took place on 05.06.2001 around 9.30 p.m. She was sitting on the raised-platform of her house with her husband Mohan Lal and her brother-in-law Ram Khiladi and were talking. Just then they heard some hue and cry from the house of her maternal aunt Vimla Devi. Krishna Veer @ Pinku S/o Maharaj Singh, Caste: Jat came outside. Her husband tried to stop Krishnaveer, Krishnaveer shouted, "You bastard, sit quietly or else I will kill you." During this hot exchange, Krishnaveer's father Maharaj came running, holding a katta country made pistol in his hand and started abusing. When her husband forbade Maharaj from abusing, he with the country made pistol in his hand, shot at her husband which narrowly passes beside his hand. Then Maharaj Singh exhorted his son Krishnaveer, ".the bastard Chamra, or else he will create problem again." Then Krishna Veer took out the country made pistol from his pocket and shot at her husband. Immediately after receiving the gunshot, her husband fell down on the raised-platform and died. The gunshot hit her husband in his chest. My brother-in-law Ram Khiladi and others reached the spot. She did not reach the spot (then stated that) she was present at the spot. She further stated that it is around 16 years back. It was 9-10 pm. Her husband Mohan Lal had been murdered by firing bullet shots. Her brother-in-law had lodged the report against Krishnaveer and Maharaj of her village. A woman namely Vimla of her locality had altercation against Krishnaveer. When she returned from Nauhare after giving fodder to her cattle, her husband was lying dead on the chabutara. She had not seen Krishnaveer and Maharaj present in the court firing bullet shots to her husband.

In her cross examination P.W.4 stated as follows:-

That no Police Officer had recorded her statement in regard to this incident. When the witness was read over her statement u/s 161 Cr.P.C., she stated that she can't tell the reason how the S.I. had recorded it. She had given her statement in this court earlier too. She stated that earlier too, she had given the same statement that she was not present at the spot. It is wrong to state that she had seen accused persons Krishnaveer and Maharaj present in the court firing bullet shots at her husband at the spot. The accused persons are the native of her village. They are Jat by caste, she is Jatav. It is wrong to state that today she is giving false statement in collusion with or under pressure or fear of the accused persons. Her brother-in-law is working in post office. His posting is at Sahawan. After the death of her husband, someone from the village had called her brother-in-law Ram Khiladi for lodging the report. Mostly there are persons of Jat caste. When her brother-in-law came, then he would have lodged the report. She had been unconscious since evening. Earlier, the statements she had given was given on behest of the people of the village.

12. P.W.5 Veer Singh C.O. in his examination-in-chief took place on 28.03.2018 has stated as follows:-

That on 6.6.01 he was posted as C.O. at PS Baldev Circle Jamunapar. On the aforesaid date on being commanded by the then Senior Superintendent of Police, the investigation of C.No. 130/01 was handed over to him. After taking over the investigation, firstly the copy (parcha no. 1) of written report was prepared by him.

Thereafter the statement of HM 74CP Mahendra Giri was recorded by him. Further the statement of informant Ram Khiladi s/o Shri Ram Jatav r/o Lakshminagar PS Jamunapar was recorded. After recording the aforesaid statements, the scene of occurrence was inspected at the instance of informant. The site map was prepared on the spot. In the original file of site map, paper number 4A/3 is enclosed marked as Ex Ka-3. After the inspection of scene of occurrence, the statements of witnesses Horilal s/o Kashiram, Kishan Swaroop s/o Nekram were recorded as hearsay evidence in C.D. (parcha 1). On 6.6.01 as he was transferred from the aforesaid circle, the investigation of the said case was conducted by the then S.P. Dwivedi.

In his cross examination P.W.5 stated as follows:-

That he went on the spot during daytime. He do not remember time. He did not see the house of Vimla, nor did he record her statement. He did not arrest any accused. He did not raid. He issued parcha 1 during investigation. Thereafter he was transferred. It is right that there was no electricity pole or bulb on the spot, thus there was no source of light. Therefore he did not get it written.He cannot tell according to map whether there was any source of light. He did not see (sic) on the spot. Many people were visiting the place. When he went on the spot, nobody told because there was no eye witness. He is not acquainted with Maharaj Singh and Krishnaveer. Ram Khiladi gave statement with reference to report. He did not make any other statement. He did inquire Ram Khiladi about Ram Khiladi's report. He did not inquire anyone. It is wrong to state that he recorded the statements at the police station on the basis of FIR. It is also wrong to state that he did not meet Ram Khiladi. It is also wrong to state that harm was caused during raid at house. It is also wrong that inquiry was made in that regard.

13. P.W.6 Gain Shanker in his examination-in-chief took place on 12.07.2018 has stated as follows:-

That the relative of Jagna belonging to their village died. The police initiated proceeding in this regard. The police conducted inquest of deceased Mohan Lal in village 16-17 years before. Mohan Lal died at night. Next day the police carried away the dead body for inquest. **His signature was obtained. The police asked five elderly people to make signatures on inquest report. He does not know that what proceedings were conducted by the police. Inquest report is paper number 4A/9 to 11 on file. It bears his signature. He does not know that how Mohan Lal was killed.**

14. P.W.7 Jheeguria in his examination-in-chief took place on 12.07.2018 has stated as follows:-

That Around 17-18 years before Mohan Lal, the son-in-law of Jagna belonging to his village died during night. Next day the police came on information. He came after the police. The police conducted inquest of the dead body. The police asked him to make his signature on document and he did it in accordance with the instructions of the police. The inquest report is paper number 4A/9 to 11 in file. **It bears his signature. He does not know that how Mohan Lal died. He does not know that who is being prosecuted for killing Mohan Lal. When he came, the**

police had sealed(sic). He did not see the dead body of Mohan Lal.

15. P.W.8 Mahendra Giri S.I. in his examination-in-chief took place on 04.10.2018 has stated as follows:-

That On 5.6.2001 he was posted as HM at PS Baldev. On the said date at 10.45 pm informant Ram Khiladi s/o Shri Ram Jatav r/o Lakshminagar PS-Jamunapar District- Mathura came with a report. Informant's report was registered by him as C.C.No. 130/2001 under Section 302 IPC and 3(1) X and 3(2)5 SC/ST Act and investigation was handed over to CO Refinery. Paper number 3A/1 is there on file marked as Ex Ka-4. It is in his handwriting and signature. He entered it in GD number 35 at 22.45 hours. The carbon copy (paper 4A/5) of original GD is present on file. The original is destroyed. He has brought a certificate in this regard. It bears his signature. He certifies it. It was marked as Ex Ka-5. The inquest of deceased Mohan Lal was conducted by Shri Ram Pal Singh after appointing Pyare Lal, Atar Singh, Gauri Shankar, Bhagwan Singh, Jheeguriya as panchas. Ram Pal Singh was posted with him at police station Baldev. He identifies Ram Pal Singh's signature. Inquest report is 4A/9 and 4A/10. It was marked as Ex Ka-6.

In his cross examination P.W.8 has stated as follows:-

That after receiving the information of receiving the SR, C.O. refinery, S.O. Baldev and others had come, but he does not remember as to when the above officers had come on 06.06.2001, nor does he knows when the dead body was picked up from the spot in order to seal and stamp it on the next day. He did not go to the place of occurrence. He does not have any information as to the spot. He knows that the murder-case of Maharaj Singh's brother and Krishnaveer's uncle pre-dates his tenure; whose case was pending.

16. P.W.9 Jag Mohan Shukla in his examination-in-chief took place on 03.07.2019 has stated as follows:-

Parcha no.-IX was prepared by him. On that day, He was posted as CIS 1st at Criminal Investigation Branch, Lucknow. On that day, he received investigation of C.No.-130/01, u/s-302IPC & 3 (2) V SC/ST, Act from previous investigating officer namley Shri Sanjay Kumar Yadav wherein receiving the concerned documents related to the investigation, investigation was initiated. Having prepared C.D. No.-X on 05.09.2002, statements of complainant Ram Khilari, Smt. Shukhadevi w/o Mohan Lal, Atar Singh, Bengali and Smt. Vimla Devi were recorded and after verifying the affidavits given by previous investigating officer, made it the part of his investigating and inspected the place of occurrence at the instance of complainant which has been marked as Ext. ka-03. Parcha no.-XI was prepared on 06.09.2002 wherein statements of witnesses of the inquest report namely Pyare Lal, Gauri Shanker, Jhingariya, Bhagwan Singh and statements of witnesses namely Girij Singh, Ramveer Singh, Vijendra Singh, Karan Singh, Chote Lal, Ajay Pal, Ramji Lal were recorded and other persons of the village were interrogated and statements of witness Ram Khilari and Shukha Devi were again recorded and statements of Smt. Shakunkala, Pipendra, Ramveer Singh and Deep Chand, Maharaj Singh and Smt. Sheela Devi and Krishnaveer Singh, who were present on the spot, were recorded.

Statements of Dr. Shubash Chand, Medical Officer, who conducted the postmortem of deceased Mohan Lal, was recorded in which Medical Officer stated that no injury was found on deceased except a bullet injury on deceased chest. C.D. No.-XII was prepared on 07.09.02 wherein preparing the aforesaid parcha and perusing the parchas of the proceeding done by the previous investigator, investigator of the local police Shri Veer Singh and SP Dwivedi, C.O., prepared parch-1 & parch no.-II 06.06.01 respectively which were inspected. The proceeding done by previous investigator, which includes site-plan, etc., and recovery memo of one empty cartridge which is paper no.4A/06 was prepared by S.I. Rampal in S.I. Rampal's handwriting and signature and the same is before him.

In his cross examination P.W.9 has stated as follows:-

That No lamp-post or light has been mentioned in the site-plan Ext. ka-03 enclosed with the file. It is correct that the incident took place at 9:30 pm. Only one empty cartridge was found on the spot and no mark of any other fire was found. It is correct that Maharaj Singh and Krishna Singh are father and son. It is that during his inquiry the witnesses namely Atar Singh, Bengali and Smt. Vimla mentioned in the FIR did not support the occurrence of the incident, nor did they claim to be eye-witnesses. It has also been stated that prior to him, no investigating officer has recorded any statement regarding this incident. He recorded the statement of witness Atar Singh, who stated in his statement "Jaswant Singh repeatedly gave advise to Ram Khilari that if Maharaj Sigh is named then he will not be able to follow the case and this case will be strong. On being asked, he stated that Jaswant Singh and others are accused of the murder-case of Maharaj Singh's brother namely Sultan Singh, at this time (he) is on bail". It is correct that Jaswant Singh is of criminal-nature. **Smt. Vimla stated in her statement to him that Krishnaveer Singh did not come to her home on the fateful day, nor did she raise any noise.**

17. The learned Sessions Judge SC/ST Act Mathura after hearing the parties and perusal of the record, acquitted accused Maharaj Singh under Sections 302 IPC and section 3(2)(v) SC/ST Act but convicted accused Krishanveer Singh under section-302 IPC and section 3(2)(v) SC/ST Act, hence this appeal.

18. Learned counsel for the appellant submits as follows:-

(i) The first argument is that all the three alleged eye-witnesses (P.W.'s 1, 2 & 4) have become hostile. He further submitted that P.W.-2 has become hostile on first instance while P.W.'s 1 & 4 have become hostile subsequently at the stage of 319 Cr.P.C., as such, it cannot be said that prosecution has proved his case beyond reasonable doubt.

(ii) The second argument is that on the similar set of evidence, appellant has been convicted and another accused Maharaj Singh has been acquitted which is illegal.

(iii) The third argument is that court below has failed to give an opportunity to offer an explanation of subsequent statement of P.W.'s 1 & 4 which were recorded on 15.4.2017 and 4.2.2017 which is violation of Section 313 Cr.P.C.

(iv) The fourth argument is that appellant cannot be convicted under

Section 3(2)(v) of the S.C./S.T. Act as there was no evidence regarding intentional insult to the deceased.

(v) The fifth argument is that Smt. Vimla Devi who was the cause of the alleged incident, has not been examined and the statement of P.W.-9 S.I. Jagmohan Shukla in his cross-examination stated that Smt. Vimla Devi in her statement stated before him that Krishna Veer has not come to her house on the date of incident and she has not made any noise on that day, accordingly, motive was not proved.

(vi) The sixth argument is that two shots were fired as per prosecution case but only one empty cartridge was recovered as per recovery memo.

(vii) The seventh argument is that prosecution version appears to be false as according to prosecution version, deceased and first informant were sitting on Chabutra outside the house of deceased after taking dinner at 8 P.M. but in postmortem report, no solid food was found inside the intestine rather 100 mt. Liquid was found inside the body of the deceased.

(viii) The last argument is that D.W.-1 has stated about false implication of accused-appellant at the suggestion of Jaswant Singh who was involved in the murder of brother of Maharaj Singh but courts below has not considered the same while passing impugned judgment.

19. Learned counsel for the appellant placed reliance upon the following judgments:

(i) Notes published in Indian Law Institute on inseparable and indivisible evidence against all accused (on the point of argument no.ii)

(ii) **Veer Singh Verma vs. State of Uttar Pradesh, Criminal Appeal No.(s) 154 of 2019,** judgment dated 28.1.2019 (on the point of argument no.ii)

(iii) **(2015) 1 SCC 496, Nar Singh vs. State of Haryana** (on the point of argument no.iii).

(iv) **(2018) 1 SCC 742, Asharfi vs. State of Uttar Pradesh** (on the point of argument no.iv).

20. Learned A.G.A. on the other hand supported the impugned judgment and order of conviction by contending that prosecution case is fully proved from the evidence of P.W.'s- 1 to 9 in spite of the fact that eye-witnesses, P.W.-1, P.W.-2 & P.W.-4 have been declared hostile. He placed reliance upon **2006 (2) SCC 450, Radha Mohan Singh @ Lal Saheb and Others vs. State of U.P.**, on the point of hostility of witnesses and submitted that appeal filed by appellant is liable to be dismissed.

21. With respect to the 1st and 2nd argument of appellant, it is relevant to mention here that P.W.-1, first informant is the real younger brother of deceased and P.W.-4 is the wife of deceased who had supported the prosecution case in their examination-in-chief and cross-examination took place in the year 2008 to 2014 but in their subsequent statement, took place in the year 2017, due to application filed by prosecution under Section 319 Cr.P.C., P.W.-1 and P.W.-4 had clearly denied their presence on spot, as such, they have been declared hostile. So far as P.W.-2 is concerned, he was declared

hostile at the first instance as he has stated that he had not seen who fired shot, as such, eye-witness account failed to prove the prosecution case. The argument of the learned A.G.A on this point on the basis of judgment of the Apex Court in **Radha Mohan Singh** (supra) to the effect that since P.W.-1 & P.W.-4 had supported the prosecution case in their examination-in-chief as well as in cross-examination took place at earlier occasion, as such, entire statement of P.W.'s- 1 & 4 will be seen in spite of the fact that P.W.'s 1 & 4 have been declared hostile.

22. Since P.W.'s- 1 & 4 have been examined in the year 2017 on the basis of the application of the prosecution itself to summon Maharai Singh under Section 319 Cr.P.C. and P.W.'s- 1 & 4 have denied their presence on spot, accordingly, Maharaj Singh was acquitted on the basis of entire evidence, as such, the conviction of appellant on the same evidence will be illegal.

23. The Apex Court in the case of **Krishna Govind Patil vs. State of Maharashtra, AIR 1963 Supreme Court 1413** has held that where, 3 out of the 4 accused charged for an offence under Section 302 IPC read with Section 34, giving them the benefit of doubt in view of the fact that their identity was not established but convicting the 4th accused under Section 302 read with Section 34 IPC on the ground that he had committed the offence along with one or other of the acquitted accused, the conviction of the 4th accused clearly wrong.

Notes of Indian Law Institute as well as the judgment of the Apex Court in **Veer Singh Verma** (supra) as cited by counsel for the appellant at Sl. No. (i) & (iii) are on the same points.

24. Accordingly, the argument nos. 1 & 2 advanced by counsel for the appellant is accepted and it is held that prosecution has failed to prove his case beyond reasonable doubt.

25. The 3rd argument of appellant and case law cited by him in the case of **Nar Singh** (supra) that courts below has failed to give an opportunity to offer an explanation of the subsequent statement of prosecution witnesses has also got substance, paragraph nos. 9, 10, 11 & 34 of **Nar Singh** (supra) are as follows:

9. The power to examine the accused is provided in Section 313 **Cr.P.C. which reads as under:-**

"313. Power to examine the accused.- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2). No oath shall be administered to the accused when he is examined under sub- section (1).

(3). The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5). The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

10. There are two kinds of examination under Section 313 **Cr.P.C. The first under** Section 313 **(1) (a) Cr.P.C. relates to any stage of the inquiry or trial; while the second under** Section 313 **(1) (b) Cr.P.C. takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In Usha K. Pillai v. Raj K. Srinivas & Ors., (1993) 3 SCC 208, this Court held that the Court is empowered by** Section 313 **(1) clause (a) to question the accused at any stage of the inquiry or trial; while** Section 313**(1) clause (b) obligates the Court to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.**

11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 **(1)(b) Cr.P.C. is not a mere formality.** Section 313 **Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of** Section 313 **Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.**

34. In our view, accused is not entitled for acquittal on the ground of non-compliance of mandatory provisions of Section 313 Cr.P.C. We agree to some extent that the appellant is prejudiced on account of omission to put the question as to the opinion of Ballistic Expert (Ex-P12) which was relied upon by the trial court as well as by the High Court. Trial court should have been more careful in framing the questions and in ensuring that all material evidence and incriminating circumstances were put to the accused. However, omission on the part of the Court to put questions under Section 313 **Cr.P.C. cannot enure to the benefit of the accused.**

In the present case, non-compliance of the mandatory provisions of Section 313 Cr.P.C. is not the only ground for acquittal rather it is coupled with other grounds also.

26. The 4th argument of appellant that there was no evidence of intentional insult to the deceased, as such, no offence is made out under Section 3(2)(v) of the S.C./S.T. Act is made out, the case law cited by learned counsel for appellant in the case of **Asharfi** (supra) will fully applicable, paragraph nos. 8, 9 & 10 are as follows:

8. In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8/9.12.1995. From the unamended provisions of Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community.

9. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) **of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.**

10. In the result, the conviction of the appellant under Section 3(2)(v) **of the Scheduled Castes and the** Scheduled Tribes (Prevention of Atrocities) Act, 1989 **and the sentence of life imprisonment imposed upon him are set aside and the appeal is partly allowed.**

27. In the present case also incident is of 9.30 P.M. i.e. of night and took place in the year 2001 i.e. before Amendment Act 1 of 2016 in respect to Section 3(2)(v) of the S.C./S.T. Act and there is no evidence on record that accused - appellant has committed offence as accused belong to scheduled caste. Accordingly, on the basis of 4th argument, it is held that no offence is made out under Section 3(2)(v) of the S.C./S.T. Act against the appellant.

28. The 5th argument is concerned, the statement of P.W-9, Jag Mohan Shukla, Sub-Inspector will be relevant, the cross examination of P.W.-9 is as follows:

पत्रावली पर संलग्न नक्शा नजरी प्रदर्श क-3 में कोई लैम्पपोस्ट या लाईट का जरिया नहीं दिखाया है। यह सही है कि घटना रात्रि के साढ़े नौ बजे बताई है। मौके वारदात पर केवल एक खोखा मिला और कोई निशानात किसी अन्य फायर के नहीं मिले। यह सही है कि महाराज सिंह व कृष्णवीर सिंह पिता, पुत्र है। यह कि मेरी जांच में fir में लिखे गवाहान अतर सिह, बंगाली व smt. विमला ने घटना का कथित होना समर्थित नहीं किया और न अपने आप को चश्मदीद गवाह होना बताया। यह भी बताया कि मुझसे पूर्व किसी जांच अधिकारी ने इस घटना के सम्बन्ध में कोई बयान नहीं लिये। मैने गवाह अतर सिंह

के बयान दर्ज किये है। अतर सिंह ने मुझे अपने बयान में यह बयान दिया था कि " जसवंत सिंह, वादी मुकदमा राम खिलाडी को बार बार राय मशविरा देते थे कि यदि महाराज सिंह का भी नाम लिखवा दोगे तो यह मुकदमें की पैरवी नहीं कर पायेगा और यह केस पक्का हो जायेगा। पूछने पर यह भी बताया कि जसवन्त सिंह आदि ने महाराज सिंह के भाई सुल्तान सिंह के मर्डर के अभियुक्त है, इस समय जमानत पर आये हुए है। " यह सही है कि जसवन्त सिंह अपराधिक किस्म का है। smt. विमला ने अपने बयान में मुझे यह बताया था कि कृष्णवीर सिंह घटना वाले दिन मेरे घर नहीं आया था और न मैने कोई शोर मचाया था।

29. Perusal of the cross-examination of P.W.-9, it is established that Smt. Vimla Devi has denied that Krishna Veer has not come to her house on the date of incident and she had not made any noise on that day. The further circumstance that Smt. Vimla Devi was not produced in the Court by the prosecution will also go against the prosecution. Accordingly, prosecution case that accused Krishnaveer entered into the house of Smt. Vimla Devi with malafide intention at 9.30 P.M. on 5.6.2001 and Smt. Vimla Devi made noise is false and prosecution case cannot be believed.

30. The 6th argument of learned counsel for the appellant that according to prosecution, two shots were fired on spot, one by Maharaj Singh and other by Krishnaveer but according to recovery memo, only one empty cartridge was recovered from the spot, this also makes the prosecution case doubtful.

31. The 7th argument advanced by counsel for the appellant that according to prosecution case, deceased was sitting on *Chabutara* in front of his house along with first informant after taking dinner at 8 P.M. while in the postmortem report, no solid material found inside the intestine rather 150 ml. liquid was found inside the body, the cross-examination of P.W.-3, Dr. Subhash Chandra was as follows:-

मृतक के आमाश्य में कोई ठोस पदार्थ नहीं था। 100 ग्राम तरल पदार्थ अमाश्य में था। ठोस पदार्थ को आमाश्य से छोटी आंत में जाने में सामान्यतया 04 घन्टे का समय लगता है। मृतक ने घटना से करीब 04 घण्टे पहले कुछ खाया होगा इसी कारण से छोटी आंत में पचा हुआ कुछ तरल पदार्थ मिला था। उक्त तरल पदार्थ शराब नहीं हो सकता है। वह पानी , चाय, कोल्ड ड्रिंक हो सकता है।

32. From the perusal of cross-examination of P.W.-3 as well as from the postmortem report, the prosecution version that deceased was sitting after taking dinner at 8 P.M. and was murdered at 9.30 P.M. appears to be false.

33. In view of the facts and circumstances of the case and evidence available on record as discussed above, we find that the evidence of the alleged eye-witnesses produced by prosecution does not inspire confidence. There exist a doubt whether they are witnesses of the incident, on the same set of evidence, the courts below has acquitted one accused (Maharaj Singh) and convicted another accused (Krishna Veer-appellant) which is wholly illegal. There can be no conviction under Section 3(2)(v) of S.C./S.T. Act as there is no evidence for the intentional insult to the deceased. There is non-compliance of Section 313

Cr.P.C. on the subsequent statement of P.W.'s- 1 & 4 recorded in 2017. The non-examination of Smt. Vimla Devi by prosecution, statement of P.W.-9 that Vimla denied the fact that Krishna Veer came to her house on the date of incident as well as postmortem report and statement of P.W.-3 (doctor) also demonstrate that the incident has not taken place at 9.30 P.M. after taking dinner, which proves that the prosecution case is doubtful and prosecution has failed to prove the charges against the appellant - accused beyond reasonable doubt.

34. Accordingly, **the appeal is allowed**. The impugned judgment / order of conviction and sentence dated 17.12.2019 passed by the Special Judge, S.C./S.T. Act, Mathura is set aside. The accused-appellant Krishna Veer @ Pinkoo in Criminal Appeal No.487/2020 in in jail. He shall be released from the jail forthwith, if not wanted in any other case.

35. Let a copy of the judgment along with the original record be sent to the court below for compliance.

(2022) 10 ILRA 647
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.10.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Appeal No. 775 of 2017

Mohd. Akku **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Vimal Shukla, Sri Piyush Kumar Singh, Sri Prabhat Kumar

Counsel for the Respondent:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Section 164, 313 & 374(2) - Indian Penal Code, Sections 376 & 511 - Protection of Children from Sexual Offence Act, 2012 - Sections 6, 8, 42 & 42-A : - Appeal – against conviction & sentence - Plea of double jeopardy - complaint - FIR - offence of attempt to rape U.P.on a minor girl of 6 years old - after appreciating the entire evidence of record, the trial court convicted and sentenced the appellant - 10 years RI and fine or Rs. 3000/- under section 376 of IPC and 10 years RI and fine of Rs. 3000/- under section 6 of POSCO Act, - whether sentence awarded to the appellant should run 'concurrently' or 'consecutively' - as per the legal proposition propounded by the Hon'ble Apex Court in case of 'Nagraja Rao Vs CBI' - conviction maintained but sentence is modified - sentenced awarded to the appellant shall run 'concurrently' not 'consequently' - appeal is partly allowed.(Para 39, 45, 48, 50)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Nagraja Rao Vs CBI (2015) 4 SCC 302,

2. Ramu Vs St. of U.P. & ors. (Criminal Appeal No. 309/2015 decided on 18.12.2020),

3. Gyanendra Singh @ Raja Singh Vs St. of U.P. (Jail Appeal No. 6590/2016 decided on 02.08.2019).

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. The instant appeal under Section 374 (2) Code of Criminal Procedure, 1973 (in short "Cr.P.C.') has been preferred by the appellant Mohd. Akku against the judgement and order dated 02.05.2017

passed by Additional Sessions Judge, Court No.1, Balrampur in Special Criminal Case No. 84 of 2013 arising out of Case Crime No. 126 of 2013, under Section 376 IPC and Section 6 of Protection of Children from Sexual Offence Act, 1912 (in short "POCSO Act'), Police Station- Panchpedwa, District Balrampur, whereby the accused- appellant has been convicted under Section 376 IPC and Section 6 of POCSO Act and has been sentenced for the offence under Section 376 IPC for 10 years rigorous imprisonment and of fine of Rs.3000/- with further direction that in default of payment of fine, the appellant has further to undergo three months additional rigorous imprisonment and again has been sentenced for the offence under Section 6 of POCSO Act for the same sentence i.e. 10 years rigorous imprisonment and fine of Rs. 3000/- with further direction that any default of payment of fine, the appellant has to further undergo three months additional rigorous imprisonment.

2. The prosecution case, in brief, is that on 30.03.2013 at about 5 P.M. victim aged about six year, daughter of Smt. Shamim Jahan (PW1) along with her elder daughter Sahar Bano (PW4) went to play at her under construction house. The house of the appellant is situated near to the house of Shamim Jahan (PW 1). Sahar Bano (PW 4) elder sister of victim went back to her house and finding the victim alone, appellant took the victim inside his house and undressed her undergarment (panty) and was attempting to rape upon the victim. On the voice raised by the victim, Shamim Jahan (PW1) along with her daughter Sahar Bano (PW 4) sent inside the house of appellant where appellant was attempting for rape laying the victim on earth and seeing the complainant (PW1), the appellant fled away. It was told by the victim to Shamim Jahan (PW1) that after offering toffee to her took the victim inside his room and laying on earth attempting to rape.

3. Complainant Samim Jahan (PW1) preferred a written report (Ex.Ka-1) at the Police Station Panchpedwa, District Balrampur on the basis whereof Chik FIR (Ex. Ka.5) was prepared and the said information was entered in the general diary report dated 30.03.2013 at about 00.45 A.M. (Ex. Ka.4) by constable Kailesh Nath (PW6).

4. The victim was produced before Dr. Subrna Kumar (PW 5) for medico-legal examination on 01.03.2013 at district hospital. In internal examination of the victim, it was found that there was inflamed (redness) on both sides of vagina, hymen was torned and no bleeding was present.

5. On 01.03.2013, the supplementary medico-legal report was prepared and on the basis of medico-legal report as well as pathology report and on the ground of supplementary medico-legal examination, age of victim was determined as 6 years.

6. Investigation of the case was entrusted to Sub-Inspector Narendra Nath Yadav (PW3).

7. The victim was produced by the investigating officer (PW3) before concerned Magistrate, Balrampur and her statement under Section 164 Cr.P.C. was recorded.

8. During the investigation, the appellant was arrested and produced for

medical examination and Sub-Inspector Narendra Singh Yadav (PW3) visited the place of occurrence and recorded the statement of witnesses prepared the site plan (Et. Ka.2) and after investigation, submitted charge sheet (Ex.Ka.3) against the appellant under Sections 376/511 IPC and Section 8 of POCSO Act.

9. Learned trial court after hearing the counsel for both sides, on 14.02.2014 framed the charges for offence under Section 376/511 IPC and Section 8 of the POCSO Act against the appellant. Thereafter on the application of the prosecution, learned trial court on 31.08.2016 framed the charges for the offence under Section 376 IPC and on 25.10.2016 framed the charges under Section 6 of POCSO Act against the appellant, who denied the same and claimed trial.

10. The prosecution in order to prove its case, examined PW 1, Smt. Samim Jahan (complaint), PW 2 Ramjan Ali, PW 3 Narendra Singh Yadav, Sub-Inspector, PW 4 Kumari Sahar Bano, PW 5 Dr. Suvarna Kumar, PW 6 Kailesh Nath and PW 7 prosecutrix as child witness, under the order dated 01.02.2017 passed by the trial Court.

11. After conclusion of the prosecution evidence, the statement of appellant was recorded under Section 313 Cr.P.C. who denies the prosecution story as well as the evidence adduced by the prosecution and stated that the victim is tutored witness and has given false deposition before the trial court at the behest of the parents. It was further stated by the appellant that initially the case was registered with allegations of rape was levelled against him with ulterior motive of false implication. It was further stated by the appellant that previously the case was registered with the allegation of attempt to rape but at the time of framing of charge, it was altered with the motive of false implication.

12. In support of his defence to rebut the prosecution story, Smt. Kausar (DW1) wife of appellant was examined as defence witness.

13. After appreciating the entire evidence and material on record and upon conclusion, trial court passed the impugned judgement and order dated 02.05.2017 convicted and sentenced the appellant as mentioned above. Aggrieved by the aforesaid judgement and order, the appellant has preferred the present appeal.

14. Per contra, Sri Aniruddh Kumar Singh, learned AGA vehemently opposed the contention aforesaid and submits that from statement of PW 1, PW 2 and PW7 it was comprehensively proved before the trial court that the appellant committed rape upon victim. It was further submitted that the statement of PW 5 Dr. Suverna Kumar is fully corroborated with the prosecution story. He further submits that on the basis of ocular testimony adduced by the prosecution as well as the medical evidence guilt of the appellant is established. He further submits that the victim was minor at the time of commission of offence, and therefore, the offence under Section 6 of the POCSO Act, is established against the appellant and, therefore, there is no illegality and infirmity in the impugned judgement and order passed by the trial court and appeal is liable to be dismissed.

15. Having heard the learned counsel for the parties and perused the record.

16. After the aforesaid arguments, the things, which emerge, are discussed as under.

17. PW 1 is Smt. Samim Jahan, first informant of the case and mother of the victim, in her deposition before the trial court, has deposed that her daughter (victim) was aged about six years at the time of incident. It was further deposed that her daughter victim went to play along with her elder sister Sahar Bano in their under construction house. It was further deposed that elder sister of victim Sahar Bano returned to her house and victim was still playing over there and appellant, who resides adjacent to the house of the informant, called the victim to his house and committed rape upon her. It was further deposed by PW 1 that due to alarm raised by victim, she reached at the spot and saw the appellant committing rape upon her daughter and appellant fled away. It was also deposed that there was bleeding of the victim and on being asked, the victim told that the appellant offered her toffee and thereafter committed rape upon her.

18. Shamim Jahan (PW 1) in her deposition before the trial court has stated that she has preferred a written application before the police station and proved the same which was marked as Ex.Ka.5 that it was emphasisly deposed by the witness that she is eye witness of the incident and has saw the appellant committing rape upon the victim.

19. PW 2, Ramjan Ali (father of the victim) has deposed before the learned trail court that he has not seen the appellant committing rape upon his daughter as he left her house 8.00 a.m. in the morning with his Rickshaw and when he came back in evening, he was informed regarding incident and what was informed to him has been stated before the court concerned.

20. PW 3 Narendra Singh Yadav, Investigating Officer has deposed before the trial court that investigation of the case was entrusted to him and on the basis of statement of informant/victim and other witnesses, charge sheet under Sections 376/511 IPC and Section 8 of POCSO Act was filed by him against the appellant. He prepared the site plan (Ex.Ka.2), recorded the statement of the witnesses, produced the victim for her statement before the concerned Magistrate under Section 164 Cr.P.C. and filed charge sheet (Ex. Ka.3) under Sections 376/511 IPC and 8 of POCSO Act.

21. PW 4 Sahar Bano was examined before the trial court in her deposition, she stated that she along with her mother saw that the appellant Md. Akku was in objectionable position with victim on cot (khatiya) and her mother took the victim along with her. It was further deposed that appellant attempted to commit rape upon victim.

22. PW 5 Dr. Suverna Kumar, who is Medical Officer examined the victim has deposed that in the internal examination of the victim, it was found that on both sides of the private part of the victim inflammation was present and it can be caused as a result of rape. The witness has proved the medico-legal report which is marked as Ex.4.

23. PW 6 Kailash Nath Constable Muharrir has deposed that on 31.03.2013 posted at Police Station Panchpedwa and first information report was lodged at 00.45 a.m. on written application of the informant Samim Jahan and registered as Case Crime

No. 126 of 2013, under Sections 576/511 IPC and Section 8 of POCSO Act, Police Station Panchpedwa, District Balrampur.

24. The victim has been examined as child witness as PW 7 before the trial court. The victim has deposed that the appellant has committed rape upon her, of which report was lodged by her mother. It was deposed that she went to the police station and she has informed to the police that when she was playing, appellant came there and gave a toffee to her and then asked her to bring water in a jug. It was further deposed that when she came with water, the appellant took her to his home and put her on cot and committed rape upon her. It was further deposed that her mother came and upon which the appellant fled from spot. It was further deposed by the witness that there was bleeding from private part and she was in pain. She further deposed that she was medically examined and incident is of before four years. Appellant took her to his home on pretext of offering toffee where she was put on the cot, thereafter appellant removed her cloth and committed rape upon her. It was further deposed that on alarm being raised, her mother came there and then the appellant left her and fled away. It was further deposed that there was bleeding from her private part.

25. After the statement of appellant under Section 313 Cr.P.C., DW 1 Smt. Kaushar wife of the appellant was examined as DW 1. The witness in her examination deposed that she has four daughters and three sons. Her elder daughter is 19 years old and youngest daughter is 8 years. She has purchased the same land out of village over which the appellant has constructed his house. Upon the aforesaid land, Ramjan and Shamim Jahan were trying to forcibly take possession over house but due to purchase of land by the appellant, they could not succeed and due to aforesaid, they were inimical to the appellant. It was further deposed that the appellant is earning his livelihood in Mumbai and has returned to the village upon death of his mother-in-law. It was further deposed that Ramjan and Shamim Jahan have exalted pressure upon the appellant for taking possession of house of appellant and forcibly implicated the appellant in the instant case. It was further deposed that on several times, there was demand of money from her in order to settle the case and on 06.01.2016 Ramjan demanded Rs.4 Lakh for release of her husband which was recorded by her and clip of recording was filed before the trial court which was marked as Ex. Kh-1.

26. In so far as argument of the counsel for the applicant is to the effect that the prosecution story is highly improbable and it will be fruitful to examine the deposition of PW 1, PW 4 and PW 7 before the trial court. PW 1 is complainant and eye witness of the incident, who in her deposition has clearly stated that the victim along with her elder sister were playing in under construction house and house of the appellant is near to the under construction house. It was deposed by PW 1 that upon loud alarm of the victim, when she reached at the place of incident, she saw the appellant committing rape upon the victim. The victim was put in intensive cross examination. PW 4 Sahar Bano, who is elder sister of victim has also supported the prosecution story. The PW 4 in her statement has deposed that when she arrived at the place of incident along with her mother, she saw that the appellant was in objectionable position with the victim upon the cot.

27. Victim was examined as PW 7 before the trial court and in her examination-in-chief has in most clear terms stated that the appellant offered him

toffee and asked her to bring water in a Jug and then she came along with water, the appellant called her inside the house where she was laid on cot and clothes were removed and rape was committed upon her by the appellant. Narration of the incident by the witness clearly goes to establish that the appellant offered toffee to the victim and asked her to bring water from jug and when the victim came with the water in jug, she was called by the appellant in house where the appellant removed cloth of the victim and committed rape upon her.

28. Statement of the victim is absolutely intact, consistent and does not show any chance of blemish. There is no inconsistence or anything adverse in her statement to show any doubt upon the prosecution story.

29. Thus, from perusal of the statement of PW 1, PW 4 and PW 7, the presence of the appellant is comprehensively proved that the victim was inside his house and commission of rape by the appellant on the victim is also established, therefore, the argument of the learned counsel for the appellant has no legs to stand and is rejected.

30. The submissions advanced by learned counsel for the appellant to the effect that the prosecution has failed to establish its case beyond reasonable doubt is concerned, the statement of the PW 1 informant as well as PW 4 elder sister of the victim as well as statement of victim herself as PW 7 clearly establish and makes abundantly clear that the appellant committed rape upon the victim in his home.

31. There is no inconsistency or contradiction in the statement of the witnesses which can be fatal for the prosecution. All the witnesses relied by the prosecution have given trustworthy testimony before the trial court which inspires confidence and are worth of acceptance.

32. It has been argued by learned counsel for the appellant that there are major contradiction in the statement of PW 1, PW 4 and PW 7 and their statements are inconsistence. It would be relevant to discuss the testimony of PW 1, PW 4 and PW 7, the ocular testimony deposed by the witness goes to show that there are hardly any contradiction in the statement of the witness. All the witness examined by the trail court are inconsistence in their testimony against the appellant and have in unequivocal terms deposed before the trial court that the appellant committed rape upon the victim and PW 1 and PW 4 of the eye witness to the incident.

33. There seems to be no force in the argument of learned counsel for the appellant as aforesaid that there are major contradiction in the statement of the witness are inconsistence to the version of the first information report.

34. It has been argued by learned counsel for the appellant that appellant has been falsely implicated due to dispute of property. This argument of counsel for the appellant is based upon the testimony of DW 1 wife of appellant whose testimony has already been discussed hereinabove.

35. The appellant in support of his contention false implication arising out of property dispute has not placed any reliable documentary evidence regarding property to establish the reason of his false implication. In absence of any such

evidence, it cannot be said that he has been falsely implicated in the present case due to property dispute.

36. It is pertinent to mention that PW 7 who herself is victim in her deposition before the trial court, stated that the appellant inside his house committed rape upon her and the same is corroborated with the medco-legal examination of the victim as well as by the statement of PW 5 Dr. Suvarna Kumar. Thus, contention of the appellant regarding the false implication of the appellant due to the property dispute does not inspire any confidence and cannot be accepted.

37. In the light of the aforesaid discussion, the finding recorded by the trial court are well reasoned based on proper appriciation of evidence adduced by the prosecution as well as defence. Trial Court has elaborately discussed the prosecution evidence in the light of the submissions advanced by prosecution as well as defence, the impugned judgement and order passed by the trial court is well reasoned and no interference is required.

38. Accordingly, the judgement and order dated 02.05.2017 passed by Additional Sessions Judge, Court No.1, Balrampur in Special Criminal Case No. 84 of 2013 is hereby affirmed.

39. Now question for appreciation left before this Court is that as to whether sentence awarded to the appellant by the trial court should run "concurrently' or "consecutively'.

40. Learned counsel for the appellant submits that the appellant has been convicted and sentenced for rigorous imprisonment for 10 years under Section 376 IPC with fine stipulation of Rs.3000/- and further rigorous imprisonment for 10 years under Section 6 of the POCSO Act with fine stipulation.

41. Submission laid by counsel for the appellant that the trial court has committed an error by not holding that both the sentence awarded to the appellant shall run concurrently and in absence of such finding the appellant is constrained to serve both the sentence awarded by the trial court under Section 376 IPC and Section 6 of POCSO Act.

42. Section 42 and 42A of POCSO Act is very clear on the aforesaid point. Section 42 and 42A of the POCSO Act is reproduced hereinbelow;

42. Alternate punishment. Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376 [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] [376E, Section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

43. In order to settle the controversy, the legal proposition propounded by Hon'ble Apex Court as well as this Court to be discussed.

44. The Hob'ble Apex Court in the case of **Nagaraja Rao vs Central Bureau of Investigation** reported in (2015) 4 SCC 302 has held as under;

"16. The following observations made by this Court in paras 9 and 10 are apposite (Mohd. Akhtar Hussain case (1998) 4 SCC 183: 1988SCC (Cri) 921: AIR 1988 SC 2143, SCC P. 187, para 9-10

"9. The section relates to administration of criminal justice and provides procedure for sentencing. The sentencing court is, therefore, required to consider and make an appropriate order as to how the sentence passed in the subsequent case is to run. Whether it should be concurrent or consecutive ?

10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different."

17. Likewise, a question arose before the three-judge Bench in State of Maharashtra vs. Najakat Alia Mubarak Ali, (2001) 6 SCC 311, as to whether the accused convicted in two cases one after another was entitled to claim set off the period of detention during investigation, inquiry or trial from the sentence imposed on conviction in both the cases. While interpreting Section 428 of the Code, the majority of the judges answered the question in affirmative. While answering the question, Justice Thomas, J. speaking for majority of the Judges, made the following observations, which are pertinent. (SCC p.320, para 17

"17. In the above context, it is apposite to point out that very often it happens, when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such count, all such sentences are directed to run concurrently. The idea behind it is that the imprisonment to be suffered by him for one count of offence will, in fact and in effect be imprisonment for other counts as well."

18. The aforesaid principle of law was relied upon by this Court in Chatar Singh vs. State of M.P., (2006) 12 SCC 37 and State of Punjab vs. Madan Lal, (2009) 5 SCC 238, and lastly recently in Manoj vs. State of Haryana, (2014) 2 SCC 153, wherein this Court taking recourse to Section 31 of the Code directed in somewhat similar facts that the sentences awarded to the accused to run "concurrently" in place of "consecutively".

45. Thus, in view of law propounded by the Hon'ble Apex Court in the case of **Nagaraja Rao (Supra)** the sentence awarded to the appellant shall run "concurrently' and not "consecutively'.

46. This Court in its judgement and order dated 18.12.2020 passed in Criminal Appeal No. 309 of 2015 passed in Criminal Appeal No. 309 of 2015 (Ramu vs State of U.P. and others) has dealt with the present situation in para 51, 52 and 54 which are quoted hereinunder;

51. It is settled principle of law that no person can be punished twice for one offence. Normally a criminal court, by virtue of Section 71 I.P.C., in such cases, where any criminal act is punishable in two or more Statute or in different provision of same statutes, convicts and sentence in such provision of such statutes where lesser punishment has been provided. Parliament was aware to this situation. Looking into the gravity of nature of offence of rape offences, particularly, rape with victim below age of 18 years, Section 42 and 42 A of POCSO Act, 2012 were incorporated to deal with such peculiar situation, which read as under:-

52. Thus it is clear that if offence of sexual assault is punishable in relevant provision of POCSO Act and also in relevant provision of I.P.C., like 376 I.P.C., Trial Court is bound to punish the accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree.

54. In view of the provision contained in Section 42 of POCSO Act, Trial Judge ought to have punished appellant only in Section 376 I.P.C., not in Section 4 of POCSO Act, 2012. In addition to it, he ought not to have punished appellant both in Sections 376 I.P.C. and in Section 4 of POCSO Act, 2012.

47. This Court in **Jail Appeal No. 6590 of 2016 (Gyanendra Singh @ Raja Singh vs State of U.P.)** has held in para 52 and 54 which is quoted herein under;

52. Thus it is clear that if offence of sexual assault is punishable in relevant provision of POCSO Act and also in relevant provision of I.P.C., like 376 I.P.C., Trial Court is bound to punish the accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree.

54. In view of the provision contained in Section 42 of POCSO Act, Trial Judge ought to have punished appellant only in Section 376 (2) (f) (i) I.P.C., not in Section 4 of POCSO Act, 2012. In addition to it, he ought not to have punished appellant both in Sections 376 (2) I.P.C. and in Section 3 /4 of POCSO Act, 2012.

48. Thus, in the light of the abovesaid settled proposition of law and discussions, the judgement and order dated 02.05.2017 passed by Additional Session Judge, Court No.1, Balrampur in Special S.T. No. 84 of 2013 arising out of Case Crime No. 126 of 2013, under Section 376 IPC and Section 6 of Protection of Children from Sexual Offence Act, 1912 (in short "POCSO Act'), Police Station- Panchpedwa, District Balrampur so far as relates to conviction of appellant is maintained and affirmed but sentence is liable to be modified.

49. In view of above, conviction of appellant under Section 6 of POCSO Act is maintained. The appellant shall serve the sentence of 10 years rigorous imprisonment and fine of Rs.3000/- and in event of default of fine, he shall further serve rigorous imprisonment for three months. No separate sentence is required for the offence under Section 376 of IPC. In case the appellant has served the sentence of imprisonment of 10 years as awarded by the learned trial court, he shall set at liberty forthwith, if not wanted in connection with any other case.

50. In the light of the observations, the appeal is **partly allowed** to the extent as above.

51. Let the copy of this judgement and lower court record be sent to the trial court for necessary information and compliance.

(2022) 10 ILRA 656
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 1043 of 2015

Ram Sewak @ Baura ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Uttar Kumar Goswami, Sri Virendra Pratap Yadav (A.C.)

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2)/383 - Indian Penal Code, 1860-Sections 363 & 376 -challenge to-conviction-no disclosure of name and address of the accused in the FIR-Informant-PW-1 denied to recognize the accused in her statement recorded u/s 161 Cr.P.C. as well as in her statement recorded before the court below as PW-1-neither any test identification parade of the accused had been carried out nor the accused was identified by the victim(PW-2)-Statement of the victim (PW-2) had not been recorded-no thumb impression or signature of the victim in the medical report, hence it is not proved that the injury report is of the victim-PW-1 had not seen the incident with her own eyes-other witnesses were not examined in support of the prosecution version-Hence, prosecution failed to prove the guilt of the accused beyond reasonable doubt.(Para 1 to 38)

B. It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous Test Identification Parade to test his powers of observations. The idea of holding T.I. Parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.(Para 19)

The appeal is allowed. (E-6)

List of Cases cited:

1. Kanan & ors. Vs St. of Ker. (1979) 3 SCC 319

2. Suresh Chandra Bahri Vs St. of Bih. (1995) SCC (Crl.) 60

3. Dana Yadav @ Dahu & ors. Vs St. of Bih. (2002) 7 SCC 295

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal has been preferred by accused-appellant, namely, Ram Sewak @ Baura against the judgment and order dated 21st January, 2015 passed by the Additional Sessions Judge, Court No.1, Banda in Sessions Trial No. 188 of 2013 (State Vs. Ramsewak @ Baura) arising out of Crime No. 363, 308 and 376 I.P.C., Police Station-Pailani, District-Banda, whereby the accused-appellant has been convicted and sentenced to undergo to (i) life imprisonment under Section 376 I.P.C. with fine of Rs. 40,000/-, in default thereof, he has to further undergo eight months' additional simple imprisonment and (ii) five years rigorous imprisonment under Section 363 I.P.C. with fine of Rs. 10,000/-, in default thereof, he has to further undergo two months' additional imprisonment, with the observations that

the total amount of fine which was to be recovered from the accused was to be paid in favour of victim as compensation and also all the sentences were to run concurrently.

2. We have heard Mr. Virendra Pratap Yadav, learned Amicus Curiae appearing for the accused-appellant no.1 and Mrs. Archana Singh, learned A.G.A. for the State. We have also perused the materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

On the basis of written report submitted by the informant-P.W.1, namely, Chunni wife of Rajava on 17th September, 2001 at 2115 hours for the alleged incident dated 15th September, 2001 between 10:00 a.m. to 11:00 a.m. (Exhibit-Ka/1), a first information report has been lodged on 17th September, 2001 as Crime No. 65 of 2001, under Sections 363/308/376 I.P.C. at Police Station-Pailani, District-Banda (Exhibit-Ka/2) alleging therein that on 15th September, 2001 between 10:00 a.m. to 11:00 a.m. while seducing the daughter of the informant (hereinafter referred to as the "victim"), who was about six years of age, the relative of her neighbour, namely, Ram Jiyavan son of Ramnath, who was not known and recognized by her, took the victim to jungle where he beat her due to which she fainted and thereafter she was brutally raped by him due to which bleeding occurred from the genitals and ears of the victim. In the written report dated 17th September, 2001 addressed to the Superintendent of Police, Banda, it has been alleged that when the informant, just after the said incident, reached the Police Station for lodging of the first information report, the Station House Officer of the Police Station concerned refused to lodge the same. After lodging of the first information report, the victim was taken to the Women Hospital, Banda by the Constable Madhuri Dubey, Police Station-Women Cell, Police Office, for her medical examination, where Dr. Rekha Rani (P.W.-4), the then Medical Officer, Women Hospital, Banda on 17th September, 2001 has medically examined the victim.

4. On external examination of the victim, the Doctor found that there was no external injury on the body of the victim. On internal examination, the Doctor has opined that:

"Full circumferential recent tear of hymen with reddened brownish margin present post vaginal wall torned at 6 o'clock position in peroneal region with diamond shaped raw area of about 1 cm. x 1.5 cm dimension. Base is bluish white filled with whitish mucoid discharge. Vagina admits one finger easily whose negotiation was very painful and smeared with blood mixed discharge when taken out. Vagina smears taken and sent for pathological examination of spermatozoa. Advised X-ray Right Wrist Joint including all carpel bone and Right Shoulder Joint for confirmation of age. Supplementary report pending till X-ray report and smear report is received from District Hospital, Banda and District Women Hospital, Jhansi."

5. In the vaginal smear report of the victim (Exhibit-Ka/5), it has been reported that vaginal smear is negative for spermatozoa. On examination of vaginal smear report (Exhibit-Ka/5), the Doctor (P.W.-2) has opined that:

"No opinion about rape can be given. Injury in private part is simple in

nature and caused by hard and blunt object . Her age is about 6 years."

6. After the medical examination of the victim was conducted, initially one Uma Shanker Singh Chandel, the then Station House Officer, Police Station-Pailani, District-Banda (P.W.-6) investigated the matter and recorded the statements of informant (P.W.-1), the victim (P.W.-2) and other witnesses, thereafter Mr. K.L. Sagar, Station House Officer of Police Station-Pailani (P.W.-5) has investigated the matter. After conclusion of the statutory investigation in the matter under Chapter-XII Cr.P.C., P.W.-5 has submitted Charge-sheet no. 78 of 2001 dated 24th December, 2001 (Exhibit-Ka/6) against the accused-appellant under Sections 363/308/376 I.P.C. The Magistrate concerned took cognizance of the charge-sheet and as the offence was triable by the court of Sessions, the same was committed to the Court of Sessions. Consequently, Sessions Trial No. 188 of 2013 (State of U.P. vs. Ramsewak) was registered in the matter. The trial proceeded in the matter.

7. On 21st November, 2013, the concerned Court framed following charges against the accused-appellant:

"मैं बृजलाल चौरसिया, विशेष न्यायाधीश (आ०व०अधि०)/ अपर सत्र न्यायाधीश, बांदा आप अभियुक्त रामसेवक उर्फ बौरा उर्फ चन्देल पर निम्नलिखित आरोप लगाता हूं-

1. यह कि दिनांक 15.9.2001 को समय 10.00 व 11.00 बजे के बीच स्थान जंगल बहद ग्राम नरी अन्तर्गत थाना पैलानी जिला बांदा पर आप अभियुक्त द्वारा वादिया मुकदमा श्रीमती चुन्नी की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष का व्यपहरण किया गया। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 363 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

2. यह कि उपरोक्त वर्णित तिथि, समय व स्थान पर आप अभियुक्त द्वारा वादिया मुकदमा की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष को ऐसी परिस्थिति में बुरी तरह से मारपीट कर बेहोश कर दिया जिससे यदि कु० कमलेश उम्र 6 वर्ष की मृत्यु हो जाती तो आप हत्या की कोटि में न आने वाले आपराधिक मानव वध के दोषी होते। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 308 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

3. यह कि उपरोक्त वर्णित तिथि, समय व स्थान पर आप अभियुक्त द्वारा वादिया मुकदमा की नाबालिग पुत्री कु० कमलेश उम्र 6 वर्ष का व्यपहरण करके उसकी इच्छा के विरूद्ध उसके साथ बलात्संग किया गया। इस प्रकार आपने ऐसा कृत्य किया जो भा०दं०सं० की धारा 376 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

अतएव एतद्द्वारा निर्देशित किया जाता है कि उक्त अरोपो का विचारण इस न्यायालय द्वारा किया जायेग"

The charges were read out to the accused-appellant, who denied the accusation and demanded trial.

8. The prosecution in order to establish the charges levelled against the accused-appellant relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:

(i) the written report given by the informant (P.W.-1) dated 17th September, 2001 has been marked as Exhibit-Ka-1;

(ii) the first information report registered on 17th September, 2001 on the written report of P.W.-1, has been marked as Exhibit-Ka-2;

(iii) Injury/medical examination report of the victim dated 17th September, 2001 has been marked as Exhibit-Ka-4;

(iv) Supplementary medical examination report of the victim dated 15th October, 2001 has been marked as Exhibit-Ka-5;

(v) Charge-sheet dated 24th December, 2001 has been marked as Exhibit-Ka-6; and

(vi) Site plan with index has been marked as Exhibit-Ka-7.

9. The prosecution has also adduced oral testimony of following witnesses:-

"i). The informant, namely, Chunni mother of the victim has been adduced as P.W.-1;

ii). The Victim has been adduced as P.W.-2;

iii) Head Constable-274 Ramnaresh, who has proved the Chik first information report has been adduced as P.W.-3;

iv) Dr. Rekha Rani, who has conducted the medical examination of the victim has been adduced as P.W.-4;

v). Inspector K.L. Sagar who has investigated the matter and submitted the charge-sheet has been adduced as P.W.-5;

vi). Sub-Inspector Uma Shanker Singh Chandel, who initially investigated the matter, has been adduced as P.W.-6."

10. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant Ramsewak @ Baura for recording his statement under section 313 Cr.PC. In his statement recorded U/s 313 Cr.P.C. on 6th January, 2015, the accused appellant denied his involvement in the crime. Accused appellant has also stated that the statements of the Prosecution witnesses are incorrect, as he has been falsely implicated due to rivalry. No witness on behalf of defence has been produced.

11. While passing the impugned judgment of conviction, the trial court after relying upon the documentary as well as oral evidence adduced by the prosecution has recorded its following finding:

(i) qua the statement given by accused-appellant under Section 313 Cr.P.C. that the oral as well as documentary evidence produced by the prosecution are false, as he has been falsely implicated due to rivalry, the trial court has recorded that neither any evidence with regard to enmity or rivalry has been produced before the court below nor any fact has been borne out from the oral or documentary evidence of prosecution which would prove any fact of implicating the accused due to rivalry. As such, the aforesaid plea of the defence has no legs to stand.

(ii) with regard to the ground taken by the defence that there is delay of two days from the date of incident in lodging of the first information report for which no explanation has been given by the prosecution, therefore, the entire prosecution version is doubtful, the trial court has recorded that the same has also no legs to stand on the ground that on perusal of the evidence it is apparent that the informant (P.W.-1) went to the Police Station for lodging of the first information report on the same day i.e. date of incident but the Station House Officer of the Police Station concerned refused to lodge the same. Such delay of two days in lodging of the same has satisfactorily been explained by the prosecution.

(iii) qua the ground taken by the defence that no case under Section 308 I.P.C. is not proved against the accused-appellant, the trial court finds substance in the same by recording that the necessary ingredients for the offence punishable under Section 308 I.P.C. is not made out against the accused-appellant, as the medical examination report of the victim does not support the prosecution version.

(iv) so far as the offence punishable under Section 363 I.P.C is concerned, the trial court has recorded that it is an admitted fact that the place of occurrence is one kilometre away from the house of victim. As per the statement of the victim, the accused-appellant took her on his shoulder to the place of occurrence from her house. At the time of occurrence, the victim was 6 to 7 years of age and minor and was in lawful guardianship of her parents. The accused-appellant had not taken any permission from the parents of the victim to take her to the place of occurrence. As such, the offence punishable under Section 363 I.P.C. is proved against the accused-appellant.

(v) with regard to the offence punishable under Section 376 I.P.C., the trial court has recorded that from the statement/evidence of the victim, the opinion of the doctor and the medical examination report of the victim prepared by the doctor and the investigation of the investigating officer and evidence, the same is also proved against the accused-appellant.

12. After recording such finding, the trial court has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that the accused-appellant, committed the offence of rape upon the victim (P.W.-2). As such, the trial court has found the offence under Sections 363 and 376 I.P.C. to have been committed by the accused person Ramsewak.

13. Aggrieved by the aforesaid judgment and the order of conviction and sentence, the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

14. Questioning the impugned judgment and order of conviction, learned Amicus Curiae appearing for the appellant submits that the first information report is highly belated for which no plausible explanation has been given by the prosecution, which makes the entire prosecution story doubtful. It is also noteworthy that there is no disclosure of name and address of the accused-appellant in the F.I.R. Informant-P.W.-1, namely,

Chunni wife of Rajava has stated in her cross-examination that she had not disclosed the name of the accused-appellant to the Investigating Officer at the time of recording of statement under Section 161 Cr.P.C. that is why she was unaware of the name of the accused-appellant. She has also stated that she had not seen the accused-appellant taking her daughter (victim) along with him. She has further stated that she had not seen the incident. She has stated that her daughter had told her about the incident and after that she knew the name of the accused-appellant. Victim (P.W.-2) has also not identified the accused-appellant in her statement given before the court below. The identification parade had also not been done by the Investigating Officer at the time of the investigation. The said offence has not been committed by the accused-appellant, hence, the prosecution story is wholly improbable as also the same has not supported by the evidence that is why the accused-appellant is not guilty of the offence punishable under Sections 363 and 376 I.P.C.

On the cumulative strength of the aforesaid arguments, learned Amicus Curiae appearing for the accused-appellant submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

15 On the other hand, Mrs. Archana Singh, learned A.G.A. for the State supports the prosecution version by submitting that the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the appeal filed by the accused-appellant who committed heinous offence is liable to be dismissed.

16. We have considered the submissions made by the learned counsels for the parties and have gone through the records of the present appeal especially, the judgment and the order of conviction and evidence adduced before the trial court.

17. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

18. In written report submitted by the informant-P.W.-1, namely, Chunni wife of Rajava has not disclosed the name of the accused Ram Sevak. From perusal of the first information report also, it is clear that in the column of accused, name of Ram Jiyavan son of Ramnath Kevat, resident of Nari, Police Station Pailani, District Banda has been mentioned. Name of the accused-appellant Ram Sewak has not been mentioned in the first information report as "accused". The informant who has given typed application to the Superintendent of Police. Banda in which she has admitted that she does not know the accused-appellant nor she recognizes him by his name, meaning thereby that at the time of lodging of the first information report, the informant as well as the victim were unaware of the name and identity of the accused-appellant. The informant has admitted in her cross-examination as P.W.-1 that she had not disclosed the name of accused-appellant to the Investigating Officer at the time of recording of her statement under Section 161 Cr.P.C. She has further stated in cross-examination that it has also not been disclosed by her to the Investigating Officer that the accused-appellant raped her daughter (victim). She

has further stated that her daughter told her the name of the accused-appellant, whereas the victim in her statement before the court has not identified the accused-appellant. With regard to identification of the accused-appellant, no question about the manner as to how the victim and her mother P.W.-1 have recognized the accused-appellant, has been put by the prosecution. From perusal of the case diary, witnesses Phool Kevat and Ram Mohan have stated in their statements recorded under Section 161 Cr.P.C. while accused-appellant Ram Sevak was taking the victim along with him, they have seen the accused-appellant Ram Sevak but both the witnesses, namely, Ram Mohan and Phool Kevat have not been adduced before the court below to identify the accused-appellant. No identification parade has been done by the Investigating Officer. The informant-P.W.-1 denied to recognize the accused-appellant in her statement recorded under Section 161 Cr.P.C. by the Investigation Officer as well as in her statement recorded before the court below as P.W.-1. Hence, it is clear that in the prosecution case the alleged offence has been committed by the accused-appellant, is doubtful.

19. For appreciating the aforesaid issue, it would be worthwhile to reproduce judgment of the The Apex Court in the case of **Kanan & Ors. Vs. State of Kerala** reported in *1979 (3) SCC 319* has opined as under:

".....It is well settled that where a witness Identifies an accused who is not known to him in the Court for the first time, his evidence Is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The Idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. ....."

20. The first informant-P.W.-1, namely, Chunni wife of Rajava has stated in her cross-examination that she had not seen the accused-appellant taking the victim to the forest along with him. She has further stated that her brother-in-law (Devar) namely, Budhram Sajivan and Ram Mohan etc. have seen the accused-appellant taking the victim along with him but all above are not examined in support of the prosecution version. The informant has accepted that she has not disclosed his name in her typed application which was given to Superintendent of Police, Banda. She has further stated that she had not seen the incident with her own eyes as she was not present on the spot when the incident occurred. She has further stated that neither she knew accused-appellant nor she recognized him by his name from before the incident. From the aforesaid it is apparently clear that the informant-P.W.-1 had not seen the incident with her own eyes. Even otherwise, there is inconsistency/improvement in the statements of the P.W.-1.

21. P.W.-2 Victim has stated in her examination-in-chief that the Investigating Officer had prepared site plan on her identification whereas the first informant-P.W.-1 has stated in her examination-in-chief that the site plan was prepared by the Investigating Officer on identification of herself. Therefore, it is not clear as to whose on identification, the Investigating

Officer had prepared the site plan of the place of occurrence. In the statements of P.W.-2 also, there is inconsistency/improvement.

22. P.W.-3, Head Constable-274 Ramnaresh, who is the scriber of the first information report has stated in his cross-examination that inspection of the injury of victim was not done by him due to non-appearance of the victim at the police station. He has further admitted that during the course of scribing of the first information report, he did not ask about the victim as to why she did not come to the Police Station. Hence at the time of scribing of the first information report, he had not seen the injuries of the victim. There is also no disclosure in General Diary with regard to the same.

23. P.W.-4 Dr. Rekha Rani, Chief Medical Officer, Mahila Hospital, Budaun has examined the victim on 17.09.2001 and she found following injuries on the which are extracted hereinbelow:-

1. Secondary sex character:-

Breast rudimentary/ infantile. Pubic and axillary hairs absent. No external injury mark seen anywhere on external surface of body

2. Internal Examination:-

Full circumferential recent tear of hymen with reddened brownish margin present post vaginal wall torned at 6 O' clock position in perineal region with diamond shaped raw area of about 1 cm X 1.5 cm dimension. Base is bluish white filled with whitish mucoid discharge. Vagina admits one finger easily whose negotiation was very painful and smeared blood mixed discharge when taken out. Vaginal smear taken and sent for pathological examination of spermatozoa. Advised X-ray Rt. Wrist joint including all carpel bone and Rt. Shoulder joint for confirmation of age. Supplementary report pending till X-ray report and smear report is received from D.H. Banda and D.W.H. Jhansi.

24. In Supplementary medical report of the victim Doctor has opined that no opinion about rape can be given. Injury in private part is simple in nature and caused by hard and blunt object.

25. From perusal of medical examination report of the victim (Exhibit-Ka-4) it is evident that there is no signature of victim on the injury report. There is only a thumb impression of mother of the victim, which is attested by the Medical Officer, Women Hospital, Banda. This fact has been admitted by the Doctor Rekha Rani (P.W.-4) in her cross-examination that the right hand thumb impression of mother of victim has been verified by her (Exhibit-Ka-4). P.W.-4 has admitted that while preparing the report and verifying the thumb impression, inadvertently, she had not mentioned the name of the "mother of victim". She had only mentioned as "mother of the victim". She has further admitted that she had not asked the name of mother of the victim at the time of verifying the thumb impression that is why her name had not been mentioned. The Doctor has also stated in her cross-examination that she has not inquired about the name of the mother of the victim i.e. P.W.-1 at the time of medication examination.

26. In such circumstances, it is not clear whether the injuries shown in the said

injury report are of the victim or are of her mother, Chunni Devi. There is no thumb impression or signature of the victim on this very report (Exhibit-Ka-4). Even otherwise, the Doctor has opined that no opinion about rape can be given as vaginal smear is negative for spermatozoa. As such, the said medical evidence of the prosecution is also doubtful.

27. P.W.-5 K. L. Sagar, Sub-Inspector has also been examined. He is a formal witness. He has submitted the charge-sheet before the court below. He has admitted in his cross-examination that he has prepared Parcha No. 13 on 26.11.2001. He has also admitted that in second line of Parcha no. 13 there is overwriting of date and by making such overwriting, the date "14.11.2001" has been mentioned.

28 P.W.-6 S.I. Umashanker Chandel is the second Investigating Officer. He has stated in his cross-examination that on 15.09.2021 the victim had not come alongwith her mother to the police station. He has also admitted that Inspector Indrajeet Singh had not written the injuries of the victim on Parcha No.1. He further admitted that he had not asked about the injuries of the victim. He further admitted that the first informant/ complainant had not disclosed the name of the accused-appellant. Indrajeet Singh, the first Investigating Officer has not been examined by the prosecution to support the prosecution case.

29. It is also noteworthy that from the record it is not clear as to whether the victim has been produced before the Magistrate concerned for recording her statement under Section 164 Cr.P.C. and why such statement has not been recorded. It is also not clear that if such statement has been recorded, why the same has not been produced before the court below during the course of trial so that the same could be exhibited and kept on record.

30. It is also noteworthy that according to medical report the injuries found on the victim were not serious, hence the trial court has not found guilty the accused-appellant of the offence under Section 308 I.P.C.

31. We have examined the judgment and order of conviction passed by the trial court, which merely noticed the prosecution version to hold that the prosecution has established guilt of the accused-appellant based on prosecution evidence. The trial court has not carefully examined the statements of the prosecution witnesses so as to evaluate the correctness or otherwise of the same. We have noticed hereinabove that there is material contradictions, inconsistencies and discrepancies in the statements of the prosecution witnesses specially star prosecution witness i.e. P.W.-1 and P.W.-2.

32. Apart from the above, neither any test identification parade of the accused-appellant has been carried out nor the accused-appellant was identified by the victim (P.W.-2). Statement of the victim under Section 164 Cr.P.C. is not on record. The first informant (P.W.-1) and the victim (P.W.-2) both did not know the name of the accused-appellant and they did not recognize him during the course of trial. There is no thumb impression or signature of the victim in the medical examination report (Exhibit-Ka-4). Hence it is not proved that the injury report is of the victim. Doctor has opined that no opinion about rape can be given as vaginal smear is found negative.

33. We may note that on 22nd March, 2014, when the victim has been adduced as P.W.-2 by the court below i.e. after more than 13 years from the date of alleged incident, she recognized him by his name for the first time in the Court, after she came to know about the accused-appellant from some villagers. As already noted above, no identification parade has been done in the present case. Hence it is not possible for a victim who was six years of age at the time of incident, to recognize the accused by his name after long lapse of time in the court.

34. In **Suresh Chandra Bahri Vs. State of Bihar**, reported in *1995 SCC (Crl.) 60*, the Apex Court has observed that identification of accused by the witness in court is substantial piece of evidence. Where accused is not previously known to the witness, Test Identification Parade must be held at the earliest possible. The relevant portion of the said judgment reads as follows:

"78. .....It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. ***From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of TI parade. ....."***

35. Again in the case of **Dana Yadav @ Dahu & Others Vs. State of Bihar** reported in *2002 (7) SCC 295*, the Apex Court has opined as follows:

"It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous Identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused

and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. ***If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence.*** *We are fortified in our view by catena of decisions of this Court in the cases of of Kanta Prasad v. Delhi Administration, AIR (1958) SC 350, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan & Ors. Vs. State of Kerala, [1979] 3 SCC 319, Mohanlal Gangaram Gehani v. State of Maharashtra, [1982] l SCC 700, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra Vs. Sukhdev Singh, [1992] 3 SCC 700, Jaspal Singh alias Pali v. State of Punjab, [1997] l SCC 510, Raju alias Rajendra vs. State of Maharashtra, [1998] l SCC 169, Ronny alias Ronald James Alwaris, (supra), George & Others Vs. State of Kerala & Anr., [1998] 4 SCC 605, Rajesh Govind Jagesha, (supra), State of H.P. Vs. Lekh Raj & Anr., [2000] l SCC 247 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat, [2000] l SCC 358."*

(Emphasis added)

36. In view of the above discussions, we find that the trial court was not justified in returning the finding of guilt against the accused-appellant on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused-appellant has been proved beyond reasonable doubt is perverse. We hold that the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt.

37. Consequently, in view of the deliberation held above, this appeal succeeds and is allowed. The judgment and order of conviction 21.01.2015 passed by Additional Sessions Judge, Court No.1, Banda in S.T. No. 188 of 2013 cannot be sustained and is hereby set aside. The accused-appellant Ram Sewak @ Baura is clearly entitled to benefit of doubt. As he has already suffered incarceration of almost ten years since the trial was started, he is entitled to be released forthwith.

38. Accordingly, the present appeal stands allowed.

39. The accused-appellant Ram Sewak @ Baura shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

40. We record out appreciation of the able assistance rendered in the case by Mr. Virendra Pratap Yadav, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority, quantified as Rs. 15,000/-

41. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Banda henceforth, who shall transmit the same to the concerned jail Superintendent for release of the accused-appellant Ram Sewak @ Baura in terms of this judgment.

(2022) 10 ILRA 666
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 2919 of 2006

Manoj Kumar ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Apul Misra, Sri Abhishek Sharma (A.C.), Sri Darwari lal, Sri P.N. Mishra, Sri Rajendra Kumar Tripathi, Sri Sayendra Kumar Mishra

Counsel for the Respondent:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 313 & 437(a) - Indian Penal Code, 1860 - Sections 34, 201, 302, 304-B & 364 - Indian Evidence Act, 1872 - Section - 25 :- Criminal Appeal – Conviction & Sentence - Life imprisonment – benefit of doubt - offence of murder - FIR registered after two months of a written complaint - alleged that accused (husband) murdered his wife (daughter of the informant) for demanding more dowry money from her parents - body of the deceased could not be located - on the receiving of a letter written from an unknown person police intimated that accused has killed his wife and dead body was dumped beneath a culvert - from where police recovered some bones and cloth - in post-mortem report, on any definite opinion can be expressed by doctor, as to whether the bones are of male or female - such material cannot be read or relied U.P.on against accused appellant - more so, main prosecution witnesses were become hostile, chain of events is also incomplete - no direct evidence are available - presumption could only have been pressed as corroborative piece of evidence and not as a substantive piece of evidence - possibility of an alternative hypothesis cannot be ruled out - prosecution fails to established the guilt of the accused beyond the reasonable doubt - thus, he is entitled for benefit of doubt - impugned conviction & sentence is set aside - appellant shall be released forthwith subject to compliance of section 437-A of Cr,P.C. - Appeal allowed. (Para –13, 16, 23, 24, 25, 26)

Appeal Allowed. (E-11)

List of Cases cited:

1. Nagendra Shah Vs St. of Bihar, (2021) 10 SCC 725,

2. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116 : 1984 SCC (Cri) 487,

3. Shivaji Sahabrao Bobade Vs St. of Mah., (1973) 2 SCC 793 : 1973 SCC (Cri) 1033.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This Criminal Appeal has been filed by the accused appellant Manoj Kumar challenging his conviction and sentences vide judgement and order dated 25.4.2006 under Section 302 read with Section 201 I.P.C. in Session Trial No. 122 of 2001 whereby he has been sentenced to life imprisonment and a fine of Rs.50,000/-.

2. It transpires that the mother of the deceased Smt. Ganga Devi, who is the first informant (P.W. 1) gave a written report on 18.1.2000 alleging therein that her daughter Pushpa Devi aged about 25 years was married about six years back to the accused appellant and she had spent Rs.50,000/- towards dowry and marriage expenses. The accused appellant and his family members apparently were not happy with the dowry and used to torture the deceased for demand of more dowry. She was not provided with food, cloths and harassed in different ways. The deceased complained to her mother about the demand of dowry and the accused appellant and his family members were counselled and requested not to do so. However, they did not agree to such request and used to beat her and would often throw her out of the house. On 11.12.1996 the father of the accused appellant and other family members forced the deceased out of the house whereafter a complaint was made and later a compromise was arrived at. However, the deceased was again harassed. The accused appellant allegedly developed relations with another lady and had also solemnized

marriage but on being confronted with such accusation, the accused appellant denied having contracted a second marriage. About four months prior to the date of the said incident the accused appellant took the deceased to his house on an assurance that he would keep the deceased happily. The first informant with an intention to ascertain well being of her daughter visited the in-laws place of the deceased about 14 days back and was informed by the family members that the accused appellant had taken her to Pilibhit. The first informant, however, did not find the deceased even at Pilibhit. Despite best endeavours, the deceased could not be traced. The first informant, therefore, made the report stating that the accused appellant along with his family members have kidnapped the deceased and killed her. On such a written report dated 18.1.2000 an FIR was registered as Case Crime No. 92 of 2000 under Section 364 I.P.C. on 3.2.2000 at 12.40 P.M.

3. Despite best efforts, the deceased could not be located. It appears that a letter dated 26.2.2000 was received in the office of the Superintendent of Police on 1.3.2000 intimating that the accused appellant has killed his wife and her dead body has been dumped beneath a culvert near a Foam Factory. This letter is not a part of the record and has not been proved. Investigation however, proceeded on the basis of the letter sent by unknown person and from the place specified in the letter, a recovery has been made by the investigating officer. The recovery included a saree and other woman garments, a pant & shirt, chadar and five bones. The recovery memo thus prepared is marked as Ex. Ka.2. The first informant and her family members were also asked to come and inspect the recovery. The first informant and her family members identified the cloths, hairs and the bones belonging to the deceased. After recovery of bones and clothes the case was converted into Section 302 read with Section 201 I.P.C. It was also noticed that in the interregnum period Section 304B I.P.C. was also added but later on this Section was dropped while submitting the charge-sheet. During investigation, a Tape Recorder has also been recovered, which is marked as Ex.Ka.15, as per which the accused appellant had admitted his guilt with regard to commissioning of the offence. The investigating officer also collected blood stained earth and plain earth from the official quarter of the accused appellant. Five bones recovered after 01.03.2000 were presented for post-mortem examination. The Doctor observed as under :

"Total (5) bones presented for P.M. Examination.

(I) Two tibia bones of different sides are present which has been eaten at both ends partially. Both bones are 26 cm. long at present.

(II) One radius bone is present which has been eaten at both ends. This bone is 24 cms. long at present (This is human bone).

(III) Two long bones which are unidentifiable are present which have been taken away. The length of these bones are 27 cms. and 17.5 cms. Long.

(IV) No mark of cut could be found on any bone.

(V) No soft tissue is present."

4. Dr. S.P. Sharma who conducted the autopsy clearly opined that from the postmortem of bones no definite opinion can be given about them being of male or female. The report of the Forensic Laboratory has also been obtained in which human blood has been found on the blood stained earth and plain earth. However, no definite opinion has been returned on items no. 1 to 3 and 5 to 10 sent for forensic examination as it is found disintegrated. The investigation however culminated in submission of a charge-sheet against the accused appellant.

5. The Magistrate took cognizance of the charge-sheet and committed the case to the Court of Sessions where the proceedings were registered as S.T. No. 122 of 2001. Charge was framed against the accused appellant under section 302, 201 and 34 IPC. The accused appellant denied the charge and claimed trial.

6. Apart from documentary evidence in the form of FIR (Ex.Ka.4), Written Report (Ex.Ka.1), Recovery Memo of cloth (Ex.Ka.2), Recovery memo of Tape Recorder (Ex.Ka.15), Recovery memo of blood stained and plain earth (Ex.Ka.16), Postmortem report (Ex.Ka.3 & Report of Vidhi Vigyan Prayogshala (Ex.Ka.20), the prosecution has examined oral testimony of P.W. 1 Smt. Ganga Devi, who is the first informant and mother of the deceased, P.W. 2 who is the father of the deceased, P.W. 3 who is the witness to identification of cloths, P.W. 4 Dr. S.P. Sharma who has conducted autopsy and examined the bones, P.W. 5 Sohan Singh who is an independent witness to the recovery of blood stained earth on the wall of the house of the accused appellant, but he has turned hostile during trial, P.W. 6 & P.W. 7 namely, Durbasha Yadav & Ganga Singh, who are the independent witnesses and alleged neighbours of the accused appellant, are also 'Bandi Rakshak' and supported the prosecution story that the accused appellant had killed his wife have also turned hostile, P.W. 8 who is the Head Constable and has verified the 'Chik FIR' and P.W. 9 who is the investigating officer. Jai Narayan Tiwari and R. K. Trivedi, who are the Sub Inspectors and were associated with the conduct of the investigation, have been summoned by the court as court witnesses.

7. On the basis of evidence so adduced, the trial court has come to a conclusion that the prosecution has established the guilt of the accused appellant beyond reasonable doubt with regard to commissioning of the offence under Section 302 read with Section 201 I.P.C. The trial court has found that the deceased was strangulated and thereafter, inflicted stab wounds and her dead body was subsequently dumped near the house of the accused appellant on Kanakpur Road so as to destroy the evidence against him. The trial court, however, found the co-accused Nanne Babu to be innocent but the accused appellant has been convicted.

8. Sri Abhishek Sharma, learned Amicus Curiae as well as Sri Rajendra Kumar Tripathi, Advocate representing the present appellant have argued the appeal at length and taken the Court through the evidences which have been brought on record.

9. Learned counsel for the appellant has foremost invited our attention to the statement of Dr. S.P. Sharma who has opined that no definite opinion can be expressed as to whether the bones are of a male or female. He submits that the

recovered bones, therefore, cannot be authoritatively said to be that of the deceased and the prosecution case cannot be accepted on such evidence. He further submits that the disclosures about existence of bones and certain cloths of the deceased are based on a letter sent by unknown person who had informed the police about the existence of such material. He submits that sending of this letter by unknown person clearly shows that someone else was also involved in the commissioning of the offence, who was aware about existence of certain bones and cloths of the deceased at a specified place. This unknown person may have conspired by keeping the articles of deceased so as to implicate the accused appellant. It is further stated that the witnesses of fact i.e. P.W. 6 & P.W. 7, who supported the prosecution case about strangulation and stabbing of the deceased by the accused appellant, turned hostile, therefore, there exists no evidence to convict the accused appellant in the present case. Learned counsel for the appellant further submits that blood stained earth and plain earth were collected almost six months after actual commissioning of the offence and since in the Forensic Report also, it has been found disintegrated, therefore, such recovery cannot be relied upon against the accused appellant. Learned counsel for the appellant further submits that this is a case of circumstantial evidence in which chain of events is incomplete. Learned counsel for the appellant also submits that in the statement under Section 313 Cr.P.C., the accused appellant had clearly stated that his wife had left for Bareilly and he himself had dropped her at the railway station and therefore, the mere fact that certain bones were allegedly recovered alleging as that of the deceased after a month, would otherwise be a weak evidence in a case where the prosecution claims to have established the guilt relying upon the circumstantial evidence. He also submits that the accused appellant has no previous criminal history and is languishing in jail for last 22 years.

10. Per contra, learned AGA submits that the deceased was subjected to harassment for demand of dowry and relation between the accused appellant and the deceased was strained and the deceased was lastly seen in the company of the accused appellant, who has failed to explain disappearance of his wife. It is also stated that identification of the deceased based upon her cloths is clearly permissible in law and as the appellant otherwise has not explained as to how his wife has disappeared the onus would be upon him to explain the circumstances of her disappearance.

11. We have heard learned counsel for the parties and perused the materials brought on record.

12. The accused appellant is charged of strangulating his wife (the deceased) at 09.30 PM on 20.12.1999 within the jail premises at Pilibhit in the official quarter of accused appellant and stabbing her on her neck and thereby killing her. The second charge is that with an intent to destroy evidence the dead body was concealed/hidden near culvert at Tanakpur Road.

13. So far as the main charge of strangulating the deceased at 09.30 PM on 20.12.1999 at the official quarter of accused appellant in the jail premises is concerned, the prosecution had relied upon the evidence of Sohan Singh P.W.5 and Durwasa Yadav P.W.6, both of whom had

supported the prosecution story in their statement under Section 161 Cr.P.C. However, at the time of their deposition in court they have turned hostile and have not supported the prosecution version. The allegation that the deceased was strangulated by accused appellant and thereafter inflicted knife blows on her neck has, therefore, not been supported by any of the prosecution witnesses of fact at the stage of trial. There is no other witness who has seen the incident. There is thus no direct evidence to implicate the accused appellant of strangulating the deceased or inflicting knife blows on her.

14. The only other evidence placed by the prosecution is the bloodstain collected from the wall and earth of the house of accused appellant. The bloodstains have been collected by the Investigating Officer on 13.06.2000, which is nearly six months after the alleged incident. Although in the forensic report human blood has been found but considering the long passage of time and no other corroborative piece of evidence in that regard it would not be safe to hold that merely on account of bloodstains found on the wall at the house of accused appellant his culpability could be established.

15. The only other material relied upon by learned A.G.A. is the audio tape which is Exhibit Ka-15 in which the accused appellant is stated to have explained the manner in which he planned the conspiracy to eliminate the deceased and executed it.

16. The tape record contains the conversation allegedly made by the accused appellant on phone which is at best a statement under section 161 Cr.P.C., which cannot be treated to be substantive piece of evidence. This statement has otherwise not lead to any recovery of incriminating material from accused appellant and, therefore, by virtue of section 25 of the Evidence Act such material cannot be read or relied upon against the accused appellant.

17. In view of the above discussion we find that the charge levelled against the accused appellant of strangulating his wife and stabbing her neck is not established by the prosecution by adducing any direct evidence.

18. This takes us next to the circumstantial evidence adduced by the prosecution against the accused appellant to prove the charge. The circumstantial evidence to implicate the accused appellant is the recovery of five bones and some hair and clothes on 05.3.2000 namely Saree, Red Colour Cloth, Green Colour Cloth, Brasserie, Kathari, Thread, Black Shirt, White Shirt, Paint and Hairs. These recoveries have been made vide recovery memo Exhibit Ka-2. The forensic report is on record as per which no blood is found on thread and paint; hairs were of human; no definite result has been found on Brasserie; no blood is found on black shirt and white shirt; on Saree, Green Colour Cloth, Red Colour Cloth, Kathari and Hairs the stain was found disintegrated.

19. Before proceeding to examine the evidentiary value of the recovered items it would be necessary to examine the circumstance in which these articles have been recovered. The deceased was allegedly killed on 20.12.1999. It is after two months that a letter dated 26.02.2000 was received in the office of Superintendent of Police on 01.03.2000 informing about the accused appellant

having killed his wife and her dead body alongwith recovered items dumped beneath a culvert near Foam Factory. This letter was marked to the Investigating Officer who found the dead body alongwith the recovered items. The dead body which consisted of certain bones was sent for postmortem and other recovered items (Exhibit Ka. 2) were sent for forensic report. This letter dated 26.02.2000 has not been produced during the course of trial. The author of this letter is unknown. It is not known as to how the author of letter became aware that these clothes and human bones were of the deceased. Even if the clothes have been identified to be of the deceased, by her family members, yet it would not lead to a definite inference that the accused appellant had done this act as it, at best, creates a suspicion against the accused appellant. The possibility of someone else having done the incident and having known that clothes and hairs of deceased were dumped near Foam Factory informed the police cannot be ruled out.

20. Even the bones which have been recovered cannot be connected to the deceased with any certainty. Dr. S. P. Sharma, who has conducted the autopsy, has explained that the skeleton examined by him consisted of two tibia bones eaten by insects from both ends and three other bones recovered were partially eaten by insects. In his opinion although these bones were human bones but he could not say with any certainty whether theses bones are of a man or woman.

21. The recovery of such bones almost after two months of the incident would not be of much help to the prosecution case as it cannot be said that these bones were of the deceased. Similarly, even if it was accepted that the recovered items like clothes etc. were of the deceased yet it would not inculpate the accused appellant since it is not known as to who had kept it there. This is so as some other person was aware about such material lying there and role of this unknown person would remain suspect.

22. Law with regard to the principles to be followed for conviction in a case of circumstantial evidence has been summed up by the Supreme Court in Sharad Birdichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116. The judgment has been followed recently by the Supreme Court in Nagendra Shah vs. State of Bihar, (2021) 10 SCC 725 while applying the five golden principles to observe as under in paragraph 17 of the judgment:-

"17. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In Sharad Birdhichand Sarda v. State of Maharashtra [Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487] , in para 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 reads thus : (SCC p. 185)

"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 inShivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033] wherein the following observations were made : (SCC p. 807, para 19)

"19. ... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.'

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

23. On evaluation of abovenoted circumstantial evidence in light of the law settled, we find that the guilt of accused appellant cannot be treated to have been established. Hypothesis of guilt pointing exclusively to accused appellant is not established in the facts of the present case. The possibility of an alternative hypothesis cannot be ruled out.

24. The trial court has taken into consideration the above material to come to a contrary conclusion so as to implicate the accused appellant. The court below appears to have been persuaded by the prosecution version and the evidence has not been subjected to careful scrutiny in light of the law settled. The court below has proceeded to accept the prosecution version without carefully subjecting the evidence to the law settled. The court below has not taken into consideration the fact that an unknown person was guiding the prosecution and the line of reasoning suggested by him has been blindly followed. The unknown author of this letter or the role which he may have played in either commissioning of the crime or in placing the recovered articles near the culvert has not been examined. If someone was aware that for the last one and a half month the dead body was lying at a particular place and that the murder was committed by the accused appellant why did he not inform the police earlier or why he suppressed his identity remains unexplained. No direct evidence of the complicity of accused appellant is otherwise available. These are crucial aspects and the involvement of any other undisclosed person in commissioning of the offence cannot be ruled out. An alternative hypothesis therefore does exist to implicate someone other than the accused appellant.

25. This takes us to the last aspect of this case i.e. the obligation on part of the accused appellant to explain whereabouts of his wife. The accused appellant in his statement under section 313 Cr.P.C has

stated that he left his wife at the railway station for catching train to Bareilly. Her alleged dead body has been located in a mysterious manner after about two months from a public place. The presumption in law on part of the accused appellant of explaining the whereabouts of deceased cannot be pressed so as to obviate the prosecution of its responsibility to prove the guilt of the accused appellant by adducing cogent evidence. Such presumption could only have been pressed as corroborative piece of evidence and not as a substantive piece of evidence. We, moreover, find that no incriminating material has been put to the accused appellant by the prosecution under section 313 Cr.P.C. with regard to presumption in law on part of accused appellant of explaining the whereabouts of his wife and, therefore, this aspect also cannot be pressed against the appellant.

26. For the reasons recorded above, we are of the view that the prosecution has failed to establish the guilt of the accused appellant beyond reasonable doubt and, therefore, he is entitled to benefit of doubt in the matter. The judgement and order of conviction and sentence dated 25.04.2006 in Session Trial No.122 of 2001 is, thus, set aside. Since the accused appellant is in jail for the last 22 years, he shall be released forthwith, subject to compliance of section 437A of Criminal Procedure Code.

27. We record our appreciation for the assistance rendered to the Court by Amicus Curiae Sri Abhishek Sharma in deciding the appeal and he shall be paid his fee by the High court Legal Services Authority.

(2022) 10 ILRA 674

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 12.10.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 6645 of 2017

Manoj Kumar Yadav ...Appellant

Versus

State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Sita Ram Sharma (A.C.)

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

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2)/383 - Indian Penal Code, 1860-Sections 304-modification of sentence-accused murdered his mother in the heat of passion upon sudden quarrel between him and his mother(deceased)-accused did not run away from the crime scene instead he was crying near the bathroom with disgrace as per statement of PW-2, PW-3 and PW-5-there existed no pre-meditation, it was a sudden fight-According to prosecution witnesses at the time of incident the accused was not well and his treatment was going on but the defence could not produce any medical evidence about the unsound mind of the accused-Hence, the conviction of accused u/s 304 IPC is sustained but the sentence is modified to the period of incarceration already undergone by the appellant.(Para 1 to 34)

The appeal is allowed. (E-6)

List of Cases cited:

1. Dahyabhai Chhaganbhai Thakkar Vs St. of Guj. (1964) AIR SC 1563

2. Pulicherla Nagaraju @ Nagaraja Reddy Vs St. of A.P. (2006) 11 SCC 444

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This jail appeal has been preferred by the appellant-Manoj Kumar Yadav challenging the judgment and order dated 10th April, 2015 passed by the Additional District & Sessions Judge, Court No.4, Kannauj in Sessions Trial No. 262 of 2011 (State Vs. Manoj Kumar Yadav), arising out of Crime No. 210 of 2011, under Section 304 I.P.C., Police Station-Tirva, District Kannauj, whereby the accused-appellant has been convicted and sentenced to undergo life imprisonment under Section 304 I.P.C. with fine of Rs. 5,000/-, in default thereof, he has to further undergo three months additional imprisonment.

2. We have heard Sri Sita Ram, learned Amicus curiae for the appellant in the present jail appeal and Ms. Archana Singh, learned A.G.A. for the State as also perused the material available on record.

3. Records of the present jail appeal reveal that on the written report (Exhibit-ka/1) dated 3rd July, 2011 of the informant-P.W.-1, namely, Mishri Lal, which was scribed by one Harinath Singh, a first information report was registered under Section 304 I.P.C. as Chik No. 154/11, on 3rd July, 2011 at 11:00 a.m. alleging therein that Ramkali wife of the informant along with her son i.e. accused appellant herein, went to in-laws' place of her daughter, namely, Sidhashi wife of Raghvendra situated at village-Vilandapur, Police Station-Tirva, District Kannauj for treatment of the accused-appellant 10 to 12 days before. On 3rd July, 2022, at around 12.30 a.m. (00:30 hours) at night, during a fight, the accused-appellant hit a wooden stick on his mother i.e. wife of the informant as a result of which she died. As the dead body was lying on the spot, the informant came to the Police Station for giving information about the offence.

4. After lodging of the said first information report, the panchayatnama (Exhibit-Ka/2) of the deceased was conducted on 3rd July, 2011 at 12:00 p.m. (noon) after starting the process at 11:00 a.m. In the opinion of the Panch (Inquest) witnesses, the death of the deceased was homicidal on account of injuries caused to the deceased on her head. Thereafter the dead body of the deceased was sealed and sent to Mortuary for post-mortem.

5. Dr. S.K. Singh (P.W.-4) conducted the post-mortem of the dead body on 4th July, 2022 at 02:30 p.m. and his report is on record as Exhibit-Ka-3 as per which the deceased was nearly 60 years of age and had died due to shock and hemorrhage as a result of following ante-mortem injuries:

"Lacerated wound left temporal region 5 cm. X 1 cm. underlying bone fractured and depressed;

(ii) Contusion right side forehead 7 x 2 cm. just above right eyebrow;

(iii) fractured ribs 4th, 5th and 6th left side chest.

6. Investigation proceeded and P.W.-5/Investigating Officer, namely, Sub-Inspector Parshuram Nirala has recorded the statements of the informant, scriber of the written report and other witnesses. The Investigation Officer went to the spot and prepared the chalan lash, photo lash. He also prepared site plan and collected plain earth, blood stained earth, blood stain from the cot and the stick containing blood, whereafter upon conclusion of statutory

investigation under Chapter XII Cr.P.C., charge-sheet came to be submitted against the accused appellant by the Investigating Officer on 15th July, 2011 (Exhibit-Ka/11).

7. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 14th November, 2011, the concerned Court framed following two charges against the accused-appellant:

"मैं चन्द्रपाल विशेष न्यायाधीश एस0 सी0 एस0 टी0 एक्ट. कन्नौज में अभियुक्त मनोज कुमार यादव को निम्न आरोप से आरोपित करता हूँ।

यह कि दि- 2/3-7-11 को समय करीब रात्रि 12.30 बजे स्थान ग्राम बिलन्दापुर मकान रावेन्द्र सिंह यादव थाना तिरवा जिला कन्नौज के क्षेत्राधिकार में आपने वादी मिश्रीलाल की पत्नी रामकली के सिर में डण्डा मार दिया जिससे उसकी मृत्यु हो गयी है। इस प्रकार आपने हत्या की कोटि में आने वाले आपराधिक मानववध का अपराध कारित किया। इस प्रकार आपने भा0 द0 स0 की धारा 304 के अधीन दण्डनीय अपराध कारित किया जो न्यायालय के प्रसंज्ञान में है।

....."

The charges were read out to the accused-appellant, who denied the accusation and demanded trial.

8. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

"the written report of the informant/P.W.-1 scribed by one Harinath Singh dated 3rd July, 2011 has been marked as Exhibit-Ka/1; the chik first information report dated 3rd July, 2011 has been marked as Exhibit-Ka/12; panchayatnama (inquest report) dated 3rd July, 2011 has been marked as Exhibit-Ka/2; recovery memo of blood stained & plain earth dated 3rd July, 2011 has been marked as Exhibit-Ka/8; the recovery memo of stained "Ban' of cot dated 3rd July, 2011 has been marked as Exhibit-Ka/9; recovery memo of wooden stick dated 3rd July, 2011 has been marked as Exhibit-Ka/10; site plan dated 3rd July, 2011 has been marked as Exhibit-Ka/7, post-mortem of the deceased dated 4th July, 2011 has been marked as Exhibit-Ka/3; and the original charge-sheet dated 15th July, 2011 has been marked as Exhibit-Ka/11"

9. The prosecution has also adduced oral testimony of following witnesses:-

"P.W.-1/informant, namely, Mishri Lal, husband of the deceased and father of the accused-appellant; P.W.-2, namely, Siddhashi who is married daughter of the deceased and informant and eye-witness of the incident; P.W.-3, namely, Ravendra Singh son-in-law of the deceased and informant; P.W.-4, Dr. S.K. Singh, who conducted the post-mortem of the deceased; P.W. -5, namely, Parshuram Nirala retired Sub-Inspector, who was investigation officer; and P.W.-6, namely, Constable-2785 Omprakash, who prepared the Chik fist information report."

10. After recording of the prosecution evidence, the incriminating evidence were put to the accused for recording his statement under section 313 Cr.PC. In his statement recorded U/s 313 Cr.P.C. the accused-appellant denied his involvement in the crime. Accused appellant specifically

stated before the trial court that he has been falsely implicated in this case. The defence did not examine any witness from its side.

11. On the basis of above evidence adduced during the course of trial, the court below has found the accused-appellant guilty of murdering the deceased beyond reasonable doubt after recording following finding:

"i). the prosecution case that after an altercation, the accused hit the deceased with a stick, due to which she sustained injuries and resultantly died has fully corroborated with the post-mortem and the statement of P.W.4, who conducted the post-mortem;

ii). plea of the defence that at the time of incident the mental condition of the accused-appellant was not good cannot be accepted on the ground that no medical certificate or evidence in that regard has been produced during the course of trial as also on the ground that as per the post-mortem report, it is established that the death of the deceased is due to the injuries sustained on her body before her death and the accused-appellant hit her repeatedly till she died.

iii). The plea taken by the defence that no one has seen the incident with his/her own eyes cannot be accepted on the ground that P.W.-2 has specifically stated in her examination-in-chief as well as in her cross-examination that the accused-appellant has committed the said offence by hitting her with the help of a wooden stick. There is no inconsistency or contradiction in the statement of P.W.-2, either in her examination-in-chief or cross-examination, even the accused-appellant had moved towards P.W.-2 with the stick from which it is established that the accused-appellant wanted to kill P.W.2 also;

iv). In this way the prosecution statement is proved on the basis of the statements of the witnesses and the medical report shows the criminality of the accused. Resultantly, the guilt is proved against the accused-appellant beyond reasonable doubt.

12. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

13. The submission of the learned Amicus Curiae appearing for the accused-appellant is that the accused-appellant is innocent and has been falsely implicated. Next submission is that the accused-appellant is of unsound mind and has not committed the said offence and as the altercation took place between the deceased the accused-appellant, at the spur of the moment the said offence has been committed. Further submission is that the accused-appellant has no motive to kill his own mother i.e. the deceased. The argument is that the accused-appellant has no previous or any subsequent criminal antecedents to his credit except the present one. Next submission is that looking to the oral as well as documentary evidence brought on record, the sentence awarded to the accused-appellant under Section 304 I.P.C., is highly excessive. The maximum punishment which could be imposed upon the accused-appellant is 10 years under Section 304 Part II I.P.C. The learned Amicus Curiae appearing for the accused-appellant lastly submits that since the incident in question occurred on a spur of

moment and in the heat of passion upon sudden quarrel, the same would be covered under the 4th Exception to Section 300 I.P.C., which reads as under:

"Exception 4. --Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

On the cumulative strength of the aforesaid, learned Amicus Curiae, appearing for the appellant submits that the sentence is excessive and ought not be sustained and the order of sentence must be modified taking lenient view in the matter.

14. Per contra, Mrs. Archana Singh, learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present jail appeal filed by the accused appellant who committed heinous crime by murdering the deceased is liable to be dismissed.

15. We have considered the submissions made by the learned counsel for the parties and have carefully examined the original records of the case as well as the impugned judgment and order of conviction challenged before us.

16. It is in the context of above submissions and materials placed on record before the Court that this Court is required to consider as to whether the prosecution has established the guilt of accused-appellants on the basis of above evidence beyond reasonable doubt?. For examining the same, it is important for us to record statements of the prosecution witnesses in brief.

17. P. W. 1/Informant, namely, Mishri Lal in his examination has stated that his wife's name was Ramkali (since deceased). He has a daughter, namely, Siddhashi. whose marriage was solemnized with Ravendra of village Vilandapur. Accused-appellant is his son and his mental balance was disturbed. He has further stated that about three years ago, he had gone to his daughter in-laws' house for the treatment of the accused-appellant with the deceased. After staying there for three days, he came to his village leaving the deceased and the accused-appellant. P.W.-1 has further stated that at the time when the accused-appellant and the deceased went to the place of his daughter at Vilindapur, the mental condition of the accused-appellant was not good. He had gone to Vilindapur for the treatment of the accused-appellant.

18. In the cross-examination, P.W.-1 has stated that he came to know about the accused-appellant thrashing the deceased. He had not seen anything with his own eyes. The accused-appellant was also sad and crying because of his mother's death. He has also stated that he brought the accused-appellant to his daughter's place after getting treatment from Kanpur, Agra and Lucknow. The mental balance of the accused-appellant was going bad for 10-11 years. After the incident, he had seen the accused-appellant in the police station.

19. P.W.-2, namely, Siddhashi, who is according to the prosecution an eye witness of the incident, has stated that the accused-appellant is her younger brother. He used to have poor mental balance. About three and

a half years ago, her parents i.e. the deceased and P.W.-1/informant came to her house to get treatment for the accused-appellant. P.W.-1 went back to his village after leaving the deceased and the accused-appellant and they were living with her. She has further stated that on the night of 02/03 July 2011, the deceased and the accused-appellant were sleeping in the verandah of the house, while she was sleeping in the room with her kids. Since her husband i.e. P.W.3 works in a mill, he went on duty. When she came out of the room after hearing scream of the deceased at around 12.30 in the night, she saw that the accused-appellant was standing near the door with a stick. When he walked towards her, she ran for her life inside the room. She made a noise. The accused-appellant had hit the deceased with a stick due to which she died. She has further stated that her husband i.e. P.W.-3 had come back from duty in the morning. P.W.-1 was informed about the entire incident. She has then stated that the accused-appellant had killed the deceased by hitting her with a stick. She has stated that the accused-appellant's mental balance was not good. Due to his lack of mental balance, he used to do strange things. He had poor mental balance even on the night of the incident. The deceased and P.W.-1 had brought the accused appellant to her place for treatment and exorcism. In her cross examination, P.W.-2 has stated that when the Investigating Officer inquired her about the incident she has narrated the same by stating that the accused-appellant had hit the deceased. P.W.-2 has further stated that her husband was doing duty in the mill on the day of the incident. The deceased and the accused-appellant were lying down in the verandah at the time of incident . The deceased was dead when she came down through stairs. On the spot, it was she and her children. When she came to the deceased, the accused-appellant walked towards her with a stick.

20. P.W.-3, namely, Ravendra Singh, husband of P.W.-2 and son-in-law of the deceased and informant, has stated that the accused-appellant is his brother-in-law. Since the accused-appellant was ill, the deceased and P.W.-1/informant came to his house for his treatment about three and half years ago. P.W.-1, leaving the deceased and the accused-appellant at his house, went back to his village Bangaramau. He has further stated that since he works as a Guard in Uttar Pradesh Setu Department Corporation, on 02.07.11 he left his house for duty. He did his duty overnight and reached home on 03.07.11 at around 07.00 in the morning after completing his duty, he saw that the deceased had died in the verandah outside the house, the accused-appellant was sitting silently near the bathroom. His wife i.e. P.W.1 was crying and she told him that at around 12 to 01 a.m./p.m. the accused-appellant has killed the deceased by hitting her with a wooden stick. She also told him that the accused-appellant had killed the deceased by hitting her with a stick in front of her. After that, P.W.1 was called. In the cross-examination, P.W.-3 has stated that on the date when P.W.-1, the deceased and the accused-appellant came to his house, the accused-appellant was mentally unsound. They had brought him for treatment and exorcism. The accused-appellant's mental balance was not good even on the day of the incident. He was not aware that the accused-apellant had beaten his mother before this incident.

21. P.W. 4. namely, Dr. S.K. Singh, in his examination has stated that he has conducted the post mortem of the deceased

Ramkali aged about 60 years. He has further stated that in his opinion the death of the deceased, was due to excessive bleeding and shock from pre-death injuries. He has further stated that injury number 1 can also come from the bar. Injury number 01 and 02 is possible to come from the same object. No wound was visible from outside in injury number 03. He has further stated that the temporal bone was broken under the head injury. The temporal bone was broken on several sides.

22. P.W.-5, namely, Parshuram Nirala, retired from the post of Sub-Inspector, who has conducted the investigation, has stated in his examination that after taking over the investigation, he reached the spot for panchyatnama. After filling the Panchayatnama of the dead body, he prepared other papers. The dead body was sealed and sent to the Mortuary for post-moretem in the presence of P.W.-5. He has also prepared the site plan and From the spot, plain soil ,blood-stained soil, blood-stained cot and a wooden stick with blood were taken in the possession of P.W.-5. On the basis of the evidence against the accused, under the charge under section 304 IPC, the charge sheet was submitted by P.W.-5. He has further stated that he saw the wounds of the deceased.

23. P.W.-6, namey, Constable 2785 Omprakash has prepared the chik first information report on the basis of written report of the informant and also proved the same.

24. So far as the plea of mental unsoundness of the accused-appellant taken on behalf of the appellant before this Court as well as before the trial court is concerned, we may record that the said plea has been rejected by the trial court on the ground that the defence has failed to produce any medical evidence certifying that at the time of incident, the accused was of unsound mind. It is no doubt true that the defence has not been able to produce any medical evidence about the unsound mind of the accused at the time of incident, but from perusal of the first information report and the statements of the prosecution witnesses nos. 1 to 3, it is crystal clear that at the time of incident, the accused-appellant was not well and his treatment was going on and for the said purpose, the deceased went to in-laws' place of her daughter along with the accused-appellant, where the incident happened.

25. For arriving at a logical conclusion, it would be worthwhile to reproduce the judgment of t**he Apex Court in the case of** Dahyabhai Chhaganbhai Thakkar Vs. State of Gujrat, reported in *AIR 1964 S.C. 1563, wherein the Apex* Court held "when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime." The Apex Court, however, considered the relevant circumstances and found that the appellant did not murder his wife in a fit of insanity and dismissed the appeal.

26. For ascertaining the aforesaid plea of legal insanity, the Apex Court has made

following observations in the case of **Dahyabhai Chhaganbhai Thakkar (Supra):**

"There is no conflict between the general burden to prove the guilt beyond reasonable doubt, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity. (ii) The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:(1).The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite, mensrea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence-oral, documentary or circumstantial, but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings. (3) **Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."**

27. From perusal of the entire evidence brought on record specially the statement of P.W.-2, who is none other than the married daughter of the deceased and sister of the accused-appellant as the post-mortem report of the deceased, it is apparently clear that on the date of incident, there was an altercation between the deceased and the accused-appellant and suddenly in a fit of anger, he attacked his mother with a stick due to which she sustained injuries and died. Therefore, it is discernable that it is the accused-appellant who has committed the offence but he had no motive or intention to do the same specifically with his mother, who was making all efforts for his treatment.

28. In **Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhara Pradesh** reported in *(2006) 11 SCC 444 in paragraph-29,* the Apex Court has opined that the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part 1 or 304 Part II. In many petty or insignificant matters, plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance,may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed jealously or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not covered into offences punishable under Section 304 Part-I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302.

29. On going through the entire evidence on record, we find that the

necessary ingredients to attract 4th Exception to section 300 IPC are clearly present in the facts of the present case inasmuch as death is caused; there existed no pre-meditation; it was a sudden fight; the offender has not taken undue advantage or acted in a cruel or unusual manner, therefore, the case in hand clearly falls under fourth exception to section 300 IPC.

30. The issue relating to quantum of sentence under Section 304 I.P.C. depends on background facts of the case, antecedents of the accused, whether the assault was premeditated and pre-planned or not, etc. There are no straight jacket formulae for the determination of the same in law.

31. In view of the above discussions and deliberations, we are of the considered opinion that although the accused-appellant/defence has not been able to establish the plea of his mental unsoundness at the time he has committed the said offence by not producing any medical evidence in support of the said plea during the course of trial but it is to kept in mind by us that the accused-appellant had no motive or intention to commit the said offence. The said offence has been committed by the accused-appellant on a spur of moment and in the heat of passion upon sudden quarrel between him and his mother (deceased), as is evident from the statement of P.W.-2. It is also not in dispute that the accused-appellant was not entirely well and was under treatment, as is clearly discernable from the statements of the prosecution witnesses. It is also to be kept in mind that after committing the said crime, the accused-appellant had not run away from the crime scene like other notorious criminals. When the accused-appellant's anger subsided, he felt a lot of disgrace and remorse and was crying near the bathroom of the house in question, as is evident from the statement of P.W.-2, P.W.-3 and P.W.-5. Seeing the aforesaid circumstances we are of the view that the quantum of sentence to life imprisonment under Section 304 I.P.C. as awarded under the impugned order of sentence is too harsh in the facts of the present case.

32. Attention of the Court has been invited to the statement of Investigating Officer as per which the appellant was arrested on 05.07.2011 and even at the time of pronouncement of judgment by the court below, the appellant was in jail. He has been enlarged on bail by this Court on 23.08.2022. The appellant therefore has undergone incarceration without remission of more than 11 years. With remission the period of incarceration would be more than 13 years.

33. Accordingly, we modify the impugned judgment and order of conviction passed by the trial court by holding that the conviction of accused appellant under Section 304 IPC is sustained but the sentenced is modified to the period of incarceration already undergone by the appellant.

34. Accordingly, the present appeal succeeds in part.

35. Since the accused-appellant is reported to be on bail, he needs not be surrender subject to compliance of Section 437-A Cr.P.C., unless he is wanted in any other case.

36. Learned Amicus Curiae, for the appellant shall be entitled to his fee from the High Court Legal Services Authority, as per the rules.

37. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Kannauj, henceforth, for doing the needful in terms of this judgment.

(2022) 10 ILRA 683
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 71 of 2022

Minor 'X' Through His Natural Guardian Father 'Y' ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Pramod Kumar Srivastava

Counsel for the Opposite Parties:
G.A., Sri Akhilesh Bharti, Sri Narendra Singh

Criminal Law - Juvenile Justice (Care and Protection of Child) Act, 2015 - Sections 12, 12(1) & 102 - Protection of Children From Sexual Offences Act,2012 - Sections 3 & 4 - Indian Penal Code,1860 - Sections 376 & 506, - Criminal Procedure Code,1973 - Section - 161, - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989 - Section- 3(2)(5) :- Criminal Revision – against rejection of Bail Application & appeal - FIR - offence of rape & threat to a 8 years of girl child - while rejecting the Bail of accused (minor) revisionist the Juvenile board observed that, the provisions of Juvenile Justice Act do not mean that once the person is adjudged juvenile, he is entitled to bail, irrespective of all other factors - court firm that, when considering the bail, the matter is to be assessed from the angle of the - (i) principle of best interest of the juvenile, (ii) angle of the demand of justice of both sides and (iii) also concern of the society at large - the law needs constant U.P.dation of meaning to achieve the goals set in the St.ment of objects and reasons at the time of enactment - thus, release shall defeat the ends of justice - impugned orders cannot be faulted and the revision is liable to be dismissed. (Para - 13, 14, 15)

Criminal Revision dismissed. (E-11)

List of Cases cited:

1. Amit kUmar Vs St. of U.P., Criminal Revision No. 2732/2010 - decided on 14.09.2010

2. Kanchan Sonkar Vs St. of U.P. - Criminal Revision No. 1266 of 2020 decided on 01.12.2020

3. Amit Vs St. of U.P., Criminal Revision No. 1852 of 2015, decided on 16.03.2016

4. Prakash Vs St. of Rajj. - 2006 Crl. L.J. 1373,

5. Vijendra Kumar Mali Vs St. of U.P. - 2003 (1) JIC 103,

6. Om Prakash Vs St. of Raj. & anr., (2012) 5 SCC 201,

7. Mangesh Rajbhar Vs St. of U.P. & anr., 2018 (2) ACR 1941.

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. It appears that name of the revisionist-juvenile has been disclosed in the memo of revision. This fault from the side of revisionist escaped detection by the Registry. The concerned Officer of the Registry is directed to delete the name of the revisionist-minor from the title of the revision as fed and shown in the data on official website and represent him as **"Minor 'X' Through His Natural Guardian Father 'Y"**.

2. Heard Sri Pramod Kumar Srivastava, learned counsel for the

revisionist and Sri Avanish Kumar holding brief of Sri Narendra Singh, learned counsel for the respondent no. 2-the informant and Sri O.P. Mishra, learned AGA for the State.

3. This criminal revision has been filed with the prayer to set aside the order of the Juvenile Justice Board, Prayagraj dated 13.09.2021 and the order of the Additional District and Sessions Judge/Special Judge, POSCO Act, Allahabad passed on 30.10.2021 in Criminal Appeal No. 101 of 2021 affirming the order of the Juvenile Justice Board, Prayagraj and declining bail to the juvenile in a matter arising out of Case Crime No. 134 of 2021 under Sections 376, 506 IPC, 3/4 of POSCO Act and 3(2)(5) of SC/ST Act, Police Station-Shankargarh, District-Prayagraj with further prayer to admit him to bail.

4. The submissions of the revisionist is that the juvenile who was found to be of the age of 15 years 8 months and 14 days on the date of the incident, by the Juvenile Justice Board vide order dated 26.08.2021, is lodged in an observation home since 01.05.2021 and that the impugned orders have been passed in complete disregard of the provisions of Section 12(1) of the Juvenile Justice Act; there has been no material before the Juvenile Justice Board or the appellate Court to arrive at a conclusion that in case the juvenile is released on bail, he shall be exposed to physical, moral and psychological danger and that his release shall not be in the best interest of the juvenile himself; the impugned orders being arbitrary and contrary to law and are liable to be set aside.

5. As per the version of the FIR, a six years old daughter of the informant had gone to gather unripe mangoes from the orchard belonging to Sarjo Master where the juvenile was also present. He dragged the victim to an abandoned hut, sexually assaulted her and also threatened and instructed her not to disclose the incident to anybody else. The victim, however, disclosed the whole matter to her mother, thereafter, the FIR Case Crime No. 0134 of 2021 under Sections 376, 506 IPC, 3/4 of POCSO Act and 3(2)(5) of SC/ST Act was registered same day at 23.47 hours i.e., within seven hours of the occurrence which took place on 30.04.2021 at 17.30 hours in the evening.

6. As per the statement of the victim under Section 161, when she went to gather some mangoes from the place of occurrence i.e., mango orchard, the juvenile taking advantage of the absence of any other in the vicinity, forcibly dragged her to an abandoned hut and ravished her after removing her clothes. After the act, he made her wear the clothes again and sent her back to her house after threatening her and instructing her not to disclose anything to anybody else. As per the medical examination report, she was bleeding from her private parts and there was also rapture of hymen and tear in labia minora and fourchette introitus. She was also bleeding from her vagina and perineum. As per the report of the C.M.O., she was merely 8 years old at the time of the occurrence.

7. First and foremost contention from the side of revisionist is that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by a coordinate Bench of this Court in **Criminal Revision No. 2732 of 2010 (Amit Kumar vs. State of U.P.) decided on 14.09.2010, Criminal Revision No. 1266 of 2020 (Kanchan Sonkar vs. State of U.P.) decided on 01.12.2020, Criminal**

Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016 and held by the *Apex Court in Prakash vs. State of Rajasthan, 2006 Cri.L.J. 1373.*

8. In **Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016, this Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103,** wherein it was observed that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in Section 12(1) of the Juvenile Justice Act, existed; so far as the ground of gravity is concerned, it was not covered under the relevant provisions; if the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid Act. The Section 12 of the Act contained a non-obstante clause, which indicated that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

9. It is contended that since there existed no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act; the 'child in conflict with law', who has been in custody for quite some time deserved to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated; that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

10. In **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201,** the Apex Court observed that the Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of juvenile as it was felt that child become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that when an accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind the court ought to be more careful. It may be noted that the Hon'ble Apex Court gave aforesaid view in the background of facts that age of the juvenile determined by the courts below was not free from doubts. In those peculiar circumstances, the Apex Court commanded attention of the Courts that where accused commited grave and heinous offence and thereafter he attempted to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable. It was also observed that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers.

11. All said and done, the nature of crime where its grave and heinous cannot be simply passed over. In this context, I choose to mention the observations made by a coordinate Bench of this Court in **Mangesh Rajbhar vs. State of U.P. and Another; 2018 (2) ACR 1941,** which reads as under:-

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

12. Ordinarily, the merits of the matter may not be unduly important where the Courts are inclined to give benefit of bail as envisaged in Section 12 of the Juvenile Justice Act. This is not to say that once a person is found a juvenile, it is mandatory to grant him bail and that merits of matter shall have no relevance. In my view, the nature of the crime and factors connected thereto never went into oblivion and this particular aspect have been usefully illuminated by the Courts time and again. In fact nature of the offence and merits of the matter may assume ample significance when the Court has to form an opinion about the ends of justice. It may be noted that the phrase 'ends of justice', cannot exist in a vacuum. Unarguably and undeniably, the Courts are under obligation to address the concerns of both the sides and strike a delicate balance between competing and often conflicting demands of justice of the two sides. When viewing the matters of bail from this particular angle of deciphering the ends of justice not only the nature of crime, but also the manner of commission thereof, methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to reckon with. To my mind, from this particular point of view, no artificial line can be drawn to differentiate cases of juvenile

above 16 years from those who are found just below 16, in ordinary circumstances. Incidentally, the accused in this case was found marginally below 16.

13. Following facts are important in the present matter before me:-

Firstly, the nature of the crime that a little innocent girl of tender age had gone to an orchard not apprehending something untoward may happen to her. Obviously, she was not in a position to physically resist a sufficiently grown up boy, who over-powered her and was made to undergo ordeal of such atrocious crime in a merciless manner. The kind of injuries, she sustained, is enough to shake once conscience. The act in itself indicates the physical and mental maturity of the juvenile and also impels this Court to think about the need for professional counseling with the object of inculcating in him a healthy mind when he grows up into an adult. Therefore, **secondly**, in my view, he actually needs strict supervision and intervention of the authorities as per the scheme of the Act for his own welfare and well being. **Thirdly**, the aim and object of the Juvenile Justice (Care and Protection of Children) Act, 2015 cannot be achieved if crimes committed by the juveniles are not viewed from the angle of concerns of the society at large as well.

14. I am of the firm view that when considering the bail, the matter is to be assessed from the angle of the (i) principle of best interest, i.e., welfare of the juvenile, (ii) angle of the demands of justice of both the sides and (iii) also the concern of the society at large. He grows into an adult with a healthy mind inside, is in the larger interest of the society. The aim and object of the Act cannot be achieved unless the statutory provisions are not interpreted according to the growing needs of the times. The laws need constant updation of meanings to achieve the goals set in the statement of objects and reasons at the time of enactment.

15. The Juvenile Justice Board did not find it a fit case to release the juvenile on bail, considering the fact that his act must have caused a lot of outrage in the public and local people of the village including the family of the victim and trauma to the victim herself. The Juvenile Justice Board observed that the provisions of Juvenile Justice Act do not mean that once the person is adjudged juvenile, he is entitled to bail, irrespective of all other factors. The Board has taken into consideration the social investigation report submitted by the District Probation Officer. Likewise, the learned appellate Court expressed its opinion that in case the juvenile is released and brought back to his family, he will fall in the same company and environs where he used to be earlier and from where he needs to be protected and rescued, hence, the demands of the best interest of the child required that he should not be released to his family members. Moreover, the learned courts below took into consideration the demands of justice of the victim's family and came to a conclusion that his release shall defeat the ends of justice. I am of the view that the orders of the learned Appellate Court and the Juvenile Justice Board, thus cannot be faulted and the revision is liable to be **dismissed** as it lacks merits.

16. The revision is, accordingly, **dismissed.**

17. The Court/concerned Board is directed to expedite the hearing and

conclude the same at the earliest without getting influenced by any of the observations made in this order.

18. Copy of the order be certified to the Court concerned

Note- Copy of the order be sent to concerned Section of the Registry for immediate compliance of direction given in Para-1 of the order.

(2022) 10 ILRA 688
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 568 of 2022

Kalim ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Santosh Kumar Chaubey

Counsel for the Respondents:
G.A., Sri J.B. Singh

Civil Law - Juvenile Justice Act,2015- Section 102-impugned order determined the age by report of Medical Board and not by school certificates-school certificate records the age as 14 years and 12 days on the date of occurrence-informant rebutted the date of birth and produced copy of pariwar register and driving license- school leaving certificate quite doubtful-no underlying document to record his age at the time of admission-Court below rightly embarked on an inquiry and radiological age was ordered.

Revision dismissed. (E-9)

List of Cases cited:

1. Ajay Kumar Singh @ Babloo Singh Vs St. of U.P. & Uday Pratap Singh; 2022 (6) ADJ 85 (LB)

2. Buddhu Vs St. of U.P.; (2021) 12 ILR A144

3. Ashwani Kumar Saxena Vs St. of M. P.; (2012) 9 SCC 750

4. Rashipal Singh Solanki Vs St. of U.P. & ors.; 2021 (11) ADJ 489

5. Parag Bhati Vs St. of U.P.; (2016) 12 SCC 744

6. Sanjeev Kumar Gupta Vs St. of U.P. & anr.; (2019) 12 SCC 370

7. Abuzar Hossain Vs St. of W. B.l; (2012) 10 SCC 489

8. Ashwani Kumar Saxena Vs St. of M.P.; (2012) 9 SCC 750

9. Babloo Pasi Vs St. of Jharkhand; (2008) 13 SCC 133

10. Arnit Das Vs St. of Bihar; (2000) 5 SCC 488

11. Jitendra Ram Vs St. of Jharkhand; (2006) 9 SCC 428

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Santosh Kumar Chaubey, learned counsel for the revisionist, Sri J.B. Singh, learned counsel for the respondent no. 2 and learned A.G.A. for the State.

2. This criminal revision has been filed under Section 102 of the Juvenile Justice Act, 2015 with a prayer to set aside the order of the Juvenile Justice Board dated 26.03.2021 passed in age determination inquiry in Misc. Application No. 43 of 2020 arising out of Crime No. 439 of 2020 under Sections 302, 120-B IPC, Police Station Hasanpur, District-Amroha (J.P. Nagar) with a further prayer to set aside the order passed in criminal

appeal affirming the order of the Juvenile Justice Board and to declare the revisionist a juvenile under the Juvenile Justice Act, 2015.

3. The submission of the revisionist are that the learned courts below have committed a manifest error of law in passing the impugned orders; in the school certificate the date of birth was shown as 10.08.2006, which clearly established the age of the revisionist as 14 years and 12 days on the date of the occurrence; the courts below ignored the school certificate thereby flouting the provisions of law; the school certificate was proved by the evidence of the teacher of the concerned primary school and by the Ex-Principal of the same institution examined as CW2 and CW3; the learned courts below instead of relying upon the original and the documentary evidence took into consideration the report of the Medical Board and disbelieved the date of birth, as shown in the certificate; the impugned order is illegal because it is founded on the fact that the copy of the pariwar register was not produced by the revisionist at the right time; at the same time, the age of the juvenile, as shown in the driving licence was accepted against the provisions of law, hence, the impugned orders are liable to be set aside and the revisionist deserves to be declared a juvenile.

4. The revisionist has relied on ***Ajay Kumar Singh @ Babloo Singh vs. State of U.P. and Uday Pratap Singh; 2022 (6) ADJ 85 (LB)***, wherein the Court observed that the matriculation certificate was available, therefore, there was no occasion to have gone for other documents, such as birth certificate issued by the local bodies. In the above case before the court the arguments of the revisionist that the Juvenile Justice Board should have gone for ossification test, was discarded as misconceived in the light of specific provisions given in clause (iii) of Section 94 of the Juvenile Justice Act, 2015 which said that only in the absence of document mentioned in clause (i) and (ii), age shall be determined by an ossification test. The Court discarded the plea that the original document of the school first attended should have been summoned and held that the court below rightly determined the age of the juvenile on the basis of the matriculation certificate and it was opined that unless some documentary proof or evidence is produced before the Board or the lower appellate court, which may negate the correctness of the high school certificate, the order cannot be faulted.

5. The revisionist also relied upon the judgment of this Court in ***Buddhu vs. State of U.P.; (2021) 12 ILR A144***, to stress the point that the educational certificate is to be preferred over any other evidence and the judgment of the Hon'ble Supreme Court of India in ***Ashwani Kumar Saxena vs. State of Madhya Pradesh; (2012) 9 SCC 750,*** wherein the Court stated its opinion in the following words:

"34.....There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be

fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination."

6. The Hon'ble Court in ***Ashwani Kumar Saxena (supra),*** then proceeded to examine the essential difference between the words 'inquiry, investigation and trial' as we find in the Cr.P.C. Thereafter held that the procedure to be followed under the Juvenile Justice Act in conducting the inquiry is the procedure as laid down in that statute itself i.e., Rule 12 of 2007 Rules and held that the age determination inquiry contemplated under the Juvenile Justice Act and Rules had nothing to do with the inquiry under other legislations like entry in service, retirement and promotion. The Court observed that where the entry made in the school certificates is available, the Court or the Juvenile Justice Board is not expected to conduct a roving inquiry and go beyond those certificates to examine their correctness when those documents have been kept during the normal course of business. The Hon'ble Court held that the credibility and acceptability of the documents, including the school leaving certificate, would depend on the facts and circumstances of each case and no hard and fast rule as such could be laid down in that regard. The Hon'ble Court also held that the certificates shall not be viewed as doubtful on a notion that the parents usually get entered a wrong date of birth in the admission registers.

7. On the other hand, the dictum of Hon'ble Apex Court in **Rashipal Singh Solanki vs. State of U.P. and Others; 2021 (11) ADJ 489** decided on 18.11.2021 has been presented before me wherein the Hon'ble Apex Court had considered the judgments given in ***Parag Bhati vs. State of U.P.; (2016) 12 SCC 744, Sanjeev Kumar Gupta vs. State of U.P. and Another; (2019) 12 SCC 370 and Abuzar Hossain vs. State of West Bengal; (2012) 10 SCC 489, Ashwani Kumar Saxena vs. State of M.P.; (2012) 9 SCC 750, Babloo Pasi vs. State of Jharkhand; (2008) 13 SCC 133, Arnit Das vs. State of Bihar; (2000) 5 SCC 488, Jitendra Ram vs. State of Jharkhand; (2006) 9 SCC 428*** and several others.

8. In Para-25 of the above judgment **(Rashipal Singh Solanki),** the Hon'ble Apex Court has pointed out **the difference** in the procedure under the two enactments i.e., the Juvenile Justice Act, 2000 and the Juvenile Justice Act, 2015, as to inquiry into determination of age of the juvenile and also the power to seek evidence, how and when to exercise that power and when to go for ossification test. The Hon'ble Court, in nutshell, held that each case may be dealt with in the light of its own peculiar facts and circumstances while keeping certain principles as guiding factor in mind as described in concluding para of the judgment of Hon'ble Apex Court. The concluding para shall be reproduced verbatim in para 13 of present judgment.

9. At the same time, the Hon'ble Apex Court in **Rashipal Singh Solanki (supra)**, in the same para pointed out **the similarity** between the Rule 12 of the Juvenile Justice Rules, 2007 and sub-section (2) of Section 94 of the Juvenile Justice Act, 2015, as a substantive provisions. The Hon'ble Apex Court referred to a judgment in ***Ashwani Kumar Saxena (supra)*** and also ***Abuzar Hossain (supra)*** highlighting the fact that only in cases where certificates are found to be fabricated and manipulated, the Juvenile Justice Board need to go for medical report and also highlighted the fact that the

yardstick for depending on the school certificates may be a bit different where the school leaving certificate or voter list etc., is obtained after conviction.

10. In may view, the Hon'ble Court kept in mind the facts and circumstances attached to production of documents/certificates, as required by the provisions of the Juvenile Justice Act before those documents could be relied upon. In another words, it appears that the opinion largely is that even if the documents are found to be prima facie correct, ***there may be facts and circumstances to alert the Court to go into the inquiry to satisfy itself as to correctness of the claim***. In the same breath, the Court referred to an opinion given in the judgment of ***Abuzar Hossain (supra)*** that when any claimant or any of the parents or a siblings in support of the claim of the juvenility raised for the first time in appeal or revision depends on mere affidavits, it shall not be sufficient to justify the inquiry for determination of age unless there exist circumstances which cannot be ignored.

11. In ***Sanjeev Kumar Gupta (supra)***, the credibility and authenticity of the matriculation certificate for the purpose of determination of age under Section 7(A) of the Juvenile Justice Act, 2000 came up for consideration. In the said case, the Juvenile Justice Board had rejected the claim of the juvenility and that decision of the Juvenile Justice Board was restored by the Hon'ble Apex Court by rejecting the order of the Hon'ble High Court. It was observed therein that the records maintained by the C.B.S.C. were purely on the basis of final list of the students forwarded by the Senior Secondary School where the juvenile had studied from Class 5 to 10 and not on the basis of any other underlying documents. On the other hand, there was clear and unimpeachable evidence of date of birth which had been recorded in the records of another school, which the second respondent therein had attended till class 4 and which was supported by voluntary disclosure made by the accused while obtaining both, Aadhaar Card and driving license. It was observed that the date of birth reflected in the matriculation certificate could not be accepted as authentic or credible. In the said case, it was held that the date of birth of the second respondent therein was 17.12.1995 and that he was not entitled to claim juvenility as the date of the alleged incident was 18.08.2015.

12. The Hon'ble Apex Court in ***Sanjeev Kumar Gupta (supra)*** considered the judgment in ***Ashwani Kumar Saxena (supra)*** and also judgment in ***Abuzar Hossain @ Gulam Hossain (supra)***, and observed that the credibility and acceptability of the documents including the school leaving certificate would depend on the facts and circumstances of each case and no hard and fast rule as such could be laid down in that regard. The Hon'ble Apex Court reproduced the observation of itself in ***Abuzar Hossain @ Gulam Hossain (supra)*** which is below:

".....directing an inquiry is not the same thing as declaring the accused to be a juvenile. In the former, the Court simply records a prima facie conclusion, while a declaration is made on the basis of evidence. Hence, the approach at the stage of directing an inquiry has to be more liberal lest, there is miscarriage of justice. The standard of proof required is different for both. In the former, the Court simply records the prima facie conclusion. It

would eventually depend on how the Court evaluates such material for a prima facie conclusion and the Court may or may not direct an inquiry. In the latter, the Court makes a declaration on evidence that it scrutinises and accepts such evidence only if it is worthy of acceptance."

13 . The Hon'ble Apex Court in **Rashipal Singh Solanki (supra),** after considering all the judgments held as below:

"29. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(ii-a) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(ii-b) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(ii-c) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i),

(ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-

technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

14. The Hon'ble Court, referring to the fact that there was no other document contradicting the date of birth as shown in the matriculation certificate, held that the medical evidence is not required and upheld the order of the Hon'ble High Court which sustained the judgment of the Sessions Court as well as the Juvenile Justice Board.

15. Coming to the facts of this matter admittedly, the school leaving certificate,

wherein the date of birth was shown as 10.08.2006, issued on 25.11.2020 by the Primary School, Bawan Kheri, Thana-Hasanpur, Amroha was produced, however, the authenticity and the acceptability of that certificate was challenged by the respondent-informant by producing a copy of pariwar register showing date of birth of juvenile as of the year 1999 as well as a driving licence showing the same year of birth. Thereafter, in rebuttal another copy of pariwar register was produced on behalf of the juvenile showing his date of birth as 10.08.2006.

16. In the above circumstances, an inquiry into the age determination was directed and several witnesses were examined. CW1-father of juvenile admitted that he knows about the date of birth of his son only on the basis of entry in the school leaving certificate and that he does not remember his exact date of birth. CW2-Mariyam, Principal of the school, though, verified the fact that the transfer certificate was issued by the school and also produced the S.R. register, the attendance register etc., however, she stated that she was unaware of the basis of entry of date of birth as 10.08.2006 and the reasons for juvenile's admission in that institutions in Class-IInd. CW3-the Ex-principal of that school stated that at the time of his admission, he recorded the age of the juvenile and the date of birth as 10.08.2006 as told by his elder brother, the only person who accompanied the juvenile at the time of his admission. Admittedly, admission register was never produced. The medical examination and the X-ray of the juvenile indicated that his radiological age was about 19 years. The radiologist namely, Dr. Kuldeep Singh found that the bones of wrist, elbow, knees and clavicle were all fused.

17. From the perusal of the impugned order, it appears that finding the school leaving certificate quite doubtful and finding that there was no underlying document to record his age at the time of admission in the concerned institution coupled with the facts that other documents like copy of pariwar register and driving licence showed different age of the juvenile, in my view, the Juvenile Justice Board and the learned Appellate Court below rightly embarked on an inquiry and radiological age was ordered to be conducted. The courts below cannot be faulted for depending upon the medical/radiological age of the juvenile and declaring him as an adult on the basis of the evidence available in the facts and circumstance of the case. Before this Court, copy of bail order passed in Bail Application No. 70/2022 dated 15.01.2022 passed by the Incharge, Sessions Judge, Amroha and copy of the order passed by this Court on 24.05.2022 in Criminal Misc. Bail Application No. 7301 of 2022 moved on behalf of the present revisionist, who claim himself to be a juvenile, has been brought on record. In the bail application moved before the Sessions Judge, the applicant-revisionist has shown his age as 19 years, which goes against his own claim.

18. In my view, there were enough of reasons to discard the documented age of the juvenile and to call for ossification test, the Board was perfectly justified in seeking evidence for determination of age and drawing its own conclusion based on the evidence available including evidence of radiological test. The Board as well as appellate court both have given a concurrent finding which is not liable to be disturbed by this Court while exercising revisional powers under Section 102 of the Juvenile Justice Act, 2015, therefore, I do

not find any illegality or impropriety in the impugned order.

19. The revision is, accordingly, **dismissed.**

(2022) 10 ILRA 695
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Revision No.858 of 2022

Deepak @ Bhoora ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Subash Chandra Yadav, Sri Vimlesh Kuar

Counsel for the Opposite Parties:
G.A.

Criminal Law - Juvenile Justice (Care and Protection of Child) Act, 2015 - Sections 12, 12(1) & 102 - Protection of Children From Sexual Offences Act, 2012- Section - 4 - Criminal Procedure Code, 1973 - Section - 161, - Indian Penal Code, 1860 - Sections 306, 354, 376(d), 452 & 506- Criminal Revision – against rejection of Bail Application & appeal against rejection - FIR - offence of teasing, molest, gang rape, threat as well as pouring kerosene on victim and set fire with intention to kill the victim - end of justice cannot be stand in vacuum - the nature and manner of commission of the crime cannot be ignored while striking a balance between demands of justice of either of the sides - facts cannot go in oblivion that victim was admitted in hospital with suicidal thermal burns by kerosene, she was pregnant due to gang-raped - she was faced MTP and ultimately during treatment of burring she was died due to septic shock - release on bail would adversely impact the law and order and equilibrium of an ordered society - the act of revisionist has put the society and its surroundings on alarm that no child of tender years and more than that the parents or the guardians of a young child would feel safe during their daily routine - thus, release of accused in conflict with law would lead to ends of justice being defeated - accordingly revision is dismissed. (Para - 14, 18, 19)

Criminal Revision Dismissed. (E-11)

List of Cases cited:

1. Shiv Kumar Vs St. of U.P., Criminal Revision No. 379 of 2009, decided on 22.12.2009

2. Dharmendra Vs St. of U.P., Criminal Revision No. 4141 of 2017, decided on 13.04.2018

3. Juvenile X Vs St. of U.P., Criminal Revision No.1693 of 2021, decided on 22.02.2022

4. X. Vs St. of U.P., Criminal Revision No.860 of 2022, decided on 21.03.2022

5. Amit Vs St. of U.P., Criminal Revision No. 1852 of 2015, decided on 16.03.2016

6. Vijendra Kumar Mali Vs St. of U.P., 2003 (1) JIC 103

7. Om Prakash Vs St. of Raj. & anr., (2012) 5 SCC 201

8. Mangesh Rajbhar Vs St. of U.P. & anr., 2018 (2) ACR 1941.

(Delivered by Hon'ble Gajendra Kumar, J.)

1. It appears that name of the revisionist-juvenile has been disclosed in the memo of revision. This fault from the side of revisionist escaped detection by the Registry. The concerned Officer of the Registry is directed to delete the name of the revisionist-minor from the title of the revision as fed and shown in the data on website and represent him as "Minor 'X'

Through His Natural Guardian Father Arjun Singh".

2. Heard learned counsel for the revisionist, learned AGA for the State as well as learned counsel for the private respondents and perused the record.

3. This criminal revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015, has been filed on behalf of the minor 'X' through his natural guardian/father Arjun Singh s/o Mohan singh, R/o Village-Gokulpur, Police Station Nidhauli Kalan, District Etah with the prayer to admit the minor on bail alongwith the prayer to set aside the order dated 15.11.2021 passed by the Juvenile Justice Board, Etah and order dated 20.01.2022 passed by the Additional District and Sessions Judge/Special Judge, POCSO Act, Etah in Criminal Appeal No.48 of 2021 arising out of Case Crime No.26 of 2019 under Section 376-D, 354, 506, 452, 306 IPC and 4 POCSO Act, Police Station-Nidhauli Kalan, District-Etah by which the criminal appeal No.48 of 2021 was rejected.

4. As per the prosecution version, instant FIR has been lodged by Veerpal Singh, father of the victim, alleging therein that his minor daughter/victim was being teased and molested since after Diwali festival by the juvenile son of Arjun along with his cousin brother Pushpendra and Manpal. and the complaint's family along with victim were also terrorised and threatened with dire consequences by them. In the evening of 23.02.2021, Juvenile and Manpal had caught the victim near Marghat with bad intention when they (accused) were returning back from the house of the victim after taking 'Aata'. On hearing the scream of the victim, some people came on the spot, thereafter she save herself. Thereafter, when victim came to her house and told about the said incident to her mother, and on getting information about the above incident, the complainant's wife scolded the juvenile and Manpal for which, the victim was threatened and scared in the said night by the juvenile and other accused persons. On 24.02.2021, at about 05:00 am, when victim was making tea in her house, finding her alone, the juvenile trespassed into the house and caught her; when she tried to save her, then the juvenile poured diesel upon her and set her on fire with the intention to kill her. Thereafter, victim in burnt condition was brought by Munnesh R/O Fatehpur in Bolero vehicle to Etah Distt. Hospital, Whereafter first aid, she was sent in an ambulance to Aligarh Medical College. According to the complainant, victim has been gangraped by the accused-persons, due to which she was pregnant and after treatment of some days, ultimately she died on 15.03.2021. Hence, F.I.R regarding this incident was lodged on 03.03.2021 at about 14:40 hours being case crime no. 26/2021 u/s 376-D, 354, 506, 452, 307 I.P.C and 4 POSCO act, at P.S Nidhauli Kalan, Distt. Etah against the Juvenile, Pushpendra and Manpal, in which after investigation charge-sheet has been submitted against the juvenile and Malla @ Manpal u/s 376-D, 354, 506, 306 I.P.C and 4 POSCO Act, on which cognizance has been taken by the Court of Special Judge (Exclusive POSCO Act), Etah on 06.05.2021.

5. During the proceedings before the Juvenile Justice Board, the revisionist was found to be the age of 16 years, 10 months and 13 days on the date of the incident and was declared juvenile vide order dated 04.10.2021. A bail application through guardian was moved before the Juvenile

Justice Board, Etah, but the same was rejected. Thereafter, a criminal appeal No.48/2021 was preferred by the father and guardian of the juvenile and the same was also dismissed vide order dated 20.01.2022.

6. Aggrieved by the above orders, this criminal revision has been preferred to set-aside the same and to admit the juvenile to bail.

7. First and foremost contention is that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by a coordinate Bench of that Court in **Criminal Revision No. 379 of 2009 (Shiv Kumar vs. State of U.P.)** decided on 22.12.2009, **Criminal Revision No. 4141 of 2017 (Dharmendra vs. State of U.P.)** decided on 13.04.2018, **Criminal Revision No.1693 of 2021 (Juvenile X vs. State of U.P.)** decided on 22.02.2022 and **Criminal Revision No.860 of 2022 (X vs State of U.P.)** decided on 21.03.2022 and **Criminal Revision No.1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016.

8. In **Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016, the Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103**, wherein it was observed that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in proviso to Section 12(1) of the Juvenile Justice Act, 2015 exists. So far as the ground of gravity is concerned, it is not covered under the relevant provisions. If the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid Act. The Section 12 of the Act contains a non-obstante clause, which indicates that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

9. It is contended that there existed no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act. In view of the above provisions, the 'child in conflict with law', who has been in custody for quite some time deserves to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated. It is also contended that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

10. Learned AGA and learned counsel for the respondent no. 2 have opposed the prayer for bail.

11. The court is conscious of the fact, which has been held in case of **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201**, wherein the Hon'ble Apex Court observed that the *Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of juvenile as it was felt that child become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that in cases when an accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind the court ought to be more careful. Thus, the Hon'ble Apex Court has clearly brought in focus the nature of crime,*

conduct of an accused as reflected in the method employed in the commission of crime as a relevant consideration while considering the matters of juvenile.

12. It may be noted that the Hon'ble Apex Court gave this view in the background of the facts that age of the juvenile as determined by the courts below was not free from doubts. In the circumstances, the Court observed that where accused commits grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable. It is also observed that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers. Nevertheless, in my view, the nature of crime the juvenile was found involved in, is again at the center stage.

13. In **Mangesh Rajbhar Vs. State of U.P. and Another; 2018 (2) ACR 1941**, a coordinate Bench of this Court noted down very important observations which I choose to refer avidly:

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him.

This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

14. I am in respectful agreement with the above observations. Ordinarily, the merits of the matter may not be important where the Courts are inclined to give benefit of bail as envisaged in Section 12 of the Juvenile Justice Act, I am of the firm view that nature of crime including other merits of the matter may assume ample significance when the Court has to form an opinion about the ends of justice. It may be noted that the phrase 'ends of justice', cannot stand in a vacuum. The manner of commission of the crime, the nature thereof cannot be ignored while striking a balance between the demands of justice of either of the sides. Hence, it cannot be said that the nature of the crime, the manner or methodology applied, the extent of involvement and evidence available are of no relevance when judging the entitlement of a juveniles to bail in cases where heinous crimes are committed. The ends of justice is undoubtedly a meaningful phrase with multidimensional implications. The Courts are under obligation to address the concerns of both the sides and strike a delicate balance between the competing and often conflicting the demands of justice. When viewing the matters of bail from this particular angle of deciphering the ends of justice not only the nature of crime, but the manner of commission thereof, methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to reckon with. The phrase 'ends of justice' may bring in within its interpretation such factors which may otherwise seem not so material or may be seemingly extraneous, irrelevant or unimportant at first glance for the purpose of applicability of last part of the proviso to Section 12(1) of the Juvenile Justice Act.

15. Following facts cannot go in oblivion that victim was admitted in the hospital on 24.02.2021 with suicidal thermal burns by kerosene; gang-rape has been committed with the victim by the juvenile and other accused; at the time of admission in the hospital she was pregnant; On request of her family, victim underwent Medical Termination of Pregnancy (MTP); victim was managed with regular debridement, fasciotomey for right hand and forearm, intraveinous fluids, antibiotics and other supportive medication, and ultimately, she died due to septic shock on 15.03.2021. Statement of the victim recorded as dying declaration, as well as Post-mortem Report of the victim dated 15.03.2021 has also supported the story of the prosecution.

16. In nutshell, it can be inferred that the juvenile was found to have complicity in this frightful crime. The juvenile was found above 16 years i.e., 16 years, 10 months and 13 days on the date of the occurrence. It was a borderline case where the accused was reaching the age of adulthood. The manner, in which, the crime was committed and the nature thereof impels me to draw a conclusion that in case the juvenile is released on bail, he shall fall of in the same hands and environs which most probably contributed towards his criminal bent of mind.

17. This Court has considered the rival submissions and perused the record. It may be true that the Courts below have not undertaken a careful exercise by evaluating the social investigation report while forming their opinion on the first of the two

dis-entitling parameters under the proviso to Section 12 of the Act, that is to say, the prospect of release bringing the child in conflict into association with some known criminal or exposing him to moral, physical or psychological danger. But, that does not end the matter. It is a case where the revisionist, though below the age of 17 years, has ravished a very young prosecutorix. About the factum of the incident, there is reasonable assurance at this stage, short of the charge being tested at the trial. The prosecution is consistent in the FIR lodged by the prosecutorix's father, the statement of the prosecutorix and her mother, recorded by the police, under Section 161 Cr.P.C. and the statement of the prosecutorix, as dying declaration, in which she has stated that juvenile along with Manpal used to tease and catch her wherever and whenever they wish and she got pregnant, when she apprised them about the same, they said to her to set herself on fire and resultantly she self immolated herself.

18. In view of the above, this Court wishes to say is that for the present, the Court seized as it is of the bail matter, there is a reasonable assurance about the charge being prima facie credible. It is true that the merits of the case or prima facie tenability of the charge, like an adult, is not entirely decisive to the fate of the bail plea. At the same time, it is not altogether irrelevant. The gravity of the charge, manner of its perpetration, circumstances in which the offence is alleged to have been committed, its immediate and not so immediate impact on the society at large and the locality, in particular, besides its impact on the aggrieved family, are all matters to be taken into reckoning while judging a juvenile's bail plea. All these factors are relevant under the last dis-entitling clause postulated under the proviso to Section 12(1) of the Act, which says that release of the juvenile would "defeat the ends of justice'. After all "defeat the ends of justice' is not a word of art. It has been thoughtfully introduced by the legislature to arm the Court with a right to overcome an otherwise absolute right to bail, where in the totality of the circumstances, release on bail would adversely impact the law and order and the equilibrium of an ordered society.

19. The case in hand shows that the revisionist by his action, if true, has put the society and its surroundings on alarm. His actions have led to a situation, where prima facie no child of tender years, and more than that the parents or the guardians of a young child, would feel safe during their daily routine, when there is nothing otherwise to call extra caution. In the opinion of this Court, it is a case where release of the child in conflict with law would lead to ends of justice being defeated.

20. The learned appellate Court and the Board have given concurrent view and have found him not at all entitled to bail and have given observation that an effective protection and supervision is needed. Such an observation for declining the bail cannot be faulted in the totality of the circumstances of the matter. I am of the view that it is not a fit case to grant bail to the present revisionist.

21. The revision is, accordingly, **dismissed.**

22. Copy of the order be sent to concerned Section of the Registry for immediate compliance of direction given in Para-1 of the order.

(2022) 10 ILRA 701
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Revision No. 908 of 2022

"Ex" (changed name) ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
Sri Narendra Deo Shukla, Sri Vivek Shukla

Counsel for the Respondents:
G.A.

Criminal Law - Protection of Children from Sexual Offences Act, 2012-accused lured victim of 6 years old-took him to a secret place-established unnatural relation-JJ Board after giving him benefit of one year on lower side-medical report-19 years-on the date of incidence-accused was below 18 years-declared juvenile-bail rejected-St.ment of victim u/s 161 and 164 Cr.P.C. St.d accused has made unnatural sex with him-manner and nature of crime-if juvenile released on bail-he shall fall of in same hands-criminal bent of mind-not entitled to bail.

Revision dismissed. (E-9)

List of Cases cited:

1. Criminal Revision No.379 of 2009 (Shiv Kumar Vs St. of U.P.) decided on 22.12.2009

2. Criminal Revision No. 4141 of 2017 (Dharmendra Vs St. of U.P.) decided on 13.04.2018

3. Criminal Revision No.1693 of 2021 (Juvenile X Vs St. of U.P.) decided on 22.02.2022

4. Criminal Revision No.860 of 2022 (X vs St. of U.P.) decided 0n 21.03,2022

5. Criminal Revision No. 1852 of 2015 (Amit Vs St. of U.P.) decided on 16.03.2016

6. Vijendra Kumar Mali Vs St. of U.P., 2003 (1) J.I.C. 103

7. Om Prakash Vs St. of Raj. & anr.; (2012) 5 SCC 201, the Hon'ble Apex Court

8. Mangesh Rajbhar Vs St. of U.P. & anr.; 2018 (2) ACR 1941

(Delivered by Hon'ble Gajendra Kumar, J.)

1. Heard Sri N.D. Shukla, learned counsel for the revisionist, Sri M.P.S. Gaur, learned AGA for the State as well as learned counsel for the respondent no. 2 and perused the record.

2. This criminal revision under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015, has been filed on behalf of the minor 'X' through his natural guardian/mother Anita w/o Shri Prakash, R/o Village- Merdha, Police Station Khutahan, District Jaunpur with the prayer to admit the minor on bail alongwith the prayer to set aside the order dated 15.12.2021 passed by the Juvenile Justice Board, Jaunpur and order dated 01.02.2022 passed by the Additional District and Sessions Judge/Special Judge, POCSO Act, Jaunpur in Misc. Case No. 102/2021 arising out of Case Crime No. 81 of 2021 under Section 377, 352, 504 IPC and 3/4 POCSO Act, Police Station-Khutahan, District-Jaunpur by which the criminal appeal No.88 of 2021 was rejected.

3. As per the version of the FIR lodged by Sanjeet Singh (informant) father of the victim, it is alleged that on 04.04.2021 at 5.00 P.M. the accused revisionist and co-accused Nitin Tiwari lured his son (victim) aged about 06 years

and took him to a secrete place where the accused persons established unnatural relation with the son of the informant. At that point of time, the informant was not present at his home as he had gone to his relatives' house and when he came back to his house, his wife and the victim had apprised him about the incident. Thereafter, when he went to the house of the accused-persons and made complaint, they abused him in filthy-language and also threatened him. On the basis of the said FIR, Case Crime No. 0081/2021 under Sections 377, 352, 504 IPC and 3/4 POCSO Act was registered and investigated upon. During the investigation, after collection of some evidence and recording of statement under Section 161 Cr.P.C. of the witnesses, the victim was medically examined and his statements u/s 161 Cr.P.C. and 164 Cr.P.C. were also recorded.

4. During the proceedings before the Juvenile Justice Board, after giving him benefit of one year on lowerside, though in medical report his age on 12.11.2021 was shown about 19 years, the revisionist was found to be the age of below 18 years on the date of the incident and was declared juvenile vide order dated 18.11.2021. A bail application through his guardian was moved before the Juvenile Justice Board, Jaunpur, but the same was rejected. Thereafter, a criminal appeal No.88/2021 was preferred by the father and guardian of the juvenile and the same was also dismissed vide order dated 01.02.2022.

5. Aggrieved by the above orders, this criminal revision has been preferred to set aside the same and to admit the juvenile on bail.

6. First and foremost contention is that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by a coordinate Benches of this Court in **Criminal Revision No.379 of 2009 (Shiv Kumar vs. State of U.P.)** decided on 22.12.2009, **Criminal Revision No. 4141 of 2017 (Dharmendra vs. State of U.P.)** decided on 13.04.2018, **Criminal Revision No.1693 of 2021 (Juvenile X vs. State of U.P.)** decided on 22.02.2022 and **Criminal Revision No.860 of 2022 (X vs State of U.P.) decided 0n 21.03,2022 and Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016.**

7. In Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016, the Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103,** wherein it was observed that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in proviso to Section 12(1) of the Juvenile Justice Act, 2015 exist. So far as the ground of gravity is concerned, it is not covered under the relevant provisions. If the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid Act. The Section 12 of the Act contains a non-obstante clause, which indicates that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

8. It is contended that there existed no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act. In view of the above provisions, the 'child

in conflict with law', who has been in custody for quite some time deserves to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated. It is also contended that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

9. Learned AGA and learned counsel for the respondent no. 2 have opposed the prayer for bail.

10. The Court is conscious of the fact in case of **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201, the Hon'ble Apex Court**, wherein the Court has observed that the *"Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of juvenile as it was felt that child become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that in cases when an accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind the court ought to be more careful. Thus, the Hon'ble Apex Court has clearly brought in focus the nature of crime, conduct of an accused as reflected in the method employed in the commission of crime as a relevant consideration while considering the matters of juvenile."*

11. It may be noted that the Hon'ble Apex Court gave this view in the background of the facts that age of the juvenile as determined by the courts below was not free from doubts. In the circumstances, the Court observed that where accused commits grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable. It is also observed that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers. Nevertheless, in my view, the nature of crime the juvenile was found involved in, is again at the center stage.

12. In **Mangesh Rajbhar vs. State of U.P. and Another; 2018 (2) ACR 1941**, a coordinate Bench of this Court noted down very important observations which I choose to refer avidly:

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is

likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

13. I am in respectful agreement with the above observations. Ordinarily, the merits of the matter may not be important where the Courts are inclined to give benefit of bail as envisaged in Section 12 of the Juvenile Justice Act, I am of the firm view that nature of crime including other merits of the matter may assume ample significance when the Court has to form an opinion about the ends of justice. It may be noted that the phrase 'ends of justice', cannot stand in a vacuum. The manner of commission of the crime, the nature thereof cannot be ignored while striking a balance between the demands of justice of either of the sides. Hence, it cannot be said that the nature of the crime, the manner or methodology applied, the extent of involvement and evidence available are of no relevance when judging the entitlement of a juveniles to bail in cases where heinous crimes are committed. The ends of justice is undoubtedly a meaningful phrase with multidimensional implications. The Courts are under obligation to address the concerns of both the sides and strike a delicate balance between the competing and often conflicting the demands of justice. When viewing the matters of bail from this particular angle of deciphering the ends of justice not only the nature of crime, but the manner of commission thereof, methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to reckon with. The phrase 'ends of justice' may bring in within its interpretation such factors which may otherwise seem not so material or may be seemingly extraneous, irrelevant or unimportant at first glance for the purpose of applicability of last part of the proviso to Section 12(1) of the Juvenile Justice Act.

14. Following facts cannot go in oblivion that alleged incident happened has been done intentionally with a conspiracy by the accused revisionist, which is evident in the statements of the victim recorded under Section 161 Cr.P.C. as well as 164 Cr.P.C. wherein, victim has specifically stated that accused-revisionist has made unnatural sex with him.

15. In nutshell, it can be inferred that the juvenile was found to have complicity

in this frightful crime. The juvenile was found to be the age of below 18 years on the date of the occurrence, after giving him benefit of one year on lower side, though in medical report his age on 12.11.2021 was shown about 19 years. It was a borderline case where the accused was reaching the age of adulthood. The manner, in which, the crime was committed and the nature thereof impels me to draw a conclusion that in case the juvenile is released on bail, he shall fall of in the same hands and environs which most probably contributed towards his criminal bent of mind.

16. This Court has considered the rival submissions and perused the record. It may be true that the Courts below have not undertaken a careful exercise by evaluating the social investigation report while forming their opinion on the first of the two dis-entitling parameters under the proviso to Section 12(1) of the Act, that is to say, the prospect of release bringing the child in conflict with into association with some known criminal or exposing him to moral, physical or psychological danger. But, that does not end the matter. It is a case where the revisionist, though below the age of 18 years, has ravished a very young victim, who is just six years old. About the factum of the incident, there is reasonable assurance at this stage, short of the charge being tested at the trial. The prosecution is consistent in the FIR lodged by the victim's father, the statement of the victim and his father, recorded by the police, under Section 161 Cr.P.C. and the statement of the prosecutrix, under Section 164 Cr.P.C. before the Magistrate.

17. In view of the above, these remarks may not be understood as the Court's intendment to express any opinion on the merits of the charge. All that this Court wishes to say is that for the present, the Court seized as it is of the bail matter, there is a reasonable assurance about the charge being prima facie credible. It is true that the merits of the case or prima facie tenability of the charge, like an adult, is not entirely decisive to the fate of the bail plea. At the same time, it is not altogether irrelevant. The gravity of the charge, manner of its perpetration, circumstances in which the offence is alleged to have been committed, its immediate and not so immediate impact on the society at large and the locality, in particular, besides its impact on the aggrieved family, are all matters to be taken into reckoning while judging a juvenile's bail plea. All these factors are relevant under the last dis-entitling clause postulated under the proviso to Section 12(1) of the Act, which says that release of the juvenile would "defeat the ends of justice'. After all "defeat the ends of justice' is not a word of art. It has been thoughtfully introduced by the legislature to arm the Court with a right to overcome an otherwise absolute right to bail, where in the totality of the circumstances, release on bail would adversely impact the law and order and the equilibrium of an ordered society.

18. The case in hand shows that the revisionist by his action, if true, has put the society and its surroundings on alarm. His actions have led to a situation, where prima facie no child of tender years, and more than that the parents or the guardians of a young child, would feel safe during their daily routine, when there is nothing otherwise to call extra caution. In the opinion of this Court, it is a case where release of the child in conflict with law would lead to ends of justice being defeated.

19. The learned appellate Court and the Board have given concurrent view and have found him not at all entitled to bail.

20. For all the reasons recorded above and considering the above-mentioned case laws, I am of the considered opinion that it is not a fit case to grant bail to the present revisionist.

21. The revision is, accordingly, **dismissed.**

22. Copy of the order be certified to the Court concerned.

23. The Court/concerned Board is directed to expedite the hearing and conclude the same at the earliest without getting influenced by any of the observations made in this order.

(2022) 10 ILRA 706
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Revision No. 1175 of 2022

Juvenile X ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Sharad Kumar Srivastava

Counsel for the Respondents:
G.A.

Civil Law - Juvenile Justice (Care and Protetion of Children) Act, 2015-Section 12(1)-informant alleges-accused penetrated his finger-minor got bleeding-victim-minor-accused declared minor-bail rejected on ground of heinous crime-Juvenile accused is a student of class IX-juvenile need strict discipline and rehabilitation -no criminal history-reform is possible-no ground to reject bail.

Bail granted. (E-9)

List of Cases cited:

1. Sanjay Chaurasia Vs St. of U.P. 2006 Cr.L.J. 2957

2. A. Juvenile Vs St. of Orissa, 2009 Cr.L.J., 2002

3. Sunil Kumar Sambhudayal Gupta Vs St. of Mah. 2011 (72) ACC 699

4. Rahul Patel Vs St. of U.P. & anr., [2018 (1) JIC 357 (All)]

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The instant Revision has been filed on behalf of Revisionist-Juvenile through his father/natural guardian against the order dated 19.01.2022 passed by Special Judge (POCSO Act)/Additional Session Judge, Fatehpur in Criminal Appeal No.53 of 2021 (Juvenile through natural guardian father Vs. State of U.P.) and order dated 17.09.2021 passed by Juvenile Justice Board, Fatehpur in Case No.111/2020, arising out of Case Crime No.489/2020, under Sections 376-A, B, 504, 506 I.P.C. and Section 5/6 of POCSO Act, Police Station- Bindki, District -Fatehpur.

2. The record indicates that notice has sufficiently been served on opposite party No.2 but none is present on behalf of the opposite party No.2.

3. Heard learned counsel for the revisionist, learned A.G.A. for the State and perused the record.

4. The facts of the case in brief are that on 18.11.2020 when the minor daughter of informant had gone for grazing the goats the revisionist/juvenile penetrated his finger in her vagina which caused pain

to the victim consequently she started weeping and crying. Hearing the alarm of victim, the witness Khushi reached on the spot, then after that the revisionist by extending threat for life, ran away from the spot. The private part of his daughter was bleeding. The F.I.R. of the occurrence was lodged on 18.11.2020 at about 23.05 hours against the sole revisionist.

5. The revisionist approached to the Juvenile Justice Board stating that he was innocent. he had been implicated falsely in the case. He had no criminal history and he was not involved in any criminal activities also. Vide order dated 04.09.2021, the Juvenile Justice Board, Fatehpur declared him juvenile, his age on the date of occurrence was found 15 years 04 months and 03 days. Accordingly, the revisionist had been declared juvenile in conflict with law. Subsequently, an application for bail was moved by the revisionist before the Juvenile Justice Board, which was rejected by the Juvenile Justice Board vide order dated 17.09.2021 on the ground that the Juvenile had the offence which is heinous in nature. If the juvenile is released on bail, then in that case his release will defeat the ends of justice. Apart from that his release will also affect the rights of victim adversely. His moral, physical and psychological development will also be affected adversely. Against the above order, the juvenile filed the criminal appeal No. 53 of 2021, before the Special Judge (POCSO Act)/Additional Session Judge, Fatehpur which too was dismissed by the appellate court vide order dated 19.01.2022 on the ground that if the appellant/juvenile is released on bail his psychological, physical and moral development will be affected adversely and the object of law shall also be defeated. Against both the rejection orders, present criminal revision has been filed through natural guardian/father of juvenile.

6. Learned counsel for the revisionist has submitted that revisionist has falsely been implicated in the case, he has no previous criminal history. He is in observation home since 19.11.2020. In the medical examination report, the hymen of victim was found intact. Only redness was found in the area of introitus with oedema which can be caused by victim herself. The medical examination has been done within 24 hours of alleged offence wherein no sign of bleeding has been found. Accordingly, the medical evidence is not supporting the F.I.R. version.

7. Learned counsel for the revisionist has further stated that the ingredients of proviso of Section 12 (1) of Juvenile Justice (Care and Protection of Children) Act, 2015, which provides the ground for rejection of bail, is not applicable in the present case. If the juvenile is released on bail, the father of revisionist undertakes that he will supervise him and will provide better atmosphere for his over all development and educate him. He further assures that his son will not misuse the liberty of bail. He will also take care for moral, physical and psychological development of his son.

8. Per contra, learned A.G.A. has contended that considering the nature of offence, the revision petition is liable to be dismissed. The revisionist has committed a heinous offence. If the revisionist is released on bail, the object of law as well as justice shall defeat.

9. Before dealing with the matter, it would be appropriate to take into account Section 12 of Juvenile Justice (Care and

Protection of Children) Act, 2015, which is reproduced as under:-

"12. Bail to a person who is apparently a child alleged to be in conflict with law.

When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

2. When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

3. When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

4. When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

10. According to the provisions of Section 12 (1), the wording used "notwithstanding anything contained in the Code of Criminal Procedure or in any other law for the time being in force" is non-obstante clause which has been used by legislation, therefore, the delinquent juvenile may be released on bail irrespective of the provisions of Code of Criminal Procedure. The exception of such release has been mentioned in proviso of Section 12 (1) i.e. if there appears reasonable grounds for believing that release is likely to bring the juvenile into association of known criminals or expose the said juvenile to moral, physical or psychological danger or the person's release would defeat ends of justice.

11. The Act, namely, Juvenile Justice (Care and Protection of Children) Act, 2015 being benevolent and social reforms oriented legislation, should be given full effect by all concerned whenever matters relating to juvenile comes for consideration before them. Therefore, for rejection of his bail application, there must be any material or evidence reflecting reasonable ground to believe that delinquent juvenile, if released on bail is likely to fall into association with known criminal persons or such liberty may expose him to moral, physical or psychological danger, or his release would

defeat the ends of justice. In absence of such reasonable grounds the bail of juvenile should not be refused. In Sanjay Chaurasia Vs. State of U.P. 2006 Cr.L.J. 2957 it has been observed that :-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27.06.2005 passed by the learned Sessions Judge, Meerut and order dated 28.05.2005 passed by the Juvenile Justice Board are illegal and set aside."

The reason to believe means there should be sufficient cause to believe such thing but not otherwise it excludes a mere suspicion. In other words, we may say that the reason means something more than the prima facie ground.

12. Learned Magistrate by its order dated 17.09.2021 has rejected the bail of revisionist mentioning that the offence committed by juvenile is heinous and non-bailable in nature.

13. In the case of ***A. Juvenile Vs. State of Orissa, 2009 Cr.L.J., 2002,*** it has been held that :

"(6) A close reading of the aforementioned provision shows that it has been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr.P.C. or any other law may be. The only restriction is that if there appears reasonable grounds for believing that his release is likely to bring him into association with any moral, physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

14. In the light of facts, circumstances and law laid down and fundamental legal principle regarding the juvenile justice, the court has to examine that whether the release of juvenile will expose him to moral, physical and psychological danger and his release on bail would affect the ends of justice.

15. The Juvenile Justice (Care and Protection of Children) Act, 2015 has been enacted by the Parliament, is a reformative and benevolent in nature. Section 3 of the Act, 2015, provides general principles to be followed in administration of the Act.

"Section ***3. General Principles to be followed in administration of Act****.- The Central Government, the State Governments, the Board, and other agencies, as the case may be, while*

implementing the provisions of this Act shall be guided by the following fundamental principles, namely:--

(i) Principle of presumption of innocence : Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth : All human beings shall be treated with equal dignity and rights.

(iii) Principle of participation : Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) Principle of non-stigmatising semantics : Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child. General principles to be followed in administration of Act.

(xi) Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic

and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start : All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

16. In the case of ***Sunil Kumar Sambhudayal Gupta Vs. State of Maharastra 2011 (72) ACC 699,*** Hon'ble Apex Court has held that :-

"Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration.

The Appellate Court should bear in mind the presumption of innocence of the accused, and further, that the Trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the Trail Court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference."

17. In the case of ***Rahul Patel Vs. State of U.P. & another, [2018 (1) JIC 357 (All)],*** this Court has held as under :-

"8. The Apex Court in a catena of judgements has constantly held that gravity of the offence is not a ground to deny bail to a juvenile accused. Unless the conduct of the accused is such to indicate that in all likelihood, after being released on bail, the juvenile-accused will indulge into more crimes. If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused."

18. During enquiry in proceedings before Juvenile Justice Board, District Probation Officer, Fatehpur has mentioned that father of the juvenile is a labourer. Juvenile is a student of Class IX. The economical condition of his family is weak and social status is normal. The juvenile needs strict discipline and rehabilitation by keeping him away from bad company also.

19. No criminal history of either revisionist or his father has been shown. No material to establish reason to believe has been brought on record. The report of District Probation Officer further indicates that a strict discipline may keep him away from bad company and his reform is possible. The father of revisionist also undertakes that he will take care for moral, physical and psychological development of his son.

20. Keeping in view the fact of the case, arguments advanced by learned counsel for the parties and legal provisions/law laid down by Apex Court and by this Court, it can be concluded that in present revision no ground is available

on record to reject the application of juvenile for bail. Hence, the revision deserves to be allowed. Both the courts below could not appreciate the legal position while rejecting bail application of delinquent juvenile. The revision stands allowed. Consequently, the impugned orders dated 19.01.2022, passed by Special Judge (POCSO Act)/Additional Session Judge, Fatehpur in Criminal Appeal No. 53 of 2021 (Juvenile through guardian father Vs. State of U.P.) and order dated 17.09.2021 passed by the Juvenile Justice Board, Fatehpur in Case No.111/2020, arising out of Case Crime No.489/2020, under Sections 376-A, B, 504, 506 I.P.C. and Section 5/6 of POCSO Act, Police Station - Bindki, District -Fatehpur are set aside.

21. It is directed that the revisionist shall be released on bail executing personal bond by his natural guardian/father with two solvent sureties each in the like amount to the satisfaction of Principal Magistrate, Juvenile Justice Board, Fatehpur with the stipulation that on subsequent dates of hearing, he shall produce the delinquent juvenile before the Board during the pendency of the case. His guardian/father shall also submit an undertaking before the Board that, (i) he shall keep proper control and look after the juvenile, (ii) He will keep away him from the company of known criminals and will do all of his endeavour to improve his better future, (iii) he will take care for moral, physical and psychological development of his son, (iv) the revisionist or his father shall not tamper with the evidence or cause threat to the witnesses. The revisionist through his guardian shall also file undertaking to the effect that he shall not seek an adjournment on the date fixed for evidence when the witnesses are present before the Juvenile Justice Board.

22. The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Fatehpur on such periodical basis as the Juvenile Justice Board determines.

23. In case of default, the Board would be competent to cancel the bail of revisionist after giving opportunity of hearing to him.

(2022) 10 ILRA 712
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Criminal Revision No. 2179 of 2022

Mahendra Singh ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Vikas Sharma

Counsel for the Respondents:
G.A., Sri Sudhir Dixit, Sri Utkarsh Dixit

Criminal Law - Code of Criminal Procedure,1973 - Section 319- Application u/s 319 Cr.P.C. by informant-allowed-Applicant summoned to face trial-P.W.1 -eye witness-informant-St.ment-in chief and cross-examination recorded-his testimony falls in realm of legal evidence-while considering Application u/s 319 Cr.P.C.-court relied upon St.ment-in-chief-no illegality-no material on the basis of which PW-1's testimony be discarded at this stage-complicity of revisionist in crime is clearly established.

Revision dismissed. (E-9)

List of Cases cited:

1. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92

2. S. Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226 and Brijendra Singh & ors. Vs St. of Raj., (2017) SCC 706

3. Labhuji Amratji Thakor Vs St. of Guj., (2019) 12 SCC 644

4. Dharam Pal & ors. Vs St. of Har. & anr., (2014) 3 SCC 306 (Constitution Bench)

5. Hardeep Singh Vs St. of Pun. & ors., (2014) 3 SCC 92 (Constitution Bench)

6. Babubhai Bhimabhai Bokhiria & anr. Vs St. of Gujarat & ors., (2014) 5 SCC 568

7. Jogendra Yadav & ors. Vs St. of Bihar & anr., (2015) 9 SCc 244

8. Brijendra Singh & ors. Vs St. of Raj., (2017) SCC 706

9. S Mohammed Ispahani Vs Yogendra Chandak & ors., (2017) 16 SCC 226

10. Dev Wati & ors. Vs St. of Har. & anr. (2019) 4 SCC 329

11. Periyasamai & ors. Vs S.Nallasamy, (2019) 4 SCC 342

12. Sunil Kumar Gupta & ors. Vs St. of U. P. & ors., (2019) 4 SCC 556

13. Rajesh & ors. Vs St. of Har., (2019) 6 SCC 368

14. Sukhpal Singh Khaira Vs St. of Pun., (2019) 6 SCC 638

15. Mani Pushpak Joshi Vs St. of Uttarakhand & anr., (2019) 9 SCC 805

16. Sugreev Kumar Vs St. of Punj. & ors., (2019) SCC Online Sc 390

17. Labhuji Amratji Thakor Vs St. of Guj., (2019) 12 SCC 644

18. Shiv Prakash Mishra Vs St. of U.r P. & anr., (2019) 7 SCC 806

19. Sartaj Singh Vs St. of Har. & anr., (2021) 5 SCC 337

20. Manjeet Singh Vs St. of Har. & ors., 2021 SCC Online SC 632. 8 1

(Delivered by Hon'ble Gajendra Kumar, J.)

1. Heard Mr. Vikas Sharma, learned counsel for revisionist, learned counsel for the State-respondents and perused the record.

2. This criminal revision has been filed challenging order dated 13.05.2022, passed by learned court of Additional District and Sessions Judge, Bulandshahar, in Sessions Trial No.660 of 2020 (State Vs. Hemant), under section 302 IPC, Police Station- Araniya, District Bulandshahar, arising out of Case Crime No.313 of 2019, whereby application under Section 319 Cr.P.C., filed by first informant/opposite party-2 Raj Kumar has been allowed. Consequently, applicant has been summoned to face trial in above mentioned case.

3. From perusal of the records, it is evident that in respect of an incident, first informant/opposite party-2 Raj Kumar lodged a F.I.R. dated 21.12.2019, which was registered as under section 302 IPC, Police Station- Araniya, District Bulandshahar, arising out of Case Crime No.313 of 2019. In the aforesaid F.I.R., as many as three named persons namely, Hemant, Mahendra Singh, Lalit and two unknown persons have been nominated.

4. In brief prosecution story as unfolded in F.I.R dated 21.12.2019, alleging therein that 1-1/2 years ago, co-

accused, Hemant borrowed Rs.6,50,000/- from the informant's uncle namely, Gyanendra Pratap Singh and despite several requests made by Gyanendra Singh, he did not return the aforesaid amount. Due to this, co-accused-Hemant feeling enmity with Gyanendra Pratap Singh, on 21.12.2019 at about 09:24 a.m., he called him by his mobile-phone bearing No.9311444194 near Dashahara Mobile Tower and when his uncle Gyanendra Pratap Singh along with one Laxmi Raj and Sateyendra Pratap Singh reached to the Bridge, then co-accused-persons namely, Hemant (revisionist), Lalit and two unknown persons started firing by using the pistol and revolver at Gyanendra Pratap Singh, as a result, he seriously injured and during treatment in the hospital, he died.

5. During the course of investigation, Investigating Officer examined first informant and other witnesses, who have supported the prosecution story, as unfolded in F.I.R. On the basis of above, as well as other material collected by Investigating Officer, during course of investigation, Investigating Officer opined to submit a charge sheet. Accordingly, Investigating Officer submitted charge sheet dated 15.03.2020, whereby one named accused namely, Hemant (revisionist) has been charge sheeted under Section 302 IPC and Section 30 of Arms Act, 1959, whereas other co-accused, namely, Mahendra Singh Chauhan s/o Dalbir Singh, Lokendra Singh @ Lalit s/o Sarjeet Singh have been exonerated. Perusal of charge sheet further goes to show that as many as 34 prosecution witnesses have been nominated therein.

6. After submission of above mentioned charge sheet, cognizance was taken upon the same by the concerned Magistrate. Since offence complained was triable by Court of Sessions, accordingly, concerned Magistrate, committed the case to the Court of Sessions. Resultantly, Sessions Trial No.660 of 2020 (State Vs. Hemant), came to be registered.

7. Trial commenced. Charges were framed against charge sheeted accused who denied the same. Consequently, burden fell upon prosecution to establish the charges so framed by leading evidence.

8. In discharge of aforesaid burden, prosecution adduced first informant (Raj Kumar) and was examined as P.W. 1. His statements were recorded. Thereafter, first informant/opposite party-2, who is also P.W.1, filed an application dated 19.04.2022, in terms of Section 319 Cr.P.C., praying therein, that since complicity of non charge sheeted but named accused Mahendra Singh s/o Dalveer Singh and Lalit s/o Sarjeet Singh are also established in the crime in question, as per his testimony therefore, they be also summoned under Section 319 Cr.P.C. to face trial in above mentioned case.

9. While aforesaid application was pending, statement of P.W.2 (Satyendra Pratap Singh) was also recorded.

10. Application under Section 319 Cr.P.C. filed by first informant/opposite party-2 was opposed by charge sheeted accused-Hemant. Ultimately, court below by means of order dated 13.05.2022, allowed the application under Section 319 Cr.P.C. and consequently, summoned co-accused, namely, Mahendra Singh s/o Dalveer Singh and Lalit s/o Sarjeet Singh to face trial in above mentioned criminal case.

11. Feeling aggrieved by the above, revisionist- Mahendra Singh s/o Dalveer Singh has now approached this Court by means of instant criminal revision.

12. Mr. Vikas Sharma, learned counsel for revisionist submits that order impugned in present criminal revision is manifestly illegal and without jurisdiction and the same is unsustainable in law and fact. It is then contended by the learned counsel for revisionist that revisionist was nominated as one of the named accused in F.I.R. dated 21.12.2019. However, during investigation, no such material was gathered by the Investigating Officer on the basis of which, complicity of present applicant was found to be established in the crime in question. Resultantly, applicant has been exculpated in the charge sheet dated 15.03.2020. He, further, submits that Investigating Officer of concerned case crime number has not yet been examined by Court below. In such circumstance, court below ought to have deferred the disposal of application under

Section 319 Cr.P.C. filed by first informant/opposite party-2, till statement-in-chief of Investigating Officer was recorded as he will be the best person to demonstrate as to under what circumstances, complicity of present applicant was not found to be established in the crime in question. As court below has pre-empted the disposal of application under Section 319 Cr.P.C., serious prejudice has been caused to applicant. It is lastly submitted that no cast iron case is made out for summoning the present applicant as per testimonies of P.W.1 Raj Kumar and P.W.2 Satendra Pratap Singh. Nothing new has been stated by P.W.1 and P.W.2 in their deposition before Court below than what was stated in their statements under Section 161 Cr.P.C. before Investigating Officer. Impugned order passed by the Court below is, thus, in teeth of Constitution Bench judgement in case of **Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92**, as well as law laid down in **S. Mohammed Ispahani Vs. Yogendra Chandak and Others, (2017) 16 SCC 226** and **Brijendra Singh and Others Vs. State of Rajasthan, (2017) SCC** 706 and court below has thus failed to exercise its jurisdiction "diligently" and has summoned revisionist in a "casual and cavalier manner", inasmuch as, there is no "strong nor cogent evidence" against revisionist, which is a pre-condition for summoning a prospective accused under Section 319 Cr.P.C.

13. On the cumulative strength of above, Mr. Vikas Sharma, learned counsel for revisionist vehemently contends that present criminal revision is liable to be allowed and impugned order be set aside.

14. Per contra, learned A.G.A. as well as learned counsel for the opposite party no.2 has opposed this criminal revision and contends that statement of P.W.1-Raj Kumar is alone material for deciding the application under Section 319 Cr.P.C. as he is a prosecution witnesses of fact,. as per law laid down by Constitution Bench in **Hardeep Singh (Supra).** However, in the present case, cross examination of P.W.-1 and P.W.-2 have also been conducted before the court below. No illegality has been committed by court below in placing reliance upon testimonies of P.W.1 and P.W.2, who have been cross-examined. Statements of P.W.1 and P.W.2- thus falls in the realm of legal evidence. Therefore court below has rightly proceeded to pass order dated 13.05.2022 by placing reliance upon same. No irregularity or illegality has been committed by the court below in passing impugned order dated 13.05.2022. From perusal of testimonies of P.W.1 and P.W.2 complicity of present applicant in the crime in question is fully established.

P.W.1 and P.W.2 are eye witnesses of the occurrence and their testimonies have to be held to be more credible and reliable. As such Court below has exercised its jurisdiction "diligently" and not in a "casual and caviliar manner". Applicant has been summoned on the basis of "strong and cogent" evidence that has emerged against him during course of above mentioned sessions trial. It cannot be said at this stage that "applicants cannot be tried along with other accused" and further that "if the evidence which has been recorded up to this stage goes unrebutted would not lead to conviction of revisionist". Police report submitted by Investigating Officer is not conclusive proof of innocence of revisionist. Even though, revisionist has been exonerated by Investigating Officer, same cannot be taken as a ground to urge that revisionist cannot be subsequently summoned to face trial. Revisionist will have adequate opportunity to prove his innocence before court below during course of trial by adducing Investigating Officer as a defence witness also. No ground has been raised in the grounds of revision that P.W.1 and P.W.2 have not stated anything new in their depositions before the court below than what was stated by them in their statements. On the aforesaid premise, it is, thus, urged by learned A.G.A. that revisionist is not entitled to any indulgence by this Court. Consequently, present criminal revision is liable to be dismissed.

15. Having heard learned counsel for revisionist, learned A.G.A. for State and upon perusal of record, this Court finds that the issue, which arises for determination in present criminal revision is: What are the parameters for exercise of jurisdiction under Section 319 Cr.P.C As a corollary to above, whether the order impugned is within the established parameters or not.

16. Parameters regarding exercise of jurisdiction by the courts under Section 319 Cr.P.C. has been considered time and again by Supreme Court. The chronology of the same is reads as under:

(i) Dharam Pal and Others Vs. State of Haryana and Another, (2014) 3 SCC 306 (Constitution Bench)

(ii) Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92 (Constitution Bench)

(iii) Babubhai Bhimabhai Bokhiria and Another Vs. State of Gujarat and Others, (2014) 5 SCC 568

(iv) Jogendra yadav and Others Vs. State of Bihar and Another, (2015) 9 SCc 244

(v) Brijendra Singh and Others Vs. State of Rajasthan, (2017) SCC 706

(vi) S Mohammed Ispahani Vs. Yogendra Chandak and Others, (2017) 16 SCC 226

(vii) Dev Wati and Others Vs. State of Haryana and Another (2019) 4 SCC 329

(viii) Periyasamai and Others Vs. S.Nallasamy, (2019) 4 SCC 342

(ix) Sunil Kumar Gupta and Others Vs. State of Uttar Pradesh and Others, (2019) 4 SCC 556

(x) Rajesh and Others Vs. State of Haryana, (2019) 6 SCC 368

(xi) Sukhpal Singh Khaira Vs. State of Punjab, (2019) 6 SCC 638

(xii) Mani Pushpak Joshi Vs. State of Uttarakhand and Another, (2019) 9 SCC 805

(xiii) Sugreev Kumar Vs. State of Punjab and Others, (2019) SCC Online Sc 390

(xiv) Labhuji Amratji Thakor Vs. State of Gujarat, (2019) 12 SCC 644

(xv) Shiv Prakash Mishra Vs. State of Uttar Pradesh and Another, (2019) 7 SCC 806

(xvi) Sartaj Singh Vs. State of Haryana and Another, (2021) 5 SCC 337

(xvii) Manjeet Singh Vs. State of Haryana and Others, 2021 SCC Online SC 632.

17. To begin with, a constitution Bench of Supreme Court in Dharam Pal (Supra) considered the provisions of Sections 193, 190, 319, 209, 173(2) and 200 to 204 Cr.P.C. and held that Sessions Judge has power to summon non charge sheeted accused after the case has been committed to Court of Sessions under section 193 Cr.P.C and for this purpose need not wait for evidence to be recorded so that non charge sheeted accused could be summoned under section 319 Cr.P.C.

18. Subsequently, in **Hardeep Singh** (Supra), another constitution Bench of Supreme Court considered the parameters for exercise of jurisdiction under Section 319 Cr.P.C. The Constitution Bench upon consideration of various provisions of Indian Evidence Act, Code of Criminal Procedure as well as underlying principles of Section 319 Cr.P.C. framed five questions for defining the parameters for exercising jurisdiction under Section 319 Cr.P.C. Thereafter, Court held as under in paragraphs 4, 5, 6, 6.5, 7, 11, 55, 56, 57, 85, 92, 105, 106, 116, 117.1 to 117.6:

"4. Reference made in Dharam Pal (Supra) came to be answered in relation to the power of a Court of Sessions to invoke Section 319 Cr.P.C. at the stage of committal of the case to a Court of Sessions. The said reference was answered by the Constitution Bench in the case of Dharam Pal & Ors. v. State of Haryana & Anr., AIR 2013 SC 3018 [hereinafter called 'Dharam Pal (CB)'], wherein it was held that a Court of Sessions can with the aid of Section 193 Cr.P.C. proceed to array any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

5. Thus, after the reference was made by a three-Judge Bench in the present case, the powers so far as the Court of Sessions is concerned, to invoke Section 319 Cr.P.C. at the stage of committal, stood answered finally in the aforesaid background.

6. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:

6.1 (i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

6.2 (ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the

examination-in-chief of the witness concerned?

6.3 (iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

6.4 (iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?

6.5 (v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

7. In this reference what we are primarily concerned with, is the stage at which such powers can be invoked and, secondly, the material on the basis whereof the invoking of such powers can be justified. To add as a corollary to the same, thirdly, the manner in which such power has to be exercised, also has to be considered.

11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -Power to proceed against other persons appearing to be guilty of offence:-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(5) (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.

56. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 Cr.P.C. i.e. provisions of Sections 200, 201,

202, etc. Cr.P.C. applicable in the case of Complaint Cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint Cases is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872, (hereinafter referred to as the 'Evidence Act') comes before the court. There does not seem to be any restriction in the provisions of Section 319 Cr.P.C. so as to preclude such evidence as coming before the court in Complaint Cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the Court, such evidence can be used only to corroborate the evidence recorded during the trial for the purpose of Section 319 Cr.P.C., if so required. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

57. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under ~~Section 319~~ Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.

92. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong

and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

117. We accordingly sum up our conclusions as follows:

Questions (i) and (iii)

- *What is the stage at which power under Section 319 Cr.P.C. can be exercised?*

AND

- *Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?*

Answer 117.1. In Dharam Pal case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

117.2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add

an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)- Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

Answer 117.4. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)- What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer.

117.5. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)- Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer 117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of ?Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh."

19. After aforesaid Constitution Bench judgement, the issue as involved in present application again came up for consideration before Supreme Court in Babubhai **Bhimabhai Bokhiria** (Supra), wherein Court dealt with the issue of summoning of a non charge sheeted

accused under Section 319 Cr.P.C. who was alleged to be involved in the crime in question on the basis of dying declaration. The issue that arose for consideration was whether on the basis of dying declaration an inference of guilt could be drawn against non-charge sheeted accused sought to be summoned in a case, which arose out of an F.I.R. registered at Kalambaug Police Station Porbandar under Sections- 302, 201, 34, 120B, 465, 468, 471 I.P.C. and Section- 25 of Arms Act. Court took notice of paragraphs 105 and 106 of the Constitution Bench judgement in **Hardeep Singh's case (Supra)** and deduced as follows in paragraphs 7, 8, 9, 15, 20, 21 and 22:

"7. Before we proceed to deal with the evidence against the appellant and address whether in light of the evidence available, power under Section 319 of the Code was validly exercised, it would be expedient to understand the position of law in this regard. The issue regarding the scope and extent of powers of the court to arraign any person as an accused during the course of inquiry or trial in exercise of power under Section 319 of the Code has been set at rest by a Constitution Bench of this Court in ***Hardeep Singh v. State of Punjab [(2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86 : (2014) 1 Scale 241]****. On a review of the authorities, this Court summarised the legal position in the following words: (SCC p. 138, paras 105-06) "105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.*

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC."

8. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher.

9. Having summarised the law on the degree of satisfaction required by the courts to summon an accused to face trial in exercise of power under Section 319 of the Code, we now proceed to consider the submissions advanced by the learned counsel.

15. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.

20.Now we revert to the authority of this Court in Rattan Singh [Rattan Singhv. State of H.P., (1997) 4 SCC 161 : 1997 SCC (Cri) 525] relied on by Dr Singhvi. In the said case, the deceased immediately before she was fired at, spoke out that the accused was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice her life snuffed off. In the said background, this Court held that the words spoken by the deceased have connection with the circumstance of transaction which resulted into death. In the case in hand, excepting apprehension, there is nothing in the note. No circumstance of any transaction resulting in the death of the deceased is found in the note. Hence, this decision in no way supports the contention of Dr Singhvi.

21. The other evidence sought to be relied for summoning the appellant is the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing has come during the course of trial regarding the content of the conversation and from the call records alone, the appellant's complicity in the crime does not surface at all.

22.From what we have observed above, it is evident that no evidence has at all come during the trial which shows even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the trial court summoning the appellant, as affirmed by the High Court, cannot be allowed to stand."

20. Subsequently in Jogendra yadav **(Supra)**, Court considered the issue as to whether a non-charge sheeted accused summoned under section 319 Cr.P.C. can claim discharge under section 227 Cr.P.C. Court referred to observations contained in paragraphs 105 and 106 of the Constitution Bench judgement in Hardeep Singh's case in paragraph 10 of the judgement and delineated the rights of an accused summoned under section 319 Cr.P.C. to claim discharge in paragraph-13 of the judgement, which reads as under:

"13. We are not unmindful of the fact that the interpretation placed by us on the scheme of Sections 319 *and* 227 *makes* Section 227 *unavailable to an accused who has been added under* Section 319 *CrPC. We are of the view, for the reasons given above, that this must necessarily be so since a view to the contrary would render the exercise undertaken by a court under* Section 319 *CrPC, for summoning an accused, on the basis of a higher standard of proof totally infructuous and futile if the same court were to subsequently discharge the same accused by exercise of the power under Section 227 CrPC, on the basis of a mere prima facie view. The exercise of the power under Section 319 CrPC, must be placed on a higher pedestal. Needless to say the accused summoned under Section 319 CrPC, are entitled to invoke remedy under law against an illegal or improper exercise of the power under Section 319, but cannot have the effect of the order undone by seeking a discharge under Section 227 CrPC. If allowed to, such an action of discharge would not be in*

accordance with the purpose of Criminal Procedure Code in enacting Section 319 which empowers the Court to summon a person for being tried along with the other accused where it appears from the evidence that he has committed an offence."

21. In spite of above noted judgements, issue did not come to rest, but again cropped up for consideration in Brijendra Singh (supra) wherein Court considered the observations made in paragraphs 8, 12, 13, 19, 105 and 106 of Constitution Bench judgement in Hardeep Singh (Supra) and applying the ratio as mentioned in aforesaid paragraphs widened the scope of parameters regarding exercise of jurisdiction under section 319 Cr.P.C. In this case, Court was examining the summoning of a non-charge-sheeted accused in a Sessions Trial under Sections-147, 148, 149, 323, 448, 302/149 I.P.C. and Section- 3 and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Court went a step further. A parallel was drawn with the deposition of prosecution witnesses before court and their statements recorded under section 161 Cr.P.C. to find out whether something new has come out in their depositions or not. Having done so, Court summed up as follows in paragraphs 13, 14, 15:-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross- examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others

who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

22. In spite of law having been settled by Apex Court in Constitution Bench judgement in Hardeep Singh **(Supra)** and two Judges Bench judgement in Brijendra Singh (Supra) which made substantial advancement in favour of prospective accused, the issue as noted above, again arose for consideration in S Mohammed Ispahani **(Supra)**. In this case, Court was considering the summoning of non charge-sheeted accused in a case under Sections-379, 427, 341, 379/34 read with Section 3(1) of Tamil Nadu Property Prevention of Damage and Loss Act, 1992. Court again took notice of observations made in paragraphs 19 as well as paragraphs 10 to 13 of Brijendra Singh's Case and by making departure from the settled meaning of evidence for the purpose of exercise of jurisdiction under section 319 Cr.P.C. opined that prospective accused can be summoned only when "strong and cogent evidence" occurs against him during course of trial and not in a "casual and cavalier manner". Ultimately, Court opined as follows in paragraphs 31, 32, 33, 34, 35, and 36:

"31.The order of the learned Chief Metropolitan Magistrate reveals that while dismissing the application of the complainant under Section 319 CrPC, the Chief Metropolitan Magistrate was swayed by two considerations:

(a) The complainant (PW 1) in his examination-in-chief had not spoken anything with regard to the alleged conspiracy entered into between the appellants i.e. the landlords and the bailiff. Also other witnesses i.e. PWs 2, 3 and 4, who were working in the company of the de facto complainant had not spoken anything with regard to the appellants. There was no documentary evidence produced by the complainant. Therefore, the available "evidence" was not sufficient to implead the appellants/proposed accused as accused in the case.

(b) The police, after thorough investigation, had filed the charge-sheet in which the appellants were not implicated. However, the complainant never filed any protest petition at that stage.

32. Taking the aforesaid grounds as their arguments, the learned counsel for the appellants have argued that there is no "evidence" within the meaning of Section 319 CrPC. The argument advanced is that the application filed by the complainant under Section 319 CrPC was an afterthought and belated effort on the part of the complainant, which was filed much after the recording of evidence of PW 1, that too when the prosecution evidence had already been concluded.

33. As against the above, the High Court, in the impugned judgment, has been influenced by the fact that names of the appellants were mentioned in the FIR and even in the statement of witnesses recorded under Section 161 CrPC these appellants were named and such statements under Section 161 CrPC would constitute "documents". In this context, the High Court has observed that "evidence" within the meaning of Section 319 CrPC would include the aforesaid statements and, therefore, the appellants could be summoned.

34. The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject-matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh case [Hardeep Singh v.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that the word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In para 105 of the judgment, however, it is observed that "only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner". This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the "evidence", on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 CrPC.

35. It needs to be highlighted that when a person is named in the FIR by the

complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.

36. In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 CrPC as independent evidence. It could only be corroborative material. In the first instance, "evidence" led before the Court had to be taken into consideration. As far as deposition of PW 1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the appellant landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellant landlords were admittedly not present at the site when the alleged incident took place, we do not find any "evidence" within the meaning of Section 319 CrPC on the basis of which they could be summoned as accused persons. PW 1 and PW 4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW 4, he has alleged that "Subsequently I came to know the said people is not police officials the people was sent by landlords of the building...". That statement may not be enough for roping in the appellants/landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , namely, "strong and cogent evidence", is lacking."

23. In **Dev Wati (Supra)**, Court considered the correctness of an order passed by the High Court, whereby it upheld the order passed by Sessions Court allowing an application under section 319 Cr.P.C. in a case under Sections- 302/34 I.P.C. Court took notice of the Constitution Bench judgement in Hardeep Singh's case. Court referred to the words "appear" and 'proved' as interpreted by Constitution Bench, with reference to Section 319 Cr.P.C. and on basis thereof examined the veracity of order impugned. Following was determined in paragraphs- 8 and 9 of the judgement:

"8. Section 319(1) CrPC empowers the court to proceed against other persons who "appear" to be guilty of an offence, though not accused before the court. A Constitution Bench of this Court in Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has ruled that the word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved", and imparts a lesser degree of probability than proof. Though only a prima facie case is to be established from the evidence led before the Court, it requires much stronger evidence than a mere probability of the

complicity of the persons against whom the deponent has deposed. The test that has to be applied is of a degree of satisfaction which is more than that of a prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, may lead to conviction of the proposed accused. In the absence of such satisfaction, the Court should refrain from exercising the power under Section 319 CrPC. In our considered opinion, the impugned judgment has been passed by the High Court keeping the aforementioned principle in mind, though the said judgment has not been cited before the High Court.

9. On considering the deposition of PW 9, we do not find any valid ground to take a different view from that of the High Court and the Sessions Court. Additionally, though the advocate for the appellants raised certain issues on facts, the same cannot be considered at this stage, inasmuch as such factors will have to be considered by the Sessions Court while deciding the matter before it on merits."

24. In spite of law relating to summoning of a non-charge sheeted accused having been fairly settled, the issue regarding summoning of a non charge sheeted accused under section 319 Cr.P.C. to face trial for offences under Sections-147, 448, 294B and 506 I.P.C., on the basis of statements of witnesses examined under section 161 Cr.P.C. came to be considered in **Periyasamai (Supra)**. Here again Court took notice of paragraphs 105 and 106 of Constitution Bench judgement in **Hardeep Singh's** case as well as paragraph 12 of the judgement in **Labhuji Amratji Thakor Vs. State of Gujarat, (2019) 12 SCC 644,** which provides the nature of evidence, required to summon a non charge sheeted accused. Upon evaluation of statements of prosecution witnesses who had deposed before Court in the light of above Court expressed itself as follows in paragraphs 13, 14, 15 and 16:

"13. In the statements recorded under Section 161 of the Code during the course of investigation, the complainant and his witnesses have not disclosed any other name except the 11 persons named in the FIR. Thus, the complainant has sought to cast net wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the complainant. Large number of people will not come to the house of the complainant and would return without causing any injury as they were said to be armed with weapons like crowbar, knife and ripper, etc.

14. In the first information report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description has not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the first information report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 IPC in view of the judgment inHardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] . The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the

absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the complainant is a husband and has initiated criminal proceedings against the family of his in-laws and when their names or other identity were not disclosed at the first opportunity.

16. Consequently, the order passed by the learned High Court is set aside and that of the trial court is restored and the application under Section 319 of the Code is dismissed. The appeal is allowed."

25. In Sunil Kumar Gupta **(Supra)**, Court considered the issue regarding summoning of a prospective accused under section 319 Cr.P.C. to face trial under Sections- 498A, 304B/302 I.P.C. and Sections- ¾ Dowry Prohibition Act, on the strength of an oral dying declaration even when his name was not mentioned in F.I.R, dying declaration or the statements of P.W.1 and P.W.3. In this case also, Court noticed the observations made in paragraphs 21 to 23 and 105 to 106 by Constitution Bench in Hardeep Singh's case. Having noticed the ratio laid down in above judgment, Court proceeded to apply the principles laid down therein and ultimately decided as follows in paragraphs 13 and 14:

"13. Applying the above principles to the case in hand, in our considered view, no prima facie case is made out for summoning the appellants and to proceed against the appellants for the offence punishable under Section 302 IPC. As pointed out earlier, in the dying declaration, deceased Shilpa has only mentioned the name of Chanchal alias Babita; but she has not mentioned the names of others. In his complaint lodged before the police on the next day i.e. 20-8-2012, Sudhir Kumar Gupta PW 1 has stated that his daughter Shilpa told him that Chanchal alias Babita and all other people set her on fire after pouring kerosene. PW 1 has neither stated the names of the appellants nor attributed any overt act. Likewise, in their evidence before the court, PWs 1 and 3 have only stated that Shilpa told them that Chanchal alias Babita and all others have set fire on deceased Shilpa. Neither the complaint nor the evidence of witnesses indicates as to the role played by the appellants in the commission of the offence and which accused has committed what offence. Under such circumstances, it cannot be said that the prosecution has shown prima facie material for summoning the accused for the offence punishable under Section 302 IPC.

14. Under Section 319 CrPC, a person can be added as an accused invoking the provisions not only for the same offence for which the accused is tried but for "any offence"; but that offence shall be such that in respect of which all the accused could be tried together. It is to be

seen whether the appellants could be summoned for the offence under Section 498-A IPC and under Sections 3 and 4 of the Dowry Prohibition Act. The statement of PW 1 both in the complaint and in his evidence before the court is very general stating that he had given sufficient dowry to Shilpa according to his status and that the groom side were not satisfied with the dowry and that they used to demand dowry each and every time. Insofar as the demand of dowry and the dowry harassment, there are no particulars given as to the time of demand and what was the nature of demand. The averments in the complaint and the evidence is vague and no specific demand is attributed to any of the appellants. In such circumstances, there is no justification for summoning the appellants even under Section 498-A IPC and under Sections 3 and 4 of the Dowry Prohibition Act. It is also pertinent to point out that upon completion of investigation, the investigating officer felt that no offence under Sections 498-A, 304-B IPC and under Sections 3 and 4 of the Dowry Prohibition Act is made out. Charge-sheet was filed for the offence punishable only under Section 302 IPC against Chanchal alias Babita. As held in the Constitution Bench judgment in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , for summoning an accused under Section 319 CrPC it requires much stronger evidence than mere probability of his complicity which is lacking in the present case. The trial court and the High Court, in our considered view, has not examined the matter in the light of the well-settled principles and the impugned order is liable to be set aside."

26. In Rajesh and Others **(Supra)**, Court again considered the principles governing the exercise of jurisdiction under section 319 Cr.P.C in a situation, where a person is named in F.I.R., and specific allegations are made against him yet not charge sheeted nor any protest petition having been filed in Court by first informant after submission of charge sheet. Here again Court took notice of the law laid down by Apex Court in Hardeep Singh **(Supra)** and Brijendra Singh **(Supra)** and then evaluated oral testimony of P.W.1 and P.W.2 whose testimonies did implicate the non charge sheeted accused in a case under Sections- 302, 307, 148, 149, 323, 324, 325 and 506 I.P.C. Ultimately, Court settled the issue as follows in paragraphs 6.8, 6.9, 6.10, 7 and 8:

"6.8. Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

6.9. In S. Mohammed Ispahaniv.Yogendra Chandak [S. Mohammed Ispahani v.Yogendra Chandak, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138] , SCC para 35, this Court has observed and held as under : (SCC p. 243) "35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

6.10. Thus, even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

7. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned trial court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed hereinabove, the appellants herein were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, PW 1 and PW 2 have specifically stated against the appellants herein and the specific role is attributed to the appellant-accused herein. Thus, the statement of PW 1 and PW 2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the courts below to summon the appellants herein to face the trial in exercise of power under Section 319 CrPC.

8. Now, so far as the submissions made on behalf of the appellants herein relying upon the orders passed by the learned Magistrate dated 1-9-2016 and 28-10-2016 that once the appellants herein were discharged by the learned Magistrate on an application submitted by the investigating officer/SHO and, therefore, thereafter it was not open to the learned Magistrate to summon the accused to face the trial in exercise of power under Section 319 CrPC is concerned, it appears that

there is some misconception on the part of the appellants. At the outset, it is required to be noted that the orders dated 1-9-2016 and 28-10-2016 cannot be said to be the orders discharging the accused. If the applications submitted by the investigating officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants herein from custody as at that stage the appellants were in judicial custody. Therefore, as such, those orders cannot be said to be the orders of discharge in stricto sensu. Those are the orders discharging the appellants from custody. Under the circumstances, the submission on behalf of the accused that as they were discharged by the learned Magistrate and therefore it was not open to the learned Magistrate to exercise the power under Section 319 CrPC and to summon the appellants to face the trial, cannot be accepted."

27. In spite of above noted judgements of Apex Court, wherein parameters regarding exercise of jurisdiction under section 319 Cr.P.C. and the nature of evidence required to summon a prospective accused has been fairly crystallized, yet the necessity to refer the matter again to a Constitution Bench for re-consideration arose in Sukhpal Singh Khaira (Supra). In aforesaid case, court was considering the summoning of a non charge-sheeted accused to face trial in a Sessions Trial under Sections- 302 read with Sections- 149 and 323 I.P.C. and Section 27 of Arms Act. Court noticed the observations made in paragraph 47 of Constitution Bench in Hardeep Singh's case but still opined that the matter requires consideration by a Constitution Bench as certain questions still remain unanswered in Hardeep Singh's case and further the parameters regarding the exercise of jurisdiction under section 319 Cr.P.C. need to be re laid down. Following was observed by the Court in paragraphs 22, 23, 24, 25, 26 and 27:

"22. It was contended that the question of law herein is unique to the present case, and the earlier judgment of Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] did not have an opportunity to cast any light about the validity of summoning orders pronounced after the passing of the judgment. They further argued that, Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , treats Section 319 in an isolated manner without taking into consideration the spirit and the mandate of the Code.

23. To strengthen the aforesaid submission, the State further contended that Section 465 CrPC was introduced to provide for a balanced mechanism under the Criminal Justice System and to stop the courts from getting into hypertechnicalities and committing serious violations. This Court in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has not considered the above principles or the issues which could possibly arise before the trial court while dealing with applications under Section 319 CrPC. The State therefore submitted that, Section 319 CrPC should not be treated as an isolated island and should instead be given a pragmatic interpretation by keeping in view the entire mandate of the Code to render complete justice.

24. Furthermore, it needs to be determined whether the trial is said to be fully concluded even if the bifurcated trial

in respect of the absconded accused is still pending consideration.

25. The appellant herein contended that, the observations made in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , cannot be diluted by a Bench of this strength. We have considered the averments made by the counsel on behalf of both parties, we feel that it would be appropriate to place the same for consideration before a larger Bench. However, we are of the considered opinion that, power under Section 319 CrPC being extraordinary in nature, the trial courts should be cautious while summoning the accused to avoid complexities and to ensure fair trial. We must remind ourselves that, timely disposal of the matters furthers the interest of justice.

26. After pursuing the relevant facts and circumstances, the following substantial questions of law arise for further consideration--

26.1.(i) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

26.2.(ii) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

26.3.(iii) What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?

27. In the light of the same, we direct the Registry to place these matters before the Hon'ble the Chief Justice of India for constitution of a Bench of appropriate strength for considering the aforesaid questions."

28. In Mani Pushpak Joshi **(Supra),** Court was considering correctness of an order passed by High Court refusing to set aside an order passed by trial Court allowing an application under section 319 Cr.P.C. in a case under Sections- 376(2) I.P.C. and Sections- 5/6 POCSO Act. In this case, Court noticed the observations made by Constitution Bench in Hardeep's Singh case in paragraphs 100, 105 and 106 of the judgement and paragraph 13 of the judgement in **Labhuji Amratji Thakor Vs State of Gujarat, (2019) 12 SCC 644**, which is regarding the nature of evidence required for summoning of a non charge sheeted accused and applying the principles laid down therein, Court ultimately resolved as follows in paragraphs 12, 13, 14, 15 and 16:

"12. In Labhuji Amratji Thakor v. State of Gujarat [Labhuji Amratji Thakor v. State of Gujarat, (2019) 12 SCC 644 : AIR 2019 SC 734] , this Court held that the Court has to consider substance of the evidence, which has come before it and has to apply the test i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. It was held as under: (SCC p. 649, paras 13-14) "13. The High Court [Meruji Jesuji Thakore v. State of Gujarat, 2018 SCC OnLine Guj 4765] does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie

case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh[Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has to apply the test i.e. 'more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction'.

14. Although, the High Court has not adverted to the test laid down by the Constitution Bench in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] nor has given any cogent reasons for exercise of power under Section 319 CrPC, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court ... The observations of the trial court while rejecting the application having that the application appears to be filed with mala fide intention, has not even been adverted to by the High Court."

13. Having heard the learned counsel for the parties at some length, we find that the order summoning the appellant for the offences under Section 376(2) of the Penal Code, 1860 (for short "IPC") read with Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 (for short "the Pocso Act") is not sustainable in law.

14. The prosecutrix is a small child. It is parents of the child who have taken the photographs either from the website of the school or from Facebook to introduce a person with spectacles as an accused. The initial version of the father of the prosecutrix and of the prosecutrix herself, as disclosed by her father in the FIR, is assault by one person. But in view of statement of Gauri Vohra (PW 11), the anger was directed against the management of the school of which the appellant is a part. Even if the father of the child has basis to be angry with the management of the school but, we find that no prima facie case of any active part on the part of the appellant is made out in violating the small child. The involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 CrPC. In fact, it is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant.

15. Obviously, the father of the child must have anger against the management of the school as his child was violated when she was studying in the school managed by the appellant but, we find that the anger of the father against the management of the school including the appellant is not sufficient to make him to stand trial for the offences punishable under Section 376(2) IPC read with Sections 5/6 of the Pocso Act.

16. The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than prima facie to make him to stand trial of the offences. Therefore, we hold that the order of summoning the appellant under Section

319 CrPC is not legal. The fact, that the prosecution after investigations has found no material to charge the present appellant also cannot be ignored. The heinous crime committed should not be led into prosecuting a person only because he was part of the management of the school. We have extracted the evidence led by the prosecution only to find out if there is any prima facie case against the appellant. We are satisfied that there is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court."

29. I n Sugreev Kumar **(Supra),** Court was examining correctness of an order passed by High Court, whereby order passed by trial Court allowing an application under section 319 Cr.P.C. in a case under Sections- 302, 307, 341, 34 I.P.C. and Sections- 25, 54 and 59 Arms Act, was upheld by the High Court. In this case also, Court considered the ratio laid down by Constitution Bench in Hardeep Singh's Case in paragraphs 95, 105 and 106 and thereafter Court formulated its view as follows in paragraphs 18, 19, 20, 21, 22 and 23:

"18. Thus, the provisions contained in Section 319 CrPC sanction the summoning of any person on the basis of any relevant evidence as available on record. However, it being a discretionary power and an extraordinary one, is to be exercised sparingly and only when cogent evidence is available. The prima facie opinion which is to be formed for exercise of this power requires stronger evidence than mere probability of complicity of a person. The test to be applied is the one which is more than a prima facie case as examined at the time of framing charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused.

19. While applying the abovementioned principles to the facts of the present case, we are of the view that the consideration of the application under Section 319 CrPC in the orders impugned had been as if the existence of a case beyond reasonable doubt was being examined against the proposed accused persons. In other words, the trial court and the High Court have proceeded as if an infallible case was required to be shown by the prosecution in order to proceed against the proposed accused persons. That had clearly been an erroneous approach towards the prayer for proceeding against a person with reference to the evidence available on record.

20 The appellant (PW 1) has made the statement assigning specific roles to the proposed accused persons. At the stage of consideration of the application under Section 319 CrPC, of course, the trial court was to look at something more than a prima facie case but could not have gone to the extent of enquiring as to whether the matter would ultimately result in conviction of the proposed accused persons.

21. The other application moved by the prosecution after leading of further evidence in the matter has been rejected by the trial court essentially with reference to the impugned orders dated 24-7-2014 and 2-7-2018 [Sugreev Kumar v. State of Punjab, 2018 SCC OnLine P&H 1848] , which are the subject-matter of challenge in this appeal.

22. In the totality of the circumstances of this case, rather than

dilating further on the evidence, suffice it would be to observe for the present purpose that the prayer of the prosecution for proceeding against other accused persons, having not been examined in the proper perspective and with due regard to the applicable principles, deserves to be restored for reconsideration of the trial court.

23. Accordingly, this appeal is allowed in part, to the extent and in the manner that the impugned orders are set aside and the applications made by the prosecution under Section 319 CrPC are restored for reconsideration of the trial court. In the interest of justice, it is made clear that we have not pronounced on the merits of the case either way and it would be expected of the trial court to reconsider the prayer of prosecution for proceeding against the proposed accused persons totally uninfluenced by any observation herein regarding facts of the case but with due regard to the evidence on record and to the law applicable."

30. In Labhuji Amratji Thakor **(Supra),** a three Judges Bench of Supreme Court considered correctness of an order passed by High Court, whereby order passed by trial court rejecting an application under section 319 Cr.P.C in a case under Sections- 363, 366 I.P.C. and Sections- 3/4 POCSO Act, was set aside. Again Court took notice of paragraphs 105 and 106 of judgement in Hardeep Singh's case, and then applied the principles laid down therein to the facts of the case. Upon evaluation of facts in the light of above, Court concurred with the view of the trial court by observing as under in paragraphs 10, 11 and 12:

"10. In the present case, there are not even suggestions of any act done by the appellants amounting to an offence referred to in Sections 3 and 4 of the Pocso Act. Thus, there was no occasion to proceed against the appellants under the Pocso Act.

11. Now, we come back to the reasons given by the High Court in allowing the criminal revision and setting aside the order of the Pocso Judge. The judgment of the High Court runs into four paragraphs and the only reason given by the High Court for allowing the revision is contained in para 3, which is to the following effect:

"3. On going through the depositions of the victim as well as her mother, some overtact and participation on the part of Respondents 3 to 5 are clearly revealing. But, this Court is not inclined to opine either way as the said fact was not stated before the police at the time of recording of their statements. But, taking into consideration the provision of Section 319 of the Criminal Procedure Code, this Court deems it appropriate to summon them and put them to trial...."

12. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. The Court has to consider substance of the evidence, which has come before it and as laid down by the

Constitution Bench in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] has to apply the test i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." Although, the High Court has not adverted to the test laid down by the Constitution Bench in Hardeep Singh[Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] nor has given any cogent reasons for exercise of power under Section 319 CrPC, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court as statements of PW 3 and PW 4. PW 3 is mother of the victim, who has clearly stated that her daughter has informed that she was abducted by the appellants and Natuji, who had taken her to the Morbi in the vehicle of Labhuji. The statement of the mother of the victim was a hearsay statement and could not have been relied for proceeding against the appellants. Now, coming to the statement of the victim, PW 4, she has only stated that Natuji, the accused had come along with his three friends, i.e. appellants and she was taken in the jeep to Morbi. She does not even allege complicity of the appellants in the offence. Her further statement was that she was taken to Morbi in the jeep driven by Labhuji and subsequently was taken to Modasa from Morbi in the jeep of Labhuji which also could not furnish any basis to proceed against the appellants. The mere fact that the jeep, in which she was taken to Modasa, the appellants were also present cannot be treated to be any allegation of complicity of the appellants in the offence. The observations of the trial court while rejecting the application holding that the application appears to be filed with mala fide intention, has not even been adverted to by the High Court."

31. In Shiv Prakash Mishra **(Supra),** Court again considered the veracity of an order passed on an application under section 482 Cr.P.C., whereby High Court refused to interfere with the order passed by trial Court declining to exercise jurisdiction under section 319 Cr.P.C. in a case arising out of Case Crime No. 328A/2013, under Sections- 148, 148, 149, 302, 307, 323 and 504 I.P.C. Again observations made by Constitution Bench in paragraphs 105 and 106 of judgement in Hardeep Singh's case as explained in paragraphs 13 of Brijendra Singh's case were noticed and on basis thereof court considered the nature of evidence required for summoning a non charge sheeted accused. It was in aforesaid background that Court examined the testimonies of P.W.1 and P.W.2 therein and summarized its views as follows in paragraphs 13, 14, 15, 16 and 17 of the judgement:

"13. In the light of the above principles, considering the present case, having regard to the contradictory statements of the witnesses and other circumstances, in our view, the trial court and the High Court rightly held that Respondent 2 cannot be summoned as an accused. The FIR in Case Crime No. 328-A/2013 was registered on 6-9-2013 at 1815 hours. The name of the second respondent is no doubt mentioned in the FIR and overt act is attributed to him. It is clear from the record that during the course of investigation, the investigating officer recorded the statements of witnesses, namely, Rajesh Kumar, Nizamuddin, Nand Kishore, Tribhuwan Singh, Bintu Rai and Nageshwar Kumar and other seven

witnesses who have stated that Respondent 2 was not present at the place of occurrence at the time of the incident. The investigating officer has also recorded the statement of one Shiv Kumar Gupta and Sandeep Gupta who are working in the same office in which Respondent 2 was employed who had stated that Respondent 2 was in the office at the time of incident. Based on the statements recorded from the witnesses, the investigating officer found that the second respondent was posted on the post of Junior Engineer in the Bridge Construction Unit of Bridge Corporation, Lucknow and he usually resided there and on 6-9-2013, he was present at his workplace and discharging his official duties. Based on the materials collected during the investigation, the investigating officer recorded the finding that on the date and time of incident, Subhash Chandra Shukla was not present at the place of occurrence. Accordingly, the name of Subhash Chandra Shukla was dropped when the first charge-sheet was filed on 19-9-2014. The supplementary charge-sheet was filed against Rahul Shukla on 15-10-2014. Though the name of the second respondent was mentioned in the FIR, during investigation, it was thus found that the second respondent was not present in the place of incident and on the basis of the findings of the investigating officer, he was not charge-sheeted. Be it noted that the appellant complainant has not filed any protest petition then and there. During investigation, when it was found that the accused was not present at the place of incident, the courts below were right in refusing to summon Respondent 2 as an accused.

14. As pointed out by the trial court, PW 1 was examined on various dates from 22-10-2016 to 2-8-2017 and examined on nine hearing dates. Though, in his chief-examination on 22-10-2016, PW 1 has stated about the presence of Subhash Chandra Shukla and attributing overt act to him that he had beaten the deceased Sangam Lal Mishra with butt of home-made pistol, on 28-2-2017, PW 1 in his cross-examination stated that Subhash Chandra Shukla was on duty at that time. The relevant portion of the statement of PW 1 reads as under:

"... Subhash Chandra Shukla does not live in the house. He does service/job. At the same time in Jigna Police Station, District Mirjapur he was making bridge and due to this reason, he was on duty there...."

15. As pointed out by the trial court and the High Court, PW 1 has made contradictory statements in the course of his examination in connection with the presence of Subhash Chandra Shukla.

16. Anand Kumar Mishra (PW 2) has been examined who is stated to be the eyewitness. PW 2 has been working as Assistant Teacher (Shiksha Mitra). His duty time is from 7.00 a.m. till 12.00 noon. PW 2 though stated that he was on leave on the date of occurrence i.e. 6-9-2013, the trial court expressed doubts about his presence at the time of occurrence. Considering the fact that PW 2 is working as a teacher and that PW 2 is a co-accused in the cross-case, the trial court and the High Court expressed doubts about the evidence of PW 2 as to the presence of the second respondent. The evidence brought on record during trial does not prima facie show the complicity of Respondent 2 in the occurrence and the High Court was justified in refusing to summon Respondent 2 as an accused.

17. The High Court and the trial court concurrently held that the materials brought on record are not sufficient to summon the second respondent as an accused in the present case. No substantial ground is made out warranting interference and the appeal is liable to be dismissed."

32. In Sartaj Singh **(Supra),** Court was examining correctness of an order passed by the High Court, whereby High Court allowed the revision and set-aside the order passed by trial court on an application under Section 319 Cr.P.C., whereby non charge sheeted accused were summoned to face trial in a sessions case, arising out of an F.I.R. under Sections- 148, 149, 341, 323, 324, 307 and 506 I.P.C. Court noticed the Constitution Bench judgement in Hardeep Singh's case as well as the judgement in S. Mohammed Ispahani (Supra). After applying the law laid down therein, Court proceeded to deduce the nature of evidence that is required for summoning of a non charge-sheeted accused and upon evaluation, disagreed with the view expressed by High Court by drawing its disagreement as follows in paragraphs 14, 15, 16 and 17 of the judgement:

"14. Applying the law laid down by this Court in the aforesaid decisions to the case of the accused on hand, we are of the opinion that the learned trial court was justified in summoning the private respondents herein to face the trial as accused on the basis of the deposition of the appellant--injured eyewitness. As held by this Court in the aforesaid decisions, the accused can be summoned on the basis of even examination-in-chief of the witness and the court need not wait till his cross-examination. If on the basis of the examination-in-chief of the witness the court is satisfied that there is a prima facie case against the proposed accused, the court may in exercise of powers under Section 319 CrPC array such a person as accused and summon him to face the trial.

15. At this stage, it is required to be noted that right from the beginning the appellant herein-injured eyewitness, who was the first informant, disclosed the names of private respondents herein and specifically named them in the FIR. But on the basis of some enquiry by the DSP they were not charge-sheeted. What will be the evidentiary value of the enquiry report submitted by the DSP is another question. It is not that the investigating officer did not find the case against the private respondents herein and therefore they were not charge-sheeted. In any case, in the examination-in-chief of the appellant-injured eyewitness, the names of the private respondents herein are disclosed. It might be that whatever is stated in the examination-in-chief is the same which was stated in the FIR. The same is bound to be there and ultimately the appellant herein-injured eyewitness is the first informant and he is bound to again state what was stated in the FIR, otherwise he would be accused of contradictions in the FIR and the statement before the court. Therefore, as such, the learned trial court was justified in directing to issue summons against the private respondents herein to face the trial.

16. Now, so far as the impugned judgment and order [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782] passed by the High Court is concerned, it appears that while quashing and setting aside the order passed by the learned trial court, the High Court has considered/observed as under: (Manjeet

Singh case [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782] , SCC OnLine P&H paras 29-30) "29. No evidence except the statement of Sartaj Singh, which has already been investigated into by the DSPs concerned was relied upon by the trial court to summon, which was not sufficient for exercising power under Section 319 CrPC.

30. As per statement of Sartaj Singh, Palwinder Singh and Satkar Singh gave him lathi-blows on the head. Manjeet Singh, Amarjeet Singh, Rajwant Singh, Narvair Singh and Sukhdev Singh were holding gandasi. Manjeet Singh, Amarjeet Singh and Rajwant Singh gave him gandasi-blows on the head and face. All the injuries are stated to fall in the offence under Sections 323, 324, 326, 341 read with Section 149 IPC. In case, so many people as mentioned above were giving gandasi and lathis blows on the head, Sartaj Singh was bound to have suffered more injuries, which would not have left him alive and probably he would have been killed on the spot. He seems to have escaped with only such injuries as have invited offence only under Sections 323, 324, 326, 341 read with Section 149 IPC. Therefore, the trial court erred in exercising his jurisdiction summoning the other accused where exaggeration and implication is evident on both sides."

17. The aforesaid reasons assigned by the High Court are unsustainable in law and on facts. At this stage, the High Court was not required to appreciate the deposition of the injured eyewitness and what was required to be considered at this stage was whether there is any prima facie case and not whether on the basis of such material the proposed accused is likely to be convicted or not and/or whatever is stated by the injured eyewitness in his examination-in-chief is exaggeration or not. The aforesaid aspects are required to be considered during the trial and while appreciating the entire evidence on record."

33. In Manjeet Singh **(Supra),** Court was considering the correctness of an order passed by High Court dismissing the revision preferred against an order passed by Sessions Judge allowing the application under Section 319 Cr.P.C. filed in a case under Sections 363, 366, 376 IPC and Sections 3/4 Protection of Children From Sexual Offences, (POCSO) Act, 2012 Court again examined the issue relating to parameters for exercise of jurisdiction under section 319 Cr.P.C. Court took notice of the constitution Bench judgement in Hardeep Singh (Supra) and S. Mohammed Ispahani (Supra) and on basis of ratio laid down therein evolved the ambit and scope of powers of Court under section 319 Cr.P.C. in paragraphs 34 of judgement. Having done so, Court examined the testimony of P.W.1 Manjeet who is an injured witness and on basis thereof tested the veracity of orders passed by High Court as well as trial court whereby summoning of non charge sheeted accused was declined. Court upon evaluation of evidence on record disagreed with the view taken by High Court as well as trial court. Following disagreement was expressed by court in paragraphs 34, 35, 36, 37 and 38 of the judgement:

"34. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:

(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted,

the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not has to wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

35. Applying the law laid down in the aforesaid decisions to the facts of the case on hand we are of the opinion that the Learned trial Court as well as the High Court have materially erred in dismissing the application under Section 319 CrPC and refusing to summon the private respondents herein to face the trial in exercising the powers under Section 319 CrPC. It is required to be noted that in the FIR No. 477 all the private respondents herein who are sought to be arraigned as additional accused were specifically named with specific role attributed to them. It is specifically mentioned that while they were returning back, Mahendra XUV bearing no. HR-40A-4352 was standing on the road which belongs to Sartaj Singh and Sukhpal. Tejpal, Parab Saran Singh, Preet Samrat and Sartaj were standing. Parab Sharan was having lathi in his hand, Tejpal was having a gandsi, Sukhpal was having a danda, Sartaj was having a revolver and Preet Singh was sitting in the jeep. It is specifically mentioned in the FIR that all the aforesaid persons with common intention parked the Mahendra XUV HR-40A-4352 in a manner which blocks the entire road and they were armed with the weapons. Despite the above specific allegations, when the charge-sheet/final report came to be filed only two persons came to be charge-sheeted and the private respondents herein though named in the FIR were put/kept in column no. 2. It is the case on behalf of the private respondents herein that four different DSPs inquired into the matter and thereafter when no evidence was found against them the private respondents herein were put in column no. 2 and therefore the same is to be given much weightage rather than considering/believing the examination-in-chief of the appellant herein. Heavy reliance is placed on the case of Brijendra Singh (Supra). However none of DSPs and/or their reports, if any, are part of the charge-sheet. None of the DSPs are shown as witnesses. None of the DSPs are Investigating Officer. Even on considering the final report/charge-sheet as a whole there does not appear to be any consideration on the specific allegations qua the accused the private respondents herein who are kept in column no. 2. Entire discussion in the charge-sheet/final report is against Sartaj Singh only.

36. So far as the private respondents are concerned only thing which is stated is "During the investigation of the present case, Shri Baljinder Singh, HPS, DSP Assandh and Shri Kushalpal, HPS, DSP Indri found accused Tejpal Singh, Sukhpal Singh, sons of Gurdev Singh, Parab Sharan Singh and Preet Samrat Singh sons of Mohan Sarup Singh

caste Jat Sikh, residents of Bandrala innocent and accordingly Sections 148, 149 and 341 of the IPC were deleted in the case and they were kept in column no. 2, whereas challan against accused Sartaj has been presented in the Court."

37. Now thereafter when in the examination-in-chief the appellant herein - victim - injured eye witness has specifically named the private respondents herein with specific role attributed to them, the Learned trial Court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eye-witness. As observed by this Court in the cases of State of MP v. Mansingh(2003) 10 SCC 414 (para 9); Abdul Sayeed v. State of MP (2010) 10 SCC 259; State of Uttar Pradesh v. Naresh (2011) 4 SCC 324, the evidence of an injured eye witness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319 CrPC the Court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial under Section 319 CrPC.

38. Now so far as the reasoning given by the High Court while dismissing the revision application and confirming the order passed by the Learned trial Court dismissing the application under Section 319 CrPC is concerned, the High Court itself has observed that PW1 Manjeet Singh is the injured witness and therefore his presence cannot be doubted as he has received fire arm injuries along with the deceased. However, thereafter the High Court has observed that the statement of Manjeet Singh indicates over implication and that no injury has been attributed to either of the respondents except they were armed with weapons and the concerned injuries are attributed only to Sartaj Singh even for the sake of arguments someone was present with Sartaj Singh it cannot be said that they had any common intention or there was meeting of mind or knew that Sartaj would be firing. The aforesaid reasonings are not sustainable at all. At the stage of exercising the powers under Section 319 CrPC, the Court is not required to appreciate and/or enter on the merits of the allegations of the case. The High Court has lost sight of the fact that the allegations against all the accused persons right from the very beginning were for the offences under Sections 302, 307, 341, 148 & 149 IPC. The High Court has failed to appreciate the fact that for attracting the offence under Section 149 IPC only forming part of unlawful assembly is sufficient and the individual role and/or overt act is immaterial. Therefore, the reasoning given by the High Court that no injury has been attributed to either of the respondents except that they were armed with weapons and therefore, they cannot be added as accused is unsustainable. The Learned trial Court and the High Court have failed to exercise the jurisdiction and/or powers while exercising the powers under Section 319 CrPC."

34. With the aid of the above, Court now proceeds to examine the correctness of impugned order dated 13.05.2022, passed by learned court of Additional District and Sessions Judge, Bulandshahar, in Sessions Trial No.660 of 2020 (State Vs. Hemant), under section 302 IPC, Police Station-Araniya, District Bulandshahar, arising out

of Case Crime No.313 of 2019, whereby revisionist has been summoned under Section 319 Cr.P.C. to face trial in above-mentioned sessions trial.

35. Before proceeding to do so, it must be noticed that following issues stand settled as per the judgements mentioned herein above and, therefore, they are not required to be dealt with.

36. The ambit and scope of powers under Section 319 Cr.P.C. now stands crystalized by Supreme Court in paragraph-34 of the judgement in **Manjeet Singh (supra).**

37. The summoning of a non charge-sheeted accused in exercise of power under Section 319 Cr.P.C. cannot be done in a "casual and cavalier manner". Power under Section 319 Cr.P.C. is "an extraordinary discretionary power which should be exercised sparingly". Vide paragraphs- 34 and 36 of the judgement **in S. Mohammed Ispahani (supra)** and paragraph- 105 of the Constitution Bench judgement in **Hardeep Singh (supra).**

38. The nature of evidence required for summoning a non charge-sheeted accused to face trial, has been summarized in paragraph-106 of the Constitution Bench judgement in **Hardeep Singh (supra)** wherein Constitution Bench has held that a prospective accused can be summoned on the basis of Statement-in-Chief of prosecution witness of fact. The only requirement is that such statement discloses more than prima facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes unrebutted would lead to conviction. The second test laid down therein is that such person could be tried with other accused. In paragraph- 36 of the judgement in S Court held that a non charge sheeted accused can be summoned only on the basis of "strong and cogent evidence".

39. The evidence of an eye witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly. Vide paragraph 37 of judgement in **Manjeet Singh (Supra).**

40. Having noted the settled position, the Court is now required to consider whether on the testimonies of P.W.1 and P.W.2, revisionist could have been summoned by court below. As an ancillary issue, Court will also have to consider as to whether court below has exercised it's jurisdiction "diligently" or as termed by Apex Court in a "casual and cavalier manner."

41. P.W.1 Raj Kumar is first informant. He is also an eye-witness of the occurrence. His statement-in-chief as well as cross-examination have also been recorded. As such his testimony falls in the realm of legal evidence. While considering an application under Section 319 Cr.P.C., Court can rely upon the statement-in-chief of a witness, vide paragraph- 92 of the Constitution Bench judgement in **Hardeep Singh (supra).** Therefore, no illegality has been committed by court below in relying upon statement-in-chief as well as cross-examination of this witness.

42. Statement-in-chief/cross examination of P.W.1-Ram Kumar is on record as Annexure-19 to the affidavit filed in support of present revision.

43. Perusal of same goes to show that P.W.1 has categorically stated about the time, place and manner of occurrence. This witness has clearly implicated revisionist alongwith others in the crime in question.

His presence at the time and place of occurrence along with others has been categorically stated by this witnesses. This witness in his deposition has clearly stated that revisionist was present at the time and place of occurrence alongwith other accused. As such, complicity of revisionist in crime in question is established. P.W.1 has also been cross-examined. However, upon perusal of examination-in-chief of P.W.1, Court does not find that any such material was culled out from this witness, on the basis of which his testimony could be discarded at this stage. Testimony of P.W.1 clearly satisfies the test as noted in paragraph- 106 of the Constitution Bench judgement in **Hardeep Singh (supra),** wherein Court has noticed Section 319 Cr.P.C. and has laid emphasis on the term "for which such person could be tried together with the accused". His testimony also satisfies the other test laid down in aforesaid paragraphs of above-noted judgement which is as follows: The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In view of fact that P.W.1 has been cross examined, wherein presence of revisionist at the time and place of occurrence stands established, as such, his testimony falls in the realm of "strong and cogent evidence." As such, testimony of this witness also satisfies the test laid down in **S. Mohammaed Ispahani (Supra).**

44. P.W.2, Satendra Pratap Singh is also an eye-witness of the occurrence. His presence at the time and place of occurrence, cannot be doubted. He has categorically detailed the manner of and, as such, credibility of this witness is higher and opposite party could not cull out any such statement on the basis of which, it can be said that his testimony is neither "strong nor cogent". There is nothing on record to disbelieve this witness. The nature of evidence required for summoning an accused under Section 319 Cr.P.C. as noted herein above is also satisfied in respect of this witness also.

44. In view of above, submission urged by the learned counsel for revisionist that court below has pre-empted the disposal of application under Section 319 Cr.P.C., inasmuch as, the Investigating Officer has not yet been examined and he was the best person to disclose the circumstances on the basis of which, revisionist was exculpated in the charge-sheet, though appears fanciful at the first flush, but is misconceived in view of law laid down by Constitution Bench in **Hardeep Singh (supra).**

45. The submission urged by learned counsel for revisionist that nothing new has been stated by P.W.1 and P.W.2 in their depositions before the Court than what was stated before Investigating Officer in their statements under section 161 Cr.P.C., the Court finds that no ground regarding above has been raised in the memo of revision. However, upon perusal of statements of P.W.1 and P.W.2 as recorded under section 161 Cr.P.C. which are on record as Annexure-2 and Annexure-5 to the affidavit, the Court finds that aforesaid witnesses in their statements as well as depositions before Court below have supported the prosecution story as unfolded in F.I.R. In their cross examination, defence has failed to cull out any such fact on the basis of which their testimonies could be discarded being unworthy of acceptance at this stage. For the conclusion drawn regarding nature of evidence of

P.W.1 and P.W.2 herein above, submission urged by learned counsel for revisionist is by itself unable to dislodge the credibility and reliability of P.W.1 and P.W.2 at this stage, wherein complicity of revisionist in the crime in question stands established.

46. Apex Court in Rajesh and Others (Supra), Sugreev Kumar (Supra), Shiv Prakash Mishra (Supra) and **Sartaj Singh (Supra)** considered the veracity of order passed on an application under section 319 Cr.P.C. wherein prospective accused were summoned in cases under section 302, 307 IPC or both. In all the cases referred to above, Court has meticulously examined the testimonies of prosecution witnesses in each of above mentioned case in the light of tests laid down by Apex Court in **Hardeep Singh (Supra) and S.Mohammed Ispahani (Supra)** and after undertaking aforesaid exercise has proceeded to decide whether on the testimony of prosecution witnesses, prospective accused could be summoned or not.

47. The same procedure as adopted by Court in judgements referred to above in preceding paragraph has been applied in present case. Court has not come across any such material to conclude that Court below has not exercised its jurisdiction "diligently" and revisionist has been summoned by Court below in a "casual and caviliar manner". Deposition of P.W.1 and P.W.2 falls in the realm of "strong and cogent evidence" and satisfies the twin test laid down by Constitution Bench in paragraph 105 of the judgement in **Hardeep Singh (Supra)**. It clearly establishes complicity of revisionist in the crime in question.

48. For all the facts and reasons recorded above, this Court does not find any good ground to interfere in this revision. The Revision lacks merit, therefore, same is liable to be dismissed.

49. It is, accordingly, **dismissed.**

(2022) 10 ILRA 746
APPELLATE JURISDICTION
CIVIL SIDE
DATED: AILAHABAD 10.08.2022

BEFORE

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

First Appeal From Order No. 614 of 2010

Smt. Ganpat Devi ...Appellant
Versus
Istiyaq Ahmad & Anr. ...Respondents

Counsel for the Appellant:
Sri Ram Singh

Counsel for the Respondents:
Sri Anand Kumar Sinha

Civil Law - Motor Vehicle Rules, 1998-Enhancement of compensation-Rule 220-A(3) -future prospects to be included-to the extent of 30% of the salary-Tribunal not awarded-award of compensation under conventional heads to be added-not added by the Tribunal-awarded compensation modifies.

Appeal allowed. (E-9)

List of Cases cited:

1. United India Insurance Company Vs Smt. Mamta Rani & ors., First Appeal From Order No. 1699 of 2013, decided on 19.07.2022

2. National Insurance Co. Ltd. Vs Rekhaben & ors., (2017) 13 SCC 547

3. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corporation & anr., (2009) 6 SCC 121

4. Vimal Kanwar & ors. Vs Kishore Da, (2013) 7 SCC 476

5. National Insurance Company Vs Pranay Sethi & ors., (2017) 16 SCC 680

6. Vimal Kanwar & ors. Vs Kishore Dan, (2013) 7 SCC 476

7. Smt. Shanti & ors. Vs Anil Awasthi @ Anil Kumar Awasthi & anr., First Appeal From Order No. 866 of 2011 and connected appeals, decided on May 30, 2022

8. Sushil Kumar & ors. Vs M/s. Sampark Lojastic Pvt. Ltd. & ors., First Appeal From Order No. 2581 of 2011, decided on 26.04.2017

9. New India Assurance Co. Ltd. Vs Urmila Shukla, 2021 SCC OnLine SC 822

10. Jiuti Devi & ors. Vs Manoj Kumar & ors., 2022 SCCOnLine All 46

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

This is a claimant's appeal, arising out of the judgment and award passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.12, Allahabad, dated 31.10.2009 in Motor Accident Claims Petition No. 420 of 2008. The claimant, who

2. The facts giving rise to this appeal lie in a narrow compass. Narrower still, would be the reference to facts of the case, and proceedings before the Tribunal, because the issue involved in this appeal is about adequacy of compensation alone. Smt. Ganpati Devi is the claimant, who is in appeal. She will hereinafter be referred to as "the claimant". Her husband was the victim of a motor accident caused by the vehicle bearing Registration No. UP-70M/5044, said to be driven rashly and negligently. The claimant's husband, in consequence of the accident, sustained injuries, to which he succumbed. The accident occurred on 23.04.2008 at the Imli Tiraha, Transport Nagar, P.S. Dhoomanganj, District Prayagraj. The deceased was aged 49 years at the time of the mishap. He was employed as a driver with the Jal Nigam and drew a monthly salary of ₹8,933/-.

3. The claimant asserts that on account of her husband's demise in the accident, she has sustained financial loss, besides suffering mental agony. She moved the Tribunal to recover from the owner of the vehicle as well as the insurer, a sum of ₹14,73,000/- in compensation. The Tribunal, by the impugned judgment, has awarded a sum of ₹1,61,232/- together with 6% simple interest from the date of institution of the claim petition until realization.

4. Aggrieved by the quantum of compensation awarded by the Tribunal, the claimant has come up in appeal.

5. Ishtiak Ahmad is the owner of the offending vehicle, whereas the National Insurance Company, Civil Lines, Allahabad are its insurers. Ishtiak Ahmad shall hereinafter be referred to as "the owner", whereas the National Insurance Company Limited, Civil Lines, Allahabad shall hereinafter be called "the insurers".

6. The learned Counsel for parties have addressed this Court on the issue of quantum alone and not the other issues dealt with by the Tribunal, about which there is no cavil before this Court.

7. Heard Mr. Ram Singh, learned Counsel for the claimant and Mr. Anand Kumar Sinha, learned Counsel for the insurers. No one appeared on behalf of the owner. I have perused the record.

8. The deceased, Banshilal Yadav was a driver in the employ of the Uttar Pradesh

Jal Nigam, Allahabad and attached with the Executive Engineer, Construction Division of the said Nigam. He was drawing a salary of ₹8,033/- per month. In order to prove the deceased's income, the claimant has filed her husband's salary certificate bearing Paper No. 19 ग1. The said certificate has been issued by the Executive Engineer, Construction Division, U.P. Jal Nigam, Allahabad. The Tribunal has recorded a finding that no evidence in rebuttal, or to contradict the said salary certificate, has been produced by the owner or the insurers. In the circumstances, the salary certificate has been accepted. The Tribunal has recorded that the basic salary of the deceased was ₹4700/-, to which was added a sum of ₹3478/- towards dearness allowance. In addition, the deceased was also in receipt of ₹680/- per month towards house rent allowance, which was added to his salary. The deceased was, thus, found to be in receipt of a monthly salary of ₹8,858/-.

9. The Tribunal proceeded to determine the compensation payable on the basis of the aforesaid monthly income. The annual income was determined by the Tribunal at a figure of ₹1,61,296/- by multiplying the monthly income with the figure of '12'. A one-third was deducted towards personal expenses of the deceased, which would be a sum of ₹35,432/-. Thus, the annual dependency was determined at a sum of ₹71,864/-. The Tribunal, however, did not take the sum last mentioned to be the annual dependency, on the basis of which, compensation would be calculated. The Tribunal took note of the evidence of the claimant, who testified as PW-1, to hold that it was acknowledged that the claimant was in receipt of a pension of ₹5000/- per mensem. The Tribunal, accordingly, held that the claimant received a sum of ₹60,000/- annually towards pension. The evidence of the witness was also considered to conclude that the deceased's son Pramod Kumar had been granted employment under The U.P. Recruitment of Dependants of Government Servants Dying-in-Harness Rules, 19741. The Tribunal, therefore, concluded that the sum of money received by the claimant in pension had to be deducted from the annual dependency. Thus, out of the annual dependency of ₹71,864/-, a sum of ₹60,000/- was deducted to determine the annual dependency for the claimant at a sum of ₹11,864/-. To the aforesaid sum, a multiplier of '13' was applied in accordance with the Second Schedule to the Motor Vehicles Act. This was done as the deceased was aged 49 years. The dependency of ₹11,864/-, upon application of the multiplier of '13', led the Tribunal to determine the substantive compensation payable at a figure of ₹1,54,232/-. To this were added, under the conventional heads, a sum of ₹5000/- towards compensation for loss of consortium and a sum of ₹2000/- towards funeral expenses. Accordingly, the total compensation determined was a figure of ₹1,62,232/-. The Tribunal directed that the compensation awarded would carry interest at the rate of 6% per annum from the date of institution of the claim petition until realization. There were certain directions regarding investment of ₹25,000/- each in Fixed Deposits in the names of Km. Kiran and Punit Kumar, the daughter and the son of the deceased. There were some other ancillary directions regarding investment of the sum of money payable to the claimant.

10. It has been noticed that though the claim petition has been solely filed by the claimant, who is the deceased's widow, but she is not the only heir and dependent. The

deceased in this case left behind six heirs, to wit, the claimant, a son Pramod Kumar Yadav aged about 29 years, a married man, Suman Devi aged about 24 years, a married daughter, Km. Kiran aged about 19 years, an unmarried daughter, Punit Kumar Yadav aged about 18 years, an unmarried son and Bachai Lal Yadav aged about 65 years, his father.

11. The Tribunal has remarked that since Pramod Kumar Yadav has been given compassionate appointment, he cannot be regarded a dependent of the deceased. Likewise, the married daughter, Suman Devi is not a dependent of her father's. The widow, that is to say, the claimant besides Km. Kiran and Punit Kumar alone have been regarded as the deceased's dependents. There is absolutely no mention made of the deceased's father, a man of 65 years.

12. Mr. Ram Singh, learned Counsel for the claimant, has criticized the exclusion of the adult son, who has been granted compassionate appointment from amongst the deceased's dependants for the purpose of determining the personal expenses. He has also assailed the exclusion of the deceased's old father from amongst his dependants by the Tribunal. It is argued that the deceased's son, prior to his compassionate appointment and post the deceased's demise, was as much a dependant of his father's as the other two unmarried siblings. It has been further argued that the deceased's father was an old man of 65 years, and there is no evidence that he was financially independant at that age. He is a senior citizen, with no recorded income of his own. As such, according to the learned Counsel for the claimant, he has to be counted as one of the deceased's dependants. Counting in the deceased's son Pramod Kumar Yadav and his father, the deceased's dependants would figure five souls in all - not three, entitling the claimant to a deduction of one-fourth towards personal expenses, rather than a one-third, as directed by the Tribunal.

13. On the other hand, Mr. Anand Kumar Sinha, learned Counsel for the insurers has supported the Tribunal's determination of the deduction to be directed on account of personal expenses of the deceased. He submits that the elder son, Pramod Kumar Yadav, has been granted compassionate appointment, which would not entitle him to qualify as a dependant of anyone. The father is a 65-year-old man and it has to be presumed that he would have an income of his own. He cannot also be regarded as a dependant. Learned Counsel for the insurers, therefore, says that the Tribunal is right in deducting a one-third from the deceased's income towards personal expenses, inasmuch as the deceased had no more than three dependants, already indicated.

14. Upon a consideration of the matter, this Court finds that the deceased's elder son, Pramod Kumar Yadav was, no doubt, a man of mature years, being aged 29 years, and a married man, at that. Still, in these days of scarcity of employment, no presumption of gainful occupation about a 29-year-old man, even married, who has a father to support, with a recorded source of income, can be drawn.

15. To the contrary, this Court is of opinion that the fact that Pramod Kumar Yadav has been granted compassionate appointment by his father's employers, who are a State employer under the Rules of 1974, treating him to be the deceased's dependant family member, is evidence

enough to infer that Pramod Kumar Yadav was not gainfully employed at the time of his father's demise. He was a dependant of his father's. Likewise, regarding the deceased's father aged about 65 years, there is not the slightest evidence to show that that he had a gainful employment at that age or an income of his own.

16. Amongst the dependents, the claimant has testified in her examination-in-chief that her father-in-law is alive. She has described the members of her family and gone on to say that all of them were dependant upon the deceased's salary. In the cross-examination of P.W.-1 Ganpat Devi, there is no question or suggestion put to her on behalf of the insurers that the deceased's father was gainfully employed at the age of 65 years or that he had an income of his own from any source. In the circumstances, being a senior citizen of 65 years, this Court is of opinion that the deceased's father must be regarded as one of his dependants.

17. There is one more issue which Mr. Sinha has raised, and that brings us back to Pramod Kumar's entitlement as a dependant. This issue is that once appointed on compassionate grounds in the deceased's stead, Pramod Kumar Yadav may not be regarded as a dependant at all. The Tribunal has accepted the said submission. In the opinion of this Court, the Tribunal has done so in manifest error. The mere fact that the elder son got an employment on compassionate basis in place of the deceased would not lead to the conclusion that he was not a dependant.

18. I had occasion to consider this question in **United India Insurance Company v. Smt. Mamta Rani and others2.** Repelling an identical contention advanced there on behalf of the insurers, it was held in **Smt. Mamta Rani (supra) :**

31. The submission of learned Counsel for the insurers that the adult son of the deceased, who has been given compassionate appointment, must not be counted amongst his dependents, is not worthy of acceptance. This submission has been urged in the past to claim deduction from the dependency put forth by the claimants. This was the issue before the Supreme Court, put in a different manner on behalf of the insurers, in **National Insurance Company Limited v. Rekhaben and others3.** There the issue was raised in terms that can best be understood by reference to the words of their Lordships in the report. These read :

11. The main contention of the appellant in these appeals is that the amount of salary received by the claimants being appointed by the employers of the deceased on compassionate grounds must be reduced from the award of compensation made in favour of the claimants. Thus, the only issue before us in these appeals is whether the income of the claimants from compassionate employment is liable to be deducted from the compensation amount awarded by the Tribunal under the statute.

32. The issue was differently posed in **Rekhaben** *(supra)*, but ultimately at the bottom of it, it is identical to the contention that Mr. Sinha raises before this Court. The contention, perhaps, has been differently put on behalf of the insurers in order to escape the principle that is laid down in **Rekhaben** and a number of other decisions of various High Courts that have not favoured any deductions from the compensation on account of compassionate

appointment, granted to one of the dependents of the deceased.

33. Mr. Sinha has sought to argue that the deceased's adult son was no longer a dependent of the deceased, being favoured with compassionate appointment in consequence of his demise. The issue, in substance, is answered against the insurers in Rekhaben by the Supreme Court, but, to dispose of a novel rendition of the same contention urged on behalf of the insurers by Mr. Sinha, it must be remarked that until time that the deceased passed away in consequence of the accident, the adult son was one of the deceased's dependents. Right to compensation stood crystallized on the date of the victim's death. The day the deceased passed away, the claimants sustained the loss, which was the dependency. The deceased's adult son was 24 years old. If the deceased had survived, the adult son might have improved his educational qualifications or looked for better prospects. There is no logic or principle by which on the grant of compassionate appointment, the adult son of the deceased is to be counted out of the dependents.

19. In view of my holding in **Smt. Mamta Rani** and the guidance of the Supreme Court in **National Insurance Company Limited v. Rekhaben and others4,** there is absolutely no substance in the submission put forth on behalf of the insurers or the opinion of the Tribunal that upon compassionate appointment being granted to the deceased's son, he is no longer to be counted as one of the dependants. The deceased's elder son is, therefore, held to be one of the family members dependent upon him at the time of his demise. Likewise, the deceased's father, who is a senior citizen with no evidence about gainful employment at that age, or income, has also to be regarded as one of the dependants. In the circumstances, the deceased must be held to have left behind five dependants, counting out, of course, the married daughter Smt. Suman Devi.

20. In view of the principle about deduction towards personal expenses of the deceased laid down by the Supreme Court in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another5,** the deduction of a one-fourth towards the deceased's personal expenses would be the correct quantification on this count. In **Sarla Verma** *(supra)* it has been held :

30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra[(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

21. The deceased having left behind five dependent family members, the case would fall in the bracket of 4-6, which would attract the deduction of a one-fourth from the deceased's income towards personal expenses, as already remarked. The Tribunal was, therefore, not right in directing a deduction of a one-third towards

personal expenses of the deceased while working out the dependency.

22. The other deduction, that the learned Counsel for the appellant has scathingly criticised, is on account of family pension that the claimant receives for her husband's services rendered to his employers. The Tribunal has, in working out the dependency, deducted the entire sum of family pension, being a figure of ₹60,000/-, from the annual dependency of ₹71,864/-. It is on the annual dependency of ₹11,864/- alone, that the Tribunal has applied the multiplier to work out the substantive dependency, that would serve as the basis for determining the compensation payable. The learned Counsel for the Insurance Company, Mr. Sinha has supported the said view and submits that the pension that the claimant receives from the employers would constitute "pecuniary advantage' that is liable to be deducted from the dependency. This Court is afraid that Mr. Sinha is not right in the aforesaid submission of his. This question has engaged the attention of the Supreme Court more that once and has been squarely answered against the insurers in **Vimal Kanwar and others v. Kishore Dan6**, where it was held :

18. The first issue is "whether provident fund, pension and insurance receivable by the claimants come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage' liable for deduction".

19. The aforesaid issue fell for consideration before this Court in Helen C. Rebello v. Maharashtra SRTC [(1999) 1 SCC 90 : 1999 SCC (Cri) 197] . In the said case, this Court held that provident fund, pension, insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. The following was the observation and finding of this Court: (SCC pp. 111-12, para 35)

"35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event viz. accident, which may not take place at all**. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No co-relation between the two.** Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on

the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no co-relation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage' liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any co-relation. The insured (the deceased) contributes his own money for which he receives the amount which has no co-relation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

(emphasis by Court)

23. In view of the aforesaid position of the law, it is held that the Tribunal was in error in directing from the annual dependency, deduction of the monthly pension received by the claimant. So far as the applicable multiplier is concerned, the same is governed by the Schedule set out in Paragraph No. 40 of the decision in **Sarla Verma**. The deceased has been unquestionably held to be aged 49 years and would, therefore, fall in the age bracket of 46-50 years stipulated in **Sarla Verma**. The applicable multiplier is "13'. The Tribunal has applied a multiplier of "13' to the annual dependency to work out the total dependency. This Court is in agreement with the Tribunal about the applicable multiplier. Learned Counsel for parties also do not seriously dispute the aforesaid view of the Tribunal.

24. The next limb of the submission that has been advanced by learned Counsel for the claimant and which has been vociferously opposed by learned Counsel for the insurers is about the future prospects. Mr. Ram Singh, learned Counsel for the claimant argues that Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 19987 would govern the award of future prospects in this case, because the deceased was a government servant, a salaried employee. Mr. Anand Kumar Sinha learned Counsel for the insurers, on the other hand, is equally emphatic in his submissions that Rules of 1998 would not apply. He submits that, at best, future prospects can be determined in accordance with the principles laid down in **National Insurance Company v. Pranay Sethi and others8**. Mr. Sinha submits that the Rules of 1998 would not be attracted to the present case, because the said rule was introduced by way of an amendment, which was enforced w.e.f 26.09.2011 governing the issue of future prospects, whereas the accident in this case occurred on 23.04.2008. He submits that amendment to Rule 220-A(3) being one that introduces a new right, is substantive law and would not operate retrospectively in the absence of an express provision in that behalf.

25. Elaborating his submissions, Mr. Sinha says that right to add future prospects to one's income was, for the first time, introduced by the decision of the Supreme Court in **Sarla Verma**, which was decided on 15.04.2009. The amendment in the Rules of 1998, inserting inter-alia Rule 220-A, of which sub-Rule (3) is a part, is inspired by the decision in **Sarla Verma. Sarla Verma** had, for the first time, granted future prospects to permanent employees in a government job, as the learned Counsel argues. The Rule grants it to government employees and the self-employed also. The Rule, therefore, brings in a new right and cannot be construed to retrospective in operation.

26. This Court is not in agreement with the aforesaid submission advanced on behalf of the learned Counsel for the insurers. The question is whether Rule 220-A(3) would apply to the present case because the accident happened on 23.04.2008, whereas Rule 220-A(3) was introduced vide Notification No. 777/XXX-4-2011-4(3)-2010 dated September 26, 2011 (Eleventh Amendment Rules, 2011). The said rules have been held by me to apply retrospectively in **Smt. Shanti and others v. Anil Awasthi alias Anil Kumar Awasthi and another9,** following the decision of a Division Bench of this Court in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others10**. There is, therefore, no doubt that Rule 220-A(3) of Rules of 1998 would govern future prospects payable to the claimant here. Rule 220-A(3) of the Rules of 1998 reads :

220-A. Determination of Compensation-

(1) X X X

(2) X X X

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under-

(i)	Below 40 years of age	:	50% of the salary
(ii)	Between 40-50 years of age	:	30% of the salary
(iii)	More than 50 years	:	20% of the salary
(iv)	When wages no sufficiently proved	:	50% towards inflation and price index

27. The issue whether future prospects would be governed by the decision of the Supreme Court in **Pranay Sethi** or Rule 220-A(3), since both govern the same right, was considered by the Supreme Court in **New India Assurance Company Limited v. Urmila Shukla11. Urmila Shukla** *(supra)* was an appeal that arose out of a decision of this Court and is, therefore, applicable, without doubt, to the determination of future prospects in the State of Uttar Pradesh. In Urmila Shukla, the question that was considered by their Lordships reads :

4. The basic ground of challenge by the appellant is that sub-rule 3(iii) of Rule 220A is contrary to the conclusions arrived at by the Constitution Bench of this Court in National Insurance Company Ltd v. Pranay Sethi reported in (2017) 16 SCC 680.

28. The issue was answered in **Urmila Shukla** thus :

9. It is to be noted that the validity of the Rules was not, in any way, questioned in the instant matter and thus the only question that we are called upon to consider is whether in its application, sub-Rule 3(iii) of Rule 220A of the Rules must be given restricted scope or it must be allowed to operate fully.

10. The discussion on the point in Pranay Sethiwas from the standpoint of arriving at "just compensation" in terms of Section 168 of the Motor Vehicles Act, 1988.

11. If an indicia is made available in the form of a statutory instrument which affords a favourable treatment, the decision in Pranay Sethi cannot be taken to have limited the operation of such statutory provision specially when the validity of the Rules was not put under any challenge. The prescription of 15% in cases where the deceased was in the age bracket of 50-60 years as stated in Pranay Sethi cannot be taken as maxima. In the absence of any governing principle available in the statutory regime, it was only in the form of an indication. If a statutory instrument has devised a formula which affords better or greater benefit, such statutory instrument must be allowed to operate unless the statutory instrument is otherwise found to be invalid.

12. We, therefore, reject the submission advanced on behalf of the appellant and affirm the view taken by the Tribunal as well as the High Court and dismiss this appeal without any order as to costs."

29. In the opinion of this Court, therefore, so long as Rule 220-A(3) is there on the statute book, future prospects have to be worked out according to the Rules of 1998, and not by the principles for determination thereof laid down in Pranay Sethi. Once it is held that future prospects are to be determined in accordance with Rule 220-A(3), there is little doubt that the deceased, under the said rule, is to be placed in the age bracket of 40-50 years, where, future prospects are to be added to the extent of 30% of the salary. The Tribunal has not awarded any future prospects in working out the dependency and calculating the compensation payable.

30. There is still one more issue which the learned Counsel for the claimant has much emphasized, and that is the award of the compensation under the conventional heads. There is little doubt that the Tribunal, in awarding compensation under the conventional heads, has manifestly erred in law, inasmuch as in **Pranay Sethi**, there are three distinct heads under which compensation has to be awarded, so far as the conventional heads go viz. Loss of Estate, Loss of Consortium and Funeral Expenses. I had occasion to consider the question of award of compensation under the conventional heads in **Smt. Shanti** (supra), where it was held :

28. Again, so far as the conventional heads are concerned, this Court is of opinion that far less than what is to be awarded for the loss of estate, loss of consortium and funeral expenses has been directed by the Tribunal. Moreover, loss of consortium is not confined to the widow alone, but the parents too are entitled to be compensated for the loss of filial consortium. The two minor children are entitled to compensation on account of loss of parental consortium. In this regard, the holding of the Constitution Bench in **Pranay Sethi** is again of much relevance, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs. 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs. 5000
(iii)	Loss of estate	Rs. 2500
(iv)	Medical expenses - actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs. 15,000

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in *Rajesh[Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though*Rajesh [Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC

(Cri) 817 : (2014) 1 SCC (L&S) 149] refers to *Santosh Devi [Santosh Devi v. National Insurance Co. Ltd.,* (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

29. The principles governing award of compensation under conventional heads, particularly with regard to award for loss of consortium, have been laid down by the Supreme Court in ***Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130. In Magma General Insurance Company Ltd.*** *(supra),* it has been held:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case

of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [*Rajasthan High Court in Jagmala Ram v. Sohi Ram,* 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in Rita Rana v. Pradeep Kumar, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in *Lakshman v. Susheela Chand Choudhary,* 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down in Pr*anay Sethi [National Insurance Co. Ltd. v. Pranay Sethi,* (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

30. It must be noted that under Rule 220-A(4) of the Rules of 1998, compensation or damages under the non pecuniary heads or the conventional heads have been stipulated. But, these are disadvantageous to the claimants and do not confer better or greater benefit upon them in comparison to liquidated figures laid down in **Pranay Sethi.** The figures under the conventional heads have been arrived at, bearing in mind the price index, falling bank interest, escalation of rates in different cases. There is a provision for 10% upward revision to be done in a span of three years. By contrast, the Rules of 1998, that have been amended to bring in Rule 220-A more than ten years ago, in the year 2011, cannot serve as a realistic index to award compensation under the conventional heads. The determination of compensation in **Pranay Sethi** would, therefore, be applicable. The revised and dynamic determination of compensation payable under the conventional heads stipulated in **Pranay Sethi** would prevail over that under the Rules of 1998. It is held, accordingly.

(emphasis supplied)

31. So far as entitlement to compensation for the loss of parental consortium to the children of the deceased is concerned, there is a distinction to be made between children who are minors and those adults. I dealt with the question in **Jiuti Devi and others v. Manoj Kumar and others12** and held :

39. Loss of consortium, that includes parental consortium, unlike dependency, is not some tangible economic loss. It is an emotional loss to the next of kin of the deceased-victim of a motor accident. In case of parental loss, it causes a particular deprivation to minors and young children, about whom it is said by the Supreme Court in United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur, to borrow the words of their Lordships, "Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents".

40. To the understanding of this Court, the impact of loss of parental consortium upon the deceased's children, in the very nature of that loss, is dependent upon the children's age. The loss of parent is a disheartening and emotional event for the child at any age of his maturity, but by the nature of the principle governing award of compensation under the head of parental consortium, the deprivation, that is suffered by a child or a minor, appears to be the determinative and entitling fact. A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head.

32. In the present case, all children being adults, compensation for the loss of parental consortium would not be payable. The claimant would be entitled to compensation for the loss of spousal consortium and the deceased's father on account of loss of filial consortium.

33. However, so far as the loss of estate and financial expenses are concerned, that has to be awarded in one set, according to the rule in **Pranay Sethi**. Thus, the awarded compensation under the conventional heads, as determined by the Tribunal, is erroneous and the same too has to be modified.

34. In view of the principles applicable for the determination of compensation payable to the claimant and the other dependants, this Court proceeds to work out the same as follows :

Sl. No.	Particulars	=	Amount
(i)	Monthly Income of the deceased	=	₹8,858/-
(ii)	Monthly Income + Future Prospects (monthly income x 30%) = ₹8858 + ₹2657 (rounded-off)	=	₹11,515/-
(iii)	Annual Income of the deceased = ₹11515 x 12	=	₹1,38,180/-
(iv)	Annual Dependency = Annual Income - one-fourth deduction towards personal expenses of the deceased (₹ 138180 - ₹34545)	=	₹1,03,635/-
(v)	Total dependency	=	₹13,47,

	= Annual Dependency x Applied Multiplier = ₹ 103635 x 13		255/-
(vi)	Claimant's entitlement under the conventional heads = Loss of Estate + Funeral Expenses +Dependents' consortium = ₹ 15,000 + 15,000 + 40,000 x 2	=	₹1,10,000/-
(vii)	**Total Compensation = Total Dependency + Claimant's entitlement under the conventional heads**	=	**₹14,57,255/-**

Total Compensation (in words) = Rupees Fourteen Lac, Fifty Seven Thousand, Two Hundred and Fifty Five only.

35. In the result, this appeal **succeeds** and is **allowed with costs.** The impugned award passed by the Tribunal is modified and the compensation awarded enhanced to a total sum of **₹14,57,255/- (Rupees Fourteen Lac, Fifty Seven Thousand, Two Hundred and Fifty Five only).** The compensation would carry Simple Interest at the rate of 7% per annum from the date of institution of the claim petition, until realisation. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

(2022) 10 ILRA 760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 895 of 2022

Daya Shankar & Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Pandey

Counsel for the Respondents:
C.S.C., Sri Santosh Kumar Tiwari, Sri Shardendu Kumar Pandey, Sri S.K. Purwar

Civil Law - U.P. Revenue Code 2006 - Section 116 - U.P. Revenue Code Rules, 2016 - Rule-109 (5) (e) - U.P.Z.A & L.R. Rules, 1950 - Rule-131 (1) (e) - Partition suit - plots in separate possession of tenure holders have to be allotted to him, if possible - Preliminary decree in a partition suit only determines the shares of the parties in the suit property and does not determine the possession of the parties or the portion to be allotted to them in final decree - final decree in a suit registered under Section 176 of the Act, 1950 has to be prepared in accordance with Rule 131 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as, 'Rules, 1952') - Rule 131(1)(e) of the Rules, 1952 provides that in making partition of a holding into two or more portions, plots which are in separate possession of a tenure-holder shall, as far as possible be allotted to such tenure-holder if they are not in excess of his share - Petitioner may not be necessarily entitled to be allotted the portion in which he allegedly in separate possession, but the said factor had to be taken into consideration by the courts below before passing the final decree and in case the petitioner was in separate possession, the said plot had to be allotted to the petitioner, if possible - Rule 131 (1) (a)

provides that the valuation of the portion allotted to each party shall be proportionate to his share in the holding - According to the principles under Rule 131 (1) (a), valuation of the portion allotted to each party shall be proportionate to his share in the holding (Para 9)

Allowed. (E-5)

List of Cases cited:

1. Paras Nath Vs Board of Revenue U.P. At Allahabad & ors. 2019 (144) R.D. 604

2. Babu Ram & ors. Vs Board of Revenue, Meerut & ors. 2016 (133) RD 459

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Sanjai Kumar Pandey, learned counsel for the petitioners, learned Standing Counsel for respondent Nos.1, 2, 3, 6 and 8, Mr. S.K. Tiwari for respondent No.4 and Mr. S. K. Pandey, learned counsel for respondent No.5.

2. Brief facts of the case are that plaintiff-respondent No.4 filed a case under Section 176 of the U. P .Z. A. & L. R. Act for partition of plot No. 364 area 0.683 hectare. There was defect in the suit as such, suit was dismissed with liberty to file a fresh suit vide order dated 27.07.2012. A fresh Suit has been filed by plaintiff-respondent No.4 on 20.11.2014 in which petitioners were plaintiff/defendants have filed their written statement and declined plaint allegations. Trial Court/Sub-Divisional Officer, Bilsi, Badaun considering the evidence on record dismissed the plaint suit vide judgment and decree dated 29.03.2016. Against the judgment and decree dated 29.03.2016, passed by trial court plaintiff-respondent No.4 filed an appeal before the Court of Commissioner and the Additional Commissioner vide judgment and decree dated 07.09.2017 allowed the suit, setting aside the judgment and decree of trial court dated 29.03.2016 and remanded the matter back before trial court with direction to decide the matter afresh after providing opportunity of hearing and leading evidence to both the parties. After remand, the trial court, registered the suit under Section 116 of the U.P. Revenue Code 2006 and decided the suit vide judgment and decree dated 10.09.2018 passing preliminary decree in the suit. Trial Court after passing the preliminary decree in disputed plot No.364 summoned the Lekhpal for filing kurra in the suit. Petitioners challenged the order of the trial court dated 10.09.2018 by way of Revision before the Revisional Court, which was dismissed vide judgment and order dated 10.08.2021 on the ground that trial court has already passed final decree on 22.03.2021 as such Revision is not maintained against the preliminary decree passed by the trial court. The Lekhpal prepared the Kurra on 05.10.2018 and the same was filed before the trial court on 28.09.2018. Trial Court further invited objection of the parties to the kurra accordingly, petitioner Nos.5 and 6 filed their objections against the kurra on 22.10.2018 and petitioner Nos. 2 and 4 filed their objection against the kurra on 18.01.2018 and by their objection, they prayed that kurra dated 18.09.2018 and 05.10.2018 be rejected. Lekhpal was examined before the trial court. Trial Court heard the objection filed by the petitioners to the kurra and found that kurra has been wrongly prepared and submitted as such kurra submitted by the area Lekhpal was rejected vide order dated 25.03.2019 and the area Lekhpal was again directed for making proper spot inspect and prepared

kurra in accordance with law as provided under the Act and Rules. Plaintiff-respondent No.4 aggrieved with order dated 25.03.2019 filed a Revision under Section 210 of the U.P. Revenue Code, 2006 before the Commissioner, but there was no interim order in the Revision, as such Area Lekhpal filed a fresh kurra before the trial court on 13.03.2020. After submission of fresh Kurra dated 13.03.2020 Additional Commissioner Bareilly, Division Bareilly without considering the material facts allow the Revision filed by contesting respondent vide order dated 24.02.2021 setting aside the order dated 25.03.2019 and sent the matter back before the trial court and proceed further according the Kurra dated 28.09.2018/5.10.2018. Petitioners challenged the order dated 24.02.2021 passed by Additional Commissioner through Revision before respondent No.1 but no order has been passed in the Revision and trial court proceeded with the matter in pursuance of the order dated 24.02.2021 and passed final order/decree on 22.03.2021/31.03.2021. Petitioners challenged the order dated 10.09.2018/ 22.03.2021/ 31.03.2021 through Appeal before respondent No.2 under section 207 of the U.P. Revenue Code, 2006, who dismissed the Appeal vide order dated 10.08.2021. Against the appellate court judgment dated 10.08.2021 as well as judgment and decree passed by the courts below Second Appeal under section 208 of U.P. Revenue Code, 2006 preferred by the petitioners was also dismissed on the same ground vide order dated 21.02.2022. Hence this writ petition.

3. This Court after hearing the writ petition for admission passed the following interim order dated 30.05.2022:

"Heard Sri Sanjai Kumar Pandey, learned counsel for the petitioners, Sri Sanjay Kumar Singh, learned Additional Chief Standing Counsel for the State respondents and Sri Santosh Kumar Tiwari, learned counsel for respondent No.4.

Learned counsel for the petitioners points out that neither the first appellate court nor the second appellate court has adverted to the objections raised by the petitioners against the decree passed by the trial court.

Learned counsel for respondent No.4 submits that the possession has been delivered pursuant to the decree of the trial court; he prays for two weeks' time to take instructions and to file a counter affidavit.

The petitioners would have two weeks thereafter for filing rejoinder affidavit.

List on 25.07.2022 as fresh.

Till the next date of listing, parties shall maintain status quo with regard to the possession over the land in question."

4. Learned counsel for the petitioners submitted that objections against the kurra prepared by Area Lekhpal on 08.09.2018/ 09.02.2018 has not been considered in accordance with law as provided under the U.P. Revenue Code and the rules framed thereunder and same has been illegally confirmed without considering the points mentioned in the objections. He further submitted that subsequent kurra prepared and filed before the trial court on 13.03.2020 has not been taken into consideration and the earlier kurra was confirmed.

5. He further submitted that provisions of Rule 109 of U.P. Revenue Code Rules, 2016 has not been considered by the courts below, as such the impugned

orders are wholly illegal. He placed reliance upon the Rules 109 of the U.P. Revenue Code Rules, 2016, which is as follows:

"Rule 109 of the U.P. Revenue Code , 2016

109. Preliminary and Final decrees (Section 117)-

(1) If the plaint referred to in rule 107 or rule 108 is in order, it shall be registered as a suit and the defendants shall be called upon to file their written statements. The suit shall then be decided according to the provisions of the Code of Civil Procedure, 1908.

(2) Before making a division the court shall-

(a) determine separately the share of the plaintiff and each of the other co-tenure holders ;

(b) record which, if any, of the co-tenure holders wish to remain joint ; and

(c) make valuation of the holding (or holdings) in accordance with the circle rate fixed by the Collector applicable to each plot in the holding.

(3) If the suit is decreed, the Court shall pass a preliminary decree declaring the share of the plaintiff.

(4) After the preparation of preliminary decree the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal.

(5) The Lekhpal shall submit the Kurra report within a period of one month from the date of receiving the order in this regard and at the time of preparation of Kurra he shall observe the following principles-

(a) the plot or plots shall be allotted to each party in proportionate to his share in the holding;

(b) the portion allotted to each party shall be as compact as possible;

(c) as far as possible no party shall be given all the inferior or all the superior classes of land;

(d) as far as possible existing fields shall not be split up;

(e) Plots which are in the separate possession of a tenure holder shall, as far as possible, be allotted to such tenure holder if they are not in access of his share;

(f) If the plot or any part thereof is of commercial value or is adjacent to road, abadi or any other land of commercial value, the same shall be allotted to each tenure holder proportionately and in the case of second condition the same shall be allotted proportionately adjacent to road, abadi or other land of commercial value; and

(g) If the co-tenure holders are in separate possession on the basis of mutual consent or family settlement, the Kurra shall, as far as possible, be fixed accordingly.

(6) When the report regarding Kurra is submitted by the Lekhpal, the objection shall be invited thereon and thereafter the appropriate order shall be passed by the Sub Divisional Officer after affording opportunity of hearing to the parties and considering the objection, if any, filed against the report submitted by the Lekhpal.

(7) If the report and Kurra is confirmed by the Sub Divisional Officer, the final decree shall follow it.

(8) At the stage of the final decree, the Court shall-

(a) Separate the share of the plaintiff from that of the defendant by metes and bounds.

(b) Place on record a map showing in different colours the properties

given to plaintiff as distinct from those given to the defendant.

(c) Apportion the land revenue payable by the parties.

(d) Direct the record of rights and map to be corrected accordingly.

(9) If, for adjusting the equities between the parties, payment of compensation regarding trees, wells or other improvements becomes necessary, the revenue Court concerned may also pass necessary orders at the stage of final decree.

(10) The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded."

6. He next submitted that first and second appellate court even have not considered objections raised by the petitioners against the decree of the trial court, as such the impugned judgment and order passed by first and second appellate court are manifestly erroneous. He also submitted that trial court in pursuance of the order dated 24.02.2021 passed by Additional Commissioner proceeded with the matter in spite of fact that petitioners have challenged the order before the Board of Revenue, but trial court without any opportunity of hearing passed the final judgment and decree on 22.03.2021/ 31.03.2021, which are wholly illegal.

7. On the other hand, contesting respondents submitted that kurra was rightly prepared by the Lekhapl and submitted before the trial court on 08.09.2018/05.10.2018. Kurra was prepared considering the provisions of the U.P. Revenue Code and Rules framed thereunder i.e. as per possession of each party over the land in question. He further submitted that proper opportunity of hearing has been afforded by the courts below to the petitioner by maintaining kurra prepared and submitted in pursuance of the judgment and decree passed by the courts below. He further submitted that suit for partition was filed in the year 2018 and petitioners are not permitted by the court to finalize the proceeding for partition. He further submitted that trial court vide order dated 25.03.2019 has rejected the kurra prepared on 08.09.2018/05.10.2018 on the technical grounds, as such the order dated 25.03.2019 was set aside vide order dated 24.02.2021. He further submitted that no interference is required against the impugned judgment and writ petition is liable to be dismissed.

8. There is no dispute about the fact that suit for partition filed under Section 176 of U.P.Z.A. & L.R. Act was decreed and order was passed for partition of kurra accordingly, kurra was prepared but petitioners filed objection against the kurra, which has been decided against the petitioners and the kurra prepared on 08.09.2018/ 05.10.2018 has been maintained by the impugned judgment.

9. Since on the basis of the objection of the petitioners to the kurra dated 28.09.2018/05.10.2018 Sub-Divisional Officer vide order dated 25.03.2019 has found that kurra dated 28.09.2018/ 05.10.2018 is legally erroneous as such the same was cancelled and Lekhpal was directed to prepare fresh kurra after making spot inspection in presence of both parties. In compliance of the order dated 25.03.2019 even fresh kurra was prepared and filed before trial court on 13.03.2020 which was according to Rule-109 of U.P. Revenue Code Rules 2016 taking into consideration the possession of the parties

also, but revisonal court without considering the subsequent kurra dated 13.03.2020 has maintained the earlier kurra dated 28.09.2018/05.10.2018 which is wholly illegal and against the provisions contained under Rule 109 of U.P. Revenue Code Rules 2016. This Court in the case of **Paras Nath vs. Board of Revenue U.P. At Allahabad and others 2019 (144) R.D. 604** has held that plots in separate possession of tenure holders have to be allotted to him, if possible. Paragraph Nos. 6, 7, 8 and 9 of the judgment are as follows:

6. A perusal of the records shows that in the plaint filed by respondent No. 5 instituting the suit registered under Section 176 of the Act, 1950, the plaintiff had himself pleaded that there had been a family settlement between the parties and the parties were in separate possession of the plots on the basis of the family settlement. The said fact was also pleaded by the petitioner as defendant in his written statement. Evidently, the issue regarding family settlement and the fact that the parties were in separate possession of the different plots or different areas of the plots was the admitted case of the parties and was before the trial court even at the time of the preliminary decree was passed by the trial court. The preliminary decree in a partition suit only determines the shares of the parties in the suit property and does not determine the possession of the parties or the portion to be allotted to them in final decree. The final decree in a suit registered under Section 176 of the Act, 1950 has to be prepared in accordance with Rule 131 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as, 'Rules, 1952'). Rule 131(1)(e) of the Rules, 1952 provides that in making partition of a holding into two or more portions, plots which are in separate possession of a tenure-holder shall, as far as possible be allotted to such tenure-holder if they are not in excess of his share. The petitioner may not be necessarily entitled to be allotted the portion in which he allegedly in separate possession, but the said factor had to be taken into consideration by the courts below before passing the final decree and in case the petitioner was in separate possession, the said plot had to be allotted to the petitioner, if possible.

7. In view of the aforesaid, the orders dated 4.7.2014 passed by the Deputy District Magistrate, i.e., respondent No. 3 in Case No. 15/209, 6.5.2016 passed by the Commissioner, Gorakhpur Division, Gorakhpur, i.e., respondent No. 2 in Appeal No. 1103/D-2014/C2014054901562 and 26.7.2016 passed by the Board of Revenue, U.P. at Allahabad, i.e., respondent No. 1 in Second Appeal No. 881/16 are evidently contrary to law and are hereby quashed.

8. The matter is remanded back to the trial court, i.e., the Deputy District Magistrate, Tehsil-Sadar, District-Maharajganj to pass fresh orders on the objections filed by the petitioner to the report of the Lekhpal within a period of three months from the date a certified copy of this order is produced before him by either of the parties.

9. With the aforesaid direction, the writ petition is allowed.

10. Rule-109 (5) (e) of U.P. Revenue Code Rules, 2016 is similar to that of Rule-131 (1) (e) of U.P.Z.A & L.R. Rules.

11. This Court in another case reported in **2016 (133) RD 459 Babu Ram**

and others Vs. Board of Revenue, Meerut and others has explained the principles provided under Rule-131 (1) (a) of the U.P.Z.A. & L.R. Rules and has held that provision of Rules have not been followed as such the impugned orders passed for preparation of kurras as well as appellate orders were set aside and matter was remitted back before trial court for obtaining fresh kurra and for fresh proceeding for final decree. Paragraph Nos 8, 9, 10 and 11 of the judgment are as follows:

"8. Rule 131 (1) (a) provides that the valuation of the portion allotted to each party shall be proportionate to his share in the holding. The petitioners took plea that plot 55 situates on Dastoi-Hapur main road and has commercial value. The respondents have not denied this fact but stated that in east of plot 67 also there is a road. Lekhpal, in his statement, has admitted that this eastern road is a kachcha road and in between this road and plot 67 there is 10 feet wide nala. Market value of plot 55 and 67 cannot be said to be equal. According to the principles under Rule 131 (1) (a), valuation of the portion allotted to each party shall be proportionate to his share in the holding. Assistant Collector is not justified in allotting share to some of the co-sharers giving frontage on roadside in plot 55 and totally depriving the petitioners from plot 55. Supreme Court in M.L. Subbaraya Setty v. M.L. Nagappa Setty, (2002) 4 SCC 743, held that the legal position is well settled that on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition. We may also clarify that the direction that the present possession of the parties shall be respected as far as possible also does not mean that if the plaintiff is not in possession of any immovable property and the same are in possession of the defendants, he could not be allotted the immovable property even though he is so entitled as per his share. If that was so, the words "as far as possible" in the said direction would become redundant.

9. Plot 54 is adjacent to plot 55 and form a compact area on the spot. Plot 55 has a big frontage on Dastoi-Hapur road. Total area of plot 54 and 55 is 1.0880 hectare. Tenure holders of kurra-1 together have 17/30 share. They were allotted an area of 0.8381 hectare in plots 54 and 55. The petitioners together have 7/30 share but they were not allotted any land in plots-54 and 55. The principles as provided under Rule 131 (1) (a) have not been followed, in as much as the petitioners have been deprived from land of commercial value.

10. In final decree 8 kurras were prepared. Plots 54 and 55 form compact area. In the same way plots 66 and 67 form compact area. In case plots 54 and 55 are divided in north south giving frontage to all the co-sharers on Dastoi-Hapur road according to their share then partition according to principles contained under Rule 131 (1) (a) may be complied with. Similarly compact area of plots 66 and 67 may be divided in east west giving a common rast in west, according to their share.

11. In view of the aforesaid discussion, the writ petition succeeds and is allowed. The kurra dated 24.09.2014, orders of Assistant Collector dated 10.08.2015, Additional Commissioner dated 20.10.2015 and Board of Revenue, U.P. dated 12.05.2016 are set aside. The matter is remanded to Assistant Collector for obtaining fresh kurra relating

partition and after hearing the parties pass fresh final decree in partition suit."

12. In view of ratio of law laid down in **Paras Nath (Supra), Babu Ram (Supra)** as well as according to the provisions contained under Rule 109 of the U.P. Revenue Code Rules, 2016 for preparation of the kurra, the authorities have to observe certain principles, which are mentioned in the said Rule 109 of U.P. Revenue Code Rules, 2016, but the same has not been followed and the objection against the kurra filed by the petitioners has been arbitrarily rejected by the trial court and maintained by the first and second appellate court, which is wholly illegal and against the provisions contained under Rule 109 of U.P. Revenue Code Rules, 2016, as such the impugned judgment and order dated 21.02.2022 passed by respondent No.1 i.e. Board of Revenue, U.P. Allahabad, judgment and order dated 10.08.2021 passed by the respondent No.2 i.e. Additional Commissioner, (Administration) Bareilly Mandal Bareilly, judgment dated 22.03.2021 and decree dated 31.03.2021 passed by Sub Divisional Officer, Bilsi, Budaun are wholly illegal and liable to be set aside, the same are hereby set aside. **The writ petition is allowed** and the matter is remanded back before the trial court to decide the objection of the petitioners dated 22.10.2018 afresh in accordance with the provisions contained under rules 109 of the U.P. Revenue Code Rules, 2016 expeditiously preferably within a period of **four months** from the date of production of certified copy of this order.

(2022) 10 ILRA 767
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-B No. 1622 of 2022

Mohd. Imran ...Petitioner
Versus
Dy. Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ved Mani Sharma

Counsel for the Respondents:
C.S.C., Sri Shivajee Singh Sisodiya

Civil Law - U.P. Consolidation of Holdings Act,1953 - U.P. Consolidation of Holdings Rules Rule 26 – Code of Civil Procedure, 1908 - O. 22 - Proceedings before the consolidation authorities are treated as a judicial proceeding but it does not mean that the provisions of C.P.C. are made applicable in the proceeding under the U.P.C.H. Act - provisions as enunciated under Order 22 of Code and the provisions as enunciated under Article 120 and 121 of the Limitation Act are not applicable in a proceeding under the U.P.C.H. Act, though provisions of section 5 of the Limitation Act, 1963 has been made applicable, for the limited purposes in proceedings under U.P.C.H. Act by virtue of Section 53-B of the U.P.C.H. Act (Para 17)

Grievance of the petitioner is that the Settlement Officer of Consolidation illegally allowed the substitution application on the same day of its filing, without giving opportunity of hearing to the present petitioner - Held - mere furnishing an information qua death of any party, along with the details of his heir and legal representatives, would be suffice for the purpose of survival of the cause of action involved in the matter - petitioner failed to demonstrate as to how he is prejudiced due to the order passed by the Settlement Officer of Consolidation in allowing the substitution or there is any likelihood of causing miscarriage of justice to the present petitioner (Para 18)

Dismissed. (E-5)

List of Cases cited:

1. Jai Jai Ram Manohar Lal Vs National Building Material Supply; AIR 1969 SC 1267

2. Ghanshyam Dass & ors. Vs Dominion of India & ors., AIR (1984) 3 SCC 46.

3. Bhivchandra Shankar More Vs Balu Gangaram More & ors. 2019(6) SCC 387

4. Bijai Narain Singh & ors. Vs St. of U.P. & ors., A.I.R. 1970 All 241 (FB) Anand

5. Narayan & ors. Vs Deputy Director of Consolidation, Gorakhpur & ors.

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner, learned counsel for the contesting respondent no. 6 and learned Standing Counsel representing respondent nos. 1, 2, 3 and 10.

2. Grievance of the petitioner is that the Settlement Officer of Consolidation has illegally allowed the substitution application on the same day of its filing, without giving opportunity of hearing to the present petitioner.

3. Record reveals that, during pendency of the appeal, a substitution application dated 17.02.2021 along with delay condonation application have been filed by the heirs and legal representatives of appellant Munir-ud-deen with an averment that he has died six months before, therefore, his name may be deleted and in his place names of his sons namely Mohd. Shafi, Mohd. Rahis, Mohd. Ishaq, Mohd. Rafiq, Khushi, Mohammad and Nafees Mohd. may be ordered to be substituted. Aforesaid substitution application along with delay condonation application was entertained on the same day by the Settlement Officer of Consolidation, who has jotted in the margin of the application allowing the substitution application and issued notices to the parties fixing 03.03.2021. At subsequent stage, present petitioner has filed objection dated 17.03.2021. The objection field by the petitioner was rejected by the Settlement Officer of Consolidation vide order dated 22.12.2021. Having being aggrieved with the orders passed by the Settlement Officer of Consolidation, present petitioner has preferred a revision before the Deputy Director of Consolidation which was dismissed as well affirming the order passed by the Settlement Officer of Consolidation. Being aggrieved petitioner has filed instant writ petition assailing orders of Settlement Officer of Consolidation (respondent no. 2) and Deputy Director of Consolidation (respondent no. 1).

4. Counsel for the petitioner submits that substitution application has been allowed on the same day of filing of the application without giving opportunity of hearing. It is next submitted that delay in filing the substitution has not been condoned. Deputy Director of Consolidation has illegally dismissed the revision on the ground of maintainability being filed against the interlocutory order, therefore, orders passed by respondent No. 1 and 2 are illegal, unwarranted under the law and tained with irregularities which deserves to be quashed.

5. Per contra, learned counsel for the contesting respondent has contended that substitution order dated 17.2.2021 was passed in presence of opposite party (in appeal) and he has not denied his presence at any stage. In deciding the revision, respondent No. 1 has discussed the merits

of the substitution as well. Petitioner (opposite party in appeal) only wants to linger the matter on the ground of technicalities which is not sustainable in the eye of law. It next contended that orders passed by respondents No. 1 and 2 are legal and suffers no infirmity, therefore, they are liable to be affirmed and instant writ petition is liable to be dismissed.

6. Having considered the submissions advanced by the learned counsel for the parties and perusal of record, I am of the considered opinion that the purpose of substitution is only for the survival of the case. No right, title and interest confers upon the substituted person with respect to the property in question. If there is any dispute qua right, title and interest of the substituted person/s, same would be adjudicated upon by the court competent in a befitting proceeding as advised. There is nothing on record to demonstrate that the persons, who are proposed to be substituted in place of deceased Munir-ud-deen, are not the heirs and legal representatives of the deceased. This aspect of the matter has properly been considered by the Deputy Director of Consolidation and has given specific finding that revisionist has not adduced any evidence to prove that there are other heirs and legal representatives of the deceased than the persons who have been substituted. Respondent no. 1 has also considered the death certificate and family membership certificate (succession) adduced by the sons of the deceased. Findings of fact given by respondent no. 1, in this respect as mentioned above, have not been contradicted by the petitioner in the instant writ petition.

7. Moreover, order dated 17.2.2021 evince presence of both the parties. For ready reference, order dated 17.2.2021 is quoted herein under:-

"उभयपक्षों को सुना गया, न्यायहित में प्रतिस्थापन प्रार्थना पत्र स्वीकार किया जाता है। पक्षों को नोटिस जारी होकर पत्रावली दिनांक 03.03.2021 को पेश हो।"

8. Finding returned by Settlement Officer of Consolidation, that substitution application was allowed in presence of both the parties, has not been challenged by the petitioner at any stage even before this Court. In objection dated 17.3.2021 (annexure No. 5) petitioner has raised objection qua sufficiency of grounds for delay condonation in filing substitution application. Apart form that paragraph 9 of memo of revision dated 11.1.2022 (annexure No. 7) it has been averred that court subordinate has passed order without giving opportunity of hearing and against the provisions of law. Plea of not affording opportunity of hearing has been taken as well in paragraph 17 of the writ petition, however, finding of fact returned by Settlement Officer of Consolidation qua "both parties heard" has not been challenged by the petitioner.

9. Prima facie, in particular facts and circumstances of the instant case, it appears that, while allowing the substitution application, Settlement Officer of Consolidation was not oblivious of the delay caused in filing the substitution application, though specific order has not been passed for the condonation of delay. Substitution application was filed along with the delay condonation application and after considering both the application order dated 17.2.2021 has been passed. In paragraph 1 of the delay condonation application, sufficient reason has been assigned that expences and instructions

were provided to the previous counsel Shri R.L. Lal, Advocate, however, after engaging another counsel, this fact came to knowledge that steps were not taken to substitute the heirs of the deceased. Therefore, there is no deliberate delay in moving substitution application, which is liable to be condoned. Cause shown for the delay has neither been assailed in the objection dated 17.3.2021 nor in the memo of revision. For the first time, in paragraph 19 of the writ petition, it is averred that "there is no documentary evidence filed with the substitution application proving that Shri RS Lal, Advocate was appellant's counsel". In paragraph 19, petitioner has referred the name of counsel as "Shri RS Lal" whereas in delay condonation application name of counsel is shown as "Shri RL Lal". Petitioner, in paragraph 3 of the memo of revision, has admitted that the counsel for Munir-ud-deen was through out pursing the appeal but heirs of Munir-ud-deen have not filed substitution application.

10. In my opinion, contesting respondents have sufficiently explained the delay of six months (as averred in delay condonation application) in filing the substitution application owing to death of appellant namely Munir-ud-deen and, therefore, it will have an effect of obliterating the ramification of delay in filing the substitution application.

11. Even otherwise it would not be appropriate to shut the door of justice due to little delay caused in filing the substitution application. In catena of judgments Hon'ble Supreme Court has expressed the view that endeavour should be made for extending the substantial justice rather to shut the door of justice on technical ground.

12. It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. Reference-- **Jai Jai Ram Manohar Lal Vs. National Building Material Supply; AIR 1969 SC 1267,** wherein it has been held that the substantial justice and technicalities, if pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. Reference - **Ghanshyam Dass & Ors. Vs. Dominion of India & Ors., AIR (1984) 3 SCC 46.**

13. Apart from that in recent judgment of **Bhivchandra Shankar More vs. Balu Gangaram More & Ors** (decided by Hon'ble Supreme Court on 07.05.2019), reported in 2019(6) SCC 387 it is expounded that in condoning the delay "sufficient cause" should be given liberal construction so as to advance substantial justice. The relevant paragraph nos. 15 and 16 of the aforesaid judgment are being quoted herein below:-

"15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bonafide could be imputable to the appellant. After referring to various judgments, in B. Madhuri, this Court held as under:-

"6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding

the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

16. Observing that the rules of limitation are not meant to destroy the rights of the parties, in N. Balakrishnan v. M. Krishnamurthy (1998) 7 SCC 123, this Court held as under:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts.

So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time." As pointed out earlier, an appeal under Section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay."

14. Moreover, applicability of provisions as enunciated under Order 22 of Code of Civil Procedure (in brevity "Code") would also be a paramount question to be considered by this Court in the instant matter. Order 22 of Code deals with the substitution of heirs and legal representatives of the deceased, who arrayed as a party in the cause title of suit/appeal being plaintiff/appellant or defendant/opposite party. U.P. Consolidation of Holdings Act (in brevity "U.P.C.H. Act") is an special enactment and under the provisions as enunciated under Section 4 of Code the provisions of the Code shall not be deemed to limit or otherwise affect the provisions of U.P.C.H. Act. For the purposes of proceedings before the consolidation courts, procedure has been provided under Section 38 of U.P.C.H. Act read with Rule 26 of U.P. Consolidation of Holdings Rules (in brevity "Rules"). In additional to these provisions, Section 41 of U.P.C.H. Act enunciates that unless otherwise specially provided by or under U.P.C.H. Act, the provisions of Chapter IX and X of U.P. Land Revenue Act, 1901 shall apply to all proceedings including appeal and application under U.P.C.H. Act. No doubt that by virtue of Section 40 of U.P.C.H. Act proceedings before the consolidation authorities have been treated as a judicial proceeding but it does not mean that the provisions of Code are made applicable in the proceeding under the U.P.C.H. Act.

15. Considering the applicability of Code in proceedings under the U.P. C.H. Act, Full Bench of this Court in the case of **Bijai Narain Singh and others vs. State**

of U.P. and others, reported in A.I.R. 1970 All 241 (FB) has expounded that provisions of Code are not fully applicable in the proceeding under U.P.C.H. Act. Relevant paragraph no. 32 of the judgment is being quoted herein under:-

"32. It may now be seen as to whether the various authorities constituted under the Act are governed by the Code of Civil Procedure in the matter of procedure. On an examination of the various provisions of the Act it would appear that all the provisions of the Code of Civil Procedure have not been made applicable to the proceedings under the Act. Some limited powers have been specifically given under Section 38 and enlarged by Rule 26, which have been again supplemented by S. 41, which says that the provisions of Chapters IX and X of the U.P. Land Revenue Act, 1901, shall apply to all proceedings under the Act. On a perusal of the provisions of Section 38 and Rule 26 it would appear that they make a mention of the application of only some provisions of the Code of Civil Procedure. In the same way the provisions in Chapter IX and X of the Land Revenue Act show that all the provisions of the Code of Civil Procedure have not been made applicable to the proceedings under that Act also. As such, it could not be held that all the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Act. Had the intention of the legislature been to make all the provisions of the Code of Civil Procedure applicable to the proceedings under the Act, it could have said so just in one sentence."

16. In the matter of **Anand Narayan and others vs. Deputy Director of Consolidation, Gorakhpur and others,** reported in 2013(121) RD 45, question relating to applicability of Order 22 of Code was considered and answered by the coordinate Bench of this Court that the provisions as enunciated under Order 22 of Code qua substitution of the heirs and legal representatives of the deceased on the record is not applicable in the cases/appeal/revision under the U.P.C.H. Act. Relevant paragraph no. 12 of the judgment in Anand Narayan (supra) is being quoted herein under:-

"12. In such circumstances, the provisions of Order 22 Rule 3(2) and Rule 4(3) CPC which provides for abatement of the suit and proceeding for not filing the substitution application within 90 days of the death of the parties will not automatically apply to the proceeding before the consolidation authorities and in view of Section 4 CPC, the special provisions regulating the proceedings before the consolidation authorities will have overriding effect and the provisions of CPC will not be imported to the proceeding in the consolidation. The case law relied by counsel for the respondents in the cases of Khedan Vs. Vishwanath, 1989 RD 364, Dibhag Singh Vs. DDC and others, 1990 RD 151, Ishwari Vs. DDC and others, 1990 RD 175 and Ranvir Singh Vs. JDC and others, 2007 (102) RD 42 as well as the Full Bench judgment of this Court in Bijai Narain Singh and Others v. State of U.P. and Others AIR 1970 All 241 (FB) squarely cover the controversy. In such circumstances, the argument of counsel for the petitioner is not liable to be accepted."

17. In this view of the matter, even assuming that substitution application was filed at a belated stage, there will be no abatement in the matter inasmuch as provisions as enunciated under Order 22 of Code and the provisions as enunciated

under Article 120 and 121 of the Limitation Act are not applicable in a proceeding under the U.P.C.H. Act, though provisions of section 5 of the Limitation Act, 1963 has been made applicable, for the limited purposes in proceedings under U.P.C.H. Act by virtue of Section 53-B of the U.P.C.H. Act. Therefore, mere furnishing an information qua death of any party, along with the details of his heir and legal representatives, arrayed in the cause title of any proceeding under U.P.C.H. Act would be suffice for the purpose of survival of the cause of action involved in the matter.

18. Learned counsel for the petitioner has failed to demonstrate as to how he is prejudiced due to the order passed by the Settlement Officer of Consolidation in allowing the substitution or there is any likelihood of causing miscarriage of justice to the present petitioner. I do not find any justifiable ground to interfere in the impugned orders passed by the Settlement Officer of Consolidation and the Deputy Director of Consolidation.

19. Accordingly, the present writ petition, being misconceived and devoid on merits, is **dismissed** with no order as to the costs.

20. However, before parting the matter, counsel for both the parties have requested for issuance of a direction for expeditious disposal of the appeal pending before the Settlement Officer of Consolidation.

21. Considering the old matter, the Settlement Officer of Consolidation, before whom the appeal is pending, is hereby directed to decide the appeal expeditiously, preferably within a period of three months from the date of production of a certified copy of this order.

22. It is expected that it should be decided by reasoned and speaking order, in accordance with law, after affording opportunity of hearing to the parties concerned without granting unnecessary adjournments.

(2022) 10 ILRA 773
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 3449 of 2018

Ram Murat ...Petitioner
Versus
D.D.C. Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sri Kamleshwar Singh, Sri Krishna Kant Vishwakarma, Sri Rakesh Pande, Sri Rajesh Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Praveen Chandra Mishra, Sri Ram Sajiwan Mishra

Hindu Law - Hindu Adoption & Maintenance Act, 1956 - Section 16 - Proof of Adoption deed - Under the Hindu Law, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking- it is essential to have a formal ceremony. - law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him - ceremony of giving and taking is essential to validate adoption - Indian Evidence Act, S. 90 - so far as admissibility of the document being 20 year old under Section 90 of Evidence Act, 1872 it has nothing to do with the ceremonies of the adoption which has to be proved either by direct evidence or presumption has to be raised according to the provisions of

Section 16 of Hindu Adoption and Maintenance Act (Para 19, 21)

Finding recorded by revisional court on the admissibility of adoption deed dated 23.3.1948 cannot be sustained as the adoption deed dated 23.3.1948 has no signature of person giving his child for adoption - Non-filing of original adoption deed before Consolidation Officer go against the respondent nos. 4 to 7 - Continuance of name of natural father of Hira Lal in Voter List, Kutumb Register as well as in the registered sale deed executed by Hira Lal raises presumption of the fact that adoption deed set up by Hira Lal is doubtful - Consolidation Officer and Settlement Officer (Consolidation) have rightly disbelieved the adoption deed executed on 23.3.1948 which was basis of claim of respondent nos. 4 to 7 - Revisional court exceeded his jurisdiction in reversing the order of Consolidation Officer and Settlement Officer (Consolidation) and upholding the adoption deed as valid and genuine and maintaining the basic year entry (Para 24)

Allowed. (E-5)

List of Cases cited:

1. Shri Jagdamba Prasad (dead) thr. L.R.'s & ors. Vs Kripa Shankar (Dead) thr. L.R. & ors., 2014 (124) R.D. 1

2. Ram Udit Vs D.D.C. & ors., 2014 (125) R.D. 627

3. Harihar Vs Deputy Director of Consolidation Mau & ors. 2015 (127) RD 144

4. Dr. Jeevan Bahadur Samaddar Vs Govind Charan Samaddar & ors. 2013 (120) RD 717

5. Ram Vrat Tripathi Vs Deputy Director of Consolidation & ors. 2006 (100) R.D. 581

6. Nathu Ram & ors. Vs Deputy Director of Consolidation Varanasi & ors. 2017 (136) RD 480

7. Ram Dular Vs Deputy Director of Consolidation Jaunpur & ors. 1994 RD 290 (SC)

8. Sheshmani and Another Vs Deputy Director of Consolidation District- Basti U.P. & ors. 2001 RD 210 (SC)

9.Sri Jagdamba Prasad (dead) through LRs & ors. Vs Kripa Shankar (dead) through LRs & ors. 2014 (124) RD 1 (SC),

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Rajesh Kumar Singh along with Mr. Krishna Kant Vishwakarma, counsel for the petitioner, Mr. Ram Sajiwan Mishra, counsel for Respondent Nos. 4 to 7. Mr. Praveen Chandra Mishra has put in appearance for Respondents No. 8 to 18.

2. Briefs facts of the case are that dispute relates to plots of Khata No. 81 situated in Village- Dewapur, Pergana- Nawabganj, District- Allahabad. Particulars of plots of Khata No.81, its area and Basic Year entry are as follows:-

S.No.	Khata No.	Plots Nos.	Area	Name of the tenure holder recorded in Basic Year
1.	81	52 (Bhumidhari)	5-4-12	Hira Lal adopted son of Ram Charan
2.	81	23 (sirdari)	0-5-0	
3.	81	24 (Sirdari)	2-10-11	
4.	81	55(Sirdari)	0-5-0	

Status of revenue entry in C.H. Form 45 in respect to 1st consolidation operation, are as follows:-

S.No.	Khata No.	Plots Nos.	Area	Name of the tenure holder recorded in Basic Year
1.	1	52	**(Class-1 ka Bhumidhar)** 5-4-12	Ram Charan son of Sheetal, Ram Lakhan (major), Hira Lal, (16 year minor) guardian Ram Lakhan real brother, sons of Mahavir

S.No.	Khata No.	Plots Nos.	Area (Class-2 Sirdar)	Name of the tenure holder recorded in Basic Year
1.	68	23	0.5.0	Ram Charan son of Sheetal
		24	2.10.11	

3. Against the Basic Year Entry, an objection under section- 9A(2) of U.P.C.H. Act was filed by petitioner's father Ram Lakhan with the prayer that he should be recorded alongwith Hira Lal over plot No. 52 and their share should be recorded as ½ each. A further prayer was made that sale deed executed by Hira Lal in favour of the Mata Prasad in respect to plot no. 52 be cancelled. In respect to plot Nos. 23, 24 and 25, petitioner's father prayed to record his name exclusively after expunging the name of Hira Lal, Father of respondent No.4.

4. Hira Lal son of Ram Charan filed his written statement and opposed the objection filed by Ram Lakhan. Hira Lal claimed the right on the basis of the adoption deed executed by Ram Charan in his favour on 23.3.1948.

5. Mata Prasad claimed the right on the basis of registered sale deed executed by the Hira Lal in his favour on 5.7.1983 in respect to 1.0.0 area of plot no. 52 so his name be recorded in place of Hira Lal. Ayodhya Prasad and Nanhe Lal claimed the right on the basis of the registered sale deed executed on 3.7.1973 by Ram Lakhan in their favour in respect to 2-12-6 area of plot no.52. Accordingly, Ayodhya Prasad, Nanhe Lal (ancestor of respondent nos. 8 to 18) prayed for recording their names after expunging the name of vendor Ram Lakhan.

6. Nine issues were framed before the Consolidation Officer and parties adduced oral and documentary evidences in support of their cases. Consolidation Officer while deciding the issues nos. 1, 2, 3, 4 & 9 recorded finding of fact that adoption deed as claimed by Hira Lal is void and ineffective as ceremony of adoption has not been proved by Hira Lal. Consolidation Officer further recorded finding that even after adoption, Hira Lal executed a registered sale deed in 1974, showing his age as 32 years and his father's name as Mahavir (natural father) which demonstrate that adoption deed is void. Accordingly,

Consolidation Officer ordered to record the name of Ram Lakhan (deceased), substituted by Ram Murat for ½ share along with Hira Lal, son of Mahavir in the place of Hira Lal, adopted son of Ram Charan.

7. While deciding the Issue Nos. 5 & 6, Consolidation Officer ordered to record the name of Ayodhya and Nanhe Lal, being vendees of Ram Lakhan, son of Mahavir as claim for ½ share of Ram Lakhan was accepted.

8. While deciding Issue Nos. 7 & 8, plot nos.23, 24 & 55 were ordered to be vested in state after expunging the name of recorded tenure holder by order of Consolidation Officer dated 7.10.2008.

9. Against the order of Consolidation Officer dated 7.10.2008, three appeals were filed under Section 11(1) of U.P. C.H. Act, one appeal by Hira Lal (father of respondent no.4), one appeal by petitioner Ram Murat and one appeal by Mata Prasad (respondent no.1). All the three appeals were consolidated and heard together by Settlement Officer (Consolidation) and by order dated 10.9.2014, Settlement Officer (Consolidation) dismissed all the three appeals.

10. Against the appellate order dated 10.9.2014, three revisions under Section 48 of the U.P. C.H. Act were filed, one by petitioner Ram Murat, one by Raja Ram and others (respondent nos. 4 to 6) and one by Mata Prasad (respondent no.7). All the three revisions were heard together by Deputy Director of Consolidation. Deputy Director of Consolidation vide order dated 8.3.2008, allowed the revisions of respondent nos. 4 to 7 and dismissed the revision filed by petitioner, setting aside the orders passed by Consolidation Officer and Settlement Officer (Consolidation) dated 7.10.2008 & 10.9.2014 and maintained the basic year entry of khata no.81 as well as ordered to record the names of Mata Prasad, vendees of Hira Lal in place of Hira Lal in respect of plot no. 52, area 1-0.0. Hence this writ petition on behalf of the petitioner.

11. Counsel for the petitioner submitted that Consolidation Officer and Settlement Officer (Consolidation) have recorded finding of fact that adoption deed is void and ineffective but Deputy Director of Consolidation has illegally held in exercise of revisional jurisdiction that civil court in Suit No.12 of 1979 has recorded finding that Ram Charan has adopted Hira Lal while the fact is the Suit No.12 of 1979 filed by Hira Lal for cancellation of sale deed dated 3.6.1973 executed by Ram Lakhan in favour of Ayodhya Prasad and Nanhe Lal was dismissed by judgment dated 8.12.1982 on the ground of lack of jurisdiction, as such, finding on any other point which were not in issue in the suit will be irrelevant. He further submitted that certified copy of adoption deed dated 23.3.1948 was filed before Consolidation Officer but original adoption deed was not filed nor there was any explanation for the same, as such, in view of the provisions contained under Sections 64, 65, 74 & 76 of the Indian Evidence Act, 1872, certified copy of adoption deed will not be admissible. He further submitted that Consolidation Officer and Settlement Officer (Consolidation) after considering the orders and entries of earlier consolidation operation, have rightly held that petitioner and his vendees are entitled to be recorded over plot no.52 but revisional court has illegally interfered with findings of act, as such, revisional order is

liable to be set aside. He further submitted that court of Consolidation Officer and Settlement Officer (Consolidation) have illegally vested the plot nos. 23, 24 & 55 in the state in spite of the fact that the petitioner's father was recorded in the 1st consolidation operation over the plot nos. 23, 24 & 55. He also submitted that provisions of Section 175 of the U.P.Z.A. & L.R. Act was not taken into consideration, as such, impugned orders are illegal. He placed reliance upon the judgment of the Apex Court in the case of **Shri Jagdamba Prasad (dead) thr. L.R.'s and Others vs. Kripa Shankar (Dead) thr. L.R. and Others, 2014 (124) R.D. 1** in which it is held that Section 48 of the U.P. C.H. Act is pari materia to Section 115 of the Code of Civil Procedure, 1908. Power of revisional authority only extends to ascertaining whether the subordinate courts have exceeded their jurisdiction in coming to the conclusion, if not, revisional authority cannot come to a contrary conclusion by admitting new fats either in form of documents or otherwise. He further placed reliance upon a judgment of this Court in the case of **Ram Udit vs. D.D.C. and Others, 2014 (125) R.D. 627** in which judgment of the Apex Court rendered in **Shri Jagdamba Prasad (supra)** has been followed.

12. On the other hand, counsel for the respondent nos. 4 to 7 submitted that revisional court has rightly exercised the jurisdiction as vested in him under Section 48 as well as explanation nos. 1, 2 & 3 of Section 48 of the U.P. C.H. Act, as such, no interference is required against the impugned revisional order. He further submitted that adoption deed executed on 23.3.1948 is more than 20 year old, as such, respondent nos. 4 to 6 are entitled to benefit of Section 90 of the Indian Evidence Act, 1872. He further submitted that entries made in the first consolidation operation were manipulated as Hiralal, father of respondent no.4 was minor during that period, as such, no reliance can be placed upon the entries of first consolidation operation. He further submitted that sale deed executed by Hiralal on 20.5.1974, although, contain the name of natural father but it was the creation of his elder brother Ram Lakhan (father of petitioner) being guardian of Ram Lakhan. Counsel for the respondent placed reliance upon paragraph no.21 of the written statement filed by Ram Lakhan in Civil Suit No.12 of 1979 by which, according to him, Ram Lakhan admitted adoption deed preferred by Hira Lal. He further placed portion of the judgment of civil court dated 8.2.1982 where civil court on the basis of averment of paragraph no.21 of the written statement found that Hira Lal is adopted son of Ram Charan, accordingly, counsel for the respondent nos. 4 to 7 submitted that no interference is required against the impugned revisional order.

13. In reply, counsel for the petitioner submitted that at the time of execution of sale deed by Hira Lal in the year 1974, Hira Lal was very much major and was aged about 32 years. He further submitted that father's name of Hira Lal as Mahavir is also mentioned in Voter List, kutumb register as well as in C.H. Form 45 of earlier consolidation operation which cannot be ignored while considering the case of adoption set up by Hira Lal (father of respondent no.4). He further placed reliance upon paragraph no.16 of the written statement where it was specifically stated that there was no adoption of plaintiff (Hira Lal) according to Hindu religion. He further submitted that there

was no issue framed in Suit No.12 of 1979 regarding adoption deed dated 23.3.1998 nor there was any adjudication of Civil Suit No.12 of 1979 on merit rather the suit was dismissed for the lack of jurisdiction of the court, as such, no reliance can be placed upon the judgment of Suit No.12 of 1979.

14. I have considered the argument advanced by learned counsel for the parties and perused the records.

15. There is no dispute about the fact that in the basic year of the consolidation operation, Hiralal, adopted son of Ram Charan was recorded in the basic year of the consolidation operation. Against the basic year entry, an objection under Section 9-A(2) of the U.P.C.H. Act was filed by petitioner's father Ram Lakhan that he should be recorded along with Hira Lal over plot no.52 and share should be ½ each. He further prayed that in respect to plot nos. 23 to 25, petitioner's father be recorded exclusively after expunging the name of Hira Lal. On the other hand, Hiralal contested the objection on the basis of adoption deed alleged to be executed in his favour on 23.3.1948 by Ram Charan. Respondent no.7 claimed the right on 1.0.0 area of plot no.52 on the basis of sale deed executed in his favour by Hira Lal and Ayodhya Prasad and Nanhe Lal claimed the right on the basis of registered sale deed executed in their favour by Ram Lakhan in respect to 2.12.6 area of plot no.52. Consolidation Officer and Settlement Officer (Consolidation) have given right to petitioner's father to be recorded over plot no.52 having ½ share, accordingly, right of vendees of petitioner's father was also accepted but the claim of Hiralal on the basis of adoption deed alleged to be executed on 23.3.1948 was rejected, accordingly, the claim of vendees of Hiralal was also rejected. Consolidation Officer has further ordered to vest the plot nos. 23 to 25 in the state as nobody was found heir of Ram Charan. Deputy Director of Consolidation has allowed the revisions of respondent nos. 4 to 7 and dismissed the revision of petitioner, accordingly, basic year entry was maintained and the case of adoption was found proved by Deputy Director of Consolidation.

16. Since in the 1st consolidation operation Ram Charan, son of Sheetal, Ram Lakhan, son of Mahavir and Hiralal, minor son of Mahavir under guardianship of Ram Lakhan were recorded over plot no.52 in C.H. Form No.45, as such, that entry cannot be ignored where the name of natural father Mahavir is mentioned against the name of Hira Lal. It is further relevant that first consolidation operation were completed in the year 1960 but no steps were taken by Hiralal to correct the entry on the basis of adoption deed nor Ram Charan has taken any steps being father of Hiralal. So far as adoption deed of 23.3.1948 is concerned, there is no signature of the person who is giving his child for adoption. It is further relevant that original adoption deed has not been filed before Consolidation Officer rather certified copy of adoption deed was filed and there is no explanation regarding original adoption deed. It is further relevant that name of natural father of Hiralal has been mentioned in Voter List, Kutumb Register even in the registered sale deed executed in the year 1974 when the Hiralal was 32 years of age, as such, this fact is also relevant which was considered by Consolidation Officer and Settlement Officer (consolidation). So far as the judgment of civil court passed in civil suit no.12/1979 filed by Hiralal for cancellation of sale deed executed by Ram Lakhan

infavour of Ayodhya Prasad and Nanhe Lal are concerned, since that suit was dismissed for lack of jurisdiction and there was no issue in the suit with respect to adoption deed dated 23.3.1948, as such, any observation in that suit regarding adoption deed will not be conclusive proof of adoption deed. Revisional court has illegally held that civil court has found the adoption deed dated 23.3.1948 as genuine. On the question of admissibility of adoption deed. It will be relevant to mention here that adoption deed is of 23.3.1948 that is before the enforcement of the Hindu Adoption & Maintenance act, 1956. In 1948, one could not claim validity of his adoption merely because registered document was executed and no presumption in law about the validity of adoption arose, according to the then prevalent law. The registered document regarding adoption has assumed significance after the enforcement of Hindu Adoption and Maintenance Act, 1956.

17. On the question of admissibility of certified copy of adoption deed, the perusal of Section 64, 65, 74 & 76 of the Evidence Act, shall be relevant, which are as follows:

"64. Proof of documents by primary evidence.--Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Cases in which secondary evidence relating to documents may be given.--Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:--

(a) When the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) 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;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence; [India] to be given in evidence;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

74. Public documents.--The following documents are public documents :--

(1) Documents forming the acts, or records of the acts--

(i) of the sovereign authority, (ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents.

76. Certified copies of public documents.--Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.--Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

18. On the point of presumption of document, more than 20 years old Section 90 of the Evidence Act, 1872 shall be relevant which is as follows:-

90. Presumption as to documents thirty years old.--Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Explanation.--Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This Explanation applies also to section 81.

STATE AMENDMENTS

Uttar Pradesh.

(a) Renumber section 90 as sub-section (1) thereof;

(b) in sub-section (1) as so renumbered, for the words "thirty years", substitute the words "twenty years";

(c) after sub-section (1) as so renumbered, insert the following sub-section, namely:--

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, it is that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested".

(d) After section 90, insert the following section, namely:--

"90A. (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which

is part of the record of a Court of Justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of defence or is relied upon in the plaint or written statement."

The Explanation to sub-section (1) of section 90 will also apply to this section; [Vide Uttar Pradesh Act 24 of 1954, sec. 2 and Sch. (w.e.f. 30-11-1954).]"

19. On the point of Section 90 of Indian Evidence Act as well as on the point of proof of adoption deed this Court in a case of ***Harihar Vs. Deputy Director of Consolidation Mau and Others 2015 (127) RD 144*** has held that so far as admissibility of the document being 20 year old under Section 90 of Evidence Act, 1872 it has nothing to do with the ceremonies of the adoption which has to be proved either by direct evidence or presumption has to be raised according to the provisions of Section 16 of Hindu Adoption and Maintenance Act. Paragraph No.7, 8 and 9 of ***Harihar (supra)*** is as follows:

"7. I have considered the arguments of the counsel for the parties and examined the record. Admittedly, the ceremonies of adoption have not been proved by any witness. Thus the only evidence relating to adoption is adoption deed dated 12.08.1964. The arguments of the counsel for the petitioner that the document, being twenty years old was admissible in evidence without any formal proof under Section 90 of the Act as such the consolidation authorities are bound to raise presumption of the ceremonies of adoption as provided under Section 16 of Hindu Adoption and Maintenance Act, 1956. Section 16 of which is relevant is quoted below:-.

16. Presumption as to registered documents relating to adoption.-- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

8. In order to raise presumption regarding adoption on the basis of adoption deed, the deed must have been signed by the person giving and the person taking the child in adoption both. Admittedly, deed dated 12.08.1964 was not signed by natural father and mother of the petitioner. As such presumption regarding ceremonies of adoption on its basis cannot be raised. In order to be valid adoption, the child must have been adopted according to the rites and custom of Hindu law. So far as admissibility of the document being 20 years old under Section 90 of Evidence Act, 1872, it has nothing to do with ceremonies of the adoption which has to be proved either by direct evidence or presumption has to be raised according to the provisions of Section 16 above.

9. Findings regarding Udasi being daughter of Soti and Khedani is based upon Pariwar Register as well as oral evidence of Udasi, which is admissible under Section 50 of the Evidence Act, 1872. There is no illegality in respect of findings of fact in this respect and no interference is required by this Court in exercise of writ jurisdiction. Similarly, the consolidation authorities have jurisdiction to correct the revenue entries of other khatas, even there was no objection by Udasi. In view of

aforesaid discussions, orders of respondents-1 and 2 do not suffer from any illegality. The writ petition has no merit and is dismissed."

20. This Court in another judgment in a case of ***Dr. Jeevan Bahadur Samaddar Vs. Govind Charan Samaddar and Others 2013 (120) RD 717*** has held that if certified copy has not been placed on record after satisfying the requirements of Section 64/65 of the Indian Evidence Act, 1872, the mere fact that it was a certified copy by itself, would not make it admissible in evidence since it is secondary evidence and can be adduced in evidence only as provided in statute and not otherwise. Paragraph No.39 and 40 of ***Dr. Jeevan Bahadur Sammaddar (supra)*** will be relevant to appreciate the present controversy which is as follows:

"41.Thus presumption under Section 90(1) is attracted in respect of original document. However, sub-section (2) is applicable in respect of certified copies but it would be attracted only when certified copy has been adduced in evidence in accordance with procedure prescribed in law, or after satisfying the requirement of law, i.e., Sections 64 and 65 of Act, 1872 and not otherwise. Under Act, 1872 certified copy as such is not admissible in evidence being a secondary evidence unless the procedural requirement thereof is satisfied. It is only when a certified copy has been adduced in evidence in accordance with requirement of the statute, the question of presumption under Section 90(2) would be attracted and not otherwise. Section 90(2) cannot be read in isolation. It has to be read in harmony with other provisions of the Act, 1872.

42. The above discussion also leads to the inference that, (1) presumption under Section 90 is discretionary, though the discretion is to be exercised judiciously; (2) sub-section (1) of Section 90 (as amended in U.P. or otherwise) is applicable only in respect to original document and not copies or certified copies; (3) the document must be 20/30 years old and must have come from proper custody; (4) the presumption is in respect of execution and attestation of document as also the handwriting of person concerned; (5) sub-section (2) (as available in U.P.) is applicable to certified copies when the same are adduced in evidence in accordance with law, i.e., as per the requirement of Sections 64 and 65 of Act, 1872. "

21. This Court in the case of ***Ram Vrat Tripathi Vs. Deputy Director of Consolidation and Others 2006 (100) R.D. 581*** has held that ceremony of giving and taking is essential to validate adoption. Para No.5 of the judgment is as follows:

"5. Besides the controversy that whether the adoption deed being tweenty year old, no further proof was required and document was to be accepted as it is, this Court has to consider various other facts and circumstances besides voluminous evidence as was available before the Courts below and as has been placed before this Court also. Petitioner has brought on record bulk of documentary evidence in the shape of school record, Khasra extracts and documents relating to proceedings of earlier cases. In all the school record, respondent No. 3 is shown to be the son of Sahadeo. In the Transfer Certificate, School Leaving Certificate, admission documents and in the declaration in the University, respondent No. 3 was shown to be recorded as son of Sahadeo. The

adoption deed is said to be dated 13.12.1946 but thereafter when for the first time, respondent No. 3 was admitted in school, form was filed by Sahadeo himself and Sahadeo was shown to be father of Ram Chandra. There is a mention in the documents so filed by petitioner that college staff asked the signatory on the form namely Sahadeo about parentage upon which, a declaration was given that Ram Chandra is the son of Sahadeo. In all Khasra extracts, Ram Chandra is shown to be the son of Sahadeo. There are several money order receipts from which, it is clear that the petitioner has been sending money to Sahadeo who happened to be elder brother. In Khasra extracts, petitioner is shown to be in possession as ''marfat' to Sahadeo. The adoption deed is not signed by Sahadeo who is said to have given his son in adoption to Ram Cheez. The Consolidation Officer by referring these factors in a precise manner, gave a clear finding that the name of Ram Chandra alone came in the papers without any reference to any amaldaramad in 1354 Fasli. Beeran Tiwari and Thag Tiwari the marginal witnesses of the adoption deed have not been examined. In all the school papers, revenue papers throughout Ram Chandra is shown to be son of Sahadeo. For the first time when Ram Chandra was admitted in School which was after the alleged adoption deed, he was shown to be son of Sahadeo. At no point of time, till the last Ram Chandra ever tried to get his parentage corrected as adopted son of Ram Cheez. In his service book also, he is shown to be son of Sahadeo. Oral evidence is contradictory in respect to the ceremony of giving and taking. It is on all these findings, genuineness of deed was rejected by the Consolidation Officer and the petitioner was accepted to be co-tenant with the respondents along with his legitimate share according to the pedigree. The appellate authority and the Revisional Court mainly on the ground that deed is twenty year old and it has not been cancelled in any competent Court have negatived the petitioner's claim and have reversed the judgment of the Consolidation Officer. The Deputy Director of Consolidation appears to have made wrong observation by saying that the land was throughout recorded in the name of Bikkan and thereafter Ram Cheez whereas the record placed before this Court states otherwise. A further wrong finding was given that Ram Chandra is entered as adopted son of Ram Cheez in the record which is not so. There is a further wrong finding that in no document, the petitioner has been shown to be in possession whereas Khasra extracts have been filed to show his name in possession as ''marfat'. The Deputy director of Consolidation has concluded by saying that in any view of the matter, entry of Ram Chandra showing his long possession, confers independent rights on him which appears to be totally misconceived as it was not the case of even respondent and on the other hand, all three were shown to be in possession in the shape of ''marfat' entry. The appellate authority in a very cryptic manner only by giving emphasis about the document being twenty year old, allowed the appeal and the Revisional Court by recording varous findings on the question of fact as noticed above, which apparently do not born out from the record has dismissed the revision. In view of the aforesaid discussion, it is clear that besides adoption deed, own conduct of the respondent No. 3 and his father throughout as is apparent from voluminous evidence was liable to be taken note of by Appellate Court and the

Revisional Court. By adoption, mode of succession stands changed and therefore, that is to be accepted with all care. Even in presence of adoption deed, ceremony of giving and taking as stated in the principle ofHindu Lawas has been noticed by the Apex Court in the case ofLakshman Singh(supra) has to be kept in mind. Few observations as are contained in the judgment of the Apex Court will be useful to be quoted here;

"That a formal ceremony of giving and taking is essential to validate the adoption has been emphasized by the Judicial. Committee again in Krishna Rao v. Sundara Siva Rao."

Further observation as has been made by the Apex Court in paras-9 and 10 will be useful to be referred at this place;

Para-9: Strong reliance is placed by learned Counsel for the appellant on the decision of the Judicial Committee in Biradhmal v. Prabhabhati. There a widow executed a deed of adoption whereby she purported to have adopted son to her deceased husband a boy. The Sub-Registrar before whom the document was registered put to the boy's natural father and to the widow questions whether they had executed the deed. The boy was also present at that time. The Judicial Committee held that, under the said circumstances, there was proof of giving and taking. The question posed by the Privy Council was stated thus: "The sole issue discussed before their Lordships was the question of fact whether on 30th June, 1924, at about 6 P.M. when the adoption deed was being registered the boy was present and was given by Bhanwarmal and taken by the widow." The question so posed was answered thus at p. 155--

"..... Their Lordships think that the evidence that the boy was present at the time when the sub-registrar put to his father and to the widow the questions whether they had executed the deed is sufficient to prove a giving and taking." This sentence is rather laconic and may lend support to the argument that mere putting questions by the sub-registrar would amount to giving and taking of the adoptive boy but the subsequent discussion makes it clear that the Privy Council had not laid down any such wide proposition. Their Lordships proceeded to observe:

"Even if the suggestion be accepted that the auspicious day ended at noon on the 30th and that the deed was executed before noon and before the boy arrived at Ajmer, it seems quite probable that the registration proceedings which were arranged for 6 P.M. would be regarded as a suitable occasion for carrying out the very simple ceremony that was necessary." These observations indicate that on the material placed before the Privy Council-it is not necessary to say that we would come to the same conclusion on the same material it held that there was giving and taking of the boy at about 6 p.m. when the judicial committee, in our view, did not intend to depart from the well recognized doctrine of Hindu Law that there should be a ceremony of giving and taking to validate an adoption.

Para-10: The law may be briefly stated thus: Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is obviously to secure due publicity. To achieve this object, it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law required that the

natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of the case. But a ceremony there shall be part of the exigencies of the situation arising out of diverse circumstances necessitated to the introduction of the doctrine of delegation and therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

22. In view of ratio of law laid down by this Court in **Harihar (supra)**, **Dr. Jeevan Bahadur Sammadar (supra)** and **Ram Vrat Tripathi (supra)**, the finding recorded by revisional court on the admissibility of adoption deed dated 23.3.1948 cannot be sustained as the adoption deed dated 23.3.1948 has no signature of person giving his child for adoption, as such, presumption regarding ceremonies of adoption on its basis cannot be raised so far as admissibility of document under Section 90 of the Evidence Act is concerned, it has nothing to do with ceremonies of adoption. Non-filing of original adoption deed before Consolidation Officer will also go against the respondent nos. 4 to 7, as such, according to provisions contained under Sections 64, 65, 74 & 76 of the Indian Evidence Act, secondary evidence will not be admissible in evidence. Continuance of name of natural father of Hira Lal in Voter List, Kutumb Register as well as in the registered sale deed executed by Hira Lal himself in 1974 when Hira Lal was about 32 years old, raises presumption of the fact that adoption deed set up by Hira Lal is doubtful. Consolidation Officer and Settlement Officer (Consolidation) have rightly disbelieved the adoption deed executed on 23.3.1948 which was basis of claim of respondent nos. 4 to 7, accordingly, both parties were given ½ share in the bhumidhari plot no.52 but so far as sirdari plot nos.23,24 & 55 are concerned that were rightly vested in state as claim of Hira Lal on the basis of adoption was disbelieved and Ram Charan was exclusively recorded over plot nos. 23, 24 & 55 and the order dated 24.7.1960 passed by the Assistant Consolidation Officer in Case No.26 in respect to recording of the name of Ram Lakhan over plot nos. 23, 24 & 55 in place of Ram Charan was rightly found doubtful as under which provision the order was passed, has not been mentioned in the order.

23. So far as revisional jurisdiction under Section 48 of Uttar Pradesh Consolidation of Holdings Act is concerned as argued by respective counsel for the parties, the decision of this Court in a case of ***Nathu Ram and Others Vs. Deputy Director of Consolidation Varanasi and Others 2017 (136) RD 480*** will be relevant in which this Court after considering the various amendment made in Section 48 of U.P.C.H. Act as well as the ratio of law laid down by Apex Court in ***Ram Dular Vs. Deputy Director of Consolidation Jaunpur and Others 1994 RD 290 (SC), Sheshmani and Another Vs. Deputy Director of Consolidation District- Basti U.P. and Others 2001 RD 210 (SC) and Sri Jagdamba Prasad (dead) through LRs and Others Vs. Kripa Shankar (dead) through LRs and Others 2014 (124) RD 1 (SC),*** has held that revisional power is not a power of first or second appellate Court, the finding recorded therein would be possible to be interfered under Section 48 of U.P.C.H. Act

only on the grounds discussed in ***Ram Dular (supra), Sheshmani (supra)*** *and* ***Jagdamba Prasad (supra)***.

24. Revisional court exceeded his jurisdiction in reversing the order of Consolidation Officer and Settlement Officer (Consolidation) and upholding the adoption deed as valid and genuine and maintaining the basic year entry, the revisional court has failed to consider the evidences and findings recorded by courts below, as such, impugned revisional order is wholly illegal. No useful purpose will be served by sending the matter back before revisional court for fresh decision as the order passed by Consolidation Officer dated 7.10.2008 and Settlement Officer (Consolidation Officer) dated 10.9.2014 are based upon evidence on record as well as on the principle laid down by this Court in Harihar (supra). **Dr. Jeevan Bahadur Samaddar** (supra) and **Ram Vrat Tripathi** (supra), accordingly, the same are hereby maintained.

25. Writ petition is allowed in part. Impugned revisional order dated 8.3.2018 passed by Deputy Director of Consolidation, Allahabad in Revision Nos. 759, 431 & 770 is quashed and the order dated 7.10.2008 passed by Consolidation Officer and order dated 10.9.2014 passed by Settlement Officer (Consolidation) are hereby maintained. No order as to costs.

(2022) 10 ILRA 786
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-B No. 2093 of 2021

along with connected cases.

Fakira & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ranjeet Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Pandey

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Section 9A (2) - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 132 - Natural Justice - Opportunity of hearing - Petitioners challenged the order passed by the Consolidation Officer, under Section 9A (2) of UP Consolidation of Holdings Act whereby name of the petitioners have been ordered to be expunged from the revenue record treating the land in question covered under Section 132 of U.P. Z.A. & L.R. Act - Aforesaid order was passed behind the back of the petitioners without issuing any notice and without affording them opportunity of hearing - Held - - Long standing entries in the name of the recorded tenure holders, who have conferred their right as bhumidhar-with-transferable right by operation of law under Section 131-A of UPZA and LR Act, cannot be expunged in a rough and casual manner - impugned orders are passed in blatant violation of natural justice and fair play - order impugned quashed - Parties relegated before the Consolidation Officer to get the matter decided de novo (Para 11, 12)

Allowed. (E-5)

List of Cases cited:

1. Hinch Lal Tiwari Vs Kamala Devi and Ors., AIR 2001 SC 3215

2. Canara Bank & ors. Vs Shri Debasis Das & ors. reported in AIR 2003 Supreme Court 2041

3. Ram Bachan Yadav and another Vs State of UP & ors., reported in 2018 (140) RD 39

(Delivered by Hon'ble Dinesh Pathak, J.)

1. In this batch of cases, common question of fact and law are involved qua post order opportunity of hearing to the persons adversely affected due to the impugned orders passed ex-parte, as the principles of natural justice and fair play has been violated.

2. The grievance of the petitioners is that they have been deprived of from their valuable right, title and interest over the land in question by the order under challenge passed behind their back sans opportunity of hearing accorded to them.

3. The Writ Petition (B) No. - 2093 of 2021 (Fakira and 12 others Vs. State of UP and 4 others) is treated as a leading file in the batch of the cases as captioned above and, accordingly, remaining cases are being decided.

4. It is apposite to mention that all writ petitions relate to the land in question situated in village Mustafapur, Thakurdwara, Moradabad. Order dated 19.10.2016 passed by the Consolidation Officer, under challenge, is common in all the writ petitions. Apart from that, in some of the writ petitions i.e. Writ Petition Nos. 1734 of 2021, 2094 of 2021, 2181 of 2021, 310 of 2021 order dated 23.12.2020 and in Writ Petition No. 2394 of 2021 order dated 23.11.2020 and in Writ Petition No. 1233 of 2022 & Writ Petition No. 1071 of 2022 order dated 19.11.2020 passed by the Consolidation Officer are challenged as well whereby name of the petitioners have been ordered to be expunged from the revenue record treating the land in question covered under Section 132 of UP Zamindari Abolition and Land Reforms Act (in brevity UPZA and LR Act).

5. Heard learned counsel for the petitioners, learned counsel for the Gaon Sabha, learned standing counsel representing State respondents and perused the record.

6. In view of the peculiar facts and circumstances of the case and order proposed to be passed, this Court proceeds to decide the instant writ petition at admission stage with the consent of the counsel for the parties present, without their respective affidavits (counter and rejoinder), with liberty to the respondents that they may move recall application if any facts, as averred in the instant writ petition are found incorrect or misleading. It is apposite to mentioned that, in maximum writ petitions, respective affidavits could not be exchanged between both the parties despite the direction given by this Court to the parties concerned.

7. The petitioners have invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India challenging the order dated 19.10.2016 and 23.12.2020 passed by the Consolidation Officer under Section 9A (2) of UP Consolidation of Holdings Act (In brevity, "UPCH Act').

8. It is submitted by the learned counsel for the petitioners that the petitioners are the allottee of the land in question as Sirdar. Subsequently, by operation of law, they became bhumidhar with transferable right under Section 131-A of UPZA and LR Act. Long standing entry made in favour of the petitioners has illegally been disturbed by the order/s under challenge passed by the Consolidation Officer in proceeding under Section 9A(2) of UPCH Act, which was initiated on the basis of the ex-parte report submitted by the Assistant Consolidation Officer. It is furhter submitted that the Consolidation Officer by

order/s under challenge, has directed to delete the exchange value of the plot in question and keep the same out of consolidation operation. Aforesaid order was passed behind the back of the petitioners without issuing any notice and without affording them opportunity of hearing. At subsequent stage, the Consolidation Officer has passed fresh order dated 23.12.2020 that too on the basis of the ex-parte report submitted by the Assistant Consolidation Officer/Consolidator. Aforesaid report was registered as well under Section 9A (2) of UP Consolidation of Holdings Act. The Consolidation Officer, vide impugned order dated 23.12.2020, has issued a direction to expunge the name of the recorded tenure holders from the land in question and the same was ordered to be recorded in the name of Ram Ganga under Class 6(2). It is further submitted that even before passing the order dated 23.12.2020 neither any notice has been issued to the petitioners nor opportunity of hearing had been afforded to them.

9. On the pointed query raised to the learned standing counsel qua opportunity of hearing being accorded to the recorded tenure holders whose name are expunged from the revenue record, he has shown his inability to contradict, despite sufficient time granted to him, the submissions made by the learned counsel for the petitioners.

10. Having considered the submissions advanced by the learned counsel for the parties and perusal of record, a short question for consideration in the instant writ petition lies in a narrow compass as to whether opportunity of hearing had been afforded to the recorded tenure holders or not, who are adversely affected owing to the impugned orders passed by the Consolidation Officer.

11. Perusal of the impugned order dated 19.10.2016 and 23.12.2020 reveal that no notice has been issued to the recorded tenure holders. Entire proceeding has been concluded only on the basis of the report submitted by the Assistant Consolidation Officer/Consolidator. In the impugned order dated 23.12.2020, there is an observation that the government counsel for the State has been heard and submitted that in view of the order dated 25.7.2001 passed by the Hon'ble Supreme Court in the case of **Hinch Lal Tiwari Vs. Kamala Devi and Ors., AIR 2001 SC 3215**, name of the recorded tenure holders were liable to be expunged. There is nothing in the orders dated 19.10.2016 and 23.12.2020 to demonstrate that the version of the recorded tenure holders has also been considered. There is no indication that the present petitioners were heard or afforded an opportunity of hearing before expunging their names from the revenue record.

12. It is abundantly clear that right and title of the petitioners are affected owing to violation of natural justice and fair play. They have been deprived of their valuable rights sans adhering to the cannons of natural justice. In the matter of Muzeeb Vs. Deputy Director of Consolidation, Azamgarh reported in AIR 1996 Allahabad 88, co-ordinate Bench of this Court has held that a post order opportunity of hearing is necessary to the person adversely affected in the cases where an entry is expunged or corrected in the revenue record sans opportunity of hearing. The relevant paragraph 5 of the judgment dated 16.2.1995 in case of **Muzeeb (supra)** is quoted hereinunder:

"5. But the matter does not end here. The possibility of an error creeping in by authority concerned cannot be ruled out. The authority passed order without hearing person adversely affected. In such matters possibility cannot be ruled out that the person affected be possessed of sufficient material by which he may be able to show that the order giving rise to entry in dispute is not a forged one. This requires safeguarding of interest of person adversely affected by correction of entry in revenue papers. This interest of affected person can be safeguarded by providing him a post order opportunity of hearing. This will also exclude possibility of error, which may arise due to want of opportunity of hearing and a possible error will also stand rectified in maintenance of correct revenue entries. For said reason a post order opportunity of hearing is necessary to person adversely affected in cases where an entry is expunged or corrected in revenue records and order correcting entry is passed without affording opportunity of hearing to person adversely affected. Correcting an entry to be based on forged or non-existing order, to which person aggrieved raises an objection that the order of correction has been wrongly passed, the aggrieved person is entitled to be heard after correction being done."

13. Explaining the principle of natural justice in the matter of **Canara Bank and others Vs. Shri Debasis Das and others reported in AIR 2003 Supreme Court 2041**, Hon'ble Supreme Court has expounded that order passed in violation of natural justice is no final decision on the case. Relevant paragraphs 16 and 21 of the judgment passed in **Canara Bank and others (supra)** is quoted hereinbelow:

"16. Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

21. How then have the principles of natural justice been interpreted in the Courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is 'nemo judex in causa sua' or 'nemo debet esse judex in propria causa sua' as stated in (1605) 12 Co.Rep.114 that is, 'no man shall be a judge in his own cause'. Coke used the form 'aliquis non debet esse judex in propria causa quia non potest esse judex at pars' (Co.Litt. 1418), that is, 'no man ought to be a judge in his own case, because he cannot act as Judge and at the same time be a party'. The form 'nemo potest esse simul actor et judex', that is, 'no one can be at once suitor and judge' is also at times used. The second rule is 'audi alteram partem', that is, 'hear the other side'. At times and particularly in continental countries, the form 'audietur at altera pars' is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely 'qui aliquid statuerit parte inaudita alteram actquam licet dixerit, haud acquum facerit' that is, 'he who shall decide anything without the other side

having been heard, although he may have said what is right, will not have been what is right' (See Bosewell's case (1605) 6 Co.Rep. 48-b, 52-a) or in other words, as it is now expressed, 'justice should not only be done but should manifestly be seen to be done'. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated."

14. In the case of **Ram Bachan Yadav and another Vs. State of UP and others, reported in 2018 (140) RD 39**, co-ordinate Bench of this Court has considered the requirement of opportunity of hearing before passing the adverse order against the recorded tenure holder expunging his name from the revenue record. The relevant paragraphs No. 14, 16 and 17 of the judgment in the case of **Ram Bachan (supra)** are quoted hereinunder:

"14. In the following authorities the Supreme Court has held that even before passing administrative orders affecting rights of parties opportunity of hearing shall be granted :

(1) Ashok v. Union of India, AIR 1997 SC 2298 (It was a case of ban of particular insecticides).

(2) Sahi Ram v. Awtar Singh, AIR 1999 SC 2169 (It was a case of mining lease).

(3) G. Pharmaceuticals v. State of U. P., AIR 2001 SC 3707 (It was a case of black listing of contractor).

(4) H.A. Shakoor v. Union of India, AIR 2002 SC 2423 (It was a case of reduction of category of a contractor).

(5) Director General of Police v. M. Sarkar, [1996] 3 SCR 530 (In this case constables were discharged from service on the ground that they produces a fake list from Employment Exchange without providing opportunity of hearing. Supreme Court approved the order of High Court setting aside discharge order on the ground of denial of opportunity of hearing).

(6) All India S.C. and S.T. Employees Association v. A.A. Jeen, [2001] 2 SCR 1183 (In this case hundreds of employees were affected hence Supreme Court held that they might be served in representative capacity).

(7) Godawat Pan Masala Products v. Union of India, AIR 2004 SC 4057 (In this case it was held that notification prohibiting manufacture and sale etc. of pan masala and gutka was bad in law as it had been issued without providing opportunity to the manufactures of meeting the facts relied upon in the notification in respect of injurious effects of pan masala and gutka).

(8) Canara Bank v. Debasis Das, (2003) 2 LLJ 531 (SC) (In this authority several principles of natural justice expressed in Latin words have been discussed in detail giving their history (since 1215), scope and applicability.

16. Accordingly, it is held that whenever an entry in the revenue record is to be cancelled and substituted particularly when the entry is continuing for more than a year, notice must be given to the party in whose favour entry stands even if prima facie, authority/court concerned (i.e. Deputy Collector/Sub Divisional Officer in most of the cases) is of the opinion that the entry is result of fake order or fraud.

17. Revenue, authorities/courts must remember that a party can in some cases successfully show that entry of his name in the revenue record is correct and not fake or based upon fake order. This question can be decided only and only after

hearing the party concerned and likely to be affected."

15. In this conspectus as above, I find substance in the submissions advanced by the learned counsel for the petitioners that orders under challenge are passed behind the back of recorded tenure holders who are adversely affected owing to orders passed disturbing the revenue entries made in their favour. There is no indication in the orders impugned passed by the Consolidation Officer qua issuance of notice to the recorded tenure holders and affording them opportunity of hearing. The impugned orders are passed in blatant violation of natural justice and fair play. Long standing entries in the name of the recorded tenure holders, who have conferred their right as bhumidhar-with-transferable right by operation of law under Section 131-A of UPZA and LR Act, cannot be expunged in such a rough and casual manner. Considering the long standing entry based on allotment of land in lease, this Court cannot remain oblivious to the valuable rights vested in the recorded tenure holders and they deserve fair trial to protect their title over the property in question.

16. With this observation, without considering the merits of the case as a averred in the writ petition qua right and title of the petitioners, the present writ petition succeeds and is allowed, on the limited point of opportunity of hearing. The order impugned dated 19.10.2016 and 23.12.2020 are hereby quashed. The matter before the Consolidation Officer is restored to its file. Parties are relegated before the Consolidation Officer to get the matter decided de novo.

17. Petitioners are at liberty to file all the relevant documents and take all possible pleas available to them to defend their right and title over the property in question. The petitioners are hereby directed to submit their complete pleading along with the corroborative evidences in support of their claim before the Consolidation Officer possibly on or before 30.9.2022. The Consolidation Officer, in turn, shall make all endeavour to consider and decide the case expeditiously preferably within a period of five months from September 30, 2022.

18. It is expected that the case of every individual shall be considered and decided by a reasoned and speaking order, in accordance with law, after affording opportunity of hearing to the parties concerned without granting them unnecessary adjournments.

19. Remaining writ petitions in batch of cases as captioned above are decided/ allowed as well in the terms and conditions as discussed above and impugned orders under challenge in said writ petitions are, accordingly, quashed.

(2022) 10 ILRA 791
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ-A No. 10854 of 2022

Yamuna Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri P.K. Upadhyay, Kalpana Upadhyay

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Proceedings along with Criminal Proceedings - U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 14(1); U.P. Police Regulations: Regulation Nos. 486, 492 and 493 - Before taking a decision whether to proceed or not with the departmental inquiry, the concerned authority has to apply mind on facts of the charge in departmental proceedings as well as contents of F.I.R. and the charge if framed in the criminal proceedings and if the authority arrived at a conclusion that departmental proceedings and criminal case are based on, identical set of facts and continuation of departmental proceedings would adversely effect, the case of delinquent or he would be prejudiced, then only, a decision could be taken not to proceed with departmental inquiry till the trial is over. Even thereafter, if there is an inordinate delay in conclusion of trial, after a reasonable time, the concerned authority may review the decision and would have a liberty to proceed with the departmental proceedings. (Para 13, 15)

B. U.P. Police Regulations: Regulation Nos. 486 - The Regulation 486(II) would come into picture when a complaint is made to police authority against any police personnel about his involvement in a non-cognizable offence, and the police authority would be at liberty to lodge an F.I.R. or initiate departmental proceedings and for that purpose, preliminary inquiry has to be conducted. So far as report of cognizable of-fence is concerned, procedure is prescribed u/Regulation 486(I) that police investigation be carried on and in case final report is accepted, departmental inquiry can be initiated, however, it is now mandatory to register F.I.R. where the in-formation discloses commission of cognizable offence and further there may be a different situation when criminal investigation is initiated on an F.I.R. lodged by complainant/victim and departmental proceedings are initiated separately on same or similar facts and in these circumstances, the department has also liberty to take a decision in terms of Regulation 492 and 493 as well as considering the judgment of *Capt. M. Paul Anthony (infra)*, which lays down the factors to be considered for continuation/staying of departmental proceedings in case of simultaneous criminal proceedings. (Para 16)

C. Standard of proof - The standard of proof required in a departmental proceedings and in a criminal case is different, as **the proof required in a departmental proceedings is one of preponderances of probability whereas in a criminal case, charge has to be proved by prosecution beyond reasonable doubt** and further that the evidence led in the departmental inquiry could not be read in a criminal case. A criminal trial is considered to be commenced only before a Court of Sessions u/Chapter XVIII of Cr.P.C. when u/s 226 (opening case of prosecution) after commitment of the case u/s 209 Cr.P.C., therefore, till proceedings are reached upto that stage, Regulations No. 492 and 493 have no role. (Para 7, 17)

In the present case, **in criminal case, investigation is still not concluded, therefore, as held earlier, stage has still not come for consideration of Regulations No. 492 and 493.** The contents of charge in the departmental proceedings are referred in para 11 of this judgment that are of negligence and due process was not followed by the petitioners when victim was kept under detention, so much as no medical facility was provided as well as he was not produced before the Magistrate within 24 hours as prescribed under Criminal Procedure Code whereas in the first part of F.I.R., there was no allegation against petitioners, however, in later part of F.I.R., an allegation against the petitioners was also made that deceased was kept under detention illegally and no medical treatment was given to him. (Para 19)

Therefore, **it cannot be said that departmental proceedings and criminal case are based on absolutely identical set of facts, though, similar to some extent.** In the memo of charge, proposed witnesses are mentioned, however, till date investigation is not concluded. Therefore, outcome of the

investigation is not on record and details of proposed witnesses are unknown at present stage. (Para 20)

D. At this stage, there is no bar to continue with the departmental proceedings. At this stage to take a definite view that proposed witnesses, if any, be identical in the criminal case would not be a correct approach and since trial is not commenced till date and therefore, even the contents of Regulation No. 492 and 493 does not bar to continue with the departmental proceedings. However, during proceedings, the petitioners are at liberty, in case investigation is concluded and further in case any charge-sheet is filed, and the proposed witnesses are same and the petitioners are able to show that continuance of departmental proceedings would cause prejudice to them, the concerned authority, if such departmental proceedings are not concluded, would be under obligation to consider grievance of the petitioners and at that stage, appropriate decision could be taken to continue with the departmental inquiry or not. Till that time, the respondents are directed to proceed further with the departmental proceedings. (Para 21, 22, 23)

Writ petition dismissed. (E-4)

Precedent followed:

1. Capt. M. Paul Anthony Vs Bharat Gold Mines & anr., 1999 (3) SCC 679 (Para 13)

2. State of U.P. & ors. Vs Babu Ram Upadhyay (5 Judges), (1961) 2 SCR 679; AIR 1961 SC 751 (Para 14)

3. Lalita Kumari Vs Government of U.P. & ors., (2008) 14 SCC 337 (Para 16)

Precedent cited:

1. Sanjay Rai Vs St. of U.P. & ors. & ors. connected cases, 2016 LawSuit(All.) 3133 (Para 3)

2. Mool Chand Singh Vs St. of U.P. & ors., Writ A No. 6405 of 2021, decided on 02.08.2021 (Para 4)

3. Rinku Singh Vs St. of U.P. & ors., Writ A No. 6978 of 2021, decided on 08.10.2021 (Para 5)

4. Prakash Ram Arya Vs St. of U.P. & ors., Writ A No. 5818 of 2019, decided on 16.04.2019 (Para 6)

5. Sudesh Singh Vs St.of U.P. & ors., Writ No. 9672 of 2018, decided on 10.04.2018 (Para 7)

6. Surendra Singh S/o Ram Shanker Singh & anr. Vs St. of U.P. & anr., Service Single No. 1735 of 2011, decided on 06.01.2012 (Para 8)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The legal issue which requires consideration of this Court is that : "whether departmental disciplinary proceedings initiated under Rule (14) 1 of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 (for short "Rules, 1991") can proceed simultaneously along with criminal proceedings initiated in pursuance of a first information lodged against same delinquent, arising out of same or similar facts?'.

2. Sri P.K. Upadhyay, learned counsel for petitioners and Sri G.N. Srivastava, learned Standing Counsel for the State respondents have relied upon different judgments passed by this Court and Supreme Court in support of their respective submissions. The submission of learned counsel for petitioners is that, there is an absolute bar to proceed with departmental disciplinary proceedings till the trial arising out of criminal proceedings is concluded, whereas stand of the State is that bar, if any, is not absolute. Both counsel have placed different interpretation of Regulations 486, 492, and 493 of Uttar Pradesh Police Regulations in their favour.

3. Learned counsel for petitioners has relied upon judgment passed by the coordinate Bench at Lucknow in ***Sanjay Rai Vs. State of U.P. and others and other connected cases, 2016 LawSuit(All) 3133*** wherein it has been held that :-

"28. From the above discussion, the protections made available to police officers in departmental proceedings, where the offence, apart from being one under Section 7 of the Act 1861 is also a cognizable or a non-cognizable offence under the Criminal Law, becomes clear. In the event of a cognizable offence, it is mandatory to lodge an F.I.R. In a case involving a cognizable offence the protections under Regulation 486(I) are available as mentioned hereinabove, i.e. police officer cannot be subjected to disciplinary action unless an FIR is lodged, investigation is done, there is reason to believe that the charge is true, but, on account of insufficiency of evidence or for any other reason, final report is submitted and is accepted under Section 173 Cr.P.C. Unless this happens, the departmental proceedings cannot go on. Furthermore, if a chargesheet is filed in the criminal case, that is the charges are not only believed to be true but there is evidence to establish the same then also the disciplinary proceedings cannot go on, as, the intent of the regulations is that the police personnel should have the benefit of a trial by a competent Court of Criminal Jurisdiction so as to protect them from mala fide action. There is nothing in the regulations which permits the holding of a departmental inquiry where a chargesheet has been filed for commission of a cognizable criminal offence before a Court of competent Criminal jurisdiction.

29. In this context the judgments of the Supreme Court in the case of State of Punjab vs Raj Kumar, (1988) 1 SCC 701; State of U.P. and others vs Surender Pal, (1989) 2 SCC 470; and State of U.P and others vs. Babu Ram Upadhyay, AIR 1961 SC 751, where the Supreme Court had the occasion to consider the object and purport of regulation 486 of the UP Police regulations and a similar provision as was existing in the State of Punjab, were considered, may be referred. The Supreme Court in the case of Babu Ram Upadhyaya (supra) mentioned the object behind Regulation 486 of the U P Police regulations in para 30 which reads as under :

"30. Now what is the object of rule I of para. 486 of the Police Regulations? In our opinion, it is conceived not only to enable the Superintendent of Police to gather information but also to protect the interests of subordinate officers against whom departmental trial is sought to be held. After making the necessary investigation under chapter XIV of the Criminal Procedure Code, the Superintendent of Police may as well come to the conclusion that the officer concerned is innocent, and on that basis drop the entire proceedings. He may also hold that it is a fit case for criminal prosecution, which, under certain circumstances, an honest officer against whom false charges are framed may prefer to face than to submit himself to a departmental trial. Therefore, the rules are conceived in the interest of the department as well as the officer. From the stand point of the department as well as the officer against whom departmental inquiry is sought to be initiated, the preliminary inquiry is very important and it serves a real purpose. Here the setting aside of the order of dismissal will not affect the public in general and the only consequence will be that the officer will have to be proceeded

against in the manner prescribed by the rules. ..."

41. Regulation 490 lays down the procedure for holding departmental proceedings. To the extent the procedure laid down therein is in conflict with the procedure prescribed in the Rules of 1991, same stands superseded for the reasons already mentioned earlier.

42. As far as Regulation 492 is concerned, though the same is not directly involved herein, but suffice it to say that it has been held to be directory, and not mandatory, by a Division Bench of this court in the case of Vijay Shanker Tiwari v. State of U.P. & ors., 1996 (14) LCD 126 which has been followed by the Full Bench of the Delhi High Court in the case of Commissioner of Police v. Sukhbeer Singh , 2014 SCC Online Delhi Delhi 1985.

43. As far as Regulation 493 is concerned, though the same is not directly attracted in the present case, nevertheless, it needs to be mentioned that there being nothing to the contrary contained in the Rules of 1991, the same is still binding upon the departmental officials, therefore, it is not open for the Superintendent of Police in the course of departmental proceedings against a police officer who has been tried judicially to re-examine the truth of any fact in issue at his judicial trial and the finding of the court on this count must be taken as final. As far as purport of the Ist part of Regulation 493 is concerned, it will depend upon the facts of a case, as, if a police officer is exonerated on the ground of insufficiency of evidence and the offence not being proved beyond reasonable doubt, which is the standard of proof applicable in criminal trials then it would be a moot point as to how far the observations or findings of the court, would be binding upon a Superintendent of Police in a departmental action, specially in view of the recitals contained in Clause (c) of Regulation 493. As far as Clause (a) and (b) of Regulation 493 are concerned a word of caution needs to be sounded as in view of the ratio in Kedar Nath Yadav's case (supra), the Superintendent of Police would not be justified in passing an order of dismissal straightway on the ground of conviction and sentence to rigorous imprisonment of a police officer regarding a criminal offence, as, the conduct leading to such conviction would have to be considered in view of Article 311(2)(c) of the Constitution of India to which the Regulations are subject, as mentioned in Regulation 477. In fact, they would be subject to it even otherwise.

44. As far as the entitlement of the department to proceed departmentally after judicial trial, is concerned, if it has resulted in conviction, then in view of Article 311(2)(c) of the Constitution action can be taken on the basis of the conduct leading to his conviction, but not otherwise. In this regard the Department does not have to wait for expiry of the period for filing a criminal appeal nor for a decision thereon, as this would be contrary to Article 311(2)(c) of the Constitution as held in Kedar Nath Yadav's case (supra). In the event of an acquittal Clause (c) of Regulation 493 would apply.

45. Thus, on a survey of the relevant provisions referred hereinabove it is evident that except in the case of non-cognizable offences, if an act constitutes an offence under Section 7 of the Act 1861 as also a cognizable offence under Criminal Law, no departmental action can be undertaken unless the eventualities mentioned in Regulation 486(I), specially Clause (6) thereof, are satisfied. In a case where chargesheet is filed such departmental action cannot be taken till the conclusion of the judicial trial. After its

conclusion it can be held in the case of a conviction on the basis of conduct leading to such conviction and in the case of acquittal or discharge, in terms of Clause (c) of Regulation 493 keeping in mind the dictum of the Supreme Court in Kedar Nath Yadav's case (supra).

46. As far as the judgment of a Single Judge Bench of this Court in Case of Surendra Singh v. State of U.P., rendered in Writ Petition No.1735(SS) of 2011 on 6.1.2012, is concerned, in the said judgment the provisions of Regulation 483 and 486, though referred, its purport, object and effect have not been considered. Moreover, in view of the above discussion, the said judgment does not help the cause of the respondent, specially as the view taken herein is supported by a subsequent Division Bench judgment rendered in the case of Shiv Lal Sonkar v. the State of U.P., 2014 (107) ALR 91, as also, a Single Judge decision reported in AIR 1968 Alld. 20, U.P. Government v. Ramakant Shukla, wherein it was also held that departmental action means entire departmental proceedings, and not merely punishment."

4. Learned counsel for the petitioners has further relied upon a judgment of coordinate Bench in the case of ***Mool Chand Singh Vs. State of U.P. and others, Writ A No. 6405 of 2021, decided on 02.08.2021*** and relevant paragraph Nos. 14 and 15 thereof are extracted hereinbelow :-

"14. Bare perusal of Regulations 492 and 493 would go to show that whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial proceeding, if any, before deciding whether further departmental action is necessary. Regulation 493 mentions that it will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer who has been tried judicially to re-examine the truth of any facts in issue at his judicial trial and the finding of the Court on these facts must be taken as final. Division Bench of this Court in the Case of Kedar Nath Yadav Vs. State of U.P. 2005(3) E.& C 1955, while considering these very Regulations, has taken the view, that even after enforcement of 1991 Rules, these two Regulations continue to hold the field.

15. Considering the aforesaid facts and circumstances of the case, the writ petition is disposed of with direction to the competent authority to decide the issue, as to whether disciplinary enquiry is to continue at all or not, and whether result of criminal trial is to be awaited, keeping in view overall fact and situation as prevailing on the spot, in the light of judgements rendered in Sanjay Rai's case (supra) and Somendra Singh's case (supra) within a period of two months from the date of receipt of copy of the order."

5. Per contra, learned Standing Counsel for the State respondents has relied upon a judgment of coordinate Bench of this Court in the case of ***Rinku Singh Vs. State of U.P. and others, Writ A No. 6978 of 2021 decided on 08.10.2021*** and relevant paragraphs thereof are quoted below :-

"21. In the light of interpretation given by this Court in the case of Surendra Singh (supra) relating to Regulations 492 & 493 of Police Regulation, this Court finds that submission of learned counsel for the petitioner based upon Regulations 492 & 493 of Police Regulation is misplaced and is not sustainable in law, since in the instant case only charge sheet in the criminal case has been filed, and trial is yet to begin.

22. Now, coming to the second limb of argument that whether disciplinary

proceeding and the criminal proceeding can proceed simultaneously where both proceedings have been initiated on the same set of charges and evidence in both the proceedings are identical and shall prejudice the criminal proceeding since petitioner would have to disclose the defence which he wants to take in the criminal proceeding. In the opinion of the Court, the said submission is also misconceived for two reasons; firstly, as detailed above, the charge against the petitioner in the criminal proceeding and disciplinary proceeding are not identical as there is one additional charge in the disciplinary proceeding which has been delineated above. Secondly, to succeed, the petitioner has to demonstrate that charge against the petitioner is grave and involves complicated questions of fact and law, and further if the disciplinary proceeding is continued that would prejudice the criminal trial of the petitioner.

23. In the case in hand, though a bald averment has been made in the writ petition in paragraph 31 that continuance of disciplinary proceeding would prejudice the criminal trial, there is no pleading in the writ petition as to how continuance of disciplinary proceeding would prejudice the criminal trial of the petitioner.

24. As the petitioner has failed to demonstrate that charge against the petitioner is grave and involves complicated questions of fact and law, and further how the continuance of disciplinary proceeding would prejudice the criminal trial of the petitioner, this Court is not inclined to accept the aforesaid submission of learned counsel for the petitioner. At this stage, it is pertinent to mention that early conclusion of the disciplinary proceeding is good in the interest of the employee as well as the department for the reason that if the employee is exonerated from the charges, he may not be out of service unnecessarily and may be reinstated, and if the employee is found guilty, the department will get rid of such employee who is not worth continuing in the employment."

6. Learned counsel for State has further relied upon another judgment of a coordinate Bench of this Court in the case of ***Prakash Ram Arya Vs. State of U.P. and others, Writ A No. 5818 of 2019, decided on 16.04.2019*** of which relevant part is extracted hereinbelow :-

"In the facts of the case at hand, the charge against the petitioner is that the petitioner had overstayed the leave without approval and sanction and that he is charge-sheeted in criminal case under Section 302 I.P.C. for hatching criminal conspiracy to eliminate Vishal Williams for having illicit relationship with his wife. The department has set up two witnesses for departmental enquiry; (i) Sub-Inspector (Clerk) to substantiate that the petitioner proceeded on leave and overstayed the leave; (ii) the Investigating Officer of the criminal case to substantiate that petitioner is involved in the commission of the said crime and charge sheet has been filed against the petitioner. Whereas, in the criminal case, there are more than twenty prosecution witnesses in support of the charge.

On specific query, learned counsel for the petitioner is unable to point out as to how the charge in the disciplinary proceedings is based on the same facts and evidence which is subject matter of criminal trial; the witnesses in the disciplinary proceedings and criminal case are entirely different and the only witness, the Investigating Officer who has filed the charge-sheet in the Court is witness in the disciplinary proceedings, to only

substantiate that criminal case has been instituted against the petitioner for heinous crime. The charge in disciplinary proceedings is overstayal without information and involvement in heinous crime. Petitioner is a fairly senior officer and being a member of the disciplined force, it is open to the disciplinary authority to proceed in departmental proceedings pending criminal trial. The learned counsel for the petitioner failed to show from the material placed on record as to whether the petitioner would be prejudiced in the criminal trial, in case the disciplinary proceeding is continued and proceeded with.

Having due regard the facts and circumstances of the case, I do not find any merit in the case."

7. Learned Standing Counsel has also placed reliance on another judgment of this Court in the case of ***Sudesh Singh Vs. State of U.P. and others, Writ A No. 9672 of 2018, decided on 10.04.2018***. Relevant part is extracted below :-

"In the instant case, however, noticing the fact that cognizance in criminal case has been taken on 6.8.2015 and not much has been proceeded in the criminal case and that the standard of proof required in the departmental proceedings is one of preponderance of probability whereas in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt, this Court does not find any merit in the submission of learned counsel for the petitioner to postpone the departmental enquiry or to quash the departmental charge-sheet.

In view of the above, no merit is found in the present petition. However, looking to the fact that the charge-sheet has been served upon the petitioner on 9.2.2016 and the petitioner has submitted his reply, the Disciplinary Authority is hereby directed to make an endeavour to conclude the departmental proceedings expeditiously, preferably, within a period of four months from the date of submission of certified copy of this order, provided the petitioner co-operates."

8. Learned Standing Counsel for the State respondents has lastly placed reliance on another judgment passed by the coordinate Bench at Lucknow in the leading case of ***Surendra Singh S/o Ram Shanker Singh and another Vs. State of U.P. and another, Service Single No. 1735 of 2011, decided on 06.01.2012*** of which relevant paragraphs are quoted hereinafter :-

"27. The above exposition of law clearly shows that the term "has been" in simple language means a thing already happened and here the term "judicially tried" means that police officer concerned's trial in the court of law is already complete but the decision is awaited.

28. Similarly Regulation 493 is attracted when trial is complete and judgment of trial court has also come, resulting in recording a finding in favour of police officer. It restrain the competent authority in such matter to create a situation where a contrary finding can be recorded in departmental proceedings vis a vis court's verdict and the Regulation provides that such a contingency should not occur hence it prohibits such a course to be followed by competent authority.

29. Going by the above discussion it becomes apparently clear that situation in the present cases do not attract either Regulation 492 or 493 in both these matters since the only stage at which the criminal cases proceeding presently are

that a charge sheet has been filed against petitioners. The petitioners cannot be said to have undergone judicial trial so far. The trial is still awaited. For the purpose of understanding the meaning of word "Trial" one may simply refer to the provisions of Cr.P.C. and that would clearly show that an accused can be said to have tried when evidence by prosecution and defence has already led and matter has been argued before trial court. This itself leaves inescapable conclusion that both these writ petitions at this stage have to fail.

36. From bare perusal of charges levelled in departmental inquiry and criminal case it is evident that though the same emanate from a common incident but charges ex facie are different. In departmental proceeding the charges relates to violation of conduct rules and departmental rules while the charges in criminal case relates to an offence under Section 223 and 224 IPC. One of the basic difference besides others in these two are that in criminal case the element of mens rea, i.e., intention to commit offence is a necessary ingredient which has no place in respect to charges levelled in departmental inquiry. It is also true that evidence in two proceedings may be similar but the procedure of inquiry/trial, the assessment of evidence and other legal principle in two proceedings are totally different.

37. It is now well settled that departmental proceedings can proceed simultaneously with criminal proceedings and there is no bar as such therein as held by the Apex Court in the case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Another 1999 (3) SCC 679 where it has been clearly held that the departmental as well as criminal, both the proceedings, can go on simultaneously as there is no bar in their being conducted simultaneously. The question as to whether during the pendency of criminal proceeding, the departmental proceeding should be stayed depends upon the facts and circumstances of the individual case. In Ajit Kumar Nag Vs. General Manager I.O.C. JT 2005 (8) SC 425, the Apex Court said that the procedure followed in both the cases as well as the subject matter of the departmental enquiry and criminal proceeding has different scope and it cannot not be said that when a criminal proceeding is going on a particular criminal charge, in that regard, the departmental proceeding cannot be allowed to proceed. The same view has been reiterated subsequently, in Chairman/ Managing Director TNCS Corporation Ltd. & others Vs. K. Meerabai JT 2006 (1) SC 444, Suresh Pathrella Vs. Oriental Bank of Commerce AIR 2007 SC 199 and Union of India & others Vs. Naman Singh Shekhawat 2008 (4) SCC 1.

38. Referring to Capt. M. Paul Anthony (supra), recently the Apex Court in Managing Director, State Bank of Hyderabad & another Vs. P. Kata Rao JT 2008 (4) SC 577 observed that the legal principle enunciated to the effect that on the same set of facts, the delinquent shall not be proceeded in a departmental proceeding and in a criminal proceeding simultaneously has been deviated from. It it also said that the dicta laid down by the Apex Court in Capt. M. Paul Anthony (supra), though has remained unshaken but its applicability has been found to be dependent on the facts and situations obtained in each case.

39. Similarly, in the case of Noida Entrepreneurs Assn. Vs. NOIDA & others JT 2007 (2) SC 620, the Court has reproduced the following conclusion deducible from various judgments as noticed in para-22 of the judgment in Capt. M. Paul Anthony (supra), namely :

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature, which involved complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

40. A similar view has also been taken in Indian Overseas Bank Vs. P. Ganesan & others AIR 2008 SC 553 and the Court held that where a prayer is made that so long as criminal proceedings are going on, departmental proceeding may not be proceeded, the Court must record a finding that the non grant of stay on departmental proceeding would not only prejudice the delinquent officer, but the matter also involve a complicated question of law. Nothing of that sort has been shown by the learned Counsel for the petitioner in the case in hand.

41. Following the aforesaid authorities of the Apex Court, this Court has taken a similar view in Priti Chauhan vs. State of U.P. & others 2008 (9) ADJ 388.

42. I, therefore, have no hesitation to hold that here is a case where it cannot be said that charges in departmental proceedings are same as in the criminal trial and thus also the submission that departmental inquiry cannot proceed simultaneously, cannot be accepted particularly."

(underline is the emphasis supplied by the learned counsel for respective parties)

9. The facts of the case are that a preliminary inquiry was conducted and thereafter following charge was framed on the petitioners under the above referred Rules, 1991 :-

"मैं आपको निम्नानुसार आरोपों से आरोपित करता हूँ।

"यह कि पिढ़वल में रघुनाथ यादव के ट्रैक्टर से बैटरी की चोरी की घटना के सम्बन्ध में दिनांक07.09.2019 को थाना घोसी पर पंजीकृत मु.अ.सं.-382/2019 धारा 379 भा.द.वि. में वांछित अभियुक्त ओकेश कुमार यादव की दिनांक 08/09.09.2019 की रात्रि समय लगभग 02:45 बजे अचानक तबियत खराब होने पर उसे तत्काल सामुदायिक स्वास्थ्य केन्द्र घोसी ले जाया गया जहां डाक्टरों द्वारा उसे समय लगभग 03:15 बजे मृत घोषित कर दिया गया। मृतक ओकेश यादव को पुलिस अभिरक्षा में थाना घोसी में दिनांक 07.09.2019 से दिनांक 09.09.2019 तक रखा गया तथा ओकेश यादव के चोटों की जानकारी

होते हुए उपचार नहीं कराया गया। *आप लोगों द्वारा यदि ओकेश यादव का चिकित्सा कराया गया होता तथा 24 घण्टे के अन्दर सक्षम मजिस्ट्रेट के समक्ष प्रस्तुत किया गया होता तो ओकेश यादव की मृत्यु नहीं होती। आप लोगों द्वारा पर्याप्त सावधानी के साथ कार्य नहीं किया गया। प्रारम्भिक जांच से आप लोग उक्त कृत्य के दोषी पाये गये। आपका यह कृत्य लापरवाही तथा स्वेच्छाचारिता का द्योतक है। आपके इस कृत्य से पुलिस विभाग की छवि धूमिल हुई है।*""

(emphasis supplied by this Court)

10. Before that, an F.I.R. was lodged against the petitioners under Section 342 I.P.C. and 304 I.P.C. on 30.04.2022 and the relevant part of F.I.R. is reproduced hereinbelow :-

"नकल तहरीर- सेवा में, श्रीमान् प्रभारी निरीक्षक महोदय, थाना-घोसी जनपद-मऊ महोदय, निवेदन है कि मैं प्रार्थीनी संगीता यादव पत्नी स्व0 ओकेश यादव सा0 तिलई खुर्द नेवादा थाना घोसी जनपद मऊ की रहने वाली हूँ। मेरे पति *ओकेश यादव पुत्र स्व0 रामधारी यादव सा0 तिलई खुर्द थाना घोसी जनपद मऊ को दिनांक 07.09.2019 समय लगभग 02:00 बजे दिन को ट्रैक्टर की बैटरी की चोरी के झूठे मामले में ग्राम हाजीपुर में विपक्षीगण द्वारा मेरे पति ओकेश यादव को मारा पीटा गया इसका विडियो भी विपक्षीगण द्वारा बनाया गया था। इस सूचना पर थाना घोसी की पुलिस थाना घोसी पर लेकर आयी थी आपसी पट्टीदारी होने के कारण आपस में दोनों पक्ष ग्राम लाखीपुर के सभ्रान्त व्यक्ति मान्धाता सिंह व ग्राम तिलईखुर्द के सुनील कुमार सिंह आदि सभ्रान्त व्यक्तियों द्वारा थाना प्रांगढ़ में पीपल के पेड़ के नीचे दोनों पक्षों के मध्य सुलह समझौते की बात चल रही थी मैं भी थाना पर थी, कि रात में अचानक मेरे पति ओकेश यादव की तबियत बिगड़ने लगी कि तभी मैं तथा ग्राम के सभ्रान्त लोगों व पुलिस द्वारा उचित इलाज हेतु सामुदायिक स्वा0 केन्द्र घोसी ले जाया जा रहा था कि रास्ते में मेरे पति की मृत्यु हो गयी।* तब मेरे चचिया ससुर द्वारा दिनांक 09.09.2019 को तहरीर देकर मु.अ.सं. 383/2019 धारा 304 भा.द.वि. अच्छेलाल यादव आदि के विरुद्ध लिखवाया गया था। *अब ज्ञात हुआ कि थाना घोसी पुलिस द्वारा दिनांक 07.09.2019 से दिनांक 09.09.2019 तक थाना घोसी में नाजायज तरीके से बैठाया गया था दवा इलाज नहीं करवाया गया जिससे मेरे पति ओकेश की मृत्यु हो गयी। जिसमें पूर्व में नियुक्त थाना प्रभारी निरीक्षक नीरज पाठक, उ0नि0 ओमप्रकाश, कां. यमुना सिंह, कां. राजमनी की लापरवाही व उपेक्षा के कारण मेरे पति की मृत्यु हुई थी। अतः निवेदन है कि उपरोक्त पुलिस वालों के विरुद्ध कानूनी कार्यवाही की जाये।*"

(emphasis supplied by this Court)

11. Heard learned counsel for parties and perused the record.

12. The judgments cited on behalf of counsel from both side have proceeded on the basis of a different approach and interpretation to the relevant Regulations bearing No. 486, 492 and 493 of U.P. Police Regulations. For reference, they are mentioned herein :-

"486. When the offence alleged against a police officer amounts to an offence only under Section 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of this Superintendent of Police in accordance with the following rules :

I.- Every information received by the police relating the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XII, Criminal Procedure Code, 1973 (2 of 1974) according to law, a case under the appropriate section being registered in the police station concerned provided that -

(1) if the information is received, in the first instance, by a Magistrate and forwarded by the District Magistrate to the police, no case will be registered by the police;

(2) if the information is received, in the first instance by the police, the report required by Section 157, Criminal Procedure Code, shall be forwarded to the District Magistrate, and when forwarding it the Superintendent of Police shall note on

it with his own hand what steps are being taken as regards investigation or the reasons for refraining from investigation.

(3) unless investigation is refused by the Superintendent of Police under Section 157(1)(b), Criminal Procedure Code and not ordered by the District Magistrate under Section 159, or unless the District Magistrate orders a magisterial inquiry under Section 159, investigation under Section 159, Criminal Procedure Code, shall be made by a police officer selected by the Superintendent of Police and higher in rank than the officer charged;

(4) on the conclusion of the investigation and before the report required by Section 173, Criminal Procedure Code is prepared, the question whether the officer charged should or should not be sent for trial shall be decided by the Superintendent of Police. Provided that before an officer whose dismissal would require the concurrence of the Deputy Inspector General under paragraph 479 is sent for trial by the Superintendent of Police, the concurrence of the Deputy Inspector General must be obtained;

(5) the charge sheet or final report under Section 173, or Section 169, Criminal Procedure Code, as the case may be, shall be sent to the District Magistrate; if the Superintendent of Police or the Deputy Inspector General had decided against a prosecution, a note by the Superintendent of Police giving the reasons for this decision shall be endorsed on, or attached to the final report;

(6) When the reasons for not instituting a prosecution is that the charge is believed to be baseless, no further action will be necessary; if the charged is believed to be true and a prosecution is not undertaken own to the evidence being considered insufficient or for any other reasons the Superintendent may, when the final report under Section 173, Criminal Procedure Code, has been accepted by the District Magistrate, take departmental action as laid down in paragraph 490.

II. When information of the commission by a police officer of a noncognizable offence (including an offence under Section 29 of the Police Act) is given in the first instance to the police, the Superintendent of Police may, if he sees reason to take action, either (a) proceed departmentally as laid down under head III of this paragraph and in paragraph 490, or (b) as an alternative to, or at any stage of the departmental proceedings, forward a report in writing to the District Magistrate with a request that he will take cognizance of the offence under Section 190(1)(b), Criminal Procedure Code, provided that report against Police Officers of having committed non-cognizable offence will (when made to the police and unless there are special reasons for desiring a magisterial inquiry or formal police investigation under the Code) ordinarily be inquired into departmental and will not ordinarily and then only if be referred to the District Magistrate until departmental inquiry is complete, a criminal prosecution is desired.

On receiving information either by means of a report in writing from the Superintendent of Police as laid down above, or otherwise as laid down in Section 190(1)(a) and (c), Criminal Procedure, of the commission by a Police Officer of a noncognizable offence, the District Magistrate may, subject to the general provisions of Chapter XIII, Part B, Criminal Procedure Code -

(a) proceed with the case under Chapter XVI Criminal Procedure Code;

(b) order an inquiry by a Magistrate or an investigation by the police

under Section 202, Criminal Procedure Code, 1973 (2 of 1974); or an investigation by the police under Section 155(2);

(c) decline to proceed under Section 203, Criminal Procedure Code, 1973 (2 of 1974).

If an investigation by the police is ordered, it would be made under Section 155(3), Criminal Procedure Code by an officer selected by the Superintendent of Police and higher in rank that the officer charged and all further proceedings will be exactly as laid down for cognizable cases in paragraph 486 (1), (4), (5) and (6) above.

If no investigation by the police is ordered, and the District Magistrate, after or without magisterial inquiry, declines to proceed criminally with the case, the Superintendent of Police will decide, in accordance with the principles set forth in paragraph 486 (1) (6) above and subject to the orders contained in paragraph 494, whether departmental proceedings under paragraph 490 are required.

III.- When a Superintendent of Police sees reasons to take action or information given to him, or on his own knowledge or suspicion, that a Police Officer subordinate to him committed an offence under Section 7 of the Police Act or non-cognizable offence (including an offence under Section 29 of the Police Act) of which he considers it unnecessary at that stage to forward a report in writing to the District Magistrate under Rule II above he will make or cause to be made by an officer senior in rank to the officer charged, a departmental inquiry sufficient to test the truth of the charge. On the conclusion of this inquiry he will decide whether further action is necessary and if so, whether the officer charged should be departmentally tried, or whether the District Magistrate should be moved to take cognizance of the case under the Criminal Procedure Code; provided that before the District Magistrate is moved by the Superintendent of Police to proceed criminally with a case under Section 29 of the Police Act or other non-cognizable section of the law against an Inspector or Sub-Inspector, the concurrence of the Deputy Inspector General must be obtained. Prosecution under Section 29 should rarely be instituted and only when the offence cannot be adequately dealt with under Section 7.

492. Whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary.

493. It will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer who has been tried judicially to re-examine the truth of any facts in issue at his judicial trial, and the finding of the Court on these facts be taken as final.

Thus, (a) if the accused has been convicted and sentenced to rigorous imprisonment, no departmental trial will be necessary, as the fact that he has been found deserving of rigorous imprisonment must be taken as conclusively providing his unfitness for the discharge of his duty within the meaning of Section 7 of the Police Act. In such cases the Superintendent of Police will without further proceedings ordinarily pass an order of dismissal, obtaining the formal order of the Deputy Inspector General when necessary under paragraph 479(a). Should he wish to do otherwise he must refer the matter to the Deputy Inspector General of the range for orders.

(b) If the accused has been convicted but sentenced to a punishment less than of rigorous imprisonment a

departmental trial will be necessary, if further action is thought desirable, but the question in issue at this trial will be merely (1) whether the offence of which the accused has been convicted amounts to an offence under Section 7 of the Police Act, (2) if so, what punishment should be imposed. In such cases the Superintendent of Police will (i) call upon the accused to show cause why any particular penalty should not be inflicted on him, (ii) record anything the accused officer has to urge against such penalty without allowing him to dispute the findings of the Court, and (iii) write a finding and order in the ordinary way dealing with any plea raised by the accused officer which is relevant to (1) and (2) above.

(c) If the accused has been judicially acquitted or discharged, and the period for filing an appeal has elapsed and / or no appeal has been filed the Superintendent of Police must at once reinstate him if he has been suspended; but should the findings of the Court not be inconsistent with the view that the accused has been guilty of negligence in, or unfitness for, the discharge of his duty within the meaning of Section 7 of the Police Act, the Superintendent of Police may refer the matter to the Deputy Inspector General and ask for permission to try the accused departmentally for such negligence or unfitness."

13. The judgments relied upon on behalf of petitioners have taken a strict interpretation of the above referred police Regulations that in a case where on basis of same or similar act, simultaneous proceedings i.e. departmental inquiry as well as investigation in pursuance of F.I.R., are undertaken there would be an absolute bar for the department to proceed with the departmenal inquiry till the conclusion of the criminal trial. However, the approach in the judgments relied upon by the respondents are on the basis of the interpretation of word "trial' and that in a case where facts are not only same, but similar also, the departmental proceedings can go on simultaneously with the police investigation if the delinquent fails to demonstrate that in such case, he would be prejudice. The petitioners' side have mainly relied upon a judgment passed by the coordinate Bench at Lucknow in Sanjay Rai (supra), wherein the coordinate Bench has taken a strict view of the interpretation of the above referred Rules. However, Bench missed to take note of judgment passed by the Supreme Court in the case of ***Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Another 1999 (3) SCC 679*** which has been taken consideration by the coordinate Bench in the case of Surendra Singh (supra) which has been heavily relied upon by learned Standing Counsel. The conclusion in Capt. M. Paul Anthony (supra) despite being repetition are mentioned hereinafter :-

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature, which involved complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and

law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

(emphasis supplied by this Court)

14. The coordinate Bench in Sanjay Rai (supra) has also placed reliance on ***State of U.P. and others Vs. Babu Ram Upadhyay (5 Judges), (1961) 2 SCR 679 : AIR 1961 SC 751***, whereby majority has considered interest of both department of police as well as of delinquent that before taking decision to continue with departmental inquiry, a preliminary inquiry was held to be important. The Court was considering that on a complaint to police on administrative side, the department may take action or conduct inquiry as envisaged in Regulations. It would be relevant to quote paragraph No. 50 from the above referred judgment (minority):-

"50. It appears to us that the object of Rule 486 is that the authority concerned should first make a preliminary inquiry to find out if there is a case against the officer complained against either to proceed in a court or to take departmental action. The investigation prescribed by Rule 486 is only for this purpose. Incidentally it may be that after such an investigation, the authority concerned may come to the conclusion that there in no case either to send the case to court or to hold a departmental inquiry. But that in our opinion is what would happen in any case of complaint against a public servant in any department of Government. No authority entitled to take action against a public servant would straightaway proceed to put the case in court or to hold a departmental inquiry. It seems to us axiomatic if a complaint is received against any public servant of any department, that the authority concerned would first always make some kind of a preliminary inquiry to satisfy itself whether there is any case for taking action at all; but that is in our opinion for the satisfaction of the authority and has nothing to do with the protection afforded to a public servant under Article 311. Rule 486 of the Police Regulations also in our opinion is meant for this purpose only and not meant to carry out the object contained in Article 311(2). The opportunity envisaged by Article 311(2) will be given to the public servant after the authority has satisfied itself by preliminary inquiry that there is a case for taking action. Therefore, Rule 486 which is only meant to gather materials for the satisfaction of the authority concerned, whether to take action or not, even though a statutory rule cannot be considered to be mandatory as that would be forging a further fetter than those contained in Article 311 on the power of the Governor to dismiss at pleasure. We are therefore of opinion that Rule 486 is only directory and failure to comply with it strictly or

otherwise will not vitiate the subsequent proceedings."

15. From the above discussion, the Court is of the view that before reaching to any conclusion, a holistic approach has to be taken including the purport of the above referred relevant Regulations of U.P. Police Regulations as well as the judgments referred hereinbefore especially the judgment passed by the Supreme Court in Capt. M. Paul Anthony and Babu Ram Upadhyay (supra). Therefore, before taking a decision whether to proceed or not with the departmental inquiry, the concerned authority has to apply mind on facts of the charge in departmental proceedings as well as contents of F.I.R. and the charge if framed in the criminal proceedings and if the authority arrived at a conclusion that departmental proceedings and criminal case are based on identical set of facts and continuation of departmental proceedings would adversely effect, the case of delinquent or he would be prejudiced, then only, a decision could be taken not to proceed with departmental inquiry till the trial is over. Even thereafter, if there is an inordinate delay in conclusion of trial, after a reasonable time, the concerned authority may review the decision and would have a liberty to proceed with the departmental proceedings.

16. The Regulation 486(II) would come into picture when a complaint is made to police authority against any police personnel about his involvement in a non-cognizable offence, and the police authority would be at liberty to lodge an F.I.R. or initiate departmental proceedings and for that purpose, preliminary inquiry has to be conducted. So far as report of cognizable offence is concerned, procedure is prescribed under Regulation 486 (I) that police investigation be carried on and in case final report is accepted, departmental inquiry can be initiated, however, in view of judgment of the Supreme Court in case of Lalita Kumari Vs. Government of Uttar Pradesh and others, (2008) 14 SCC 337, it is now mandatory to register F.I.R. where the information discloses commission of cognizable offence and further there may be a different situation when criminal investigation is initiated on an F.I.R. lodged by complainant/victim and departmental proceedings are initiated separately on same or similar facts and in these circumstances, the department has also liberty to take a decision in terms of Regulation 492 and 493 as well as considering the judgment of Capt. M. Paul Anthony (supra).

17. The above observation of this Court based on the basic difference in regard to standard of proof required in a departmental proceedings and in a criminal case which is different so much as the proof required in a departmental proceedings is one of preponderances of probability whereas in a criminal case, charge has to be proved by prosecution beyond reasonable doubt and further that the evidence led in the departmental inquiry could not be read in a criminal case. A criminal trial is considered to be commenced only before a Court of Sessions under Chapter XVIII of Cr.P.C. when under Section 226 (opening case of prosecution) after commitment of the case under Section 209 Cr.P.C., therefore, till proceedings are reached upto that stage, Regulations No. 492 and 493 have no role.

18. In the above background, the Court proceeded to consider the contents of charge framed against the petitioners in departmental proceedings as well as the

contents of F.I.R. lodged against the petitioners.

19. On instructions, it has been stated at Bar by learned counsel for parties that in criminal case, investigation is still not concluded, therefore, as held earlier stage has still not come for consideration of Regulations No. 492 and 493. The contents of charge in the departmental proceedings are referred in paragraph No. 11 of this judgment that are of negligence and due process was not followed by the petitioners when victim was kept under detention, so much as no medical facility was provided as well as he was not produced before the Magistrate within 24 hours as prescribed under Criminal Procedure Code whereas in the first part of F.I.R., there was no allegation against petitioners, however, in later part of F.I.R., an allegation against the petitioners was also made that deceased was kept under detention illegally and no medical treatment was given to him.

20. Therefore, it cannot be said that departmental proceedings and criminal case are based on absolutely identical set of facts, though, similar to some extent. In the memo of charge, proposed witnesses are mentioned, however, till date investigation is not concluded. Therefore, outcome of the investigation is not on record and details of proposed witnesses are unknown at present stage.

21. At this stage to take a definite view that proposed witnesses, if any, be identical in the criminal case would not be a correct approach and since trial is not commenced till date and therefore, even the contents of Regulation No. 492 and 493 does not bar to continue with the departmental proceedings. However, during proceedings, the petitioners are at liberty, in case investigation is concluded and further in case any charge sheet is filed, and the proposed witnesses are same and the petitioners are able to show that continuance of departmental proceedings would cause prejudice to them, the concerned authority, if such departmental proceedings are not concluded, would be under obligation to consider grievance of the petitioners and at that stage, appropriate decision could be taken to continue with the departmental inquiry or not.

22. However, at this stage, the Court is of the view that there is no bar to continue with the departmental proceedings.

23. In view of above, the prayers made in this petition are rejected and the respondents are directed to proceed further with the departmental proceedings. However, after filing of the charge sheet, if any, and at the stage of commencement of trial the petitioners would have liberty to bring subsequent event on record in departmental proceedings, that continuation of the departmental proceedings may cause prejudice to them and in that case, the respondents shall take an appropriate decision.

24. In view of above and also considering the law on issue as well as facts of the present case, this writ petition is **dismissed** with aforesaid observations.

(2022) 10 ILRA 807
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ-A No. 12181 of 2022

Harshit Prakash ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 5 - The very language of Rule 5 of 1974 Rules is explicitly clear that it shall apply only in those cases where the government servant dies in harness and his/her spouse is not already employed with the government, only in that case the application for compassionate appointment shall be considered. (Para 6)

It is admitted case of the petitioner that his father was working with the State Government at the time of death of his mother who was already a government servant, therefore, in view of the clear statutory provision of Rule-5 of 1974 Rules, the petitioner is not entitled for being considered on compassionate grounds and therefore his candidature has rightly been rejected by the impugned order. (Para 7)

Perusal of the impugned order dated 17.10.2016 shows that **the candidature of the petitioner has not been rejected on the ground of his sound financial status rather has been rejected as the other spouse i.e. father of the petitioner was in government service at the time of death of the deceased (mother of the petitioner) who was also in government service**. (Para 8, 9)

Writ petition dismissed. (E-4)

Present petition assails order dated 17.10.2016, passed by Director, Directorate of Child Development, Nursing and Nutrition, U.P., Lucknow and orders dated 21.10.2016 and 13.06.2022, passed by District Program Officer, Kanpur Nagar.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the petitioner and learned Additional Chief Standing Counsel for respondent no. 1 to 4.

2. Through this petition the petitioner has prayed for the following relief:-

"a) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 17.10.2016 (Annexure - '1' to this writ petition) passed by the respondent no.2 as well as impugned order dated 21.10.2016 and 13.06.2022 (Annexure - '2' & '3' respectively to this writ petition) passed by the respondent no.3.

b) Issue a writ, order or direction in the nature of mandamus commanding upon the respondents to grant compassionate appointment to the petitioner in the respondent department, forthwith."

3. Learned counsel for the petitioner submits that the mother of the petitioner who was a government servant and was serving as Mukhya Sevika in the office of Child Development Project Kanpur (Pratham), Kanpur Nagar has died on 20.02.2016 while she was in service. The petitioner being the elder son along with two sisters in the family submitted an application for compassionate appointment on 03.05.2016 along with requisite documents. The Director Child Development, Nursing and Nutrition, U.P. Lucknow rejected the petitioner's application for compassionate appointment vide impugned order dated 17.10.2016 and by a consequent order, the District Program Officer Kanpur has also issued impugned order dated 21.10.2016. Thereafter he gave a representation before the authorities that was also rejected vide order dated

13.06.2022 by the District Program Officer, Kanpur.

4. Learned Standing Counsel has opposed the petition submitting that both the parents of the petitioner were in government service. The mother Munni Devi @ Munni Kushwaha who was working as Mukhya Sevika in the office of Child Development Project Kanpur (Pratham), Kanpur Nagar died in the year 2016, however, Shri Umesh Kumar who is the father of the petitioner was working in the State Secretariat, therefore, the authorities found that since the father of the petitioner who is the bread earner of the family was still employed with the State Government, there is no occasion for giving the benefit of compassionate appointment to the petitioner.

5. The compassionate appointment to the dependents of the deceased, government servant is provided under Rule-5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred as 1974 Rules) which are extracted below:-

*"**5. Recruitment of a member of the family of the deceased**. - (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-*

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner. (2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death."

6. Perusal of Rule 5 of 1974 Rules shows that in case the death of the government servant during service after the commencement of the rules and the spouse of the deceased government servant is not already employed under the Central Government or the State Government etc. then on making an application by the dependent of the deceased government servant for the purpose of giving suitable appointment in government service he can be appointed on compassionate ground. The very language of Rule 5 of 1974 Rules is explicitly clear that it shall apply only in those cases where the government servant dies in harness and his/her spouse is not already employed with the government, only in that case the application for compassionate appointment shall be considered.

7. It is admitted case of the petitioner that his father was working with the State Government at the time of death of his mother who was already a government servant, therefore, in view of the clear statutory provision of Rule-5 of 1974 Rules, the petitioner is not entitled for being considered on compassionate grounds and therefore his candidature has rightly been rejected by the impugned order.

8. Learned counsel for the petitioner at this stage has drawn attention of the Court towards government order dated 17.06.2014 which is on record at page no. 32 of the petition and has submitted that the appointment under the Rules 5 of 1974 Rules cannot be refused merely on the ground that financial status of the applicant is sound.

9. Perusal of the impugned order dated 17.10.2016 shows that the candidature of the petitioner has not been rejected on the ground of his sound financial status rather has been rejected as the other spouse i.e. father of the petitioner was in government service at the time of death of the deceased (mother of the petitioner) who was also in government service and thus, the authority has rejected the claim of the petitioner on the ground that since the other spouse of the deceased was already in government service at the time of death of the mother of the petitioner, therefore, as per Rule - 5 of 1974 Rules, there was no occasion for providing compassionate appointment to the petitioner.

10. The petition being devoid of merits and is accordingly dismissed.

(2022) 10 ILRA 810

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 4174 of 2022

Km. Mohini ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prakhar Tandon

Counsel for the Respondents:
C.S.C., Sri Shravan Kumar Pandey, Sri Shyam Narain Pandey, Sri Yashwant Singh

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974; The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness (Twelfth Amendment) Rules, 2021 - Language of Rules is very much clear, which provides that **first right of appointment on compassionate ground goes to husband or wife as the case may be in case of death of Government employee.** (Para 6)

In the present case, there is no dispute of fact that deceased-employee was married and his wife is alive and also claiming appointment on compassionate ground. Therefore, under the Rules, she is only entitled for appointment and no relief can be granted to petitioner-sister, which is at Serial No. 4 in order of hierarchy given in Rules, 1974 read with amended Rules 2021, in case deceased Government employee is unmarried. Therefore, petition is having no force and liable to be dismissed. (Para 7)

Writ petition dismissed. (E-4)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner, learned standing counsel for respondent no. 1, Sri Yashwant Singh, learned counsel for respondent nos. 2 and 3 and Sri S.N. Pandey, learned counsel for respondent no. 4.

2. Present petition has been filed with following prayers;

"(i). Issue a writ, order or direction in the nature of mandamus directing the respondents to decide the representation dated 01.12.2021 for compassionate appointment of the petitioner within a month.

(ii). Issue a writ, order or direction in the nature of mandamus directing the respondents to grant compassionate appointment to the petitioner."

3. Learned counsel for the petitioner submitted that father of petitioner was working on the post of "Safai Karmchari Ward 99/107" at Nagar Nigam, Kanpur and during the course of service, he died. After his death, brother of petitioner (son of deceased- employee) has been granted appointment on compassionate ground under the provisions of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "Rules, 1974") as "Safai Karmchari" to cater the need of all family members dependent upon deceased-employee including petitioner- sister. Unfortunately, in a road accident, brother of petitioner also died on 16.10.2021. After his death, her mother has given consent for appointment of petitioner on compassionate ground. Petitioner has filed representation dated 01.12.2021 before respondent no. 2 for appointment, which is pending for decision, therefore, a direction may be issued to respondent no. 2 to decide the same and appoint the petitioner on compassionate ground under the provisions of Rules, 1974 amended vide The Uttar Pradesh Recruitment of Dependants of Government Servants Dying In Harness (Twelfth Amendment) Rules, 2021 (hereinafter referred to as "Rules, 2021).

4. Learned counsels for the respondents objected the submissions raised by learned counsel for the petitioner and submitted that as per Rules, 1974 readwith amended Rules 2021, definition of family is given in order of hierarchy. After death of deceased- employee, first right goes to husband or wife, second right goes to sons/ adopted sons, third right goes to daughters (including adopted daughters) and widowed daughter-in-law and fourth right goes to unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried. He next submitted that in the present case, there is no dispute that deceased- employee was married and his wife has also raised a claim for appointment on compassionate ground after death of her husband. Therefore, as per Rules, 1974 readwith amended Rules 2021, petitioner has no right of appointment after death of deceased- employee and respondent no. 4 is only having right to be appointed on the compassionate ground after death of her husband.

5. Learned counsel for the petitioner could not dispute the aforesaid facts and only submitted that earlier appointment was given to her brother to cater the need of all family members dependant upon her father, therefore, petitioner is also entitled to get appointment after death of her brother.

6. I have considered the rival submissions raised by learned counsel for

the parties as well as perused the record and Rules, 1974 readwith amended Rules 2021. Language of Rules is very much clear, which provides that first right of appointment on compassionate ground goes to husband or wife as the case may be in case of death of Government employee. For ready reference, Rules, 1974 is being quoted hereinbelow;

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In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the Governor is pleased to order the publication of the following English translation of notification no. 6/XII-1973-Personnel-2-2021T.C-IV, dated November 12, 2021:

GOVERNMENT OF UTTAR PRADESH
PERSONNEL SECTION-2

NOTIFICATION

Miscellaneous

No. 6/XII-1973-Personnel-2-2021T.C-IV

Dated Lucknow, 12 November, 2021

IN exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules with a view to amending The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974:

THE UTTAR PRADESH RECRUITMENT OF DEPENDANTS OF GOVERNMENT SERVANTS DYING IN HARNESS (TWELFTH AMENDMENT) RULES, 2021

Short title and commencement

1. (1) These rules may be called **The Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (Twelfth Amendment) Rules, 2019.**

(2) They shall come into force at once.

Amendment of rule-2

2. In the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974, in rule 2, for existing clause (c) set out in column-1 below, the clause as set out in column-2 shall be substituted, namely:-

COLUMN-1	COLUMN-2
Existing clause	Clause as hereby substituted
(c) "family" shall include the following relations of the deceased Government servant:-	(c) "family- shall include the following relations of the deceased Government servant:-

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(i) wife or husband;	(i) wife or husband;
(ii) sons/ adopted sons;	(ii) sons/ adopted sons;
(iii) unmarried daugters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;	(iii) daughters (including a...pted daughters) and widowed daughters-in-law,
(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;	(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;
(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court:	(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court:
Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him.	Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him.

By order,

(Dr. Devesh Chaturvedi)
Additional Chief Secretary.

7. In the present case, there is no dispute of fact that deceased- employee was married and his wife is alive and also claiming appointment on compassionate ground. Therefore, under the Rules, she is only entitled for appointment and no relief can be granted to petitioner- sister, which is at Serial No. 4 in order of hierarchy given in Rules, 1974 readwith amended Rules 2021, in case deceased Government

employee is unmarried. Therefore, petition is having no force and liable to be dismissed.

8. So far as claim of petitioner about her maintenance is concerned, it is open for her to seek appropriate remedy against respondent no. 4, if any Rule provides for the same.

9. Accordingly, writ petition is **dismissed** with aforesaid observations. No order as to costs.

(2022) 10 ILRA 813
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.09.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal No. 395 of 2022

Rajeev Kumar ...Appellant
Versus
Kamlesh Kumar Singh & Ors. ...Respondents

Counsel for the Appellant:
Lalta Prasad Misra

Counsel for the Respondents:
Amrendra Nath Tripathi, C.S.C.

A. Administrative Law – Nomination of Chairman – Jurisdiction - U.P. Technical Education Act, 1962 - Scheme of Administration: Clause 7 - It is observed that cancellation of earlier panel and preparation of fresh panel because the earlier panel was non-existent, is not acceptable for the reason that the occasion for the Committee of Management to prepare new panel did not arise in this case as the State Government had not taken any decision on the first panel before the second panel was proposed by the Committee of Management. (Para 28)

(1) Interpretation - The answer to the point for determination that whether in terms of the provisions contained in Clauses 7(2)(a) and 7(2)(b) of the Scheme of Administration, the State Government could have acted upon the earlier panel and whether appointment from the said panel could have been made, though one of the persons of panel suggested by the Committee of Management of the institution, had died., lies in correctly interpreting the provision contained in Clause 7(2)(b) of the Scheme of Administration. The said provision clearly states that **in case no one is nominated as Chairman of the Committee of Management of the institution from amongst the persons of the panel suggested by the Committee of Management, the Committee of Management shall submit a second panel containing three names.** (Para 17, 18)

(2) Jurisdiction to recommend second panel - A plain reading of Clause 7(2)(b) of the Scheme of Administration reveals that second panel can be recommended/sent/proposed by the Committee of Management only if the State Government does not nominate any person from the first panel. It would simply mean that the Committee of Management will assume jurisdiction to recommend the second panel if the State Government rejects all the names in the first panel and refuses to nominate anyone of them. (Para 19)

In the instant case, the process of nomination of Chairman in case of any vacancy in the office of Chairman will start from the resolution of the Committee of Management proposing a panel of three persons, as per Clause 7(2)(a) of the approved Scheme of Administration. The process further proceeds with the recommendation to be made by the Director, Technical Education, U.P. on the panel suggested/sent/proposed by the Committee of Management and this process comes to an end only once the decision on the panel proposed/sent/suggested by the Committee of Management and on the recommendation made

by the Director, Technical Education, is taken by the State Government. The process thus terminates only once the decision is taken by the State Government. In our considered opinion, the Committee of Management will assume jurisdiction to propose/send/suggest the second panel only on completion/termination of the process which commences proposal/submission of first panel by the Committee of Management. (Para 20)

In the present case, before the process which commenced on resolution of the Committee of Management proposing three names in the first panel could logically culminate in the decision by the State Government, the Committee of Management cancelled the earlier panel and proposed a new panel. Such a course, is not envisaged, neither is it provided for in the Clauses 7(2)(a) and 7(2)(b) of the approved Scheme of Administration. (Para 21)

(3) "Not taking decision" and "not nominating" are two different acts - Forwarding the name of three different persons as second and subsequent panel is not envisaged in a situation where the State Government does not take decision. It is rather permissible only if the State Government takes a decision and does not nominate any of the person from the panel. Clause 7(2)(b) states that the Committee of Management shall recommend second panel in case the State Government does not nominate a person to be Chairman. Thus, pending decision by the State Government Committee of Management will not get authority to recommend the second panel. (Para 24)

(4) Insistence of the learned counsel representing the respondent No. 1-petitioner that it will be incumbent upon the State Government to take decision to nominate the Chairman only if the panel consists of three persons in all circumstances and situations, is thus, in our opinion, not correct. Any panel prepared by the Committee of Management and forwarded after recommendation by the Director, Technical Education will exhaust only on decision on the said panel is taken by the State Government. (Para 25)

(5) By shrinkage of panel of three persons to two, no individual right gets infringed - To be included in the panel for nomination as Chairman by the Committee of Management cannot be said to be right of any individual. It is the right of the Committee of Management conferred on it by the Clause 7(2) of the approved Scheme of Administration to prepare a panel of three persons of its choice. Since the remaining two persons on the first panel were also the persons of choice of the Committee of Management, as such by shrinkage of panel of three persons to two, no individual right gets infringed. **Even if, on account of such exigency as death the panel shrinks to two persons, before final decision for nomination is taken by the State Government, the person who may be nominated as Chairman will still be the choice of Committee of Management.** (Para 26, 27)

B. Independent application of mind – It has been argued that the decision of the State Government cannot be said to be the decision emanating from independent application of mind by the authority who took decision. It has been observed by the Court that different departments of the State Government have been created for convenience. **Any decision of the State Government in a particular department, even if it is based on opinion of Law Department or any other department, cannot be said to be vitiated merely because opinion of some other department was taken before arriving at the decision in question.** (Para 29)

C. Absence of challenge to the order dated 13.01.2021 – It is argued that in absence of challenge to the order dated 13.01.2021, passed by the Director, Technical Education whereby a fresh panel was invited, the procedure which followed thereafter cannot be faulted with. Court held that **the letter of the Director, Technical Education, dated 13.01.2021 was only an intermediate step in the process which culminated in the decision of the State Government finally taken on 12.05.2022** whereby the appellant was nominated as a Chairman of the Committee of Management. (Para 30, 31)

Special appeal allowed. (E-4)

Present special appeal lays a challenge to the judgment and order dated 07.09.2022, passed by the learned Single Judge in Writ-C No. 2957 of 2022 which setting aside the order of the State Government dated 12.05.2022, nominating the appellant as Chairman of the Committee of Management of Town Polytechnic, Ballia.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Saurabh Srivastava, J.)

1. This intra-court appeal filed under Chapter VIII Rule 5 of the Rules of the Court lays a challenge to the judgment and order dated 07.09.2022, passed by the learned Single Judge in Writ-C No.2957 of 2022 whereby after setting aside the order of the State Government dated 12.05.2022, nominating the appellant as Chairman of the Committee of Management of Town Polytechnic, Ballia, a direction has been given to the Committee of Management of Town Polytechnic, Ballia to take decision afresh for preparing a panel of three persons and to forward the same to the Director, Technical Education, U.P. who, in turn, has been directed to forward the same to the State Government whereupon the State Government has been directed to take decision nominating Chairman of the Committee of Management of the said institution.

2. Heard Dr. L.P. Mishra along with Ms. Neha Chaddha and Sri Prafulla Tewari, learned counsel representing the appellant, Sri Anand Kumar Singh, learned State Counsel representing the State-respondents, Sri Amrendra Nath Tripathi along with Sri Anas Sherwani, learned counsel representing the respondent No.1-petitioner and perused the record available before us on this Special Appeal.

3. Before adverting to the rival submissions advanced by learned counsel representing the parties, it is apposite to note certain facts of the case which are necessary for appropriate adjudication of the issues involved in this case.

4. Town Polytechnic, Ballia is an institution which is governed by the provisions of U.P. Technical Education Act, 1962 and the regulations framed under the said Act. The State has approved a Scheme of Administration which, *inter-alia*, provides for constitution of the Committee of Management to be headed by a Chairman who is to be nominated by the State Government.

5. The controversy in this case commenced with the occurrence of a vacancy in the office of the Chairman of the Committee of Management of the institution. Clause 7 of the approved Scheme of Administration provides that Chairman of the Committee of Management shall be nominated by the State Government. As per Clause 7(2)(अ) of the Scheme of Administration, the Committee of Management will send a panel of three persons for appointment of Chairman of the Committee of Management to the Director, Technical Education, U.P. It further provides that the State Government on the recommendation of the Director, Technical Education, U.P. shall appoint one of the three persons of the panel which may be proposed by the Committee of Management. Clause 7(2)(ब) of the Scheme of Administration provides that in case the State Government does not nominate any of the person from the panel, the Committee of Management shall propose the second panel containing three names who shall be different from the persons proposed in the first panel. Clause

7 of the approved Scheme of Administration is quoted herein under :

"(7) अध्यक्ष प्रबन्ध समिति की नियुक्ति :–

(1) प्रबन्ध समिति का अध्यक्ष उ0 प्र0 शासन द्वारा नामित किया जायेंगा ।

2(अ) संस्था की सोसाइटी की संस्तुति पर प्रबन्ध समिति तीन नामों का पैनल (आवश्यक नहीं कि इसके सदस्य हों) अध्यक्ष प्रबन्ध समिति की नियुक्ति हेतु निदेशक प्राविधिक शिक्षा उ0 प्र0 को भेजेगा।

निदेशक प्राविधिक शिक्षा की संस्तुति पर उत्तर प्रदेश शासन तीन नामों के पैनल में से किसी एक व्यक्ति को अध्यक्ष प्रबन्ध समिति के पद पर नामित कर सकता है।

2(ब) यदि शासन द्वारा उपरोक्त पैनल में से किसी व्यक्ति को अध्यक्ष पद हेतु नामित नहीं किया जाता है तो संस्था की प्रबन्ध समिति द्वारा तीन नामों का दूसरा पैनल संस्तुत किया जायेगा जो प्रथम पैनल में शामिल तीन नामों से भिन्न होगें।"

6. On occurrence of vacancy in the office of the Chairman of the Committee of Management of the institution, a meeting of Committee of Management is said to have taken place on 25.11.2020 which prepared a panel of three persons, namely, (1) Sri Arvind Kumar Srivastava, (2) Sri Rajiv Kumar and (3) Sri Ajay Kumar Ojha. The decision taken by the Committee of Management in its meeting dated 25.11.2020 was communicated by the Secretary of the Committee of Management to the Director, Technical Education, U.P. by means of his letter dated 26.11.2020. The Director, Technical Education, vide his letter dated 01.12.2020 recommended that out of the aforesaid three persons in the panel prepared by the Committee of Management, Sri Arvind Kumar Srivastava be nominated as Chairman of the Committee of Management of the institution. However, before the State Government could take decision on the panel proposed by the Committee of Management and the recommendation made by the Director, Technical Education by means of letter dated 01.12.2020, Sri Arvind Kumar Srivastava died and accordingly a letter was written by the Secretary of the Committee of Management of the instition to the Director, Technical Education on 06.01.2021 intimating him about the death of Sri Arvind Kumar Srivastava and further intimating that Sri Kamlesh Kumar Singh (respondent No.1-petitioner) has been nominated as officiating Chairman till the meeting of the Committee of Management is convened and the Committee of Management appoints an officiating Chairman.

7. The Director, Technical Education on the said letter dated 06.01.2021 approved the nomination/appointment of Sri Kamlesh Kumar Singh as officiating Chairman till the Committee of Management elected its new officiating Chairman, vide letter dated 13.01.2021. It, thus, appears that the nomination of Sri Kamlesh Kumar Singh was an interim arrangement which was to last till Committee of Management nominated a new officiating Chairman. By the said letter, a direction was issued by the Director, Technical Education to the Joint Director, Technical Education, Varanasi to convene a meeting of the Committee of Management within 15 days for preparing a panel of three names till nomination of regular Chairman is made.

8. The Committee of Management held its meeting on 24.01.2021 and decided to cancel the earlier panel and further resolved to nominate a panel of three persons, namely, (1) Sri Kamlesh Kumar Singh, (2) Sri Sudhir Kumar Srivastava and (3) Sri Kamlesh Kumar Srivastava. It was also resolved that till the regular Chairman is nominated by the State Government, Sri Kamlesh Kumar Singh shall continue to

officiate on the said post. The new panel as resolved by the Committee of Management was sent to the Director, Technical Education by means of letter dated 27.01.2021 whereupon the Director, Technical Education by means of his letter dated 22.02.2021 sent the penal to the State Government with his recommendation to nominate Sri Kamlesh Kumar Singh, who was placed at Serial No.1 of the new panel, as Chairman of the Committee of Management. The State Government wrote a letter to the Director on 22.12.2021 after seeking legal advice from the Law Department and sought clear proposal in the light of the legal opinion tendered by the Law Department.

9. A perusal of the letter dated 22.12.2021 addressed to the Director, Technical Education and written by the State Government reveals that the Law Department had opined that in case of death of a person in the earlier panel, the panel will not be incomplete nor will it lapse.

10. The Director, Technical Education thereafter wrote a letter dated 24.12.2021 in pursuance of the letter of the State Government dated 22.12.2021 making a recommendation that the decision for nomination of the Chairman be taken pursuant to the earlier proposal dated 01.12.2020. On the said recommendation made by the Director, Technical Education, the State Government took a decision to nominate the appellant as Chairman of the Committee of Management of the institution which is embodied in the order dated 12.05.2022. It is this order dated 12.05.2022 appointing the appellant as Chairman of the Committee of Management of the institution which was challenged by the respondent No.1-petitioner in the writ petition, which has been decided by means of judgment and order dated 07.09.2022, passed by the learned Single Judge, which is under appeal before us.

11. Learned counsel for the appellant has vehemently argued that merely because of the death of one of the persons named in the earlier panel, namely, Sri Arvind Kumar Srivastava, the earlier panel could not be treated to have lapsed or defective in any manner. It has further been argued by the learned counsel for the appellant that the State Government thus has acted lawfully by passing the order dated 12.05.2022 nominating the appellant as Chairman of the Committee of Management of the institution and there is no illegality in the said order. It has also been argued on behalf of the appellant that on receipt of the earlier panel with the recommendation of the Director, Technical Education, before the State Government could act upon and take decision to nominate one of the persons named in the earlier panel as Chairman of the Committee of Management of the institution, Sri Arvind Kumar Srivastava died and on account of his death the panel did not lapse and accordingly the State Government has rightly acted upon the earlier panel and has lawfully appointed the appellant as Chairman of the Committee of Management of the institution.

12. Dr. Mishra further arguing on behalf of the appellant has submitted that on receipt of the earlier panel since the death of one of the persons occurred before the decision on the said panel could be taken by the State Government, the State had three options. The first option available to the State Government was that it could have appointed one of the two remaining persons in the first panel, secondly, it could

have rejected the panel of remaining two persons and thirdly, the State Government could have asked for one additional name by the Committee of Management. His submission, thus, is that it was not open to the Committee of Management to have cancelled the earlier panel and proposed the new panel for the reason that earlier panel had not exhausted on account of the fact that Government had not taken any decision on the same and in absence of any defect or lapse in the earlier panel, on account of death of Sri Arvind Kumar Srivastava it was incumbent upon the State Government to have taken the decision. He further states that however, in its discretion, the State Government could have rejected the remaining two names from the first panel and it is only after such decision that the Committee of Management would have assumed the jurisdiction to nominate a fresh panel. On behalf of the appellant, it has, thus, been argued that learned Single Judge has not correctly construed the provisions of Clauses 7(2)(v) and 7(2) (c) of the approved Scheme of Administration and has thus arrived at the conclusion which is not borne out from the said provisions. Further submission of the learned counsel for the appellant is that in the aforesaid view of the matter the finding recorded by the learned Single Judge that the first panel of three names stood lapsed on account of death of one of the persons in the panel, is not as per the Scheme of Administration.

13. It has also been urged on behalf of the appellant that Clauses 7(2)(अ) and 7(2)(ब) of the Scheme of Administration appear to have been misread by the learned Single Judge and he records a finding that in all exigencies, the State Government can act upon only in case where all the three persons in the panel suggested by the Committee of Management are surviving. It has thus been urged on behalf of the appellant that the judgment and order passed by the learned Single Judge is erroneous which deserves to be set aside and the Special Appeal deserves to be allowed.

14. Learned State Counsel while arguing on behalf of the State-respondents has submitted that the order passed by the State Government, dated 12.05.2022 whereby the appellant was nominated as Chairman of the Committee of Management does not suffer from any illegality and, in fact, the same is in accordance with the approved Scheme of Administration, as such the said order did not warrant any interference by the learned Single Judge in the writ petition filed by the respondent No.1-petitioner.

15. Sri Amrendra Nath Tripathi, learned counsel representing the respondent No.1-petitioner has argued that the order dated 13.01.2021 whereby the Director, Technical Education had required the Committee of Management to send a fresh panel, was not challenged and in absence of challenge to the said order, the earlier panel could not have been acted upon and accordingly no appointment from the earlier panel could have been made. He has further argued that the Committee of Management had decided in its meeting held on 24.01.2021 to cancel the earlier panel which power is vested in the Committee of Management and accordingly nomination of Chairman from the panel which stood cancelled by the Committee of Management, could not have been made. His submission is that once the fresh panel was proposed the earlier panel ceased to exist. Sri Tripathi also argued that the decision dated 12.05.2022, passed by

the State Government suffers from the vice of non-application of mind as the same is based on solely on the opinion of the Law Department and the authority passing the said order does not appear to have applied his independent mind. It has further been argued that the earlier panel could not have been acted upon for the reason that the panel included a dead person (Arvind Kumar Srivastava).

16. It has also been submitted by the learned counsel representing the respondent No.1-petitioner that Clause 7(2)(v) uses the words, "a panel of three (तीन नामों का पैनल)' and on the death of Sri Arvind Kumar Srivastava, the panel comprised of only two living persons and hence in absence of panel of three persons, as envisaged in Clause 7(2)(v) of the Scheme of Administration, the State Government erred in appointing the appellant from the said panel of two persons as Chairman of the Committee of Management of the institution. In this view, the submission is that such course to the State Government was not available in absence of panel of three living persons. He has thus argued that the learned Single Judge while passing the judgment and order under appeal herein has taken the correct view in the matter and has rightly interpreted the provisions of Clauses 7(2)(v) and 7(2)(c) of the Scheme of Administration and has, thus, rightly set aside the order of State Government, dated 12.05.2022, appointing the appellant as Chairman of the Committee of Management of the institution. He, thus, prays that the Special Appeal may be dismissed at its threshold.

17. On consideration of the rival submissions made by the learned counsel for the respective parties, the point for consideration which emerges in this case is as to whether in terms of the provisions contained in Clauses 7(2)(अ) and 7(2)(ब) of the Scheme of Administration, the State Government could have acted upon the earlier panel and whether appointment from the said panel could have been made, though one of the persons of panel suggested by the Committee of Management of the institution, had died.

18. The answer to the point for determination, as culled out above, lies in correctly interpreting the provision contained in Clause7(2)(c) of the Scheme of Administration. The said provision clearly states that in case no one is nominated as Chairman of the Committee of Management of the institution from amongst the persons of the panel suggested by the Committee of Management, the Committee of Management shall submit a second panel containing three names.

19. The question, thus, is as to when does the Committee of Management assumes the jurisdiction to recommend/propose/send the second panel. A plain reading of Clause 7(2)(c) of the Scheme of Administration reveals that second panel can be recommended/sent/proposed by the Committee of Management only if the the State Government does not nominate any person from the first panel. It would simply mean that the Committee of Management will assume jurisdiction to recommend the second panel if the State Government rejects all the names in the first panel and refuses to nominate anyone of them.

20. In the instant case, the process of nomination of Chairman in case of any vacancy in the office of Chairman will start from the resolution of the Committee of Management proposing a panel of three

persons, as per Clause 7(2)(अ) of the approved Scheme of Administration. The process further proceeds with the recommendation to be made by the Director, Technical Education, U.P. on the panel suggested/sent/proposed by the Committee of Management and this process comes to an end only once the decision on the panel proposed/sent/suggested by the Committee of Management and on the recommendation made by the Director, Technical Education, is taken by the State Government. The process thus terminates only once the decision is taken by the State Government. In our considered opinion, the Committee of Management will assume jurisdiction to propose/send/suggest the second panel only on completion/termination of the process which commences proposal/submission of first panel by the Committee of Management.

21. If we analyze the facts of this case, what we find is that before the process which commenced on resolution of the Committee of Management proposing three names in the first panel could logically culminate in the decision by the State Government, the Committee of Management cancelled the earlier panel and proposed a new panel. Such a course, in our considered opinion, is not envisaged, neither is it provided for in the Clauses 7(2)(अ) and 7(2)(ब) of the approved Scheme of Administration.

22. Admittedly, before final decision on the first panel as proposed by the Committee of Management could be taken by the State Government, one person on the said panel died, however, the fact remains that no final decision on the first panel was taken by the State Government and accordingly, in our considered opinion, the Committee of Management did not have any jurisdiction to suggest/send/propose the second panel.

23. In the aforesaid back-ground, when we look at the judgment rendered by the learned Single Judge, the same appears to be based on erroneous interpretation of Clause 7(2)(ब) of the approved Scheme of Administration. Learned Single Judge has opined that the intent and purpose of the said provision is that the State Government should get an opportunity to nominate the person as a Chairman out of three persons at the first instance and if the State Government does not take a decision the name of three different persons is to be forwarded.

24. We are unable to agree with the aforesaid finding recorded by learned Single Judge regarding interpretation of Clause 7(2)(ब) of the approved Scheme of Administration. Forwarding the name of three different persons as second and subsequent panel is not envisaged in a situation where the State Government does not take decision. It is rather permissible only if the State Government takes a decision and does not nominate any of the person from the panel. "Not taking decision" and "not nominating" are two different acts. Clause 7(2)(ब) states that the Committee of Management shall recommend second panel in case the State Government does not nominate a person to be Chairman. Thus, pending decision by the State Government Committee of Management will not get authority to recommend the second panel. It thus follows that the basic premise on which the learned Single Judge has interpreted the Clause 7(2)(ब) of the approved Scheme of Administration, in our opinion, is erroneous.

25. Any panel prepared by the Committee of Management and forwarded

after recommendation by the Director, Technical Education will exhaust only on decision on the said panel is taken by the State Government. Insistence of the learned counsel representing the respondent No.1-petitioner that it will be incumbent upon the State Government to take decision to nominate the Chairman only if the panel consists of three persons in all circumstances and situations, is thus, in our opinion, not correct. The question or point for preparation of second panel in terms of the provision contained in Clause 7(2)(ब) of the approved Scheme of Administration will arrive only if the process gets completed and the process initiated on the resolution of the Committee of Management nominating a panel of three persons will get concluded only once the decision by the State Government is taken.

26. We may also consider as to what is the impact of consideration by the State Government for nomination of Chairman of the Committee of Management from the panel of two persons only which situation in this case had arisen on account of death of third person of the panel. It is to be seen that all the three persons in the panel form collective choice of the Committee of Management. Even if, on account of such exigency as death the panel shrinks to two persons, before final decision for nomination is taken by the State Government, the person who may be nominated as Chairman will still be the choice of Committee of Management.

27. To be included in the panel for nomination as Chairman by the Committee of Management cannot be said to be right of any individual. It is the right of the Committee of Management conferred on it by the Clause 7(2)(अ) of the approved Scheme of Administration to prepare a panel of three persons of its choice. Since the remaining two persons on the first panel were also the persons of choice of the Committee of Management, as such by shrinkage of panel of three persons to two, no individual right gets infringed and accordingly, in our opinion, for this reason as well the conclusion arrived at by the learned Single Judge regarding interpretation of Clause 7(2)(ब) of the approved Scheme of Administration appears to be erroneous.

28. Thus, submission made by Sri Amrendra Nath Tripathi, learned counsel representing the respondent No.1-petitioner that on cancellation of earlier panel and preparation of fresh panel, the earlier panel was non-existent, in our opinion, is not acceptable for the reason that the occasion for the Committee of Management to prepare new panel did not arise in this case as the State Government had not taken any decision on the first panel before the second panel was proposed by the Committee of Management.

29. As far as the submission made by Sri Tripathi that the decision of the State Government cannot be said to be the decision emanating from independent application of mind by the authority who took decision is concerned, we may only observe that different departments of the State Government have been created for convenience. Any decision of the State Government in a particular department, even if it is based on opinion of Law Department or any other department, cannot be said to be vitiated merely because opinion of some other department was taken before arriving at the decision in question.

30. Sri Tripathi has also argued that in absence of challenge to the order dated

13.01.2021, passed by the Director, Technical Education whereby a fresh panel was invited, the procedure which followed thereafter cannot be faulted with.

31. If we consider the aforesaid argument of Sri Tripathi, we do not find ourselves in agreement with him for the reason that the letter of the Director, Technical Education, dated 13.01.2021 was only an intermediate step in the process which culminated in the decision of the State Government finally taken on 12.05.2022 whereby the appellant was nominated as a Chairman of the Committee of Management.

32. In view of the discussion made and reasons given above, we are unable to find ourselves in agreement with the judgment and order passed by learned Single Judge, which is under appeal herein.

33. Resultantly, the Special Appeal is **allowed** and the judgment and order dated 07.09.2022, passed by learned Single Judge in Writ-C No. 2957 of 2022 is hereby set aside.

34. Consequences to follow.

35. There will be no order as to costs.

(2022) 10 ILRA 822
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Criminal Appeal No. 2216 of 2014

Saroj Kumar Tiwari ...Appellant

Versus

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

Counsel for the Appellant:
Sri Sudhir Kumar Srivastava, Sri Sanjeev Srivastava, Sri Sushil Kumar Dwivedi

Counsel for the Respondents:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 3- Circumstantial Evidence-The most fundamental principle of criminal jurisprudence is that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

In a case based upon circumstantial evidence it is incumbent upon the prosecution to connect the links of the circumstances in a single chain which must establish the culpability of the accused.

Indian Evidence Act, 1872- Section 8- Motive- Whatever motive is shown is in the confessional statement of the appellant before the police which is, firstly, not admissible in evidence and, secondly, no such disclosure statement has been exhibited.

Settled law that confession of accused is inadmissible in evidence and further in absence of any disclosure statement being exhibited by the prosecution, no reliance can be placed on any such confession for proving the motive behind the commission of the offence.

Indian Evidence Act, 1872- Section 27- From the two site plans and the recovery memos two separate places from where recoveries were shown- from the statement of PW-7 (I.O.) both recoveries were effected from the house of Sapan Kumar- The witnesses of the recoveries have not been produced by the prosecution. Rather, they have appeared as defence witnesses (DW-2 and DW-3) and have challenged the recovery by

stating that they were made to sign plain papers.

As the recoveries are not corroborated by the prosecution witness and witnesses of the recoveries have been examined by the defence, hence no reliance can be placed on the recoveries. (Para 28, 30, 33, 34)

Criminal Appeal allowed. (E-3)

Case Law/Judgements relied upon:-

1. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644

2. Devi Lal Vs St. of Raj., (2019) 19 SCC 447

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Saurabh Srivastava, J.)

1. Heard Sri Sushil Kumar Dwivedi for the appellant, Sri Amit Sinha, learned A.G.A., for the State and perused the record.

2. This appeal is against the judgment and order dated 13.05.2014 passed by Sessions Judge, Kaushambi in Sessions Trial No.325 of 2003 whereby the appellant, namely, Saroj Kumar Tiwari, has been convicted under Sections 302 and 201 I.P.C. and sentenced as follows: imprisonment for life and fine of Rs.10,000/- coupled with a default sentence of one year additional R.I. under section 302 IPC; and two years R.I. and fine of Rs.2,000/- coupled with a default sentence of six months additional imprisonment under section 201 IPC. However, co-accused, namely, Anju Tiwari and Munni Devi, were acquitted from the charge of offences punishable under Sections 302 and 201 IPC.

Introductory facts

3. A written report (Ex.Ka-1) was lodged by P.W.-1, a village Chowkidar, on 22.05.2000 at 11.30 hrs, at P.S. Saini, district Kaushambi, giving rise to case crime no.145 of 2000. It was alleged in the written report that PW-1 (the informant) received information from villagers, at about 10 am, that a dead body of an unknown person was noticed lying in the grove of Daya Ram Dhobi near Habbu Nagar, Dubana; when P.W.-1 went there he saw that a headless body, without clothes, was lying under a Mahua tree in that grove. The chik report (Ex.Ka-5) and G.D. entry (Ex.Ka-6) thereof was prepared by PW-6.

4. Inquest was conducted at the spot on 22.05.2000 at 13.55 hrs of which an inquest report (Ex.Ka-2) was prepared by S.I. Panna Lal (not examined) which was proved by P.W.-2 Rajkumar. The condition in which the body was noticed at the time of inquest is reported as follows:-

"दशा शव- सिर जानिब पू० पैर व दक्षिण बायां हाथ केहुनी से बांये मुड़ा बांये सीने पर दाहिना हाथ दाहिने मुड़ा दाहिनी सीने पर दाहिनी टांग दाहिनी ओर मुड़ा बायां पैर सीधा शव बांयी करवट नग्न अवस्था में पड़ा है।

हुलिया शव- गर्दन से ऊपर का हिस्सा गायब, गोरा रंग एकहरा मजबूत जिस्म ऊंचाई लगभग 5 ¼ फीट उम्र लगभग 25 वर्ष ।

चोट शव- शव को उलट पलट कर देखा गया, निम्न चोटें हैं-

(1) गर्दन से ऊपर का हिस्सा गायब है (2) दाहिनी बाजू पर धसा हुआ खून आलूद घाव (3) कटा हुआ हथेली का घाव (4) बांया हाथ ..... खून आलूद (5) वायी हाथ पर कटा हुआ खून आलूद घाव । "

5. Autopsy was conducted on 23.05.2000 at about 5 P.M. by Dr. Yatindra Kumar Pathak, P.W.-8, who prepared autopsy report (Ex.Ka-13). In the autopsy report, following details were mentioned:-

External examination:-

A male body of well built, Rigor mortis is passed off from whole body, abdomen is distended. Body is in early stage of decomposition.

Ante-mortem injuries-

1. Head and neck is separated from thorax by sharp weapon.
2. A lacerated wound 4 cm.x 2 cm. Muscle deep in right upper arm.
3. An incised wound 4 cm x ½ cm in front of right hand.
4. A lacerated wound in area of 4 cm x 2 cm muscle deep in front of left hand.
5. A lacerated wound 3 cm x 1 cm in front of top of right shoulder.
6. An incised wound 8 cm x ½ cm in size in back of left forearm.

Cause of death:

Shock and haemorrhage due to ante mortem injuries.

Time since death

About two days

6. During the course of investigation, the Investigating Officer (I.O.) recovered slipper of one leg of the deceased red in colour and light yellow colour watch strap of which recovery memo (Ex.Ka-3) was prepared. The I.O also showed recovered of a semi-circular sickle having wooden handle measuring six fingers (angul); a shirt with full sleeves having blue stripes; and a blue coloured jeans, blood-stained, on the pointing out of appellant (Saroj Kumar Tiwari) of which recovery memo (Ex.Ka-10) was prepared. Investigation of Case Crime No.145 of 2000 was completed and chargesheet (Ex.Ka-12) was submitted by CO, namely, D.P. Shukla, P.W.-7 against Saroj Kumar Tiwari (appellant), Smt. Munni Devi and Anju Tiwari under Section 302/201 IPC. After taking cognizance, the case was committed to the Court of Session giving rise to S.T. No.325 of 2003. On 17.05.2004, accused persons, namely, Saroj Kumar Tiwari, Smt. Munni Devi and Anju Tiwari were charged for offences punishable under Section 302/201 IPC. All of them pleaded not guilty and claimed to be tried.

7. The trial court examined nine prosecution witnesses, namely, P.W.-1 Shyam Lal - the informant; P.W.-2 Rajkumar - witness of inquest; P.W.-3 Daya Ram - another witness of the inquest, P.W.-4 Bhuvneshwar Tiwari - uncle of the deceased, P.W.-5 Awadh Kishor Singh - neighbour of the deceased residing at Patna; P.W.-6 Surya Mani Pandey - the constable who prepared the chik report and GD entry of Case Crime No.145 of 2000; P.W.-7 D.P. Shukla, C.O. Crime, the Investigating Officer of Case Crime No.145 of 2000; P.W.-8 Dr. Yatindra Kumar Pathak who conducted the autopsy; and P.W.-9 Constable Ramdev who proved the signatures of S.I. Panna Lal (since dead) on the inquest report and papers prepared in connection therewith for autopsy.

Prosecution Evidence

8. The testimony of above mentioned prosecution witnesses, in brief, is as under:-

9. **P.W.-1- Shyam Lal- Informant:-** He stated that the incident occurred four years ago. At around 10 a.m., some villagers told him that a dead body has been lying beneath a tree in the grove of Daya Ram Dhobi, he went there and saw a beheaded dead body of an unknown person, without clothes, lying there. He gave information at the police station. He proved his thumb impression over the written report which was marked as Ex.Ka-1.

During cross-examination, P.W.-1 stated that he did not carry a written complaint to the police station. He gave oral information regarding discovery of dead body. At the police station, constable took his thumb impression over Ex.Ka-1. At the time when he put his thumb impression, the paper was blank and nothing was written on it. He arrived at the police station in between 10-11 a.m. He stayed at the police station for two hours. When he was present at the police station, neither S.I. nor anyone inquired from him and no statement was recorded. After two hours when constable permitted him, he returned from the police station to the place where the dead body was lying. He again visited the place of incident at around 1 p.m., at that time, the dead body was not there and neither police nor any person was available there. When he saw the dead body, it was without clothes. Immediately thereafter, he stated that it had lower under-garment. He also stated that when he arrived near the dead body, there was no article lying beside it and there was no whisper in the village as to whose dead body it was.

10. **P.W.-2 - Rajkumar - witness of inquest:-** He admitted his signature on the inquest report (Ex. Ka-2) and memo of recovery (Ex. Ka-3). He reiterated about noticing a beheaded dead body lying under a tree in the grove of Daya Ram Dhobi wearing under-garments (i.e. baniyan and chaddhi). He stated that S.I. Panna Lal sealed the dead body and conducted inquest in his presence. During his presence, S.I. did not collect any article or earth. There was no article lying near the dead body, only blood was spread nearby. He was not sure whether the blood spread there was collected by the S.I.

During cross-examination, P.W.-2 stated that he arrived at the spot at about 12 noon. There were many police personnels available at that place. Members of public were few. S.I. received his signatures over a blank paper and informed him that this paper is for sealing the dead body. S.I. did not collect any slipper or strap of watch in his presence and those items were not noticed by him there. P.W.-2 further stated that S.I. received his signatures over 3-4 blank papers and nothing was written over the same.

11. P.W.-3 - Daya Ram - another witness of the inquest:- In his statement in chief, he stated that about four or four and half years ago, a beheaded dead body was found in his grove. Neither he saw the dead body nor the S.I. sealed the dead body or performed inquest in his presence. After looking at the papers, he denied his thumb impression thereon. He stated that he is literate and can sign. On the application of the prosecution, the witness was declared hostile and prosecution was allowed to cross examine him.

During cross-examination by the prosecution, P.W.-3 stated that with regard to the incident, S.I. never recorded his statement. On being confronted with his statement under Section 161 of the Cr.P.C.,

he denied having made any such statement. He also denied the suggestion that he has colluded with the accused.

12. P.W.-4 - Bhuvneshwar Tiwari - Uncle of the deceased:- In his examination in chief, P.W.-4 stated that the deceased Pranesh Kumar Tiwari is his nephew. At the time of his murder, his age was near about 25 years. His nephew was an English teacher in Anishabad English Convent School. In the year 1998, his nephew (the deceased) performed court marriage with the daughter of Saroj Tiwari (appellant before the court). Thereafter, again, marriage ceremony was performed in a temple at Patna in the year 2000. That marriage ceremony was attended by both sides in a congenial atmosphere and both sides happily returned to their respective homes. After that, Pranesh (the deceased) told his mother that he will go to his Sasural at Barkhi and shall have Sheetla Maa Darshan on 21.05.2000. P.W.-4 stated that he and few others went to Patna Railway Station to see off the deceased. After seeing off the deceased they returned to their respective houses. Whereafter, on 25.05.2000, Lal Bahadur Singh, Police Station Saini, showed one identity card to inquire whether that person is known to PW-4. P.W.-4 acknowledged that it was of his nephew. The police then informed P.W.-4 that that person has been murdered within the jurisdiction of Police Station Saini. The police personnel thereafter returned. On getting that information, P.W.-4, Geeta Devi (mother of Pranesh) and Awadh Kishor (PW-5) arrived at Police Station Saini. At the police station, SHO showed clothes, sickle- the murder weapon, rope, pant and blood stained clothes and red slippers along with album. On seeing those articles P.W.-4 identified them as that of his nephew. He also recognised a Kada of his nephew Pranesh Tiwari. PW-4 stated that Pranesh Kumar Tiwari has been murdered by Saroj Kumar Tiwari, his wife Munni Devi and his daughter Anju Devi. After narrating all that, P.W.-4 stated that before this marriage, Pranesh Tiwari was married to another girl who was insane and handicapped. The family members of that insane girl did not object to his re-marriage therefore, Pranesh entered into a second marriage. P.W.-4 stated that Saroj Tiwari knew that it was the second marriage of Pranesh yet it was performed in a most harmonious atmosphere. P.W.-4 stated that when his nephew came with his wife and in-laws on 22nd, he was murdered by them. A bundle of clothes etc was opened before the court. Inside that, blue stripe shirt, blood stained jeans pant, one red colour slippers and one sickle were kept which were shown to P.W.-4. He identified the clothes as that of Pranesh Kumar Tiwari and the same were made material exhibits. A second bundle was also de-sealed before the court wherein two clean pant-shirt were there. P.W.-4 spotted and identified these clothes as that of Pranesh and they were marked material exhibits. Another bundle opened had a small Khaki colour envelop with one coin of Re.5 and one coin of Rs.2 with two Rs.1 coins and two coins of 50 paisa. Two separate boxes were also opened, one was having blood stained earth and the other box was empty. P.W.-4 proved his signatures on a memorandum regarding showing of certain articles of the deceased for identification. The memorandum was marked as Ex.Ka-4.

During cross-examination, P.W.-4 stated that when he arrived at the police station, he was shown two bundles. In one bundle, blood stained clothes, sickle, nylon rope, slippers and in another bundle, two pants and two shirts were there. In next

bundle, there was nothing except two shirts. At that time, these bundles were sealed. P.W.4 expressed his inability to state as to how many papers were signed by him. P.W.-4 also stated in his cross-examination that when these bundles were shown to him at the police station, there were no outsiders except police personnel. The papers signed by him were not bearing any other signature except of Awadh Kishor. In respect of first marriage of Pranesh Kumar, P.W.-4 stated that he can not tell in which season the first marriage of Pranesh Kumar was solemnised though the second marriage was performed just 2-4 months after first marriage. In the year 1998, when Anju Devi came for the first time after marriage, she stayed for 15 days in her in-laws house. At that time, the first wife was not there. She was at her native place. After 1998, Anju Devi never came to stay with her in-laws. PW-4 stated that his house is 52 kilometres away from Patna in the village. PW-4's family and Pranesh's entire family reside in the village. Pranesh use to reside in a room provided by the institution where he used to teach. Nobody of PW-4's family resided with him. Pranesh Kumar used to visit the village every Sunday. One brother of PW-4, namely, Brij Nandan Tiwari was residing in a building of custom department whereas PW-4 and his family resided in the village. On 16.05.2000, Pranesh informed that he would be going to his in-laws village on 21.05.2000 and had requested PW-4 and his family to be at the railway station. On a specific question as to whether P.W.-4 used to see off Pranesh whenever he departed, PW-4 stated that it was not a custom/habit to come to the railway station to see him off but on 21.05.2000, it was felt necessary to see him off therefore, they went to the railway station in the morning at about 5 a.m. P.W.-4 then clarified that when they reached Patna Station, Pranesh had met them outside the station. After meeting Pranesh, they left. Outside the station, Pranesh was alone. PW-4 stated that neither he met Saroj Kumar Tiwari nor he met his wife or daughter at the railway station.

P.W.-4 stated that after getting information from the police on 25th regarding Pranesh's death, they left for Saini on 29th by Toofan (train) in the evening and reached Sirathu next day morning at 5 o'clock. From there they went straightaway to police station Saini. They reached Saini police station at about 6.30 a.m. Clothes etc. were shown at nine o'clock. They remained at the police station till 11 o'clock. After 11 o'clock they returned. Between 9 o'clock and 11 o'clock, PW-4 met the I.O. There, P.W.-4 and Awadh Kishore signed two or three papers but Geeta Devi did not sign any paper. The village where the deceased was married was known from before but, that day, it was not considered appropriate to visit the village. Saroj Kumar used to work in the Agriculture Department of the government at Patna.

P.W.-4 denied the suggestions that on 21.5.2000, Pranesh Kumar along with his father-in-law Saroj Tiwari, wife and mother-in-law did not leave for Saini; and that Pranesh Kumar had gone to Fatehpur alone on 21.5.2000 to attend his friend's wedding. PW-4 stated that he does not know whether Saroj Kumar Tiwari had told Pranesh that after attending the wedding, he should meet him in the village on 24.5.2000. P.W.-4 denied the suggestion that Saroj Kumar Tiwari remained at Patna on 22.05.2000 and did government work in his office at Patna on 22-5-2000. PW-4 stated that he does not know that when Saroj Kumar Tiwari reached his village on

24th, the police arrested him. PW-4 denied the suggestion that the clothes shown in the bundle were the clothes brought by the police personnel, who came to inform PW-4 at Patna, from the village house to show a false recovery. He also denied the suggestion that Pranesh Kumar was killed and robbed by unknown miscreants while he was returning alone to his in-laws' house after attending the wedding. P.W.-4 also denied the suggestion that Saroj Kumar Tiwari did not commit murder of Pranesh but was implicated on the basis of suspicion. He also denied the suggestion that Pranesh did not marry anyone other than Anju Devi.

13. **P.W.-5 - Awadh Kishor Singh - Neighbour of the deceased residing at Patna-** He stated he knows Pranesh Kumar Tiwari who was a resident of his village and a teacher at Girdhar Niwas Patna; he had married a mentally retarded girl in the year 1995 but, on the basis of mutual understanding and panchayat, that marriage was dissolved. PW-5 had heard that Pranesh had a second marriage. The second marriage was solemnized in Patan Mandir at Patna with the daughter of Saroj Kumar Tiwari. Saroj Tiwari was a resident of Kaushambi district in U.P. After few days of marriage, it came to his knowledge on 20.5.2000 that Pranesh was going to his in-laws place at village Happu Nagar, P.S. Saini, district Kaushambi. Pranesh Tiwari was dropped at Patna Junction by his uncle and his mother. PW-5 himself did not witness it, but Pranesh's uncle told him that Pranesh's father-in-law Saroj Tiwari and Saroj Tiwari's wife and their daughter were there. On 25.05.2000, UP Police arrived and showed some photo identity cards and asked him whether they knew that person. PW-5 was also told that he has been murdered. Thereafter, Bhuvneshwar Tiwari and PW-5 left Patna on 29.05.2000 and they reached Saini Police station on 30.05.2000. After reaching the police station, the Inspector showed them some articles i.e. clothes, rope, slipper, sickle (hansiya) and inquired whether they could recognise those articles. Pranesh was seen wearing one of those clothes few days ago.

During cross-examination, P.W.-5 stated that he is a teacher at Barh. At the time of occurrence, he was working as a teacher. The distance between Barh and Patna is around 64 KM. There is a railway station at Barh. The distance of Barh to Rana Bigha is 4 KM. There is a metalled road from Barh to Rana Bigha. Twice a week, PW-5 used to visit Patna. He did not know in which school Pranesh Kumar Tiwari was a teacher. He also did not know as to in which house in Patna he used to live.

P.W.-5 further stated that he never saw Saroj Tiwari in Patna. He stated that he has not seen Saroj Tiwari till date. PW-5 stated that first marriage of Pranesh Tiwari was solemnised after his consent. Four years after the first marriage, the second marriage of Pranesh Tiwari was solemnised. PW-5 did not participate in the second marriage of Pranesh Kumar. But he had heard that the second marriage was solemnised at Patan temple in Patna.

He further stated that Bhuvaneshwar Tiwari and he left for U.P. by Toofan Express. They reached Sirathu Railway Station next day at 4-5 am. They reached PS Saini by about 7-8 am. There, the sub-inspector recorded his statement as also of Bhuvaneshwar Tiwari. In respect of Pranesh Kumar's second marriage, PW-5 stated that it was solemnized after three years of the first marriage; that he does not

remember whether Pranesh Kumar's second wife ever visited the village; that he neither saw nor heard of second wife of Pranesh visiting the village. He denied the suggestions (a) that he never visited the police station Saini to see the articles; (b) that the constable who had visited his village had obtained Bhuvaneshwar Tiwari's and his signature on a blank paper; (c) that no articles were shown to him at PS Saini; and (d) that whatever statement he has given before the court has been tutored by government advocate Shri T.C. Kesarwani.

14. **P.W.-6 - Suryamani Pandey - Chik maker**- He proved the registration of the FIR, preparation of the Chik Report and GD Entry thereof . During cross-examination, he stated that the complainant had come alone to the police station to lodge the report. He had brought a scribed report though he did not mention as to who scribed it. The S.H.O. was not present at the time of registration of the FIR. The original chik was sent to the C.O. Office on the next day.

15. **P.W.-7- D.P. Shukla- Investigating Officer-** He stated that on 22.05.2000, he was posted as the Inspector-in-charge, P S Saini. On that day, Case Crime No.-145/2000 u/s. 302, 201 I.P.C. was registered at the police-station on the basis of written complaint made by PW-1. On 22.05.2000, he prepared C.D. and took copy of the chik, copy of the report, recorded statement of the complainant, statement of the witnesses of the inquest report and tried to identify the dead body. After preparing the inquest report, he lifted one slipper, strap of watch and blood stained earth from the spot. On 24.05.2000 he arrested the accused persons i.e. Saroj Kumar Tiwari, Smt. Munni Tiwari and Anju Tiwari on the basis of information received from an informer. After their arrest they confessed their guilt and disclosed the name of the deceased as Pranesh Kumar s/o Late Chandra Bhushan Tiwari r/o Rana Beegha, P.S. Barh, district-Patna, Bihar. PW-7 also got the murder weapon i.e. the sickle (blood stained) recovered at the instance of Saroj Tiwari from the house of his Behnoi (brother in law) Sapan Kumar. It was hidden in a haystick kept in a room. He also recovered blood-stained clothes of the deceased, suitcase and railway ticket from the same room and recovery-memo of these articles were prepared. On 22.5.2000, the inspection of the scene of occurrence was carried out at the instance of the complainant and site-plan was prepared, which was marked as Ext.Ka-7. He also prepared site plans of the place from where he recovered murder-weapon sickle and nylon rope and clothes of deceased Pranesh Kumar, which were marked Ex. Ka-8 and Ex. Ka-9. Recovery-memo of the murder-weapon and blood stained clothes was proved by him as Ext.Ka-10 and recovery-memo of nylon rope and other clothes was proved as Ext.Ka-11. PW-7 stated that medical examination of accused Saroj Tivari was got done; that the medical-report is attached with CD. On 27.5.2000, Lal Bahadur Singh was sent with appropriate direction to inform family of the deceased Pranesh Kumar Tiwari and collect evidence. On 30.5.2000, statement of the constable who was sent to inform the family of the deceased and show photos was recorded. The details of the information received from him was entered in the case-diary and statements of the other witnesses were recorded. Statements of Shri Bhuwaneshwar Tivari, Smt. Geeta Devi, Awadh Kishor and others were recorded. On 2.6.2000, C.D. No.5 was prepared in which details of original P.M.

report and inquest-report were mentioned. Statements of Dr. Awasthi P.H.C. Sirathu and Constable Narendra were recorded and materials were dispatched to Forensic Lab Lucknow for examination. Whereafter, charge-sheet was filed against the accused persons after investigation. Charge-sheet was marked as Ext.Ka-12.

During cross-examination, he stated that he arrested the accused on 24.05.2000 on the basis of tip given by an informer. He further stated that witness Jainul had informed that it was a matter of discussion in the village that Saroj Tewari, his wife, daughter and son-in-law had come from Saini to Daranagar by Tempo in the evening and after getting off, they walked on foot and that the dead body is of their son-in-law. The witness Jainul had also stated that on 21.5.2000, at 8.00 p.m., he saw Saroj Tewari, his wife, daughter and a boy aged around 25 years getting off the tempo at Daranagar and going on foot to their house. PW-7 however admitted that he has not made Jainul a witness in the case. PW-7 stated that witnesses had disclosed to him that the accused had come to attend thirteenth day rituals and that they have murdered their son-in-law. On the basis of this information, he arrested the accused and collected evidence. PW-7 stated that during investigation, he recorded statement of Gaya Ram, Ram Naresh Tripathi, Dwarika Prasad and the village Pradhan Mayawati on 22.5.2000. These witnesses also stated about discussion in the village that the accused have murdered their son-in-law. On the basis of this information, the accused were arrested for interrogation and the weapon of murder was recovered. He proved various seizure memos but admitted that the recovered material is not before him in the court. He denied the suggestion that he did not recover weapon of murder on the pointing out of the accused. He denied the suggestion that he managed to bring the clothes by sending a constable to show a false recovery. He also denied the suggestion that he has purposely not mentioned names of public witnesses of the recovery memo in the charge-sheet. PW-7 stated that he does not remember whether any identity card of the deceased was found or not. Then he stated that no identity card of the deceased was found. Rather, photographs of the deceased were sent to his home through the constable.

PW-7 denied the suggestions (a) that entire investigation was bogus and a false charge-sheet has been submitted; (b) that the recoveries have been fabricated; and (c) that all the parchas have been fabricated while sitting at the police station and the papers have been back dated.

16. **P.W.-8 - Dr. Yatindra Kumar Pathak** - Autopsy Surgeon - He proved the autopsy report details of which we have noticed above. In respect of the internal examination, he stated that there was no semi-digested food in the stomach; the stomach was empty; small intestine was half-filled and large intestine too was semi-filled. There was no mark of circumcision on penis. The death could have occurred on 21.05.2000 at 9:30 pm.

During cross-examination, he stated that he received the dead body on 23.05.2000 at 1:10 pm in the mortuary. Documents relating to inquest report were received. The dead body was received as unknown. He did not get videography of the postmortem examination. He noticed two incised wounds on the body of the deceased. Those could be caused by a knife. Head of the deceased was severed off. This may be caused with a heavy and

sharp cutting weapon such as farsa and gandasa. It is not possible to cause it with a sickle used for cutting the grass. The body had started decomposing. The injury might be 2 ½ days old but not 3 days. It is likely to be of the morning of 21.05.2000. No semi-digested food was found in the stomach. It is wrong to state that he prepared the postmortem report at the instance of his subordinate.

17. **P.W. -9 - Ramdev - Constable** - He proved the signature of S.I. Panna Lal on the inquest report and other papers relating to dispatch of the body for autopsy.

18. It be noted that during the pendency of the trial a serologist report dated 13.09.2000 (Ex. Ka-19) was produced as per which, 8 articles were sent for determining presence/ absence of human blood. These were: (1) blood-stained earth; (2) plain earth; (3) Chappal (slipper); (4) watch strap; (5) Coins; (6) piece of cloth; (7) shirt; (8) Jeans pant; (9) Hansiya / sickle with butt. Except coin, blood was found on each article. In piece of cloth and shirt, human blood was found. In rest of the articles blood had disintegrated therefore, its origin could not be ascertained. With respect to the articles where blood of human origin could be found, the blood group could not be ascertained as sample was found unfit for such test.

Statement under section 313 CrPC

19. The incriminating circumstances appearing in the prosecution evidence were put to Saroj Kumar Tiwari and his statement under Section 313 Cr.P.C. was recorded on 09.05.2013, 25.11.2013 and 15.04.2014. In his statement made on 09.05.2013, the appellant admitted that his daughter Anju had married Pranesh Kumar but denied the remaining allegations. The fact of recovery of blood-stained earth; weapon of assault, nylon rope and site plans prepared in respect thereof were put vide question no.8. The appellant denied those recoveries and claimed that they are totally fabricated; no recovery was made at his pointing out. On being questioned as to why he has been implicated, he stated that he has been implicated only on the basis of suspicion. In response to the question as to what he has to say, appellant stated that at the time of the incident he was working as a store assistant in the Agriculture Department at Patna. On 21.5.2000 he was on duty. His son-in-law Pranesh, on 21.05.2000 left Patna to go to Fatehpur to attend marriage of his friend. Appellant did not accompany him. When appellant came home on 23.05.2000, police arrested him. On 25.11.2013, the forensic report Ex. Ka-19 was put to him. In response to which, the appellant stated that he has nothing to say. On 15.04.2014 when another statement under section 313 CrPC was recorded, he reiterated what he had stated earlier and also claimed that the forensic report is not admissible.

Defence Evidence

20. After the statement under Section 313 Cr.P.C. of the appellant was recorded, four defence witnesses, namely, Jainul Abdeen - D.W.-1; Jabar Ali - D.W.-2; Sapan Kumar Mishra - D.W.-3; and Awadh Kishor Sharma - D.W.-4, were examined. Their testimony in brief is noticed below.

21. **D.W.-1- Jainul Abdin - Note: This witness according to I.O. had informed the I.O. that the deceased had come with the appellant and the other co-accused and they were noticed**

alighting together from a Tempo. D.W-1 stated that he is acquainted with Saroj Tiwari of Habbu Nagar for last 20-25 years. The distance of Saroj Tiwari's village is 3¼ km from his village. He never met children of Saroj Tiwari, nor he knows about them. They do not live here. They have been living in Patna for 30-35 years. He stated that neither 12-13 years ago nor ever, he saw Saroj Tiwari and his children going to their home after getting off from the tempo at Daranagar; neither he has knowledge about recovery of the dead body from an orchard in the village of Saroj Tiwari nor he heard that the dead body was of Saroj Tiwari's son-in-law. He stated that he has been Block Pramukh from 1988 to 1994 and from 2000 to 2005. The villagers had told him that Saroj Tiwari has been arrested. He stated that no police officer recorded his statement nor had interrogated him regarding the case in which Saroj Tiwari was arrested.

During cross-examination, D.W-1 stated that he has not received any summon or notice from the court for recording his statement; that he is deposing at the request of Saroj Kumar Tiwari; that he is unaware about the murder of Pranesh; and he is also unaware that 13 years ago, a dead body was found lying in the grove of Daya Ram. D.W.-1 also stated that he does not know Anju Tiwari daughter of Saroj Tiwari; he is not aware about the marriage of Anju Tiwari; and that he was never ever interrogated by the police of police station Saini. Note: DW-1 was not confronted with any of his statement recorded under Section 161 Cr.P.C.

22. **D.W.-2 Zabar Ali - Note: He is a witness of the seizure memos (Ex. Ka-10 and Ka-11) of weapon of assault, blood stained shirt and trouser, clothes etc.** He stated that he knows Saroj Tiwari who is of his own village; Saroj Tiwari had been residing at Patna for last 32 to 35 years; but used to visit his village where he has his own house and land; 13 years ago, he heard that a beheaded dead body was found in a grove of his village, he never went there; he did not have information as to whose body it was; it was not heard by D.W.-1 that the dead body was of the son-in-law of Saroj Tiwari. He denied that Saroj Tiwari handed over the blood stained sickle and blood stained clothes such as pant and shirt, nylon rope to the police. The police never went to the house of Saroj Tiwari along with him. D.W.-1, however, accepted his signatures on Ex.Ka-10 and Ex.Ka-11. But stated that his signatures over the Ex.Ka-10 and Ex.Ka-11, were obtained by I.O. in front of the house of the Principal and when he inquired about that, the police personnel informed that nothing is serious and, therefore, he signed the papers. D.W.-2 also stated that he had informed the IO that he is not a literate person but on insistence of the IO, he had put his signatures over the papers which, at the time of making signatures were blank. D.W.-2 also stated that he was never interrogated and his statement was never recorded to confirm the recovery.

During cross-examination, D.W.-2 stated that he has not received any summon from the court and that he has given his statement on the request of Saroj Tiwari. He stated that he does not know about the marriage of Anju Tiwari, daughter of Saroj Tiwari. D.W.-2 stated that he does not know anything about the beheaded body found in the grove of Daya Ram. He stated that he had put his signatures over 2 or 3 blank papers. At that time, neither there was a sickle nor pant or shirt or anything there. D.W.-2 stated that as and when Saroj

Tiwari visited the village they used to formally greet each other. He denied the suggestion that being a resident of the same village, he is making his statement to save Saroj Tiwari.

23. **D.W.-3 - Sapan Kumar Mishra - Note: He is another witness of the seizure memos (Ex. Ka-10 and Ka-11) of weapon of assault, blood stained shirt and trouser, clothes etc**. He stated that Saroj Kumar Tiwari is his mama (maternal uncle) who has his own house in DW-3's village though, he had been working in Patna for last many years and living there with family. He stated that on 24.05.2000, it was death anniversary of his father. Saroj Tiwari along with his family, had come on 23.05.2000 from Patna. The Police arrested him from his home that very night, and took him to the police-station. Neither Saroj Tiwari nor his family members had taken out or handed over blood stained sickle, blood stained clothes and nylon rope. Next day, the I.O. and Police had come to DW-3's house and asked him to put signatures on two blank papers. When he refused to sign on blank paper, they threatened him to put him in jail. Then he put his signature on both papers i.e. Ex Ka-10 and Ex Ka-11. When he had put his signature, there was nothing written on it. The I.O had not recorded his statement.

During cross-examination, DW-3 stated that he had not received notice/summon from the court for giving his testimony. He came at the request of his uncle i.e. accused-appellant. Nothing much could come out from his cross-examination except that his mama had come from Patna along with his family on 23.05.2000 on DW-3's father's death anniversary and the Police had arrested Saroj Tiwari, Munni Devi and Manju in the night of 23.05.2000; and that a dead body without head was recovered from the orchard of Dayaram near Dubna village. He did not know whose dead body it was. Anju's marriage had been solemnized, as was told by his mama. He denied the suggestion that while putting signature on the papers i.e. Ex.Ka-10 and Ka-11, they were written. He admitted that in addition to his signature, signature of Jabar Ali was also obtained on those papers. He denied the suggestion that he was giving false statement to defend Saroj Tiwari i.e. his mama.

24. **D.W.-4- Awadh Kishor Sharma** - DW-4 stated that Saroj Kumar Tiwari has been working as a store assistant in Bihar State with Agro Industries Development Corporation Ltd. in its base work Shop at Patliputra, Patna since 01.01.77 and is to retire in June, 2015. DW-4 stated that he had been posted as an Administrative Officer there and he retired from there in July 2010 and now, he is working on contract in the same corporation. DW-4 stated that S.K. Tiwari had worked on 22.05.2000 at Patliputra and was on earned leave from 23.05.2000 to 15.07.2000 and joined his duties on 17.07.2000. DW-4 stated that the duty hours in the factory are from 8.30 am to 5.00 pm. DW-4 produced the attendance register from May, 2000 to July 2000. He identified Saroj Tiwari in the court. The original attendance register was produced and photo copies thereof verified under his signature were marked as Ex. Kha-1 to Ex. Kha-3.

During cross-examination, he stated that when he got date from the court, he came to give his testimony. He stated that in this Corporation in the year 2000 he was Senior Assistant. Attendance register Ex. Kha-1 to Ex. Kha-3 was not in his handwriting; his signature is not on the

register; 21.05.2000 was Sunday; it would take 6 hours to reach Allahabad from Patna by train; he has not brought the application for earned leave from 23.05.2000 to 15.07.2000; the Administrative Officer Laxman Prasad used to take the signatures of employees on the attendance register; his signature is not in that register; signature of Sri Laxman Paswan is nowhere in the register; if one starts from Allahabad to Patna in the evening or night of May, 21.05.2000 then one can reach Patna by 8.30 on 22.05.2000. He also stated that on 22.05.2000, he was not working with S.K. Tiwari in the factory because he was in the Head Quarter; he did not meet S.K. Tiwari on 22.05.2000. He denied the suggestion that he is giving a false statement to benefit S.K. Tiwari.

Trial Court Findings

25. The trial court held that it was proved by the evidence on record that the deceased had to visit his Sasural (in-laws house) at Kaushambi on 21.5.2000 and he boarded a train to go there; that he got killed there; that the murder weapon and blood-stained clothes were recovered at the pointing out of the accused-appellant; that the defence evidence raising plea of alibi was inconclusive and not confidence inspiring as 21.05.2000 was Sunday; that the motive to commit murder was there as the accused suppressed his first marriage to marry appellant's daughter and, therefore, when the first marriage came to light motive developed. Finding these circumstances as to constitute a chain so complete that it pointed conclusively that it was the appellant and appellant alone who committed the murder and to destroy the evidence, threw headless body in a grove, convicted and sentenced the appellant accordingly. The trial court however acquitted the other two co-accused, namely, Anju Tiwari (wife of the deceased) and Munni Devi (wife of the appellant) on the ground that there was no recovery at their instance hence, they were entitled to the benefit of doubt.

Submissions of the learned counsel for the Appellant

26. The learned counsel for the appellant submitted (a) that the body was naked and headless therefore, there is no basis to assume that it was the body of the son in law of the appellant; (b) that there is no evidence that the deceased and the appellant were seen together in the village in the night preceding, or anytime before, the morning when the headless body of the deceased was recovered; (c) that the recovery of blood-stained clothes, weapon of assault, etc is not proved beyond reasonable doubt, even the witnesses to the recovery have resiled from it; (d) even otherwise, the recovery does not inspire confidence inasmuch as why the articles would be hidden in some one else's house; (e) there is no strong motive for the crime; (f) there was no credible information to arrest therefore, the whole exercise of arrest and subsequent recovery becomes doubtful; (f) that it appears to be a case where the appellant and his family, on the basis of suspicion and to solve out a puzzling murder, have been falsely implicated. It was urged that the trial court did not properly evaluate the evidence hence, the judgment and order of conviction is liable to be set aside.

Submissions on behalf of the State

27. The learned AGA submitted that from the suggestions given by the defence to the prosecution witnesses it was established

that the body was of the son in law of the deceased; otherwise also, the clothes etc of the deceased recovered at the instance of the appellant proved that the deceased had been in the village. The appellant in his statement under section 313 CrPC admitted that the deceased was married to his daughter. The witnesses had proved that the deceased left Patna to go to his Sasural and that he were to go with his in-laws and wife therefore, it was proved that they were in company of each other. In such circumstances, in absence of explanation as to when they parted company and in view of recovery of incriminating articles, the chain of circumstances stood complete. Consequently, the trial court was justified in recording conviction, particularly, when the plea of alibi was inconclusive.

ANALYSIS

28. Having noticed the entire evidence and the rival submissions, before we proceed to evaluate the evidence we must bear in mind that this a case where there is no ocular account of murder. Considering that we are dealing with a case which is to be decided on the basis of circumstantial evidence, it would be useful to bear in mind the legal principles as to when the court can convict an accused on the basis of circumstantial evidence. In **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644**, the Supreme Court following its earlier decisions in Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 and Bablu V. State of Rajasthan, (2006) 13 SCC 116 held that "*in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*. Further, in Sharad Birdhichand Sarda's case (supra), it was clarified that the circumstances from which the conclusion of guilt is to be drawn should be fully established meaning thereby they 'must or should' and not 'may be' established. In addition to above, we must bear in mind that the most fundamental principle of criminal jurisprudence is that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions (**vide Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793)**. These settled legal principles have again been reiterated in a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be

true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.

19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

29. Bearing the legal principles noticed above we shall evaluate the evidence brought by the prosecution. The prosecution seeks to bring home the charge by following circumstances: (a) that the deceased was married to the daughter of the appellant; (b) that it was second marriage of the deceased by hiding the first marriage therefore, the accused held motive for the crime; (c) that on 21.05.2000 deceased came to the village of the appellant with the appellant, appellant's daughter and wife by boarding an early morning train at Patna; (d) next day morning, at about 10 am deceased's beheaded body was noticed; (e) the investigating officer, during the course of investigation received information about the deceased being the son in law of the appellant and of being with the appellant and other co-accused in the evening preceding recovery of his body therefore, acting on this information, appellant was arrested on 24.05.2000; (f) whereafter, on the confessional statement of the appellant and at his pointing out, blood stained clothes including plain clothes of the deceased and murder weapon etc was recovered on 24.05.2000; (g) thereafter, information was given to the family members of the deceased who identified the clothes etc. These circumstances according to the prosecution were duly proved and they constituted a chain so complete as to point conclusively towards the guilt of the appellant by ruling out all hypothesis consistent with his innocence.

30. Now we shall deal with each of the above circumstances to find out whether they have been duly proved. In so far as circumstance (a) i.e. the deceased was married to the daughter of the appellant is concerned, it stands proved by the statement of PW-4 and this fact is admitted to the appellant as would be clear from his answer to question no.5 made while recording his statement under section 313 CrPC on 09.05.2013. In so far as circumstance (b) i.e. the motive for the crime is concerned, the prosecution set out the theory of second marriage with the daughter of the appellant without disclosure of first marriage. No doubt, PW-4, uncle of the deceased has proved that the deceased was earlier married to a mentally challenged girl and the marriage with the daughter of the appellant was second marriage of the deceased, but there is no disclosure in his statement or of any other witness that the second marriage was performed by suppression of first marriage or that there were strained relations between the appellant and the deceased. Whatever motive is shown is in the confessional statement of the appellant before the police which is, firstly, not admissible in evidence and, secondly, no such disclosure statement has been exhibited. That apart, from the statement of PW-4, it appears, the second marriage was performed in a cordial atmosphere. Further, there is no admissible evidence that the

daughter of the appellant was being harassed by the deceased. In these circumstances, we are of the view that there is no motive proved for the crime and the finding to the contrary returned by the trial court is based on inadmissible evidence and is therefore liable to be reversed. However, as motive is a mental element and, therefore, even if the prosecution has failed to prove a cogent motive for the crime, it would have to be assessed whether other circumstances have been proved. If so, whether they constitute a chain so complete as to point out that in all human probability it is the appellant and no one else who has committed the murder.

31. Before we proceed to dwell on other issues, it would be relevant to notice and address the submission of the learned counsel for the appellant that prosecution has failed to fix the identity of the corpse. It has been argued that the corpse was a headless body with no clothes on it. Nothing has been brought on record as to on what basis the body was identified, particularly, when there is no scientific evidence such as DNA test on record. At first blush the submission appears attractive but when we deeply probed into the evidence on record, we noticed that there is no serious challenge to the body being that of the son in law of the appellant. Even in the statement recorded under section 313 CrPC, dated 09.05.2013, while answering question no.13 (i.e. a general question as to whether the accused has anything to say), the appellant did not state that his son in law Pranesh is not dead. Rather, he stated that Pranesh had left Patna on 21.05.2000 to go to Fatehpur to attend a friend's wedding. Interestingly, PW-4, uncle of the deceased, who had deposed that his nephew Pranesh has been killed by the accused, was given a suggestion, during cross-examination by the defence, that Pranesh Kumar had come to attend a wedding and after attending the wedding on his way back to his Sasural, at a secluded place, he was attacked, robbed and killed by unknown miscreants. By this suggestion the defence indirectly admitted that Pranesh was killed. Further, vide identification memorandum Ex. Ka-4, the chappal and clothes as well as photo of the deceased were identified on 30.05.2000 by PW-4 and PW-5 as that of the deceased. Hence, we reject the argument of the learned counsel for the appellant that the prosecution could not fix the identity of the headless body.

32. In so far as circumstance (c) i.e. that on 21.05.2000 deceased came to the village of the appellant with the appellant, appellant's daughter and wife by boarding an early morning train at Patna is concerned, except the evidence of PW-4 there is no direct evidence that the deceased boarded a train early morning at Patna to go to Allahabad. Interestingly, the appellant also admits in his statement under section 313 CrPC that his son in law left Patna on 21.05.2000 to go to Fatehpur to attend a friend's wedding. But the appellant denied that he and his family also came with the deceased (i.e. appellant's son in law). Rather, appellant's case is that the appellant and his family arrived at their village on 23.05.2000 when the police arrested them. What is important is that PW-4, the only witness of fact who states that the deceased left Patna to go to his Sasural, does not indicate that he saw the appellant and other co-accused with the deceased at the Patna railway station or noticed them there or had seen the appellant and other co-accused boarding the train. His statement is that the deceased met him outside the station. There is no other witness examined to indicate that the appellant along with other co-

accused were seen together with the deceased on 21.05.2000. In view of the discussion above, circumstance (c) above is partly proved to the extent that the deceased left Patna on 21.05.2000. But it is not proved that the deceased left Patna with the appellant or/and the other co-accused.

33. As we have already found that the headless body was of Pranesh Kumar i.e. appellant's son in law, we also notice that it was proved by PW-1 that the headless body was found on 22.05.2000 in the grove of Daya Ram. Further, from the spot a red colour chappal (slipper) and watch strap was recovered which has been proved by seizure memo dated 22.05.2000 (Ex. Ka-3). Now, what is crucial is whether the police arrested the appellant along with the co-accused on 24.05.2000 and effected recovery of articles as reflected by seizure memos (Ex. Ka-10 and Ex Ka-11). Ex. Ka-10 is recovery memo dated 24.05.2000 showing recovery of weapon of assault (Sickle - Hansiya), a full sleeve blue stripe shirt and a jeans pant blood-stained at the pointing out of the appellant. The recovery memo does not record the disclosure statement but states that recovery was made at the pointing out of the appellant. Jabar Ali (DW-2) and Sapan Kumar Mishra (DW-3) are witnesses of the seizure memo. It also bears signature of Saroj Kumar Tiwari. Similarly, Ex Ka-11 is recovery memo dated 24.05.2000 showing recovery of Nylon rope, one shirt, colour light red with stripes, one shirt full sleeves, brownish colour, with stripes, one jeans pant, grey colour and one black colour trouser. This recovery memo Ex. Ka-11 also does not record the disclosure statement but states that recovery was made at the pointing out of the appellant. Here also Jabar Ali (DW-2) and Sapan Kumar Mishra (DW-3) are witnesses of the seizure memo. It also bears signature of Saroj Kumar Tiwari. Interestingly, in support of the two recovery memos, two site plans dated 24.05.2000 have been prepared by PW-7. One is Ex Ka-8 and the other is Ex. Ka-9. Ex. Ka-8 is titled as Naksha Najri (site plan) of deceased's blood-stained clothes. The contents of the plan would reflect that it is a grove of Daya Ram having Mahua trees. The index of the site plan (Ex. Ka-8) would suggest that the spot from where the blood-stained clothes of the deceased were taken out is shown by point A. Just north of that spot is grove of Daya Ram. When we compare it with site plan (Ex. Ka-7) prepared in respect of the spot from where the headless body was recovered on 22.05.2000 it becomes clear that the spot disclosed in site plan Ex. Ka-8 and site plan Ex Ka-7 is the same grove. Notably, as per prosecution case, body of the deceased was found lying in the grove of Daya Ram. What is important to note is that Ex Ka-8 does not indicate from where the sickle was recovered. But when we come to the statement of PW-7 (I.O.), who effected the recovery of blood stained clothes and sickle, we find that according to him recovery of blood-stained clothes was made from a room of the house of Sapan Kumar where in a haystack the sickle was hidden. Thus, the site plan which shows recovery of blood-stained shirt from near the grove of Daya Ram, where the body was found, is at complete variance with the statement of PW-7. All of this would suggest that the recovery of blood-stained shirt was from the spot i.e. where the body was found and the same was attributed to the appellant. What is also important to note is that the two witnesses of the recovery memo DW-2 and DW-3 have claimed that their signatures were obtained on plain papers and DW-3 was threatened that if he does not sign, he would be put behind bars.

34. Similarly, when we come to the site plan (Ex. Ka-9), prepared in respect of the

other recovery memo, it is noticed that it is tilted as Naksha Najri (site plan) of recovery of murder weapon Hansiya (Sickle), nylon rope and other clothes of deceased Pranesh Kumar. The contents of the site plan would reflect that it relates to a house. Point A is shown as the place from where the murder weapon has been taken out. It is shown to be from haystack kept in a room. Point B is a room in the house from where two shirts and pants of Pranesh Kumar were taken out. It be noted that the index of the site plan (Ex. Ka-9) does not speak of recovery of blood-stained shirt or blood-stained pant of the deceased, it only speaks of other clothes of the deceased. Thus, what is clear from the two site plans and the recovery memos is that there were two separate places from where recoveries were shown. One, from where recovery of blood-stained clothes was shown, as per site plan (Ex. Ka-8), was near the grove of Daya Ram where the body was found and the other was the house of Sapan Kumar (DW-3) from where the Sickle and other clothes of the deceased was recovered. But, surprisingly, from the statement of PW-7 (I.O.) both recoveries were effected from the house of Sapan Kumar. Notably, the witnesses of the recoveries have not been produced by the prosecution. Rather, they have appeared as defence witnesses (DW-2 and DW-3) and have challenged the recovery by stating that they were made to sign plain papers. DW-3 from whose house recovery was made claimed that he was made to sign those papers under threat of implication. In such circumstances, as the accused-appellant claimed that the recovery was fabricated after arresting him on 23.05.2000, there arises a serious doubt with regard to the genuineness of the recovery more so, because we find no evidence on the basis of which arrest of the appellant was effected. Notably, according to the defence, the appellant was working at Patna, he took train from Patna to reach the village on 23.05.2000. At the village, he was arrested and implicated. If the appellant had been in the village from before, and information had been received regarding murder of his son in law, he would for sure been interrogated on 22.05.2000 itself, particularly, when headless body was found in the morning of 22.05.2000. As to when and from whom information was received about the involvement of the appellant and his family, warranting their arrest, the prosecution evidence is shaky. PW-7 (I.O.) only speaks of receipt of information from an informer. Another person, namely, Jainul, from whom the I.O. claims receipt of information with regard to the accused and the deceased being noticed together alighting from a Tempo in the night of 21.05.2000 has not been examined as a prosecution witness. Rather, he appeared as a defence witness (DW-1). DW-1 completely denies witnessing any such thing and denies giving information to the police. Noticeably, DW-1 was not confronted with any of his previous statement recorded under Section 161 CrPC. Further, if the appellant had his own house in the village, what was the occasion to keep clothes of the deceased in the house of Sapan Kumar. All of this would probalize the defence case that the appellant was at Patna till 22.05.2000; his son in law (i.e. the deceased) came alone, whereas the appellant arrived in the village on 23.05.2000 whereafter he was arrested and implicated. For all the reasons above, the recoveries set up by the prosecution at the instance of the appellant do not inspire our confidence, particularly, when there is no separate disclosure statement exhibited to support the recovery. Rather, it appears to be a case where the blood-stained shirt

etc was recovered from near the spot from where the headless body was lifted and since the deceased had come to the village, his plain clothes and other articles were found in the house of Sapan Kumar with whom he may be staying, in absence of his father in law, as a relative of his father in law. In so far as Sickle is concerned it is a common agriculture tool. Its presence by itself is not incriminating. Interestingly, the doctor (PW-8) stated that the head could not have been severed with a grass cutting Sickle. Otherwise also, the origin of the blood found on the Sickle could not be ascertained as it had disintegrated.

35. Once we discard the alleged recoveries at the instance of the appellant, and notice that there is complete absence of evidence that the deceased was last seen alive with the appellant or the other co-accused on 21.05.2000 in the village or even in the train from which the deceased arrived, there is very little evidence against the accused appellant and, therefore, it would be highly unsafe to convict the appellant, particularly, when even the motive for the crime was not proved as already discussed above.

36. For all the reasons above, we are of the view that the prosecution has not been able to bring sufficient evidence to raise its case from the plane of suspicion to the level of proof. Further, the prosecution has not been able to rule out alternative hypothesis consistent with the innocence of the appellant. Thus, we have no option but to allow the appeal by extending the benefit of doubt to the appellant. The appeal is, accordingly, **allowed**. The judgment and order of the trial court is set aside. The appellant is acquitted of the charge for which he has been tried and convicted. He is reported to be in jail. he shall be released forthwith unless wanted in any other case subject to fulfilment of the requirement of section 437-A CrPC to the satisfaction of trial court below.

37. Let a copy of the order be sent to the trial court for information and compliance.

(2022) 10 ILRA 840
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 1932 of 2019

Pratap Singh & Anr. ...Appellants
Versus
The State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Ravi Shankar Tripathi, Sri S. Raizada

Counsel for the Respondents:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 65-B (4)- Once genuineness of the CDRs was admitted by the counsel representing the appellants before the trial court and, consequent to that admission, they were marked, objection with regard to their admissibility for want of certificate contemplated under section 65-B(4) of the Evidence Act, raised for the first time before appellate court, is liable to be rejected.

Where the defence has admitted the genuineness of the call detail records before the trial court, then no objection to the same can be raised at the appellate stage.

Indian Evidence Act, 1872- Section 27- Recovery without disclosure-It appears very strange as to why would the accused-

appellant no.1 carry mobile no. 9808068517 with him for 14 days without even using the same. Had it been hidden and recovered on the basis of a disclosure statement, the incriminating value of the recovery would have been much greater. But here the recovery is not on the basis of a disclosure statement made at the time of arrest. Moreover, PW-1 the witness of recovery, as per memorandum (Exb. Ka-11), does not support recovery of the phone. Further, there is a serious doubt about the timing of arrest as noticed above-The owner of the instrument i.e. PW-1's son has not been produced as a witness and the CDRs of the mobiles do not give the tower location details to enable us to connect the location of the two mobiles qua each other as also qua the place where the body of the deceased was found, we are of the considered view that the circumstance of recovery of mobile of the deceased from the appellant no.1 (Pratap) is unworthy of acceptance and is accordingly discarded.

In order to qualify as a valid recovery under Section 27 of the Evidence Act, the said recovery should be upon the basis of a disclosure statement and the circumstances of the recovery should be credible and trustworthy.

Indian Evidence Act, 1872- Last Seen theory-Chance Witness-The deceased in the company of the appellants- PW-2 is a mere chance witness who made no prompt disclosure to the police despite being fully aware of the incriminating value of what he witnessed, which renders his testimony highly doubtful. Last seen theory operates when there is close proximity between the time and place when the deceased is last seen alive with the accused and recovery of the body of the deceased. But where there is a big gap, possibility of intervening circumstances cannot be ruled out. In such a scenario, the circumstance may only raise suspicion but it would not travel to the level of proof of guilt.

The testimony of a chance witness who had last seen the deceased in the company of the accused, should be treated with caution as it is required from the said witness to give a credible explanation for his presence at the spot and there has to be a close proximity between the time when the deceased was last seen alive with the accused and the time of his death. (Para 34, 35, 38, 39, 40)

Criminal Appeal allowed. (E-3)

Case Law/Judgements relied upon:-

1. Sharad Birdhichand Sarda Vs St. of Maha. (1984) 4 SCC 116

2. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors, (2020) 7 SCC 1

3. Anvar P.V. Vs P.K. Basheer & ors, (2014) 10 SCC 473

4. Sonu @ AmarVs St. of Har., (2017) 8 SCC 570

5. R.V.E. Venkatchala Gounder Vs Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752

6. Rajender @ Rajesh @ Raju Vs St. (NCT of Delhi), (2019) 10 SCC 623

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Sameer Jain, J.)

1. This appeal is against the judgment and order dated 05.02.2019/07.02.2019 passed by the Vth Additional Sessions Judge, Bareilly in Sessions Trial No. 596 of 2011, arising out of Case Crime No. 1073 of 2010, P.S. Izzatnagar, District-Bareilly, whereby the appellants have been convicted and sentenced under Sections 364/34, 302/34, 201 and 404/34 I.P.C. as follows:-

(i) 10 years R.I. as well as fine of Rs. 5,000/- each, coupled with a default sentence of 2 months, under Section 364/34 I.P.C.;

(ii) Imprisonment for life as well as fine of Rs. 10,000/- each, coupled with a

default sentence of 4 months, under Section 302/34 I.P.C.;

(iii) 7 years R.I. as well as fine of Rs. 5,000/- each, coupled with a default sentence of 2 months, under Section 201 I.P.C.; and

(iv) 3 years imprisonment as well as fine of Rs. 2,000/- each, coupled with a default sentence of one month, under Section 404/34 I.P.C.

All sentences to run concurrently.

INTRODUCTORY FACTS

2. On 03.05.2010, Mewa Ram (PW-1) gave a written missing report, dated 02.05.2010, (Exb. Ka-1) at P.S. Izzatnagar, District Bareilly which was entered in GD as report no. 70 (Exb. Ka-3), at 21.15 hours, by Head Constable Braj Raj Singh (PW-6). The written report (Exb. Ka-1) was scribed by Brij Nand Kumar Gola (son of PW-1 - not examined). In the missing report it is alleged that on 29.04.2010 at about 8.30 am, PW-1 left home to attend to his duties. When he returned at 5.30 pm, he did not find his wife Munni Devi (the deceased), aged 47 years, present. On finding his wife absent, he dialled his wife's Mobile No. 9808068517 which was found switched off. After waiting for her till 8 pm, he made efforts to contact his relatives to ascertain her whereabouts, but could get no information about her. During search of her possessions, it was found that her bank passbook of U.P. Regional Gramin Bank, Branch Partapur, Bareilly and Rs. 5,000/- including gold chain, earrings and other jewellery articles were missing. Suspecting foul play, missing report was lodged without naming any suspect.

3. As per prosecution story on 12.05.2010, PW-5 (Rajesh Kumar Singh) got information that discovery of an unknown female body was reported at P.S. Moosajhag, Badaun. On getting this information, PW-5, with PW-1 and Head Constable Vinod Kumar (not examined) went to P.S. Moosajagh, Budaun. There, on the basis of clothes and photograph, PW-1 could identify that the photograph was of his missing wife Munni Devi's body. As a result whereof papers concerning inquest, autopsy, etc of that body were brought to P.S. Izatnagar, Bareilly and on 13.05.2010, vide report no. 33, at 10.30 hours, the missing report was converted into Case Crime No. 1073 of 2010 under Sections 364, 302, 201 I.P.C.

4. According to the prosecution case the appellants were arrested on 13.05.2010; at the time of arrest, appellant no.1 (Pratap Singh) was found in possession of two mobile instruments of Nokia model no. 1208 and 1209, with SIM of numbers 8954197544 and 9808068517. Evidencing that seizure, a memorandum (Exb. Ka-11), witnessed by PW-1 and other police personnel, was prepared. After investigation it was found that Mobile No. 8954177544 was of Pratap Singh (appellant no.1) whereas Mobile No. 9808068517 was of Munni Devi's son Yatindra. The call detail records collected indicated that calls were exchanged between the two mobile numbers on 25.04.2010, 26.04.2010, 27.04.2010 and 29.04.2010.

5. During investigation, on 05.06.2010 statement of Jagan Lal (PW-2) was recorded. He disclosed that on 29.04.2010, at about 11 am, he noticed Pratap Singh and Raju (appellants) with Munni Devi (the deceased) at Pachlore Chauraha on Rampur road.

6. After completing the investigation, on 05.06.2010 charge-sheet (Exb. Ka-13) was submitted by Pradeep Kumar Tripathi (PW-8) against the appellants. Cognisance

was taken on the charge-sheet and thereafter the case was committed to the Court of Session. On 04.05.2012, the Court of Session charged both the appellants with offences punishable under Sections 364/34, 302/34, 201 and 404/34 I.P.C. The appellants pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as nine witnesses. Their testimony, in brief, is as follows:-

8. **PW-1 - Mewa Ram (husband of the deceased)**. He reiterated the contents of the written report (Exb. Ka-1). Thereafter, PW-1 stated **that missing report of his wife was published in the newspaper. [Note: The newspaper report was produced, which was marked material exhibit-1] (*This newspaper cutting reveals that news item was published on 05.05.2010 with photograph of the deceased)***. PW-1 stated that thirteen days after the incident, he came to know from the police that an unknown female body has been found within the jurisdiction of P.S. Moosajhag, District Budaun. On this information, PW-1 and police personnel from police station Izzatnagar went to police station Moosajhag where, from clothes and photograph it was ascertained that the photograph was of the body of the deceased. It was also discovered that the inquest and autopsy of the body had been done and it was cremated. **In respect of recovery of the mobile which his wife (the deceased) was using, PW-1 stated that it was not recovered in his presence. Rather, the police had recovered it.** In respect of relationship with his wife (the deceased), PW-1 stated that on 02.05.1999 while they were travelling together they met with an accident in which his wife sustained injuries. **Since then, his wife (the deceased) had behavioural issues. She used to make false accusations and used to speak loudly. To cure herself of these behavioural issues she came in the grip of ''Tantrik' (sorcerer) and ''Sadhus' (saints). PW-1 stated that he learnt that when he used to be away from his house, ''Tantrik' (Pratap) used to visit her.**

On 25.07.2013, PW-1 was examined again to identify the seized clothes etc. worn by the deceased at the time of her death. On the basis of their identification by PW-1, those clothes etc were made material exhibits.

During cross-examination, PW-1 stated that he had been with his wife for 25 years; that the written report (Exb. Ka-1) was scribed by his son Brijendra Kumar Gola and it was given on 02.05.2010. The information regarding his wife being missing was published in the newspaper; that neither her abduction nor murder was witnessed by him; and that neither in the written report (Exb. Ka-1), nor in the article published in the newspaper, suspicion was expressed against anyone. He denied the suggestion that he had lodged a false missing report.

9. **PW-2 -Jagan Lal** - *This witness has been examined by the prosecution as a witness of last seen circumstance.*

PW-2 stated that he knows PW-1 and his wife (Munni Devi-the deceased) as earlier they used to reside in CB Colony near PW-2's house. He also knows accused Pratap Singh and Raju as Pratap's sister is married in village Pinidher where PW-2's sister is married. Pratap Singh and Raju were residing as tenants of Sriram, which is

half a kilometre from PW-2's house. **Village Pachlore falls within the jurisdiction of P.S. CB Colony.** In respect of the incident, PW-2 stated that on 29.04.2010, at about 11 am, he saw Pratap Singh and Raju with Munni Devi at Pachlore Chauraha, Rampur road. They were waiting for a conveyance. All three were wearing clothes of yellow colour. When PW-2 asked them as to where they were going, all three told him that they were going to Sai Baba's Darbaar. **PW-2 stated that few days later, he read in the newspaper that Munni Devi had gone missing. He also learnt that body of Munni Devi was found within the jurisdiction of PS Moosajhag, District Budaun. He stated that in the newspaper, photograph of Munni Devi was published. When he met Mewa Ram (PW-1), he informed PW-1 that he had noticed Munni Devi in the company of Pratap Singh and Raju on 29.04.2010.**

During cross-examination, PW-2 stated **that Mewa Ram's house in CB Colony was at a distance of 200-300 meters from his house; that now in that house of Mewa Ram, Mewa Ram's son is residing.** On being questioned as to when Mewa Ram shifted from CB Colony's house, PW-2 stated that he does not remember. But he clarified by stating that PW-1 and his wife had been visiting CB Colony. PW-2 stated that his relations with Mewa Ram are cordial and being residents of the same locality, they had been on visiting terms. **PW-2 stated that though he had not met Mewa Ram in those 10-15 days preceding the date of the incident but he had met him (Mewa Ram) 5-6 days after the incident.**

PW-2 further stated that he has a furniture shop at Rampur road. In respect of the day of the incident i.e. 29.04.2010, PW-2 stated he had left his house at quarter to 11 in the morning to go to his furniture shop. He arrived at his shop at quarter to 12. That day, he was in his shop till the evening. When he left his house for the shop, he did not meet anyone. Immediately thereafter, PW-2 clarified that when he was returning in the evening from his shop he did not meet anyone but, while he was going to his shop, he met Pratap, Raju and Munni Devi.

In respect of his reaction on the missing report published in the newspaper, PW-2 stated that the newspaper report about Munni Devi going missing was published 3-4 days after the incident. The day he read the missing report in the newspaper, he gave information to Mewa Ram (PW-1). Mewa Ram had come to his house with his son. The relevant extracts of PW-2's statement in this regard are reproduced below:-

'मेरी घटना से पहले महीना दो महीना पहले मुन्नी देवी, प्रताप से मुलाकात नही हुयी थी अखबार मे निकला था मुन्नी देवी गायब हो गयी है अखबार मे तीन चार दिन बाद निकला था। जिस दिन मैने पेपर मे पढ़ा उस दिन मैने मेवाराम को सूचना दी थी। उसी दिन मेवाराम अपने पत्नी के विषय मे पूछताछ करने आये थे मेवाराम के साथ उसका बेटा भी था।''

On further questioning, PW-2 stated that he gave information to the police about 15 days after the incident. The police had interrogated him at P.S. Izzatnagar. PW-2 admitted the suggestion that his sister is married in the same village where Pratap's sister was married. However, PW-2 denied the suggestion that as relations between his sister and Pratap's sister are sour, he is making a false statement.

10. **PW-3 - Majid** - *A village chowkidar who discovered the body of the deceased.* He stated that about 3-1/2 years ago, at about 5 pm, while he was herding

his goats in the jungle, he found a female body in a *Barsati Naala.* The body was in a yellow colour sari and blouse. He gave information about discovering the body. Upon his information, the police arrived at the spot, conducted inquest and sent it for autopsy.

During cross-examination, he stated that he found the body at about 5.30 pm. He stated that he is not a literate person; he had just put his thumb impression on the report; that the body had marks of injury around the neck.

11. **PW-4 - Dr. Harpal Singh**- *He is the autopsy surgeon who conducted the autopsy.* He stated that on 01.05.2010, while he was posted as Medical Superintendent at District Hospital, Budaun, at about 3.30 pm, he conducted autopsy of an unknown female body. PW-4 stated that in his report he described the body as of average built and that rigor mortis had passed off; decomposition had started; skin was peeling off; abdomen was distended; and the entire body including face was swollen. No external ante-mortem injury was noticed but, on dissection of neck, trachea was found congested; hyoid bone was found fractured; brain and lungs were congested; stomach was empty; small intestine had chyme and gases; large intestine had faecal matter and gases. According to him, death was a result of asphyxia due to injuries noticed on the neck. On the basis of his statement, autopsy report was marked Exb. Ka-2. PW-4 stated that time since death before autopsy was about 2-3 days.

Opportunity to cross-examine PW-4 was given but it was not availed.

12. **PW-5 - Rajesh Kumar Singh.** He stated that on 03.05.2010, he was posted at Chowki of PS Izzatnagar when PW-1 (Mewa Ram) lodged a missing report regarding his wife Munni Devi. During investigation, he learnt that an unknown female body was found within the jurisdiction of PS Moosajhag, Budaun. On getting that information, he, PW-1 and Head Constable Vinod Kumar went to PS Moosajhag and there from the clothes and photograph of the body, PW-1 identified that the photograph was of his wife's body. Consequently, he obtained inquest report and other papers and gave information to SHO Pradeep Kumar Tripathi (PW-8) whereafter, vide report no. 33, dated 13.05.2010, at 10.30 hours, the missing report was converted into Case Crime No. 1073 of 2010, under Sections 364/302/201 I.P.C. PW-5 stated that on 13.05.2010 itself, he, along with S.O. Pradeep Kumar Tripathi (PW-8), arrested the accused Pratap Singh and Raju from near CB Ganj Railway Station at about 19.30 hours. From the possession of Pratap Singh mobile set of Munni Devi (the deceased) was recovered, which was identified by PW-1.

During cross-examination, PW-5 denied the suggestion that the accused was wrongly shown arrested on 13.05.2010 at 19.30 hrs when, in fact, he was lifted from his house in the morning at 5.00 am on 13.05.2010 and thereafter was made to sit at the police station. ***Note: It appears from paper no. 32 Kha/89 on the trial court record that PW-5 was shown the news paper report wherein arrest of the appellant Pratap on the previous date was published.*** **In that context, PW-5 admitted that such information was published in the newspaper.** He, however, denied the suggestion that a false case was fabricated against the accused. At this stage, the witness was given another suggestion, which was, that Pratap's servant

was lifted on 12.05.2010 and was made to sit at the police station, which was published in newspaper. PW-2 denied this suggestion and claimed that no such news was published in the newspaper. He also denied the suggestion that the accused persons were lifted from their shop and falsely implicated.

13. **PW-6- Head Constable Braj Raj Singh**. *He is the person who made GD Entry of the missing report (Exb. Ka-1) submitted by PW-1*. He stated that in the month of May, 2010, he was posted as Head Constable at PS Izzatnagar. On 03.05.2010, Mewa Ram (PW-1) gave a written missing report which was entered in the GD on 03.05.2010 at 21.15 hours vide report no.70. He proved the copy of the GD entry, which was marked Exb. Ka-3. He stated that on 13.05.2010, S.I. Rajesh Kumar Singh (PW-5) returned to the police station with information about the death of Smt. Munni Devi and had deposited the inquest report, autopsy report along with a bunch of papers. PW-5 also told PW-6 that the informant has been able to identify the body of his wife on the basis of clothes and photographs. PW-6 stated that the autopsy report indicated that death was a result of strangulation therefore, vide report no. 33, dated 13.05.2010, at 10.30 hours, the missing report was converted into Case Crime No. 1073 of 2010, under Sections 364/302/201 I.P.C. He proved copy of the GD entry of conversion, which was marked Exb. Ka-4.

During cross-examination, PW-6 confirmed that the missing report was given by PW-1 on 03.05.2010 at 21.15 hours which was entered in the GD by Constable Clerk Virendra Kumar. He stated that Constable Virendra Kumar was posted with him at the police station. He identified the signature of Virendra Kumar. He stated that the GD entry of conversion was made on return of S.I. Rajesh Kumar Singh when he had come with inquest report, clothes etc. of the deceased. He denied the suggestion that the conversion entry was made under pressure of S.I. Rajesh Kumar Singh. He also denied the suggestion that the Constable Clerk Virendra Kumar was not posted with him at the police station concerned. He also denied the suggestion that missing report was fabricated.

14. **PW-7 - S.I. Virendra Pal Singh**. *He is a witness of preparation of inquest report and papers relating to autopsy of the body*. He stated that on 30.04.2010, he was posted at PS Moosajhag, Budaun. On that day, village Chowkidar-Majid gave information with regard to discovery of a female body in his area. On receipt of that information, PW-7 and fellow police personnel went to the spot and conducted inquest. After conducting inquest, he prepared papers such as challan lash, photo lash, etc. for autopsy of the body. The inquest report and autopsy related papers were marked Exb. Ka-5 to Exb. Ka-10.

15. **PW-8 - Pradeep Kumar Tripathi -The Investigating Officer.** He stated that he was posted as In-charge of P.S. Izzatnagar. On 13.05.2010, he took over investigation of Case Crime No. 1073 of 2010; that after collecting copy of inquest report, autopsy report, etc he recorded the statements of Constable Braj Raj Singh and Mewa Ram (the informant) and made search for the accused persons; that the accused persons were arrested; they confessed their guilt and from Pratap, Mobile No. 8954197544 and 9808068517 (which was of Munni Devi) were recovered. Both mobiles were seized and sealed in a cloth; a seizure memo was

prepared, which was signed by him, the witnesses and Pratap (the accused). The seizure memo was marked Exb. Ka-11. The second CD parcha was prepared on 22.05.2010 when statement of I.O., who prepared inquest report, village chowkidar and other inquest witnesses were recorded and on the instructions of that village chowkidar, the site plan of the place from where body was recovered was prepared, which was marked Exb. Ka-12. He stated that on the same day, he recorded statement of Raksh Pal, Sukhbir Singh and the Constable, who took the body for autopsy. On 27.05.2010, he obtained ID of the two mobiles as also their call detail records (CDRs). From the CDRs it was noticed that calls were exchanged between the two mobiles on 25.4.2010, 26.04.2010, 27.04.2010 and 29.04.2010. After 29.04.2010, there were no calls made, inter se, the two mobiles. He stated that one mobile recovered from Pratap was in the ID of Pratap whereas the other mobile, which was allegedly in use of the deceased (Munni Devi), was in the name of her son (Yatindra). PW-8 stated that on 03.06.2010, he recorded the statement of S.I. Rajesh Singh, S.I. S.S. Mishra, Head Constable Vinod Kumar, Constable Bhupendra Kumar and Constable Amit Kumar. **Thereafter, on 05.06.2010, he recorded statement of Jagan Lal (PW-2).** After completing the investigation, he submitted charge-sheet under Sections 302 364, 201 and 404 I.P.C., which was marked Exb. Ka-13.

During cross-examination, he stated that he took over investigation of the case on 13.05.2010; by then, on 12.05.2010, the body of Munni Devi (the deceased) had already been identified on the basis of photograph at P.S. Moosajhag, District Budaun. He stated that he had not gone to PS Moosajhag. Rather, the Chowki Incharge S.I. Rajesh Kumar Singh and Head Constable Vinod Kumar had gone to PS Moosajhag. With them, deceased's husband Mewa Ram had also gone. He denied the suggestion that he did not properly investigate the case and submitted a false charge-sheet.

On 31.03.2017, PW-8 was re-examined. He stated that the mobile instrument mentioned in the seizure memo (Exb. Ka-11) is not before him because, despite request for its production, report was received that due to fire in the Malkhana, the mobiles got destroyed in respect of which a GD entry was made on 13.05.2013, vide report no. 68 at 22.30 hours.

During cross-examination, the witness confirmed that the mobile was destroyed in the fire that took place in the Malkhana.

On 02.11.2018, PW-8 was again re-examined under order of the court dated 27.06.2018. During re-examination, PW-8 stated that when the accused Pratap was arrested, two mobile phones were recovered, namely, 8954197544, which was of Pratap, and 9808068517, which was of the deceased; and the call detail records indicated that inter se the two mobiles multiple calls were exchanged. PW-8 clarified that Mobile no. 8954197544stood in the name of Pratap Singh whereas Mobile no. 9808068517 stood in the name of Yatindra son of Munni Devi. PW-8 proved the CDRs obtained by him from Call Detail Electronic System. Those CDRs were marked Exb. Ka-15 to Exb. Ka-22.

16. **PW-9 - Ved Prakash Agnihotri.** He stated that he was posted at Sadar Malkhana police station, Bareilly. In the Malkhana register vide Serial No. 1168/12

articles were deposited in connection with Case Crime No. 1073 of 2010. On 24.07.2014, there was a fire accident in Sadar Malkhana, Bareilly and the articles got destroyed. He proved the report in connection therewith which was exhibited as Exb. Ka-14.

During cross-examination, PW-9 stated that clothes etc. of the deceased, which were also deposited vide report no. 1168/12 in connection with Case Crime No. 1073 of 2010, were produced on 25.07.2013. He reiterated that the fire accident in the Malkhana took place on 24.07.2014.

STATEMENT OF THE ACCUSED U/S 313 CRPC

17. (a) **Statement of accused Raju:**

In his first statement recorded on 04.02.2015, he denied the incriminating circumstances appearing in the prosecution evidence against him and stated that he met Munni Devi only when Mewa Ram (PW-1) used to visit Budaun with her; on his own, he never visited Bareilly. He claimed himself innocent and falsely implicated. He denied the incriminating circumstance in respect of recovery of mobile of Munni Devi as also with regard to the call detail records.

In his additional statement recorded on 03.11.2017, he stated that he is innocent and this is the first criminal case against him.

On 17.01.2019, yet another additional statement of accused Raju was recorded in which, in response to Question No. 2, Raju stated that there was no recovery of mobile of Munni Devi from him. He again denied the call detail records put to him. He also denied having conversations with Munni Devi on the mobile.

(b) Statement of accused-appellant Pratap:

His first statement u/s 313 Cr.P.C. was recorded on 04.02.2015 in which he denied the incriminating circumstances including the recovery of mobile phone of Munni Devi from him which was put to him vide question no. 6. He also denied telephonic conversation with Munni Devi, which was put to him vide question no. 9. He stated that the investigation was not fair; that a false charge-sheet has been submitted; that there is enmity between him and Jagan Lal (PW-2) and he has been falsely implicated.

Additional statement was recorded on 03.11.2017 in respect of report of fire accident at Malkhana on 24.7.2014 and destruction of articles in that fire.

He denied the said circumstance and claimed that this is the first criminal case against him.

In addition to above, another additional statement of Pratap was recorded u/s 313 Cr.P.C. on 17.01.2019 wherein, in response to question no.2 put to him, he again denied the recovery of mobile of Munni Devi from him. Further, he did not admit the CDRs put to him vide question no. 3; and denied having talks with Munni Devi from Mobile No. 8954197544 on Mobile No. 9808068517. But he did not deny that mobile no. 8954197544 was in his name and that mobile no.9808068517 stood in the name of son of Munni Devi. He claimed that the prosecution has failed to prove its case and therefore, he be acquitted.

DEFENCE EVIDENCE

18. A defence witness was examined, namely, Smt. Ratnesh, as DW-1.

19. DW-1 stated that she is a neighbour of Pratap; she has been residing in Budaun for last 10 years; that the lady who has been killed, was never seen in her mohalla; Pratap has a shop; in that shop, Raju works as an employee. They have been falsely implicated.

During cross-examination, DW-1 stated that she is illiterate; she appeared as a witness without being summoned; she was informed by Pratap that she has to give her evidence; she gave her statement as a neighbour of Pratap and whatever she has stated is correct. She admitted that when Pratap leaves his house, he does not inform her; she does not know whether Pratap had visited Pachlore, Bareilly on 29.04.2010. She denied the suggestion that she has made a false statement to save Pratap. She also denied the suggestion that Pratap is a "Tantrik" and practiced sorcery for the purposes of extorting money, jewellery etc.

To the Court, DW-1 informed that she is a household lady and remains in her house. She admitted that there are several houses in her colony and she is not aware as to who visits her neighbour.

TRIAL COURT FINDINGS

20. The trial court found following circumstances proved:- that on 29.04.2010, the deceased went missing from her home; that the deceased was not keeping well, therefore she use to take help of "Tantrik" etc.; that the deceased had been in touch with the appellant Pratap as could be elicited from the CDRs of the two mobiles; that on the day when she went missing i.e. 29.04.2014, there were exchange of calls inter se mobile of the deceased and mobile of the accused Pratap; that on 29.04.2010, PW-2 saw the accused Pratap and Raju with the deceased at about 11 am in a yellow saree; that the deceased was not seen alive thereafter; that on 30.04.2010 the body of the deceased was discovered wearing yellow colour saree; that the autopsy report confirmed homicidal death; that the medical evidence indicated that her death could have occurred on 29.04.2010; and that the accused Pratap was found in possession of the mobile of the deceased. Upon finding all the above circumstances proved, the trial court found these circumstances constituting a chain so complete that in absence of any explanation from the appellants as to when they parted company of the deceased and how the mobile phone of the deceased came in their possession, it pointed conclusively that except the appellants there was no one else who committed murder of the deceased and to hide evidence thereof disposed off the body in the jungle. After holding as above, the appellants were convicted and sentenced as above.

21. We have heard Sri R.S. Tripathi for the appellants and Sri J.K. Upadhyay, learned A.G.A., for the State and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

22. The learned counsel for the appellants submitted that the prosecution case is based on circumstantial evidence. Firstly, the incriminating circumstances have not been proved beyond reasonable doubt and, secondly, it does not form a chain so complete as to conclusively point towards the guilt of the appellants by ruling out hypotheses consistent with the

innocence of the appellants. That apart, the prosecution story appears inherently improbable and does not at all inspire confidence for the following reasons:-

(i) The deceased went missing from home on 29.04.2010 yet, PW-1 (husband of the deceased) who came to learn about the deceased having gone missing in the evening of 29.04.2010 lodged no report till the night of 03.05.2010. Moreover, PW-1 himself stated that his wife had behavioural issues since 1999 and she used to make false accusations on him and use to speak loudly and had fallen in the grip of Tantriks and saints; and that it was learnt that in his absence Tantrik Pratap (the appellant no.1) used to visit her house yet, there is no mention of these facts in the missing report, which was lodged after three clear days. Further, these circumstances would indicate that PW-1 had motive to get rid off his wife and, therefore, his conduct of delaying the missing report shrouds the prosecution story in doubt and throws a serious possibility of PW-1 having a hand in the murder of his wife;

(ii) PW-5 stated that during investigation on the missing report he received information with regard to discovery of an unknown female body within the jurisdiction of P.S. Moosajhag, Budaun but the date, time and source when and from whom PW-5 received that information is not disclosed. PW-8 also does not disclose the source of that information. PW-1 only states this much that after 13 days he learnt from the police station that a dead body was found within the jurisdiction of P.S. Moosajhag, Budaun. No witness from police station Moosajhag, Budaun, except PW-7, has been produced to prove as to when information of discovery of body was given either to PW-1 or to the police of police station Izatnagar, Bareilly. PW-7 who was posted at P.S. Moosajhag, Budaun at the relevant time speaks of holding inquest on 30.04.2010. He does not give any information as to when information with regard to discovery of body was provided to PW-1 and the police of P.S. Izatnagar. Thus, the prosecution evidence is silent as to how the information about discovery of body came to P.S. Izzatnagar. Further, from the testimony of both PW-1 and PW-2 it is clear that news item of the deceased going missing with her photograph was published in newspaper on 05.05.2010, giving numbers of persons to be contacted on getting any information (See Material Exb. 1), yet, till 12.05.2010 no information about the deceased could be gathered, which is unbelievable. It therefore appears to be a case where the investigation agency in collusion with PW-1 was building up a story and when they found a soft target, the story was given its shape. It may also be a case where the investigating agency was groping in the dark and just to solve out the case developed the prosecution story. These two possibilities derive strength also from the circumstance that if the body was identified on 12.05.2010, as per testimony of PW-8, then why there was no conversion entry of the missing report till 13.05.2010 and why there was no recording of statement of the informant (PW-1) till 13.5.2010. All of this would suggest that either the investigating agency in collusion with PW-1 was building up a case with ulterior motive or it had no clue about the murder and just to solve out the case, the story was developed by guess work upon finding a soft target.

23. The recovery of mobile phone of deceased's son, alleged to be in use of the deceased, from Pratap on 13.05.2010 is completely bogus and false for the following reasons: (a) the recovery memorandum says

that recovery was made in the presence of PW-1 on 13.05.2010 but PW-1, in his statement, specifically stated that mobile of his wife was not recovered in his presence rather, the police on its own recovered the mobile; (b) the recovery is neither on the basis of a disclosure statement nor from any place where the mobile might have been hidden, rather, it was found in possession of the appellant-Pratap at the time of his arrest on 13.05.2010. There appears a news paper report, publication of which is accepted by PW-5 on the suggestion given to him, that Pratap was lifted from home earlier. Therefore, the entire recovery becomes doubtful. Further, as per call detail record, there is no call made from Mobile No. 9808068517 after 29.04.2010 therefore, what was the purpose of carrying the said mobile by the accused from 29.04.2010 till 13.05.2010. Otherwise also, the tower location of the mobile was not obtained to ascertain whether the two mobiles at any given time were found at one location. All of this would suggest that this mobile was very much in possession of the informant or a member of his family and was planted only to create evidence of recovery against the appellant.

24. The CDRs are not proved inasmuch as there is no certificate as contemplated by section 65-B (4) of the Evidence Act. Even otherwise, as there is no evidence in respect of location of the mobile, even if calls were exchanged between the two instruments, namely, one of the appellant Pratap and the other of the deceased, it can be of no help in drawing an inference with regard to the guilt of the accused appellants for the offences of abduction or murder.

25. In so far as the last seen circumstance narrated by PW-2 is concerned, firstly, the testimony of PW-2 is highly unreliable as he is just a chance witness, secondly, his statement was recorded after a month on 05.06.2010 even though, according to PW-2, he had good relations with PW-1 and had noticed the missing report published in the newspaper just 3-4 days after she had gone missing and, thirdly, PW-2 claims that he gave information of the last seen circumstance to PW-1 immediately on reading missing report in the newspaper but, if that was so, PW-1 would have made a prompt disclosure to the police about complicity of the appellants. Interestingly, there was no such disclosure by PW-1 even in his statement to the I.O. on 13.05.2010. All of this would suggest that the police was groping in the dark and just to solve out the case, false evidence was created.

26. It was argued that the trial court has failed to evaluate the evidence in proper perspective and it took the evidence fabricated against the appellant as gospel truth. Hence, it was prayed that the judgment and order of the trial court be set aside and the appellant be acquitted.

SUBMISSIONS ON BEHALF OF THE STATE

27. Sri J.K. Upadhyay, learned A.G.A., appearing for the State, submitted that the delay in lodging the missing report is not sufficient to draw an adverse inference against the prosecution because it is quite natural that a person would be on the look out for his wife and only when he finds himself helpless that he would lodge a report. It was argued that there is no dispute that out of the two mobiles recovered from the possession of the appellant no.1, one was of appellant no.1. The call detail records were exhibited and no objection to its admissibility was raised. Rather, the

counsel for the accused-appellants, namely, Sri S. Raizada, made an endorsement on the CDRs to the effect that he accepts their genuineness. Therefore, its admissibility cannot be challenged in appeal. The call detail records indicated exchange of calls between the mobile of the appellant and the other mobile, which stood in the name of deceased's son Yatindra and was in use of the deceased. There is no explanation of the appellant no.1 as to in what connection calls were made to and received from the other mobile. This clearly means that the appellants are hiding true facts. It was submitted that since the police witnesses have proved the recovery of the two mobiles from appellant no.1 and the CDRs indicate that there were exchange of calls between the two mobiles, the burden was on the accused to explain as to in what circumstances the other mobile was in his possession. In absence whereof, an adverse inference in respect of the guilt of the appellant was rightly drawn by the trial court.

28. Learned A.G.A. also submitted that PW-2 had noticed the deceased in the company of the two appellants on 29.04.2010 at about 11 am and thereafter the deceased was not seen alive. Nothing much could be pointed out with regard to any malice or enmity of PW-2 with the two accused as to doubt his testimony therefore, the burden was on the two accused to explain whether they parted company with the deceased or not. In absence of any explanation and in view of recovery of the mobile of the deceased from the appellant no.1, the trial court was justified in holding that the chain of circumstances stood complete pointing conclusively that in all human probability it was the appellant and no one else who committed the murder of the deceased and to remove the evidence of murder, threw her body in a Naala. Learned A.G.A. therefore prayed that the appeal be dismissed and the judgment and order of conviction and sentence be confirmed.

ANALYSIS

29. Having noticed the rival submissions and the entire evidence on record, admittedly, there is no direct evidence of the crime therefore, before we proceed to evaluate the evidence, we must bear in mind the legal principles as regards when an accused can be convicted on evidence circumstantial in nature. The law in this regard is well settled. In the oft-quoted and consistently followed decision of the Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116**, the legal principles in this regard have been summarised, in paragraph 153 of the judgment, 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 v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made:

"19. .....Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between

'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

30. In light of the legal principles noticed above, we would have to ascertain, firstly, as to what were the incriminating circumstances relied upon by the prosecution, secondly, whether those were of conclusive nature and tendency, thirdly, whether the prosecution has been successful in proving those circumstances beyond reasonable doubt and, fourthly, whether they form a chain so complete as to show, by excluding all reasonable hypotheses consistent with the innocence of the accused, that in all human probability the act must have been done by the accused and no one else.

31. In the instant case, the prosecution seeks to rely on following circumstances:-

(a) The deceased, wife of PW-1, after her accident in the year 1999, had behavioural issues as a result whereof she was seeking advice and had fallen in the grip of "Tantriks/Priests". The accused-appellant no.1 was a "Tantrik". The deceased was in touch with the accused-appellant no.1 as could be gathered from CDRs of the mobile of the appellant no.1 and the mobile in use of the deceased. On 29.04.2010 at about 5.30 pm, when PW-1 returned from office, he discovered his wife (the deceased) missing. Upon which, when PW-1 dialled the mobile of the deceased it was found switched off. Despite hectic search when deceased could not be traced out and when it was noticed that she had taken Rs.5000/- cash, a missing report was lodged by PW-1 at P.S. Izatnagar, Bareilly on 03.05.2010. Whereafter, when it was learnt that a female body was found within the jurisdiction of PS Moosajhag, Budaun, on 12.05.2010 PW-1 with the police team of P.S. Izzatnagar, Bareilly went to P.S. Moosajhag, Budaun where, from clothes and photograph of the body, it was identified that the body which was found on 30.04.2010 and cremated thereafter was of the deceased.

(b) Inquest report dated 30.04.2010 and autopsy report dated 01.05.2010, collected from P.S. Moosajhag, Bareilly, confirmed a homicidal death. Autopsy report prepared on 01.05.2010 at 3.30 pm indicated that the deceased could have died about 2-3 days before, which correlates with the date 29.04.2010 i.e. the date when she went missing;

(c) PW-2 saw the deceased and the two appellants together at 11.00 am on 29.04.2010. When PW-2 noticed the deceased she was wearing a yellow colour saree. The body of the deceased was clothed in the same colour, which fact is confirmed by its photograph, inquest report and clothes seized at the time of inquest/ autopsy;

(d) On 13.05.2010 two mobile phones were recovered from the appellant no.1; one of those two, was of the son of the deceased in use of the deceased. The CDRs of the two mobile phones confirmed exchange of calls inter se the two mobile

phones. The last call from/on the mobile used by the deceased was on 29.04.2010 which corroborates PW-1's statement that deceased's mobile was found switched off when he dialled her number;

(e) No explanation came from the appellants as to under what circumstances they were together with the deceased and whether they parted company of each other, if so, when. Further, there is no explanation as to in what circumstances appellant Pratap was found in possession of the mobile phone of the deceased.

According to the prosecution, these circumstances formed a chain so complete that pointed conclusively that in all human probability it was the appellants and no one else who committed the murder of the deceased for the money which the deceased was carrying when she left her home on 29.04.2010.

32. Having narrated the circumstances on which the prosecution seeks to build its case against the appellants, for a convenient and effective analysis of the evidence, we divide the evidence led by the prosecution into multiple parts, namely, (a) that the deceased was wife of PW-1; (b) she had an accident in 1999 due to which she used to have behavioural issues; (c) for treatment of those issues she used to consult Tantrik etc in which connection Pratap Tantrik used to visit her house; (d) that on 29.04.2010 at 8.30 am PW-1 left his house to attend to his duties and returned at 5.30 pm to find his wife absent; (e) upon finding his wife absent, he dialled her number 9808068517, which was found switched off; (f) when, despite hectic search, PW-1 could not find his wife, he submitted missing report (Exb. Ka-1), dated 02.05.2010, on 03.05.2010 at 21.15 hrs at P.S. Izzatnagar; (g) that on 12.05.2010, upon information that an unknown body was found within the jurisdiction of P.S. Moosajhag, Budaun, PW-1 and PW-5 visited the said police station and identified the body from its photograph and clothes; (h) that from the police papers received from P.S. Moosajhag, Budaun it was noticed that the body was discovered by PW-3 in the Naala of a jungle on 30.04.2010 at about 5.00 pm or so and that the autopsy confirmed that it was a homicidal death; (i) that on 13.05.2010, vide report no.33, at 10.30 hrs, on the basis of papers received from P.S. Moosajhag, case was converted to case crime no.1073 of 2010 at P.S. Izzatnagar, Bareilly and investigation was taken over by PW-8; (j) on 13.05.2010, statement of PW-1 was recorded; (k) on 13.05.2010 at 19.30 hrs both the appellants were arrested from CB Ganj, Railway Station and from the possession of appellant Pratap two mobiles were recovered, one was of the appellant Pratap and the other was of deceased's son, which was claimed to be in use of the deceased, of which seizure memorandum (Ex. Ka-11) was prepared; (l) the call detail records of the two mobiles indicated that there had been exchange of calls between the two mobiles from 25.04.2010 to 29.04.2010 and the last call on/from the mobile in use of the deceased was made on 29.04.2010 i.e. the date when the deceased went missing; (m) on 29.04.2010 at 11 am, PW-2 had noticed the deceased in the company of two appellants and at that time the deceased was wearing yellow colour saree; (n) that the body of the deceased which was found next day on 30.04 2010 had a saree of yellow colour; and (o) the autopsy report dated 01.05.2010 not only proved that death was homicidal but it also indicated that it occurred two or three days before, which correlates with the date when she was last seen alive in the company of the appellants.

Admissibility of the CDRs without the certificate

33. Before we proceed to determine whether each of the above narrated

circumstances have been proved beyond reasonable doubt, we would deal with the legal submission of the learned counsel for the appellant with regard to the admissibility of the CDRs brought on record without the certificate as contemplated under section 65-B (4) of the Evidence Act. It is now settled by a three-judge Bench decision of the Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others, (2020) 7 SCC 1**, following an earlier three-judge Bench decision in **Anvar P.V. v. P.K. Basheer and others, (2014) 10 SCC 473**, that the certificate required under section 65-B (4) of the Evidence Act is a condition precedent to the admissibility of secondary evidence of an electronic record and that the secondary evidence is admissible only if led in the manner stated and not otherwise. In that decision it was held that section 65-B differentiates between the original information contained in the computer itself and copies made therefrom -- the former is the primary evidence and the latter being secondary evidence. It was held that certificate required under section 65-B (4) is unnecessary if the primary evidence, such as a laptop, computer, computer tablet or even a mobile phone, etc is produced and proved by its owner by entering the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. However, where the computer happens to be a part of the computer system or computer network and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with S.65-B(1), together with the requisite certificate under section 65-B (4).

34. In this case the issue that arises for our consideration is a bit different. Here, we notice from the trial court record that the genuineness of the call detail records (CDRs) was admitted by Sri S. Raizada Advocate, counsel representing the accused-appellants. On the basis of his admission, the CDRs were exhibited as Exb. Ka-15 to Exb. Ka-20 and Exb. Ka-21. However, there is no certificate on record as contemplated by section 65-B (4) of the Evidence Act. In this context, the moot question that arises for our consideration is whether, once the secondary evidence of the CDRs is taken on record as an exhibited document consequent to acceptance of its genuineness by the counsel for the accused-appellants, the same is to be eschewed from consideration for want of a certificate as contemplated by section 65-B (4) of the Evidence Act. This issue is no longer res integra. In **Sonu alias Amar v. State of Haryana, (2017) 8 SCC 570**, an identical issue came up for consideration before the Supreme Court. The Supreme Court relying on earlier decisions including one in **R.V.E. Venkatchala Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752** held that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage but where objection is with regard to the mode or method of proof, the same being procedural, if not taken at trial, cannot be permitted at appellate stage. The Supreme Court held that it is nobody's case that CDRs which are a form of an electronic record printed on paper are not inherently admissible in evidence. The objection is only in respect of mode or method of proof. If an objection was taken to CDRs being marked without a certificate, the trial court could have given the prosecution an opportunity to rectify the deficiency. The Supreme Court observed that an objection relating to mode or method of proof is to be raised at the time of marking of document

as an exhibit i.e. at the trial stage, and not later. With the above reasoning, upon finding that the CDRs were already exhibited in the records of the trial court and the objection was only with regard to the mode of proof, the Supreme Court overruled the objection as to the admissibility of the CDRs without the certificate contemplated under Section 65-B(4). The above decision of the Supreme Court was followed in **Rajender alias Rajesh alias Raju v. State (NCT of Delhi), (2019) 10 SCC 623** where also, the Supreme Court did not allow raising of objection at the appellate forum as to the admissibility of CDRs for want of certificate under section 65-B (4) of the Evidence Act. In light of the decisions noticed above, we are of the view that once genuineness of the CDRs was admitted by the counsel representing the appellants before the trial court and, consequent to that admission, they were marked Exb. Ka-15 to Exb. Ka-20 and Exb. Ka-21, objection with regard to their admissibility for want of certificate contemplated under section 65-B(4) of the Evidence Act, raised for the first time before appellate court, is liable to be rejected and is, accordingly, rejected.

Relevance of the CDRs

35. Although the CDRs may be admissible in evidence but as to how far they are relevant to indicate the involvement of the appellants in the crime is another issue altogether. It be noted that the exhibited CDRs only indicate exchange of calls between two mobiles, namely, No. 8954197544 and No. 9808068517. The latter is claimed to be in use of the deceased, though it stands in the name of her son, whereas the former is of the appellant. The CDRs produced do not indicate the tower location as to show that at any time the two instruments were found at one location. Further, there is no voice call recording to indicate as to who was talking with whom. In these circumstances, the CDRs produced would only indicate some kind of acquaintance between the caller and the recipient of the call and nothing more. Had the CDRs indicated that the mobile instrument seized had used both SIMs, that is, one of the accused-appellant Pratap and the other of the deceased, then an inference could have been drawn that both instruments at some stage were in possession of one person. But here the CDRs do not indicate that same instrument was used for making calls by using both SIMs. In these circumstances, the relevance of CDRs is only to show that the caller and recipient of the call were acquainted with each other.

Evaluation of the Evidence

36. Now we shall advert to the evidence in respect of the facts culled out in paragraph 32 herein above. The facts that the deceased is the wife of PW-1, used to live with PW-1, had an accident in the year 1999, giving rise to behavioural issues, are proved by the testimony of PW-1 as regards which, there appears no serious cross-examination by the defence. However, the allegation that in connection with her behavioural issues she was in contact with *Tantriks* (sorcerers) or saints including the appellant Pratap is not proved by any cogent evidence. Testimony of PW-1 in this regard is that he had heard that when he used to be away, *Tantrik* Pratap used to visit his house. This statement is hearsay and is not admissible in proof of that fact. PW-2, the other witness of fact, neither states that Pratap is a *Tantrik* nor states that he saw Pratap visiting the house of deceased/ PW-1. PW-2, however, stated that on 29.04.2010 at

11 am he saw the deceased in the company of the appellants near Pachlore Chauraha. PW-2 also stated that they had told him that they were going to Sai Darbaar. But since PW-2 did not state that Pratap is a Tantrik and use to visit the house of the deceased or that the deceased used to visit his house in connection with Tantrik Kriya (sorcery), the testimony of PW-2 does not at all prove that, firstly, appellant Pratap was a Tantrik and, secondly, the deceased was in the grip of the appellant (Pratap) in connection with Tantrik Kriya (sorcery). Even if we accept the testimony of PW-2 that the deceased, wearing a yellow colour dress, was noticed with the appellants at Pachlore Chauraha on 29.04.2010 at 11 am and they reported to PW-2 that they were going to Sai Darbaar, in absence of further details in the testimony, no inference can be drawn with regard to appellant (Pratap) being a Tantrik and of him having a grip on the deceased. Notably, there is no evidence that the deceased was taken by the appellants from her place of residence at Sun City. Further, no witness of Sun City colony, where the deceased resided with her husband, has been examined to prove that in absence of PW-1 the appellant used to visit the deceased. In these circumstances there is no worthwhile evidence to prove that the appellant was a Tantrik and that he visited the house of the deceased or that the deceased was in his grip. We are therefore of the firm view that the prosecution has failed to prove that, firstly, appellant was a *Tantrik*, secondly, that he had been visiting the house of the deceased, or vice versa, in connection with *Tantrik Kriya* (sorcery) and, thirdly, that the deceased was in the grip of the appellant (Pratap).

37. We shall now evaluate the evidence in respect of alleged recovery of mobile of the deceased from appellant Pratap and of the deceased being last seen alive with the appellants on 29.04.2010. Before evaluating the evidence in respect of these two circumstances, we would like to put on record that the mobile alleged to be in use of the deceased and recovered from the appellant Pratap was in the name of the son of the deceased. Son of the deceased has not been produced as a witness. In this context, it would be worthwhile to examine whether the son of the deceased resided at the same place where deceased resided or he resided elsewhere. According to PW-1 he resided with his wife at Sun City. In his testimony PW-1 does not state where his son, whose mobile was used, resided. From PW-1's statement during investigation, it appears that Yatindra, in whose name the mobile was, had been in Noida in connection with his studies. However, this part of his statement is not admissible. Interestingly, PW-2 stated that the deceased and her husband (PW-1), earlier, use to reside in C B Colony where PW-2 also had his house. From there, they (deceased and her husband) shifted to Sun City colony. As per PW-2, son of PW-1 continued to reside in C. B. Colony. It is not disclosed whether the mobile recovered was of that son who resided at C.B. Colony. Be that as it may, it is not proved on record that the son of the deceased, whose mobile was being allegedly used by the deceased, resided with the deceased. Using phone of a family member who resides under the same roof is not uncommon. But using phone of a person, even though part of the family, who resides elsewhere is an unnatural circumstance which requires an explanation. In this regard PW-1's son who was the owner of the mobile phone, allegedly recovered from the appellant Pratap, was a material witness, which the prosecution did not produce. He could have thrown light on the issue whether the

mobile recovered was in regular use of the deceased or he had handed over the mobile to her that day itself. Notably, PW-2, who allegedly noticed the deceased with the appellants near Pachlore Chauraha at 11 am on 29.04.2010, stated that village Pachlore falls in P.S. C B Colony. Interestingly, as per PW-2, the son of the deceased continued to reside in C B Colony. In such circumstances, a doubt is created in our mind whether the deceased on that fateful day had come to C B Colony to her son's house and from there, after taking his mobile, went to some other place. For clarity on all these issues, testimony of PW-1's son, who was the scribe of the FIR, was important. He was a material witness whom the prosecution did not produce. That apart, there is inordinate delay in making a missing report. All these circumstances do not inspire our confidence in the prosecution story therefore, we would have to carefully scrutinise the evidence in respect of alleged recovery of mobile as well as the circumstance of the deceased being last seen alive in the company of the appellants.

38. As to whether the prosecution has been successful in proving beyond reasonable doubt the recovery of the mobile in use of the deceased from the appellant is an issue which we shall address now. Notably, the appellant Pratap in his statement under section 313 CrPC has claimed the alleged recovery as bogus. It is noteworthy that the recovery is not on the basis of a disclosure statement from a place where the mobile might have been kept or hidden. Rather, it is from the appellant Pratap when he was arrested on 13.05.2010 at 19.30 hrs of which a seizure memorandum (Ex. Ka-11) was prepared. PW-1 who is a witness to the memorandum (Exb. Ka-11) states that the police did not recover the mobile phone in his presence. Importantly, a suggestion was given to PW-5, who effected arrest and recovery, that arrest was made much earlier than stated and the fact of arrest was reported in newspaper earlier than the disclosed time of arrest. Though, this suggestion has been refuted but the fact that it was so published in the newspaper has been admitted by PW-5 during cross-examination. What is also interesting is that there is no arrest memorandum on record. On perusal of the case diary we noticed that when on 13.05.2010 the statement of PW-1 was recorded he had not disclosed the name and description of the accused but has only given information regarding involvement of a Tantrik. Notably, arrest was shown to have been made at C B Ganj Railway Station on the tip off given by PW-1. In such circumstances whether the case was built against the appellants after their arrest or the arrest followed receipt of credible information against them is an issue which comes for our consideration. The former appears more probable because, firstly, the case diary contains no material to show as to what was the credible information available against the appellants before their arrest and, secondly, as per CDRs of Mobile Phone no. 9808068517 (alleged to be in use of the deceased), no call was made by using that SIM or that mobile instrument after 29.04.2010. It appears very strange as to why would the accused-appellant no.1 carry mobile no. 9808068517 with him for 14 days without even using the same. Had it been hidden and recovered on the basis of a disclosure statement, the incriminating value of the recovery would have been much greater. But here the recovery is not on the basis of a disclosure statement made at the time of arrest. Moreover, PW-1 the witness of recovery, as per memorandum (Exb. Ka-

11), does not support recovery of the phone. Further, there is a serious doubt about the timing of arrest as noticed above. Thus, keeping in mind that the owner of the instrument i.e. PW-1's son has not been produced as a witness and the CDRs of the mobiles do not give the tower location details to enable us to connect the location of the two mobiles qua each other as also qua the place where the body of the deceased was found, we are of the considered view that the circumstance of recovery of mobile of the deceased from the appellant no.1 (Pratap) is unworthy of acceptance and is accordingly discarded.

39. Now we shall examine whether the testimony of PW-2 that he saw the deceased in the company of the appellants on 29.04.2010 at 11 am is worthy of acceptance. PW-2 is a person who resides in CB Ganj Colony where the informant (PW-1) used to reside before shifting to his new residence in Sun City Extension Colony. PW-2 states that he knew the deceased and her family as they were residents of the same colony. PW-2 also states that he also knows the accused because accused Pratap Singh's sister is married in the same village where PW-2's sister is married. PW-2 stated that few days after 29.04.2010, he had learnt about Munni Devi being missing. He had also come to know about recovery of the body of Munni Devi. He stated that news paper report, with photograph, of Munni Devi going missing was published. He stated that it was published 3-4 days after the incident; and the day he read the newspaper, he informed PW-1 that he had witnessed the accused and Munni Devi together on 29.04.2010. Notably, Ex. 1 (newspaper report) is dated 5.5.2010. We fail to understand that if PW-2 was so close to PW-1 that he immediately informed PW-1 what he saw on the day when the news was published, why there was no disclosure by PW-1 to the police before 13.05.2010. Notably, statement of PW-1 recorded in case diary on 13.05.2010 does not even disclose about receipt of information from PW-2. Otherwise also, if PW-2 was really a witness and had informed PW-1 of what he witnessed, why the statement of PW-2 was recorded by the I.O. on 05.06.2010 and not before. All these circumstances seriously dent the credibility of this witness. Other than that, PW-2 is a mere chance witness. He states that while he was going to his shop he noticed the accused and the deceased together at the Chauraha. The exact location of his shop is not disclosed. How close it was to the Chauraha is not disclosed. PW-2 therefore is a mere chance witness who made no prompt disclosure to the police despite being fully aware of the incriminating value of what he witnessed, which renders his testimony highly doubtful. More over, the fact that his statement was recorded on 05.06.2010, that is, at the fag end of investigation, would suggest that he is a got up witness to provide a link to an otherwise weak case of the prosecution. In these circumstances, the statement of PW-2 that he noticed the yellow colour saree of the deceased is not of much relevance to corroborate his testimony as, by this time, he could have easily been made aware of the colour of dress worn by the deceased when her body was found. We therefore hold that the last seen circumstance has not been proved beyond reasonable doubt.

40. Even otherwise, last seen theory operates when there is close proximity between the time and place when the deceased is last seen alive with the accused and recovery of the body of the deceased. But where there is a big gap, possibility of

intervening circumstances cannot be ruled out. In such a scenario, the circumstance may only raise suspicion but it would not travel to the level of proof of guilt. In the instant case, the last seen circumstance is of 11 am on 29.04.2010 whereas the body of the deceased was found in a jungle naala on 30.04.2010 at about 5.00 pm. The distance of that spot from the place where the deceased was last seen alive with the appellants is not disclosed specifically. Even the CDRs do not reflect location of the mobiles alleged to have been recovered. In such an event, reasonable probability of involvement of some one else cannot be ruled out. Thus, in a nut shell there is no worthwhile evidence to sustain conviction.

41. In view of our analysis above, we are of the considered view that the prosecution has failed to prove the charge against the appellants. The trial court has failed to properly evaluate and test the prosecution evidence. Consequently, the appeal is **allowed**. The judgment and order of the trial court is set aside. The accused appellants are acquitted of the charges for which they have been tried and convicted. The appellants are reported to be in jail. They shall be released forthwith, unless wanted in any other case, subject to compliance of provisions of Section 437-A Cr.P.C. to the satisfaction of the court below.

42. Let a copy of this order along with record of the court below be sent to the court below for information and compliance.

(2022) 10 ILRA 860
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2022

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE MAYANK KUMAR JAIN, J.

Crl. Appeal No. 1984 of 1984

Manni Singh @ Mannu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri G.S. Chaturvedi, Sri Anurag Shukla, Sri Mewa Lal Shukla

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

Criminal Law- Code of Criminal Procedure,1973- Section 313 - The Indian Evidence Act, 1872- Section 106 - The appellant in his statement under section 313 Cr.P.C. did not utter even a single word as to ever finding his wife missing or else making any effort to find her thereafter. Being husband, the appellant failed to offer any acceptable explanation for this ignorance-The appellant has failed to discharge his burden as cast upon him under section 106 of the Evidence Act, 1872 to prove the whereabouts of his wife after she was found to be missing. The appellant only stated that after returning to his village he came to know that a criminal case was registered against him. However, he did not say anything about the status of the whereabouts of his wife. In these circumstances, it was the liability of the appellant to offer any explanation about his missing wife.

Section 106 of the Evidence Act casts the burden of proof upon the accused to give an explanation about the facts especially in his knowledge and where he gives no explanation, or false explanation, in his statement u/s 313 of the Cr.Pc. then an adverse inference is bound to be drawn against him. (Para 34, 36, 39)

Criminal Appeal rejected. (E-3)

Case Law/Judgements relied upon:-

1. Mohd. Mannan @ Abdul Mannan Vs St. of Bih., (2011) 2 SCC (Cri) 626

2. Md. Younus Ali Tarafdar Vs St. of W.B, A.I.R. 2020 SC 1057: A.I.R. Online 2020 SC Page-238

3. Pattu Rajan Vs St. of T.N (2019) 4 SCC 771

4. Ganpat Singh Vs St. of M.P (2018) 2 SCC (Criminal) 159

5. Sudru Vs St. of Chhattis., (2019) 8 SCC 333

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. This Criminal Appeal has been preferred against the judgment and order dated 19.07.1984 passed by the Learned 1st Additional Sessions Judge, Jhansi in Sessions Trial No.107 of 1983 (State Vs. Manni Singh @ Mannu Lal), arising out of Case Crime No.68 of 1983, under Sections 302/201 of IPC, Police Station Navabad, District Jhansi, whereby the accused-appellant Manni Singh @ Mannu Lal was convicted under section 302 of IPC and sentenced to undergo life imprisonment. He was also convicted under Section 201 of IPC and sentenced to undergo three years of rigorous imprisonment. Both the sentences were directed to run concurrently.

2. Facts giving rise to the prosecution case are that Sri Krishna Dutt Mishra, Sub-Inspector received information on 20.02.1983 at 6.30 p.m. from constable Shrawan Kumar that a dead body of a female is lying in the well situated in the University Campus. He along with constable Matole Rajak and constable Shivcharan Sharma reached the place of occurrence and with the assistance of some villagers, the dead body of the deceased was taken out from the well. Since the source of light was not available, inquest could not be made. On inquiring, it came to the knowledge that the dead body so recovered is of Smt. Lad Kunwar, w/o Mannu Kumhar, chaukidar of the University Quarter. The inquest report of the dead body was prepared the next day and the dead body was handed over to constable Rananjay Singh and Constable Mahesh Prasad for post-mortem examination.

3. After lodging of First Information Report, S.I. Krishna Dutt Mishra started the investigation and it was revealed that the husband of the deceased, Mannu Kumhar had killed his wife as both of them quarrelled. The accused-appellant Mannu Kumhar had caused injuries on the body of his wife and after her death, he threw the body in the nearby well to conceal the evidence. Based on this, the first information report of this case was registered as Case Crime No. 68 of 1983 under Sections 302, 201 IPC against the accused-appellant Manni Singh alias Mannu Lal, which was entered in the G.D. of the police station concerned. One Taveez, one chain of Gilat, and one chain of brass were recovered from the body of the deceased and were taken into possession by the Investigating Officer. A recovery memo was prepared which was exhibited as Exhibit Ka-2. During the investigation, the Investigating Officer prepared the recovery memo of a torch through which PW-2 Laxman Singh, the guard of the University Campus, had seen the accused-appellant near the well on the fateful night. This recovery memo was exhibited as Exhibit Ka -12. On 22.02.1983, the Investigating Officer, in the presence of witnesses Khushal and Hariram, reached the place of occurrence, i.e. the quarter of the accused-appellant, and recovered one bloodstained coat, a piece of the plaster from the wall on which

blood was present, bloodstained "baan' (rope used to knit the cot), few broken pieces of bangles, one earring made of steel and one "Bichhiya'. Apart from these, one bent (danda) with blood stains over it was also recovered. The recovery memo was exhibited as Exhibit Ka-9. Recovered articles were sent for examination to the Forensic Science Laboratory and a report was obtained from there, which is available on record. After the conclusion of the investigation, the charge sheet was submitted by the Investigating Officer under Sections 302/201 of IPC against the accused-appellant, which was exhibited as Exhibit Ka-11. Thereafter, the case was committed to the Court of Sessions, and charges under Section 302/201 of IPC were framed against the accused-appellant Manni Singh alias Mannu Lal. The accused-appellant pleaded not guilty and claimed to be tried.

4. To prove its case, the prosecution produced nine witnesses. PW-1-Roop Singh, PW-2-Laxman Singh, PW-3-Masalti, PW-4 Ramesh, PW-5 Bhagwan Das (brother of the deceased,) PW-6 Khushali, PW-7 S.I. Krishna Dutt Mishra, First Investigating Officer, who prepared the inquest report of the dead body, PW-8 Jai Pal Singh, second Investigating Officer, and PW-9 Dr. R.N. Sharma, who conducted the post-mortem examination of the deceased Lad Kunwar.

5. After the conclusion of the prosecution evidence, the statement of the accused-appellant under Section 313 of Cr.P.C. was recorded, in which the accused denied that he has committed the crime and stated that the witnesses have given false evidence against him and deposed based on doubt only. He further stated that witness Masalti is the cousin of his brother-in-law (sadhu), witness Laxman Singh is the friend of witness Khushali, and witness Ramesh is the pocket witness of the police and has given false evidence against the accused. The accused-appellant also stated that he had gone to his village on 19.02.1983 and returned on the third day, thereafter he came to know that he has been implicated in this case.

6. Hearing both sides and after vetting the evidence, facts and circumstances of the case, the trial Judge recorded conviction and passed sentence against the Appellant as aforesaid.

7. Being aggrieved by the impugned judgment and order, the accused-appellant has preferred the present criminal appeal.

8. We have heard Shri Mewa Lal Shukla, learned counsel for the accused-appellant, Shri Sunil Kumar Tripathi, learned Additional Government Advocate for the State, and perused the record.

9. On the basis of the evidence available on record, it has to be determined as to whether on the intervening night of 19.02.1983 the accused-appellant committed the murder of his wife Lad Kunwar and with the intention to cause disappearance of the evidence threw away her dead body in the well.

10. Learned counsel for the appellant argued that there is no direct evidence that the appellant has committed the murder of his wife Lad Kunwar. The appellant has falsely been implicated due to village enmity and the appellant was not even present in the village at the time of occurrence since he had gone to his village on 19th morning and when he returned after 2-3 days, he came to know that a case

has been registered against him. Further, it is submitted that the witnesses examined by the prosecution are inimical with the appellant and have, therefore, given false evidence against him. The oral evidence is not in consonance with the medical report since incised wounds were also mentioned in the medical report and the prosecution has not stated how these injuries were inflicted upon the deceased by the appellant. It is also submitted that the alleged recovery made from the house of the appellant is concocted and false and no such recovery was made. To make his submission good, the learned counsel for the appellant argued that no motive has been assigned by the prosecution against the appellant, and hence, the prosecution has utterly failed to prove the charges against the appellant. The appellant is liable to be acquitted and the appeal deserves to be allowed.

11. Per contra, learned AGA argued that the case of the prosecution rests upon circumstantial evidence. The appellant was last seen together with the deceased by the witnesses who witnessed that the appellant was mercilessly beating his wife Lad Kunwar and these witnesses suggested to the appellant that he should consult the doctor since she was bleeding profusely. On being asked why the appellant was beating his wife, they were told that she was always abusing him. Deceased Lad Kunwar was not seen alive by anyone after these witnesses saw her with the appellant till her body was recovered from the well. It is apparent that deceased Lad Kunwar suffered nineteen injuries on her body and the cause of the death was ascertained as a result of ante-mortem injuries. After throwing the dead body of his wife in the well, the appellant was seen by the Chowkidar of the village at around 1 AM and he identified the appellant under the torch light.

12. Further, it is submitted that since the appellant was absconding, his house was searched by the investigating officer, and incriminating articles such as blood-stained "dhurrie', broken pieces of bangles, and one bent, which was used by the appellant to beat the deceased, were recovered. Apart from these, the investigating officer also took the piece of the floor on which blood was found. All these articles were sent to Forensic Laboratory and as per the report of this laboratory, human blood was found on these articles. The prosecution witnesses have stated that the appellant used to frequently quarrel with his wife Lad Kunwar. The deceased Lad Kunwar told her brother Bhagwan Das (PW-5) that the appellant beats her and she apprehended that he would kill her.

13. To buttress his arguments, the learned AGA further submitted that being the husband it was the duty of the appellant to know about the whereabouts of his wife while he only stated in his statement under Section 313 Cr.P.C. that after returning from his village he came to know that a case has been registered against him. The appellant did not utter even a word about his wife. The presumption under section 106 of the Evidence Act is to be drawn against the Appellant. These circumstances indicate that the Appellant is only and the only author of the crime and he has rightly been convicted and sentenced by the trial Court. Judgment and order of the trial Court are based upon the material available on record. Thus, the appeal of the appellant is liable to be dismissed.

14. Admittedly, the case of the prosecution rests upon circumstantial evidence.

15. The Hon'ble Apex Court while discussing the case of circumstantial evidence in **Mohd. Mannan Alias Abdul Mannan Vs. State of Bihar, (2011) 2 Supreme Court Cases (Cri) 626** held that:-

"In our opinion to bring home the guilt on the basis of circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in a fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid down to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case."

16. In **Md. Younus Ali Tarafdar v. State of West Bengal A.I.R. 2020 Supreme Court 1057: A.I.R. Online 2020 SC Page-238** the Hon'ble Supreme Court laid out the factors to be considered while adjudicating the case of circumstantial evidence observed that:-

" There is no direct evidence regarding the involvement of the Appellant in the crime. The case of the prosecution is on basis of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence as laid down by this Court are :

Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hyopothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

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

17. In **Pattu Rajan V. State of Tamil Nadu (2019) 4 SCC 771**, the Apex Court observed the nature of evidence in the case of circumstantial evidence and held that:-

"30. Before we undertake a consideration of the evidence supporting such circumstances, we would like to note that the law relating to circumstantial evidence is well settled. The Judge while deciding matters resting on circumstantial evidence should always tread cautiously so as to not allow conjectures or suspicion,

however strong, to take the place of proof. If the alleged circumstances are conclusively proved before the Court by leading cogent and reliable evidence, the Court need look any further before affirming the guilt of the accused. Moreover, human agency may be faulty in expressing the picturisation of the actual incident, but circumstances cannot fail or be ignored. As aptly put in this oft-quoted phrase:" Men may lie, but circumstances do not".

31. As mentioned supra, the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude every other hyopothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused. Although it is not necessary for this Court to refer to decisions concerning this legal proposition, we prefer to quote the following observations made in Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116 (SCC p. 185 para 153-154) : (AIR 1984 SC 1622, at p. 1655-56, paras 152-153):

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobde V. State of Maharashtra 1973 Cri L.J 1783 where the following observations were made:

Certainly, it is a primary principle that accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be and "must be" is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

154. These five golden principles, is we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

18. The Hon'ble Supreme Court concerning the cases based on circumstantial evidence in **Ganpat Singh Vs. State of Madhya Pradesh (2018) 2 Supreme Court Cases (Criminal) 159**, held that:-

"There are no eyewitnesses to the crime. In a case which rests on circumstantial evidence, the law postulates a twofold requirement. First, every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. Second, all the circumstances must be consistent only with

the guilt of the accused. The principle has been consistently formulated thus:

"The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence."

19. The present case of the prosecution consisted of the following circumstances:-

(i) Evidence of last seen of the deceased together with the appellant

(ii) Motive of commission of the crime by the appellant

(iii) Recovery of the incriminating articles from the place of occurrence

(iv) Concealment of evidence by the appellant

Evidence of last seen of the deceased together with the appellant

20. The investigation commenced on the basis of the information given by PW-1-Roop Singh, the Chaukidar of Bundelkhand University. PW-1 after receiving information that one dead body was lying in the well near the university quarter, visited the spot and informed the police telephonically. The police took out a dead body of a woman who was later identified as Lad Kunwar, wife of Mannu Lal.

21. PW-3-Masalti and PW-4 Ramesh are the witnesses of the fact that they saw Lad Kunwar alive for the last time in the company of the appellant on the day of occurrence around 10:00 pm inside the quarter of the appellant. Thereafter, her body was recovered, and she was not seen alive by anyone in the intervening period. PW-3-Masalti and PW-4 Ramesh have stated in their evidence that they were passing by the quarter of the appellant when they heard and saw Lad Kunwar, wife of the appellant, weeping. Besides, they saw that Lad Kunwar was sitting on the floor and the appellant was mercilessly beating her with bent. Both the witnesses have stated that they have witnessed the incident and they suggested the appellant to take his wife to the hospital. No material contradiction occurred in the testimony of these two witnesses in their cross-examination that deceased Lad Kunwar was last seen alive by them and after the incident, her body was found in the well.

22. The Hon'ble Apex Court in **Ganpat Singh Vs. State of Madhya Pradesh (2018) 2 Supreme Court Cases (Criminal) 159** while observing the significance of last seen theory held that:-

"Evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The settled formulation of law is as follows:

"The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased

is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

Motive of commission of the crime by the appellant

23. PW-1 Roop Singh has stated in his testimony that the appellant was residing adjacent to his quarter and very often the husband and the wife used to quarrel with each other. PW-3 Maslati and PW-4 Ramesh stated in their testimony that when they reached inside the quarter of the appellant, they witnessed that the appellant was mercilessly beating his wife with a bent. On being enquired about the reason for such action, the appellant told them that her wife, Lad Kunwar used to quarrel often and used abusive language against him. PW-5 Bhagwan Das, who is the brother of the deceased Lad Kunwar, has also stated in his testimony that approximately five days before the occurrence of the incident, he had heard about the fight between his sister and the appellant. After hearing this news, he went to his sister, the deceased, to bring her back along with him but the appellant did not permit him from doing so and asked him to go back. The deceased confided with PW-5 that the appellant used to beat her frequently and she feared for her life. She, thus, requested PW-5 to take her back along with him. Thus, this witness has also corroborated the version of PW-3 and PW-4 about the motive behind the commission of the crime by the appellant as the appellant frequently had quarrels with his wife and used to beat her often.

Recovery of the incriminating articles from the place of occurrence

24. PW-6 Khushali is the witness of recovery from the place of occurrence, i.e. the house (quarter) of the appellant. He has proved the recovery of a bloodstained dhurrie and a bloodstained bent. The police also took possession of a piece of the plaster from the wall on which blood was present along with bloodstained baan (rope used to knit the cot). Apart from these, one ear pin, few broken pieces of bangles, and one Bichhiya (foot ring) were also recovered from the place of occurrence. PW-6 is the witness of the recovery memo (Ex Ka 9)

25. PW-8 Jai Pal Singh, SHO, who is the second investigating officer of the case, has proved the recovery memo as Ex Ka 9. This witness also stated in his evidence that in the presence of independent witnesses, the lock of the quarter of the appellant was broken and a bloodstained dhurrie, a bloodstained bent, piece of the plaster from the wall on which blood was present along with bloodstained baan (rope used to knit the cot), one ear pin, few broken pieces of bangles, and one Bichhiya (foot ring) were recovered from the place of occurrence. This witness proved the recovered article as Ex 12 to Ex 14. These articles were sent to Forensic Laboratory for chemical examination. The report of the Forensic Lab Ex Ka 15 concluded that human blood was found on these articles. Thus, the recovery of incriminating articles from the appellant's quarter indicates that the appellant mercilessly beat his wife at the

place of occurrence, and owing to such beating, blood injuries were inflicted upon her, as evidenced by the blood stains on such recovered articles.

Concealment of evidence by the Appellant

26. The body of the deceased Lad Kunwar was recovered from a well by PW-7 S.I. Krishna Dutt Mishra after receiving the information from Constable Shravan Kumar that a body of a woman is lying in the well situated in the campus of the University. The body was taken out which was identified as the body of Lad Kunwar, the wife of the appellant. PW-7 prepared the site plan of the place of recovery of the dead body (Ex Ka- 3). This witness had stated in his evidence that he prepared the inquest report of the dead body and prepared requisite documents for post-mortem.

27. PW-1 Roop Singh is the informant, gave information to the police (station) about the presence of a dead body inside the well and also the witness of fact of the dead body being taken out from the well. He identified the dead body as that of Lad Kunwar-the wife of the appellant.

28. PW-2 Laxman Singh stated that he was deputed as Chowkidar from 5 PM to 5 AM in the university campus. On the day of occurrence, at around 1 AM, he heard some sound and approached the well and found that the engine of the well was intact in its place. appellant Mannu Lal was returning from the well. On being asked, the appellant told that he came there to ease himself and he hit the stone with his leg which fell inside the well. This witness identified the appellant in the light of a torch that he had at that time. On the next day, he came to know that body of a woman was lying inside the well. He reached there and found that the dead body was of Lad Kunwar, wife of the Appellant. He handed over the torch to the investigating officer who prepared the recovery memo (Ex Ka-2) which bore his signature. PW-7 SI Krishna Dutt has proved the execution of Ex Ka 2. He also stated that after receiving the information about the discovery of a dead body inside the well, he along with other police personnel reached the site of the well and with assistance of the villagers, took out the body from the well. At the same time, he came to know that it was the body of the wife of the appellant.

29. On the basis of appreciation of the above evidence it is proved that the appellant after committing the murder of his wife Lad Kunwar, with the intention to cause disappearance of the evidence, threw her body inside the well which was recovered later on and identified by the witnesses as the wife of the appellant. The presence of the appellant as proved by PW-2 Laxman near the well at 1 AM on the night of occurrence indicates that the appellant was there to dispose off the body thus, causing disappearance of the evidence.

30. Apart from the appreciation of the evidence available on record, it is pertinent to mention here that PW-7 Krishna Dutt and PW-8 Jai Pal Singh, the first and second Investigating Officer respectively, have stated in their evidence that they completed all the formalities during the course of the investigation. The inquest of the dead body was conducted, and it was sent for post-mortem. Formal documents were executed. A site plan of the place of occurrence and the place of recovery of the

body was prepared. The torch through the light of which, witness Laxman saw the appellant on the night of the incident was also taken and is proved as exhibit.

31. PW-9 Dr. R.N. Sharma has conducted the post-mortem of the deceased Lad Kunwar and prepared his report. The following ante-mortem injuries were found on the body of the deceased:-

"1- दाई खोपडी पर उभरे भाग के सामने Horizontal 1 -1/2" x 1/2" x हड्डी तक गहरा साफ कटा घाव है। हड्डी पर नीचे घाव का निशान था।

2- बाऐं कन्धे से लेकर हाथ तक दोनों तरफ ¼" x 1/4" से लेकर ½" x ½" की अनेक खराशें हैं।

3- बाई भुजा के निचले भाग में पीछे ½" x ¼ " x मांस तक गहरा साफ कटा घाव है।

4- बाई जांग के नीचे बाहरी ओर 5" x ½" की खराश है।

5- बाऐं Cubital fossa के उपर 3" x ½" लाल नीला नीलगू निशान। नीचे काटने पर खून जमा है व humerus हड्डी टूटी है।

6- बाई जांग के निचले अन्दर के भाग में 2" x ¼" की खराश।

7-बाई टांग के निचले सामने के भाग में व टखने के बाहरी भाग पर एक एक ¼" x ¼" की खराशें हैं।

8- बाएं अंगूठा व उंगलियों पर तलवे की तरफ लाल नीले नीलगू निशान हैं।

9- दाएं पंजे के अंगूठा व उंगलिओं पर लाल नीले नीलगू निशान हैं।

10- दाई टांग के निचले पीछे के भाग पर ¼" x ¼" की खराश हैं।

11- दाई जांग के बीच में सामने पास पास दो क्रमशः 3" x ¼" व 2" x 1/4" की खराशें हैं।

12- दाई जांग की बीच से लेकर उपर भाग तक फैला बाहरी ओर 5" x ½" का लाल नीला नीलगू निशान था। निशान के बीच (कागज फटा) जगह खाल सामान्य थी।

13- दाऐं कूलहे पर 3" x ½ " का लाल नीला नीलगू निशान

14- दाई अग्रबाहु के पीछे बीच में व अन्दर की तरफ बीच में एक एक 1" x ¼" की खराशें हैं। हलकी पपडी जमी है।

. 15- दाएं कंधे पर 1" x 1" का लाल नीला नीलगू निशान।

16- बाएं स्तन पर 1" x ¼ " की खराश

17- बाएं कन्धे के पीछे 2" x 2" की खराश।

18- दाई आंख के उपरी व निचले पलकों पर ¼" x ¼ " की एक एक खराश है।

19- बाएं कन्धे पर ¼ " x ¼ " की खराश है।

32. The doctor has opined that the death of the deceased was caused due to bleeding and shock and may be caused by bent and danda. The deceased died due to ante mortem injuries. Further, he stated that the injuries might have been caused during the intervening night of 19/20.02.1983.

33. The medical evidence is in consonance with the oral evidence of PW-3 Masalti and PW-4 Ramesh who are the witnesses of the fact that they saw the appellant beating his wife using a bent mercilessly and she was bleeding profusely. The nature of injuries caused to the deceased indicates that the appellant caused severe injuries to his wife Lad Kunwar and she succumbed to such injuries.

34. Appellant in his statement recorded under Section 313 Cr.P.C. pleaded not guilty and stated that he has falsely been implicated. He was not present in the village on the day of occurrence, and he had gone to his village on 19th morning and came back after 2-3 days. Thereafter,

he came to know a case has been registered against him.

35. Section 106 of the Evidence Act, 1872 reads thus:-

"106. Burden of proving fact especially within knowledge.--*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

36. The appellant in his statement under section 313 Cr.P.C. did not utter even a single word as to ever finding his wife missing or else making any effort to find her thereafter. Being husband, the appellant failed to offer any acceptable explanation for this ignorance.

37. In the case of ***Pattu Rajan Vs. State of Tamil Nadu, (2019) 4 SCC 771 (2019) 2 SCC (Criminal) 354***, the Hon'ble Supreme Court held:

"The doctrine of last seen, if proved, shifts the burden of proof onto accused, placing on him the onus to explain how the incident occurred and what happened to victim who was last seen with him. Failure on the part of accused to furnish any explanation in his regard, as in the case in hand, or furnishing false explanation would give rise to a strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances."

38. In **Sudru v. State of Chhattisgarh, (2019) 8 SCC 333,** the Hon'ble Court observed:-

"*In this view of the matter, after the prosecution has established the aforesaid fact, the burden would shift upon the appellant under Section 106 of the Evidence Act. Once the prosecution proves, that it is the deceased and the appellant, who were alone in that room and on the next day morning the dead body of the deceased was found, the onus shifts on the appellant to explain, as to what has happened in that night and as to how the death of the deceased has occurred.*

9. In this respect reference can be made to the following observation of this Court in Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] : (SCC p. 694, para 21)

"21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."

39. In view of the above factual and legal matrix, it transpires that the appellant has failed to discharge his burden as cast upon him under section 106 of the Evidence Act, 1872 to prove the whereabouts of his wife after she was found to be missing. The appellant only stated that after returning to his village he came to know that a criminal case was registered against him. However, he did not say anything about the status of the whereabouts of his wife. In these circumstances, it was the liability of the appellant to offer any explanation about his missing wife.

40. On the basis of the above discussion, we have concluded that the

circumstances clearly indicate that the appellant committed murder of his wife Lad Kunwar, causing severe injuries on her body. The incident was witnessed by the eye-witnesses namely PW-3 Masalti and PW-4 Ramesh. The motive of the incident is also proved by the prosecution with the evidence of PW-1 Roop Singh, PW-2 Laxman Singh, PW-3 Masalti, PW-4 Ramesh, and PW-5 Bhagwan Das. The recovery of incriminating articles in the presence of PW-6 Khushali and the recovery memo prepared by PW-7 Krishna Dutt as exhibited as EX Ka 2 also indicate the circumstances leading to the murder of Lad Kunwar by the appellant. The presence of the appellant on the intervening night at around 1 AM near the well where later dead body was found, also indicates the conduct of the appellant to try to cause disappearance of the evidence. Further, the appellant failed to discharge his burden as cast upon him under section 106 of the Evidence Act, 1872. All this evidence indicates that appellant Manni Lal is the author of the crime and he committed the murder of his wife Lad Kunwar. The prosecution has succeeded to bring home the charges against the appellant under section 302/201 IPC beyond reasonable doubt. The trial court has rightly convicted and sentenced the appellant Manni Lal. Therefore, the impugned judgment and order of the trial court do not require any interference and are liable to be confirmed.

41. The criminal appeal is accordingly dismissed.

42. In this case, the Appellant is on bail, his personal bond and surety bonds are cancelled. He be taken into custody forthwith and be sent to jail to serve out the remaining part of his sentence.

43. Let the certified copy of this order be transmitted to the trial court for ensuring compliance.

(2022) 10 ILRA 871
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 2534 of 2007

Balister & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Shyam JI Gaur, Sri A.K. Dubey, Sri A.R. Dubey, Sri G.P. Dishit, Sri Noor Mohammad, Sri Sheshadri Trivedi(A.C.)

Counsel for the Respondents:
Govt. Adv.

Criminal Law- Indian Evidence Act, 1872- Section 3- From perusal of the aforesaid framing charge order, it is apparent that the place of occurrence is the shop of Satendra, which is situated in village Tanda Vahad, Police Station-Bhudana District Muzaffarnagar. All the evidence has however been led by the prosecution over the place of occurrence i.e. Point-A+ which is Tiraha at a distance of 40 passes from the shop of Satendra alleged to be place of occurrence in Charge Paper No.10/A. It means that the incident had not occurred at ''Point A+' as shown in site plan as ''Exhibit-Ka/12'. Thus, in these circumstances, the place of occurrence is shifting. This anomaly creates a doubt upon the prosecution version.

Where the prosecution fails to establish the place of occurrence and the testimony of the witnesses is inconsistent with regard to the place of occurrence, then the same renders the story of the prosecution doubtful.

Indian Evidence Act, 1872- Section 3- There is inconsistency with respect to weapon used by the accused persons- There is major discrepancy and inconsistency in the statements of the witnesses which also creates doubt in prosecution version.

It is settled law that although minor inconsistencies and contradictions have to be ignored, but where the inconsistencies and contradictions are major in nature and go to the root of the case of prosecution, then the same have to be taken into consideration by the Court.

Indian Evidence Act, 1872- Section 114 (g)- Inspite of the fact that Devendra is the witness and his information is the basis of disclosure about the manner in which the fight erupted on the spot leading to the murder of deceased yet Devendra is not adduced in evidence.

Where the prosecution withholds the evidence of a material witness whose testimony may be unfavourable for the case of the prosecution, then the court may draw an adverse inference against the prosecution.

Indian Evidence Act, 1872- Section 3 - It is clear that the source of light at the time of occurrence is not explained. In the absence of any source of light, it would be difficult for witnesses to recognise the accused persons at the time of occurrence.

Where the occurrence is of night hours, then source of light would be a relevant factor for identification of the accused.

Indian Evidence Act, 1872- Section 3 - P.W.-1 and P.W.-2 are interested witnesses as P.W.-1 and P.W.-2 are brother and cousin brother of the deceased respectively and as such their statements were liable to have been minutely examined when there is no independent witness.

Settled law that testimony of interested and related witnesses has to be considered with abundant caution by the court. (Para 21, 27, 28,29, 30, 32, 39)

Criminal Appeal allowed. (E-3)

Judgements/Case Law relied upon:-

1. Matlab Ali Vs St. of U.P. (Crimininal Appeal No. 175 of 1971, dec. on 09/08/1971)

2. Syed Ibrahim Vs St. of A.P., (2006) 10 SCC 601

3. St. of U.P. Vs Mangal Singh & Ors., (2009) 12 SCC 306

4. Asraf Biswas Vs. St. of W.B., 2016 SCC OnLine Cal 4342

5. Jumma Vs St. of U.P., MANU/UP/1104/1992, Pr.-19

(Delivered by Hon'ble Shiv Shanker Prasad, J.)

1. This appeal has been preferred by accused-appellants, namely, Balister and Smt. Kamla against the judgment and order dated 21st March, 2007 passed by the Additional Sessions Judge, Court No.6, Muzaffarnagar in Sessions Trial No. 830 of 2006 (State of U.P. Vs. Balister and Another), under Sections 302/34 I.P.C. arising out of Crime No. 838 of 2005, Police Station-Budhana, District-Muzaffarnagar, whereby both the accused-appellants have been convicted and sentenced to undergo life imprisonment under Section 302/34 I.P.C. with fine of Rs. 7,000/- each, in default thereof, they have to further undergo one year additional imprisonment.

2. We have heard Mr. Sheshadri Trivedi, learned Amicus Curiae appearing for the accused-appellant no.1 and Kumari

Meena, learned A.G.A. for the State. Appellant no.2 has died and her appeal has already abated by this Court vide order dated 8th September, 2022. We have also perused the entire materials available on record.

3. The prosecution story, as reflected from the records, is as follows:

On the basis of a written report submitted by the informant-P.W.1, namely Jagendra Singh dated 23rd November, 2005 (which was marked as Exhibit-Ka-1), a first information report (Exhibit-Ka-9) was lodged on 23rd November, 2005 at 06:30 p.m. (in evening), which was registered as Crime No. 231 of 2005 under Section 302 I.P.C., at Police Station-Badhana, District-Muzaffarnagar against three persons, namely, Puran, Balister and Smt. Kamla. In the said report, it has been alleged that on 23rd November, 2005 at 06:30 p.m., the brother of the informant-P.W.-2, namely, Anil Kumar went to the grocery shop of Satendra for buying some goods, where Puran, his brother Balister and his mother Smt. Kamla, who are residents of same village, were already standing there. When Anil Kumar, brother of the informant-P.W.-1, after buying goods, returned to his house from the said grocery shop, then the above three persons in front of the street of their house, started abusing and threatening him that they will see him today. When Anil Kumar brother of the informant-P.W.2 objected not to do the same, then Balister and Kamla grabbed Anil Kumar from behind and Puran started hitting him by Tabal. When Anil Kumar fell on the ground then Balister also started hitting him with Balkati. At the same time, the informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar were coming from their fields through the front road. Hearing the sound in the street, informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar reached the spot and tried to save him as also they raised alarm. On seeing informant-P.W.-1, Krishnapal Singh, Mahipal and Sanjeev Kumar, all the accused persons, namely, Puran, Balister and Smt. Kamla, ran away after threatening them. They chased them but did not succeed in catching them. Thereafter, they picked up Anil Kumar from the spot and took him to the hospital by a Car, where he was declared dead. Thereafter they went to the Police Station along with the dead body of Anil Kumar. Resultantly, on the written report of the informant-P.W.-1, Crime No. 231 of 2005 was registered. On registration of the said case, the inquest of the body of the deceased, which was lying in a Marshal jeep outside the Police Station, was conducted by Sub-Inspector Vijay Pal Singh (P.W.4) on 23rd November, 2005 at 2200 hours. Since injuries were found on the body of the deceased, in the opinion of the inquest witnesses, the cause of death of the deceased was homicidal. The inquest report was marked as Exhibit-Ka-3. As such, after sealing the dead body of the deceased, the same was sent to Mortuary for post-mortem on 23rd November, 2022 through Constables Yadram and Maheshpal.

4. The post-mortem of the dead body of the deceased Anil Kumar was conducted by Dr. U.S. Fauzdar (P.W.-3) on 24th November, 205 at 03:30 p.m. and in his opinion, the cause of death of deceased was due to shock and haemorrhage as a result of ante-mortem injuries. On post-mortem of the dead body of the deceased, following ante-mortem injuries were reported:

"(1). Incised wound 7 cm. x 1/2 cm x scalp deep on the back of skull (occipital region), 8 cm. above to hair line of back,

(2). Incised wound 8 cm. x 1 cm. x muscle deep over left cheek;

(3) Incised wound 15 cm. x 3 cm. x bone deep on left side of neck, underneath tissues are sharply cut with severed of cortical vessels, veins, partial cut of on left side trachea, Fifth cervical body of vertebra is partially cut;

(4) Incised wound lower 1/2 of outer helix of left Pinna. Cut;

(5) Contused abrasion 3 cm. x ½ cm. on top of left shoulder;

(6 Contused abrasion 1 cm. x 1/2 cm. on deltoid prominence of left shoulder;

(7). Contused abrasion 10 cm. x 1/2 cm. on back of left upper arm;

(8) Contused abrasion 10 cm. x 1/2 cm. on back of left shoulder;

(9) Incised wound 13 cm. x 3 cm. x muscle deep on Inner back of left forearm lower 1/2;

(10) Incised wound 3 cm. x 1 cm. x muscle deep on dorsum of left wrist;

(11) Incised wound 6 cm. x 2 ½ cm. x bone deep on flexor aspect of left forearm lower third;

(12) Incised wound 10 cm. x 2 ½ cm. x bone deep dorsum of left hand with fractured of v, iv & iii metacarpal, fractured ends are are reddish in colour;

(13) Incised wound 1 cm. x 1/2 cm. muscle deep on flexor aspect of left middle finger; and

(14). Incised wound 1 cm. x 1/2 cm. muscle deep of flexor aspect of left middle finger."

5. It would be worth noticing that the accused-appellant, namely, Balister @ Kallu and Smt. Kamla were also got medically examined by Dr. Vineet Kaushik, In-charge Medical Officer, Primary Health Centre, Budhana, Disrict Muzaffarnagar 13th November, 2005, wherein no fresh visible injury were seen on the bodies of the accused-appellants.

6. After sending the body of the deceased for post-mortem, the Investigating Officer, namely, Jagdish Singh, the then Station House Officer, Badhaut, District Baghpat, P.W.-6, went to the place of occurrence and collected blood stained earth and plain earth, thereafter prepared memo of recovery (Exhibit-13). He also prepared Site Plan of the place of occurrence. He recorded statements of witnesses. On 12th December, 2005, the Investigating Officer arrested the named accused persons, namely, Ballister and Smt. Kamla and on their pointing out, he recovered Balkati and Tabal which were alleged to have been used in the crime of which the recovery memo was also prepared (Exhibit-Ka-14). After completion of statutory investigation in terms of Chapter XII Cr.P.C., the Investigating Officer submitted the charge-sheet against the accused persons. The learned Magistrate took cognizance of the offence on the charge-sheet and committed the case to the court of Sessions Judge.

7. It would also worth noticing that the recovered weapons i.e. Tabal and Balkati as also the clothes and article, which were collected from the body of the deceased, namely, pant along with belt, T-shirt, Baniyan, underwear and kardhan, were sent for forensic examination to the Forensic Science Laboratory, U.P. Agra. After examining the same, the Forensic Science Laboratory has submitted its report dated 16th June, 2006. Though in the said report, it has been reported that human blood stain was found on all the objects sent for forensic examination, but it was preposterous.

8. On 21st November, 2006, the learned Trial Court framed charges against the accused persons for offences punishable

under Sections 302 I.P.C. read with Section 34

9. In order to prove its case, the prosecution relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are catalogued herein below:-

"i). First information report was marked as Exhibit Ka -9 ;

ii). The written report of informant/P.W.-1 Jagendra Singh Jaat, was marked as Exhibit Ka-1;

iii). Recovery memo of blood stained and plain earth collected from the place of occurrence was marked as Exhibit Ka-13;

iv). Recovery memo of blood stained Tabal and Balkati was marked as Exhibit Ka-14;

v). The post-mortem report of the deceased Anil Kumar was marked as Exhibit Ka-2;

vi). Report of Forensic Science Laboratory, U.P. Agra was marked as Exhibit Ka-7; and

vii). Site plan with index was marked as Exhibit Ka-15."

10. The prosecution also examined total nine witnesses in the following manner:-

"i). The Informant, namely, Jagendra Singh, brother of the deceased has been adduced as P.W.-1;

ii). Sanjeev Kumar, who is alleged to be an independent witness, has been adduced as P.W.-2;

iii) Dr. U.S. Fauzdar, District Hospital, Muzaffarnagar, who conducted the post-mortem of the body of the deceased Anil Kumar has been adduced as P.W.-3;

iv) Sub-Inspector Vijaypal Singh, who prepared the inquest report of dead body of the deceased, has been adduced as P.W.-4;

v). Constable-378 Shashi Kawar Rana, who prepared the Chik first information report (Exhibit-ka-9) on the basis of written report of the informant Jagendra Singh has been adduced as P.W.-5; and

vi). Sub-Inspector Jagdish Singh, the then Station House Officer, Police Station-Budhana, who conducted the investigation of the alleged crime.

11. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellants Balister and Smt. Kamla for recording their statements under section 313 Cr.PC. In their statements recorded U/s 313 Cr.P.C. on 19th January, 2007, the accused appellants denied their involvement in the crime. Accused appellants Balister and Smt. Kamla specifically stated before the trial court that they have been falsely implicated in this case. The defence has also adduced Yogendra Singh resident of the same village, as D.W.-1.

12. It would also be worth noticing that the trial court under Section 311 Cr.P.C. has summoned Balesh Kumar, the then teacher of Dayanand Bal Vidyalaya, Junior High Court, Budhana, Police-Station Budhana, District-Muzzafarnagar and has also recorded his statement as Court Witness.

13. While passing the impugned judgment of conviction, the trial court after relying upon the documentary as well as oral evidence adduced by the prosecution, has recorded its finding that it has been proved that the prosecution has mentioned the immediate reason for the murder of Anil by the accused from the very beginning and has also proved by the evidence. The informant-P.W.-1 took the injured Anil, who was breathing a little, immediately to

the Primary Health Center where he was declared dead and immediately thereafter he was taken from there to the Police Station, where on the written report of the informant, the first information report has been lodged. The first information is prompt in which date, time and place of incident; the immediate reason for commissioning of the offence; the details of the weapons used by the accused-appellants; the name of the witnesses; the brief details of the incident have been mentioned and there is no possibility of any false facts being mentioned in the first information report. The entire prosecution version has been proved by the eye-witnesses, namely, P.W.-1 and P.W.-2. Though both eye-witnesses are brothers of the deceased yet their presence on the spot is proven and despite the fact that they have faced a long cross-examination but they stand in the test of truth. There is no possibility of false implication of the accused in the alleged offence by the prosecution even if they do not have any prior enmity with the accused without any reason. Despite the fact that they are real brother of the deceased. It is also not likely that they will falsely implicate an innocent person except the real accused. The medical evidence has also supported the statements of the eye witnesses and the prosecution version. The investigation in the matter has been done promptly following due procedure known to law. There is no defect in the investigation done in the matter so that the benefit of the same could accrue to the defense party. After recording such finding, the trial court has come to the conclusion under the impugned judgment of conviction that the prosecution has been able to fully prove that both the accused, in furtherance of their common intention, committed the murder of Anil Kumar in front of their street. As such, the trial court has found the offence under Section 302 read with 34 I.P.C. to have been committed by the accused persons Balistar and Smt. Kamla. Consequently, the trial court has awarded sentence of life imprisonment along with a fine of Rs. 7,000/- each.

14. Aggrieved by the aforesaid judgment and the order of conviction and sentence, the present jail appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded to the accused-appellants is too severe.

15. Questioning the impugned judgment and order of conviction, learned Amicus Curiae appearing for the appellant no.1 Balister submits that:

(i) the alleged incident took place on 23.11.2005 when the brother of informant Anil Kumar S/o of Dhara Singh R/o Tanda P/s Bhudhana, Muzaffarnagar had gone to purchase few items from the shop of Satendra at about 6:30 p.m. When the deceased was returning to his house after purchasing the said items, he was surrounded by Puran, his brother Balister and mother of Balister, namely, Smt. Kamla, who threatened and abused informant's younger brother Anil. In the meantime, Balister and Kamla grabbed Anil and Puran attacked him with Tabal. Consequently, Anil fell down on the ground. Balister also attacked him with Balkati. This incident was seen by Kishan Pal Singh, Mahi Pal and Sanjeev Kumar, who were returning from their fields. When they heard screams of Anil Kumar, they tried to rescue him. Thereafter, Puran, Balister and his mother Kamla Devi ran away from the place of occurrence. The

injured Anil was brought to the hospital where he was declared dead. After that, the informant (P.W.-1) along with other took him in a Jeep to the Police Station, where on the written report of the informant the first information report has been lodged. Henceforth, it is evident that the alleged incident took place on 23.11.2005 at 6:30 p.m. Whereas, the first information report has been lodged by the informant P.W. 1 on 23.11.2005 at 20:50 p.m. The distance between the place of occurrence and the P.S. concerned is about 7 kms;

(ii) in support of prosecution story, prosecution has adduced two eyewitnesses P.W.-1 Jogendra Singh and P.W.-2 Sanjeev Kumar. These two are the star witnesses of the prosecution. However, there are major contradictions in their statements and that is why, in the first information report, it is stated that Puran attacked Anil with Tabbal and Balister attacked him with Balkati. The same has been stated in chief-examination by Jogendra Singh P.W.-1, whereas P.W.-1 Jogendra Singh has stated in his statement under 161 Cr.P.C. that Puran as well as Balister had attacked the deceased Anil with Tabbal. Hence, there is contradiction with regard to the weapons, which are alleged to have been used by both the accused Puran and Balister for assaulting the deceased Anil;

(iii) it is stated in the first information report that the accused-appellants Balister and Kamla grabbed deceased Anil at the time of occurrence, whereas P.W.-1 Jogendra Singh in his cross-examination admitted that accused-appellant Kamla caught hold of the left-hand of deceased Anil and did not grab him along with accused Balister, whereas in the first information report it has been alleged that she had grabbed him along with accused Balister. P.W.-2 Sanjeev Kumar stated in his examination-in-chief that Balister caught hold of left-hand of Anil and accused Kamla caught hold right-hand of Anil. As such, there is inconsistency in the statements of the star witnesses P.W. 1 and P.W.- 2;

(iv) there was no source of light at the place of occurrence. Although P.W.-2 Sanjeev Kumar has stated that there were two gas lanterns, which were lighting. It has also been stated that P.W.- 2 Sanjeev Kumar had seen the occurrence in the light of these two lanterns. Whereas, P.W.-1 Jogendra Singh has stated in his examination-in-chief that there was no electric light at the place of occurrence. He has further stated that there was no light of lanterns at the place of occurrence because there were no gas lanterns, which were lightning at the time of occurrence;

(v) in the month of November at about 6:30 p.m. in evening, according to Indian climate, it becomes dark. Prosecution witness P.W.-1 Jogendra Singh has stated in his cross-examination that at the time of occurrence there was dense darkness. Therefore, it is apparently clear that in the absence of source of light, it was impossible for witnesses to recognize the accused persons. Sanjeev Kumar P.W.-2 has stated in his cross-examination that the Investigating Officer had recorded his statement under Section 161 Cr.P.C. after a month from the date of incident. Thus, there is a possibility of development/improvement in the statements of the witnesses;

(vi) P.W.- 2 Sanjeev Kumar has stated that, "*I heard the incident at tiraha from the main road*". While in the order of framing of charge passed by the trial judge on 21.11.2006, it has been mentioned that the incident occurred at the shop of Satendra, which is situated at village-Tanda Vahad Police Statiton Bhudhana, District Muzaffarnagar. From the perusal of the site

plan which is marked as Exhibit Ka-12, which have been prepared by the Investigating Officer, tiraha is shown as "Point A+' and shop of Satendra is situated in the east side of this very tiraha which is 40 passes (Kadam) away from "Tiraha Point A+', meaning thereby that the place of occurrence has shifted. As such, due to shifting of place of occurrence, the prosecution story is wholly unreliable;

(vii) it has been stated in the first information report as well as in the cross-examination of P.W.-1 Jogendra Singh that at the time of incident Mahipal, Sanjeev and Kishan Pal were present, but the prosecution has not examined Mahipal and Kishan Pal except Sanjeev Kumar as P.W.-2. P.W.- 1 Jogendra Singh has stated in cross-examination that when he arrived at the place of occurrence, his brother was lying injured. Blood of his brother was spilled on the ground. Whereas, in the first information report, it has been stated that the accused Puran and Balister attacked Anil with Tabbal and Balkati. The same has been stated by P.W.- 2 Sanjeev Kumar in his examination-in-chief. It is therefore, clear that there are major contradictions in the statements of P.W.-1 and P.W.-2 as well as in the first information report;

(viii) P.W.-3 Doctor U.S. Faujdar who conducted the post-mortem of the deceased Anil, has stated in his cross-examination that there was no injury on the waist of the body of deceased Anil. At the time of post-mortem, P.W.-3 had found as many as 14 ante-mortem injuries on the left part of the body of the deceased, but none of the injuries are shown on the waist of the dead body of the deceased. Therefore, the entire prosecution story is doubtful;

(ix) Jagendra P.W. 1 and Sanjeev P.W. 2 have not seen the incident because when they arrived at the spot, the incident had already occurred, meaning thereby that after the occurrence of the incident, witnesses reached the spot. On the basis of which it can be said that before arrival of the witnesses including P.W.-1 and P.W.2 at the spot, the accused persons ran away, meaning thereby that they have not seen the incident by their own eyes. Therefore, the prosecution story is wholly improbable as also the same has not been supported by the evidence and that is why, the accused appellants are not guilty of the offence under Section 302 read with 34 I.P.C.

On the cumulative strength of the aforesaid, learned Amicus Curiae appearing for the appellant no.1 submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

16. On the other-hand, Kumari Meena, learned A.G.A. for the State, supports the prosecution version by submitting that the statements of P.W.-1 Jagendra and P.W. 2-Sanjeev are credible in the facts and circumstances of the case and since they are eyewitnesses and have clearly disclosed about the commissioning of the offence of murder, therefore, the trial court has not committed any error in holding conviction of the accused appellants under Section 302 read with 34 I.P.C. On the cumulative strength of the aforesaid submissions, learned A.G.A. submits that as this is a case of direct evidence, the impugned judgment and order of conviction does not suffer from any illegality and infirmity so as to warrant any interference by this Court. As such the present appeal filed by the accused-appellant who committed heinous crime by murdering deceased Anil Kumar, is liable to be dismissed.

17. We have considered the submissions made by the learned counsels

for the parties and have gone through the records of the present appeal especially, the judgment and the order of conviction and evidence adduced before the trial court.

18. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

19. The facts, as have been noticed above, would clearly go to show that the incident of this case has occurred on 23.11.2005 at 6:30 p.m. in the evening. The first information report qua the incident has been lodged on 23.11.2005 at 20:50 p.m. According to prosecution, the first information report is well within time and prompt. As per the first information report, the incident took place on the relevant date as on 23.11.2005 at 6:30 p.m. when Anil Kumar had gone to purchase a few items from the shop of Satendra. When the deceased Anil was returning to his house after purchasing the said items, he was surrounded by Puran, his brother Balister and his mother Kamla, who threatened and abused the informant's younger brother Anil. In the meantime, Balister and Kamla grabbed Anil and Puran attacked Anil with Tabal. Resultantly, Anil fell down on the ground. Balister also attacked Anil with Balkati. In the first information report, it has been stated that the incident occurred in the street which is situated in front of the house of the accused persons. The house of accused persons shown by the Investigating Officer is situated in the east side from the shop of Satendra, whereas, as per the site plan, the place of occurrence has been shown by the Investigating Officer on tiraha at "Point A+'. This place of occurrence is situated west side from the shop of Satendra which is 40 passes (Kadam) away from the shop of Satendra. On 21st November, 2006, the trial court has framed charge against the accused person namely, Balister and Kamla, the said order has been numbered as 10/A and a copy of which is brought on record at page-12 of the paper book.

20. For examining veracity or genuineness or otherwise of the fact as to what is the actual place of occurrence, it would be worthwhile to reproduce, the order of trial court framing charge against the accused-appellants, which is quoted hereinafter:

"मै, अशोक कुमार पाठक, अपर सत्र न्यायाधीश, कोर्ट नम्बर 6, मुजफ्फरनगर आप 1. बालिस्टर एवं 2. श्रीमती कमला को निम्न आरोप से आरोपित करता हूॅरू यह कि दिनांक 23.11.2005 को समय करीब 6.30 बजे ***शाम स्थान सतेन्द्र की दुकान गांव टाण्डा बहद थाना बुढ़ाना जिला मुजफ्फरनगर में*** आपने सामान्य आशय से इस आशय, ज्ञान व परिस्थिति में वादी जगेन्द्र सिंह के भाई अनिल की कोहली भर ली तथा आपके एक अन्य सह अभियुक्त पूरन ने तबल व पलकटी से तथा आपने भी पलकटी से अनिल को उपहतियॉ कारित कर उसकी हत्या कारित की। इस प्रकार आपने धारा 302 सपठित धारा 34 भ0द0सं0 के अर्न्तगत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

मै एतद् द्वारा निर्देश देता हूॅ कि उक्त आरोप हेतु आपका विचारण इस न्यायालय द्वारा किया जाये।"

21. From perusal of the aforesaid framing charge order, it is apparent that the the place of occurrence is the shop of Satendra, which is situated in village Tanda Vahad, Police Station-Bhudana District Muzaffarnagar. All the evidence has however been led by the prosecution over the place of occurrence i.e. Point-A+ which is Tiraha at a distance of 40 passes from the shop of Satendra alleged to be place of occurrence in Charge Paper No.10/A. In the circumstances as elaborated herein-above,

the place of occurrence is shifting. The same has been alleged by P.W.-1 Jogendra Singh in his examination-in-chief that when Anil Kumar deceased had gone to purchase some items from the shop of Satendra, Puran, Balister and Kamla were already there and after surrounding Anil, all the accused persons threatened and attacked him. From the perusal of this version of P.W. 1, the incident occurred in the street, which is situated between the shop of Satendra and house of the accused persons. As per Jogendra Singh P.W.-1, the incident did not occur at "Place A+' as shown by Investigating Officer, in site plan as "Exhibit-Ka/12'. Moreover, P.W.-1 Jagendra Singh has admitted in his cross-examination that, "tiraha is situated 10-15 passes (Kadam) away from the place of occurrence." On the contrary, in site plan, the Investigating Officer has indicated the place of occurrence at "Point A+'. P.W.-2 Sanjeev Kumar has stated in his cross-examination that shouting was heard by him at tiraha which is on the street. It means that the incident had not occurred at "Point A+' as shown in site plan as "Exhibit-Ka/12'. Thus, in these circumstances, the place of occurrence is shifting. This anomaly creates a doubt upon the prosecution version.

22. In ***Matlab Ali v. State of U.P. (Crimininal Appeal No. 175 of 1971, decided on 9th August, 1971)***, this Court has observed that, "shifting of place of occurrence is a serious matter and must necessarily cast a grave doubt as to the correctness of prosecution version. If place of occurrence is different, there could be no question of alleged eyewitnesses seeing anything."

23. It is pertinent to note that in ***Syed Ibrahim v. State of A.P.***, reported in (2006) 10 SCC 601, the Hon'ble apex court has observed that, "when the place of occurrence itself has not been established it would not be proper to accept the prosecution version".

24. In State of ***U.P. v. Mangal Singh and Ors.***, reported in (2009) 12 SCC 306, the Hon'ble apex court has observed that, "whereon a reading of evidence it is clear that occurrence as claimed is changed, it was noticed that the witnesses were shifting their versions almost at every stage. This itself was sufficient to doubt the veracity of the prosecution version".

25. Again, in ***Asraf Biswas v. State of W.B.***, reported in 2016 SCC OnLine Cal 4342, the Hon'ble Apex Court made reference to the case of ***Syed Ibrahim v. State of A.P.***, reported in (2006) 10 SCC 601, wherein it has been stated that, "it would not be proper to accept the prosecution case when the place of occurrence itself has not established. The place of occurrence was not proved beyond all reasonable doubts in the instant case and as a result, we have no hesitation to arrive at a conclusion that there was infirmity in decision making process of the learned Trial Judge. Once it is held that the place of occurrence has not been established beyond all reasonable doubts, then the other circumstances are hardly sufficient to establish the guilt of the accused".

26. In **Jumma Vs. State of U.P**. reported in MANU/UP/1104/1992, Pr.-19; a Division Bench of this Court has observed that, *"shifting of place of occurrence is a serious matter and must necessarily cast a grave doubt as to the correctness of prosecution version. If place of occurrence is different, there could be no*

question of alleged eyewitnesses seeing anything."

27. As per the first information report, at the time of occurrence, accused Balister and Kamla had grabbed Anil, whereas the accused Puran attacked Anil with Tabbal and thereafter the accused Balister attacked him with Balkati. On the other hand, P.W.-2 Sanjeev Kumar has stated in his examination-in-chief that Balister caught hold of left hand of Anil and Kamla caught hold of right hand of Anil. Puran was attacking Anil with Tabbal and when Anil fell down on ground, Balister attacked him with Balkati. On the contrary, P.W.-1 Jogendra Singh in his statement recorded under Section 161 Cr.P.C. has stated that the accused Puran as well as accused Balister both attacked Anil with Tabbal. Therefore, there is inconsistency with respect to weapon used by the accused persons.

28. In the first information report as well as in the examination-in-chief of P.W.-1 Jogendra Singh it has been alleged that accused Balister and Kamla had grabbed deceased Anil at the time of occurrence, but P.W.-1 Jogendra Singh has stated in his cross-examination that Kamla caught hold of the hand of Anil from left side. Whereas, P.W.-2 Sanjeev Kumar has stated in his examination-in-chief that Balister had caught hold of the left hand of Anil and Kamla had caught hold of right hand of Anil. At this point of juncture, there is major discrepancy and inconsistency in the statements of the witnesses which also creates doubt in prosecution version.

29. It is also noteworthy that when Balister caught hold of left hand of deceased Anil and Kamla caught hold of right hand of Anil at the time of incident as is stated by P.W.-2 Sanjeev Kumar in his examination-in-chief or Kamla had caught hold of left hand of deceased Anil at the time of occurrence, as stated by P.W. 1 Jogendra in his cross-examination, it is not possible that the accused persons, who had caught deceased Anil, did not receive any injury. From the perusal of Photo-Lash (Exhibit-Ka/4) and the Post-mortem report (Exhibit-Ka/2), it is apparent that there were 14 ante-mortem injuries, which are on the left-side of the deceased. If Kamla or Balister had caught hold of the left/right hand of deceased Anil then, it is not possible for them not to receive any injury on the point of catching hold of the hands of deceased. Therefore, there are major contradictions, inconsistency and discrepancy which again creates doubt in the prosecution version.

30. P.W.-1 Jogendra Singh has stated in examination-in-chief that Sanjeev Kumar, Kishan Pal and Mahi Pal arrived at the time of occurrence but except Sanjeev Kumar as P.W.-2, neither Kishan Pal nor Mahi Pal have been examined in support of prosecution story. Even Satendra and Devendra have also not been examined in support of prosecution story. P.W.-1 in his statement has disclosed that the fact about the three accused persons including the appellant no.1 of abusing the deceased was informed by Devendra. Devendra however is not produced. As per the statements of P.W.-1 and P.W.2, it was Devendra, who told Jogendra (informant-P.W.1), Sanjeev Kumar (P.W.-2), Kishan Pal and Mahipal that in front of his shop, there was altercation between the deceased Anil Kumar and accused persons, namely, Puran, Balister and Kamla and at that time, the accused persons were having Tabal and Balkati. Inspite of the fact that Devendra is the witness and his information is the basis

of disclosure about the manner in which the fight erupted on the spot leading to the murder of deceased yet Devendra is not adduced in evidence.

31. It would also be worth noticing that as per the version of the first information report as well as the statement of P.W.-1 in his examination-in-chief that on the date of incident, the deceased went to the shop of Devendra for buying some goods and when he was returning to his house after buying the same, on the way in front of their street, the accused persons, namely, Puran, Balister and Kamla assaulted the deceased, whereas in the cross examination, P.W.-1 has stated as follows:

"देवेन्द्र ने यह बात भी मुझे बतायी थी कि उसकी दुकान पर मुलजिमान की मेरे भाई अनिल के साथ कहन सुनन हुयी थी। क्या कहन सुनन हुयी थी यह उसने नहीं बताया था। देवेन्द्र ने मुझे यह भी बताया था कि उसकी दुकान पर जब मुलजिमान से मेरे भाई की कहन सुनन हुयी थी तब मुलजिमान बलकटी व तवल लिए हुए थे मेरे ध्यान नहीं है कि मैने दरोगा जी को देवेन्द्र द्वारा बतायी जाने वाली बात बतायी थी या नहीं। यह बात देवेन्द्र ने बतायी थी तहरीर में मैने नहीं लिखी।"

Similarly, in his cross examination, P.W.-2 has stated as follows:

"मैने पूर्ण व अनिल को देखा था। वे लोग कहा से आये थे मैने नहीं देखा था। मैने दरोगा जो को यह बात बतायी थी कि घटना से पहले अनील मृतक व मुलजिमान देवेन्द्र की दुकान से आये थे। दरोगा जी ने मुझसे सारी बाते पूछी थी। मोटी–2 बाते घटना के बारे में पूँछी थी।"

Perusal of the aforesaid statements would go to show that there is material contradiction as to at whose shop, either Devendra or Satendra, the deceased went to buy the goods.

32. As per prosecution story, the incident occurred on 23.11.2005 at 6:30 p.m. in the evening. According to Indian climate, in the month of November, at about 6:30 p.m. it gets dark, meaning thereby that at the time of occurrence, there was darkness. This fact is admitted by P.W.-1 Jogendra Singh in his cross-examination that at the time of occurrence, it was deep dark. P.W.-1 Jogendra has also admitted that at the time of occurrence, there was no supply of electricity. P.W.-2 Sanjeev Kumar in his cross examination has also admitted that at the time of occurrence, it was dark night. P.W.-1 Jogendra has however stated in his cross-examination that at the time of occurrence, gas lantern was lightning at the gate of the house of Narendra. However, no gas lantern was recovered by the Investigating Officer during the course of investigation. Hence, it is clear that the source of light at the time of occurrence is not explained. In the absence of any source of light, it would be difficult for witnesses to recognise the accused persons at the time of occurrence.

33. P.W.-1 Jogendra in his cross-examination has also stated that which of two accused had assaulted the deceased, how many injuries were inflicted upon the body of the deceased and in which part, he sustained injuries, are not known to him. He has further stated that accused Puran has assaulted Anil on his waist but from the perusal of the post-mortem report, no injury was found on the waist of deceased Anil. From the aforesaid it is apparent that there is inconsistency in the statements of this star witness i.e. P.W.-1 which also makes the prosecution story doubtful.

34. P.W. 2 Sanjeev Kumar has also stated in his cross-examination that he is unable to say as to which of two accused has assaulted Anil and on which part of his body, he sustained injuries. His statement under

Section 161 Cr.P.C. has been recorded by the Investigating Officer after one month from the date of alleged incident. He further stated in his cross-examination that the deceased Anil and accused persons had come at the place of occurrence from the shop of Devendra before the incident occurred. Whereas, the prosecution version as unfolded in the first information report as well as in the statement of P.W.-1 Jogendra Singh, the deceased Anil had gone to purchase something from the shop of Satendra. There is again major discrepancy and inconsistency in the statement of this second star witness which creates major doubt in the prosecution version. Apart from the above, P.W.-2 has admitted in his cross-examination that he is cousin brother i.e. son of real uncle of the deceased Anil, that is why it can be said that he is an interested witness, as argued on behalf of accused-appellant.

35. P.W. 3 Doctor U.S. Faujdar who did autopsy of the dead body of deceased Anil and found 14 injuries on his dead body but stated in his cross-examination that there was no injury on the waist of the dead body of the deceased.

36. P.W. 5 Constable 378 Shashi Kawar Rana has admitted in his cross-examination that it is true that the then Chief Judicial Magistrate C.J.M. has perused the first information report on 29.11.2005. He has admitted that he is unable to tell as to why the the first information report reached to the court so late. The argument of learned Amicus Curaie is that the first information report is ante-timed as the delay in its dispatch to Magistrate is not disclosed.

39. P.W. 6 the Station House Officer, Jagdish Singh has admitted in his cross-examination that it is true that there is no signature of Sub-Inspector Chandrashekhar on Alaqatal recovery memo. Henceforth, recovery memo of alaqatal as well as alaqatal has not been proved by this witness P.W. 6. This witness has also admitted that on the date of occurrence, it was dark night. He further stated that informant Jogendra in his statement had stated to him that, at the time of occurrence, Balister and Puran had Tabbal. He has also admitted that no gas lantern was taken in the possession of Police. He further stated that on the inspection of place of occurrence, no slippers of deceased Anil were recovered. He is also unable to tell as to why first information report dated 23.11.2005 reached the court of Chief Judicial Magistrate on 29.11.2005.

38. Accused Balister has stated under Section 313 Cr.P.C. that he has been falsely implicated owing to village animosity. During the pendency of the present appeal, accused Kamla has died. With regards to said accused Kamla, vide order of this Court dated 8th September, 2022, the present appeal at her behest has been abated.

39. We have examined the judgment and order of conviction passed by the trial court, which merely noticed the prosecution version and thereafter has referred to various judgments to hold that the prosecution has established guilt of the accused-appellants based on prosecution evidence. The trial court has not carefully examined the statements of the prosecution witnesses so as to evaluate the correctness or otherwise of the same. We have noticed hereinabove that there are material contradictions, inconsistencies and discrepancies in the statements of the prosecution witnesses specially its star prosecution witnesses i.e. P.W.-1 and P.W.-2, who are alleged to be eye-witnesses of

the incident in question. Apart from the above P.W.-1 and P.W.-2 are interested witnesses as P.W.-1 and P.W.-2 are brother and cousin brother of the deceased respectively and as such their statements were liable to have been minutely examined when there is no independent witness. The trial court has also not carefully examined the site plan prepared by the Investigating Officer qua the shifting of place of occurrence.

40. In view of the above discussions, we find that the trial court was not justified in returning the finding of guilt against the accused-appellants on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused appellant has been proved beyond reasonable doubt, is thus rendered unsustainable. We hold that the prosecution has failed to prove the guilt of accused-appellants beyond reasonable doubt.

41. Consequently, in view of the deliberation held above, this appeal succeeds and is allowed. The judgment and order of conviction of accused-appellants dated 21.03.2007 passed in Session Trial No. 830/06, by the Additional Session Judge Court No. 6 Muzaffarnagar cannot be legally sustained and is, hereby, set aside. The accused-appellant no.1 Balister is clearly entitled to benefit of doubt. As he has already suffered incarceration of almost 15 years since the date of his conviction, he is entitled to be released forthwith.

42. Accordingly, the present appeal stands allowed.

43. The accused-appellant no.1 Balister shall be released on compliance of Section 437-A Cr.P.C., unless he is wanted in any other case forthwith.

46. We record our appreciation for the able assistance rendered in the case by Mr. Sheshadri Trivedi, learned Amicus Curiae, who would be entitled to his fee from the High Court Legal Service Authority, quantified as Rs. 15,000/-

47. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Muzaffarnagar henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellant no.1 Balister in terms of this judgment.

(2022) 10 ILRA 884
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE UMESH CHANDRA SHARMA, J.

Jail Appeal No. 3367 of 2010
connected with
Crl. Appeal No. 3490 of 2010

Pawan Mishra ...Appellant
Versus
State ...Opp. Party

Counsel for the Appellant:
From Jail, Sri V.P. Gupta, Sri Vindeshwari Prasad

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

Criminal Law- Code of Criminal Procedure, 1973- Section 154- Ante-Timed FIR- As per *Tehrir* Exhibit Ka-15, it was moved before the S.H.O, Police Station New Agra on 27.06.2005 and the same was also entered in the G.D (Exhibit Ka-4) on the very same day, at 6:30 p.m. at Rapat no. 62 and Chik No. 224/2005. Consequently a Case U/s 364-A I.P.C was lodged- On the back of the *Chik* F.I.R, the contents of *Tehrir* had not been copied- It was the

duty of the concerned Constable Moharrir to get the Tehrir copied on the back of *Chik* F.I.R, if it is not so copied then it was not the fault of the informant, and in fact it was the mistake of Constable *Moharrir.*

Merely because the constable moharrir omitted to copy the tehrir on the back of the Chik FIR, the FIR cannot be said to be ante timed.

Code of Criminal Procedure, 1973- Inquest report- It is not a substantive piece of evidence- The whole purpose of preparing the inquest report under Section 174 Cr.P.C. is to investigate into the cause of death and also to draw up a report of the apparent cause of it. The object of the proceedings under Section 174 Cr.P.C is only to ascertain whether a person had died under suspicious circumstances or on account of an unnatural death. The effort is also to find out the apparent cause. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, or who were the witnesses of the assault is foreign to the ambit and scope of such proceedings.

The purpose of an Inquest report is to only ascertain the cause and manner of death with description of the injuries on the body and is therefore not a substantive piece of evidence.

The Indian Evidence Act , 1872- Section 6 - The conversation between the informant Banwari Lal Sharma and the deceased Jeevan alias Amar Sharma with regard to their reaching Agra for employment and with regard to the fact that the latter was received by the accused Pawan Mishra, and that both the deceased boys stayed in hotel arranged by the accused and that the accused demanded of ransom everything is part of the same transaction. The connected facts and evidence thereon are relevant and admissible in evidence under Section 6 of The Indian Evidence Act.

The facts regarding the arrival of the deceased at Agra, the accused having received them and arranged for their accommodation would be relevant facts as they form the part of the same transaction resulting in the death of the deceased.

The Indian Evidence Act , 1872- Section 32(1)- Conversation of the deceased Jeevan alias Amar to the informant while coming from Devghar and also from Agra to the informant at Devghar is also relevant and admissible in evidence under Section 32 of the Indian Evidence Act- Though hear-say evidence is not admissible in evidence but in the event the victim dies, his previous statements to any living person become relevant and admissible in evidence under Section 32 (1) of The Indian Evidence Act if it relates to cause of his death. The statement would be relevant in every case or proceeding in which the cause of death of that person is in issue. In Indian Law it is not necessary that the person who made any declaration was actually expecting an assault which would kill him.

Although hear say evidence is not admissible in evidence but any previous statement of the deceased relating to his cause of death would be relevant and the same will be treated as a dying declaration.

The Indian Evidence Act, 1872- Section 106- Deceased persons were in company of all the three accused persons, therefore, it is the burden of all the accused-appellants to discharge their burden of proof under section 106 of The Indian Evidence Act.

Settled law that once the prosecution discharges its initial burden proving that the deceased was in the company of the accused before he met a homicidal death, then the onus shifts upon the accused to discharge the said burden by explaining the circumstances behind the death of the deceased. (Para 16, 28, 52, 53, 55)

Criminal Appeal rejected. (E-3)

Case Law/Judgements relied upon:-

1. Brahm Swaroop Vs St. of U.P., A.I.R 2011 S.C. 280

2. Nagaraj Vs St. Rep. (2015) 4 SCC 739

3. Babu Vs St. of Ker. (2010) 9 SCC 189

4. G. Parshwanath Vs St. of Kar. A.I.R 2010 S.C 2914

5. Sadik Vs St. of Guj. (2016) 10 SCC 663

6. Dasin Bai Vs St. of Chhattis. (2015) 89 ACC 337 SC

7. Sanjeev Vs St. of Har. (2015) 4 SCC 387

8. Mahavir Singh Vs St. of Har. (2014) 6 SCC Page 716

9. Harendra Vs St. of Assam AIR. 2008 SC 2467

10. Himanchal Prashasan Vs Om Prakash AIR. 1972 SC 975

11. Ramanand Vs St. of H.P, AIR 1981 SC 3617

12. St. of U.P. Vs Ramveen Singh & anr. 2007 (6) SC 164

13. Nathiya Vs St. (2016) 10 SCC 298

14. Bhim Singh Vs St. of U.K., (2015) 4 SCC 281

15. Sharad Birdhichand Sarda Vs St. of Maha., (1984) 4 SCC 116

16. St. of W.B Vs Dipak Halder, (2009) 7 SCC

17. St. of Goa Vs Pandurang Mohite, AIR 2009 SC 1066

18. St. of U.P. Vs Satish, 2005 (3) SCC 114

19. Rohtash Kumar Vs St. of Har., 2013 (82) ACC 401 (SC)

20. Prithipal Singh Vs St. of Punj., (2012) 1 SCC 10

21. Ashok Vs St. of Maha., (2015) 4 SCC 393

22. Bhagirath Vs St. of Har., (1977) 1 SCC 481

23. Pakla Narayan Swami Vs Emperor AIR 1939 PC 47

24. Sucha Singh Vs St. of Punj., AIR 2001 SC 1436

25. Sunder Vs St. AIR 2013 SC 777

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

(1) Heard learned counsel for the appellant, Sri Vindeshwari Prasad and the learned A.G.A for the State in Jail Appeal No. 3367 of 2010 and Sri Phoolbadan Yadav along with Sri Vishnu Shanker Gupta (Amicus Curiae) for the appellants and learned A.G.A. for the State in Criminal Appeal No. 3490 of 2010 and perused the material available on record.

(2) The instant appeal has been preferred against the judgement and order dated 13.04.2010 passed by Special Judge (D.A.A), Agra in S.T No. 121 of 2005 (State Vs. Pawan Mishra & Ors), arising out of Case Crime No. 356 of 2005, under Section 364A, 302/201 I.P.C, Police Station New Agra, District Agra whereby the accused-appellants have been convicted under Section 302 I.P.C sentencing them to undergo rigorous imprisonment for life. They were to pay Rs. 10,000/- each as fine. It was further provided that on default of payment of fine the appellants were to further undergo two years of additional simple imprisonment.

(3) The court further convicted the appellants under section 364-A I.P.C. and sentenced the appellants to undergo rigorous imprisonment for life and imposed fine of Rs. 5000/- on each of the appellants. Here again it was provided that in default of payment of fine the appellants would undergo one year additional simple imprisonment.

(4) The trial court has further convicted the appellants under section 201 I.P.C. sentencing the appellants to undergo

5 years of rigorous imprisonment and also imposed fine of Rs. 5,000/- and further provided that in default of payment of fine the appellants would undergo one years additional simple imprisonment. All the sentences were to run concurrently.

(5) **Brief facts of the case are** that informant Banwari Lal Sharma, s/o Rameshwar Lal Sharma resident of Gali Devghar P.S.- Devghar, District-Devghar, Jharkhand lodged an F.I.R. (Exhibit-Ka-15) on 27.06.2005 with the allegation that his nephew Pawan Mishra, s/o Vashudev Mishra, resident of Mausoli Bazar, Raniganj, P.S.- Raniganj, District- Bardhaman, West Bengal presently residing in the house of Natholi Ram Godala, Bizapur Road, District- Agra left Raniganj and came to Agra after killing his cousin there. It was stated in the F.I.R. that occasionally he used to come to the house of the first informant and also used to talk to the informant by his mobile no. 09219799101. In this conversation he also promised to provide job to the informant's nephew Amar @ Jivan Sharma, s/o Puranmal Sharma. Owing to this promise of Pawan Mishra on 11.06.2005, the informant's nephew Amar Sharma and a friend of his Victor @ Potan, s/o Vishnu Dev Varnwal, resident of Kanutola, District- Devghar, Jharkhand reached Agra and on 12.06.2006, Amar @ Jivan informed the first informant that he along with his friend had reached Agra and also informed the first informant about their meeting with Pawan Mishra. After 2-3 days had passed, Jeevan rang up the first informant and told him that there was no arrangement of any job. In response the first informant told him to come back. On 15.06.2005, Pawan Mishra informed the appellant that he was sending both the boys back via Purva Express. When on 16.06.2005, the boys did not reach home at the given time then the first informant tried to talk to Pawan Mishra to inform him that the boys had not reached home. Pawan threatened the first informant that they would reach only when he would send them and informed that he had abducted both of them. On 17.06.2005, Pawan again informed via telephone that the boys will be released only after the ransom money was paid. On 18.06.2005, the first informant informed the Deputy Superintendent of Police, Devghar regarding the incident who in his turn wrote a letter to the Superintendent of Police, Agra, U.P. In the evening of 18.06.2005, Pawan Mishra demanded Rs. 7,00,000/- ransom via telephone and threatened that he would cut the boys into several pieces if the amount of ransom was not provided to him. On 20.06.2005, Pawan again asked via telephone and asked the first informant to reach Gwalior with the money. He also told him as to who was to be given the money would also be informed. Thereafter, the first informant without giving second thoughts came to Agra and contacted the District Magistrate, Agra who sent him to the Superintendent of Police, Agra. Since then the informant was searching for the boys but they could not be traced out. He requested the police to lodge an F.I.R. The first information report was lodged and also chik F.I.R. was prepared.

(6) Upon receiving the Tehrir (written information), a case bring Crime No. 356/05 under Sections 364 I.P.C was registered in Police Station- New Agra, District Agra, and Chik F.I.R Exhibit-Ka-3 was prepared and entry of the said F.I.R was made in G.D in Ex. Ka-4.

(7) After recovery of the dead bodies of the abducted deceased persons namely

Victor @ Potan and Amar @ Jeewan Sharma, Sections 302 and 201 I.P.C were also added. The Investigating Officer prepared the recovery memo of the dead bodies and proved the same as Exhibit Ka-16. He also prepared Ex. Ka-17 when the two farm Shovels/Hoes and plain soil were recovered. He also proved the map prepared by him as Ext. K-18.

(8) After completing the investigating he had submitted the charge sheets against all the three accused appellants and had proved them as Ext. Ka-19.

(9) Cognizance was taken on the charge-sheets and trial commenced in the Court of Sessions. From there the case was transferred for trial to the Court of Special Judge (Dacoity Affected Area), presided over by Sri Dileep Singh, who recorded oral evidence. After the closure of the prosecution evidence, the statements of the accused persons were recorded under Section 313 Cr.P.C, in which the accused persons denied the charges. The accused did not come up with any oral or documentary evidence in their defence. After conclusion of the trial and hearing of the arguments, the lower court below found the accused guilty for the commission of offences of under Sections 364A, 302 and 201 I.P.C and convicted and sentenced the accused persons.

(10) Prosecution has produced witnesses to prove the case. In brief evidence of witnesses is reproduced as under:

1. P.W.1 Dr. Amitabh, District Jail, Agra deposed on oath that on 28.6.2005 he was posted in Emergency Department of District Hospital, Agra. That day at 4 p.m. he had done autopsy of the dead-bodies of deceased Amar Sharma alias Jeevan son of Pooran. The dead body of one of the deceased, namely, Amar Sharma alias Jeevan alias was recognized by CP 345 Vijender and C.P. 982 Ram Rautang,P.S. New Agra, The deceased was about 22 years old who had died two weeks ago.

On **external examination** following facts were found. The body was rotten. The teeth were loose and the brain was in a fluid state. The tissues of the body were soft and loose (cracked) and in semi liquid state and had turned black in colour. There was mud all around the bodies. The neck muscles were partially in a fluid state. **The hyoid bone of the neck was found to be broken.** The stomach of the deceased was stored. One kidney, the whole spleen, liver and some parts of the intestines were also stored.

Decay was present in the skin of the deceased.

In the internal examination, it was found that the brain and membranes were in liquid state, Chest and pleura were in liquid state, both lungs and heart were in liquid state, abdominal muscles and membrane were in a liquid state. Red stops were found in the stomach, gas was present in the chest and large intestine. It was soft and loose. Spleen and kidney had become soft. As the cause of death was not fixed the viscera was pserved. According to this witness P.W.1 the deceased had died in between 12.6.2005 and 15.6.2005. This witness recognized his signature and writing on Ext. A-1 and A-2, in both the Post mortem reports. During the course of cross-examination this witness admitted that he could not say as to how these two dead persons had died because their dead bodies were rotten and it was not possible to identify the ante mortem injuries. He admitted that he had mentioned the time of

death about two weeks prior to the post mortem in which there may be possibility of three days variations. He admitted that the condition of the dead bodies were such that they were not easily identifiable. He had not mentioned any identification mark on the body of the dead bodies. Further he deposed in cross examination that temperature in the month of June remains 45 degree Celsius and decomposition starts after 24 to 36 hours after death. According to him the bone and flesh were not separated.

On the same day he did post-mortem of the dead-body of deceased Victor alias Potan. According to him the deceased was about 23 years old and had died about two weeks ago.

External Examination:-

There was decomposition in the body. The teeth in the socket were loose. The brain had changed to a fluid state. The tissues of the body had become soft and loose and had turned into a semi liquid state. The stomach and intestine were coming out of the stomach. There was soil on the body. The muscles of the neck were partially liquid. The neck (hyoid bone) was broken (from left side). Viscera was preserved. In Jar-'A' the stomach, in Jar-'B' the kidney, the whole spleen and the piece of intestine were kept in Jar-'C'. Salt solution was also kept. The genital skin had rotten.

Internal Examination:-

The brain and membranes were in liquid state, Chest wall was in a liquid state, both lungs and heart were partially in liquid state. The abdominal muscle and membranes were in a liquid state, red coloured spot were found in the stomach, gas was present in the chest and large intestine, liver was soft and loose. As the cause of death could not be ascertained, therefore, the viscera was preserved.

This Court is of the opinion that from the oral evidence it is established that after administering sleeping pills in lassi to the deceased persons when they became unconscious, they were strangulated and thereafter were buried one by one. Thus it is obvious that the cause of death of the deceased persons was the breaking of their hyoid bones. Thereafter they were buried under the earth. In Ka-24 FSL Report Agra no poison has been found in the viscera and other parts of the body of the deceased persons. It is also noteworthy that no suggestion has been given to this witness that dead bodies were not of the alleged persons but of some other persons.

P.W.2 S.I. Satya Veer Singh has deposed that on 27.6.2005 he was posted as constable clerk in P.S. New Agra. He further deposed that on the basis of tahrir of the informant Banwari Lal Sharma written by Amit Kumar a case as Crime No356/2005 under Section 364-A IPC State Vs. Pawan Mishra was registered and a chick no.224 was prepared. This witness has proved this chick FIR as Ex.Ka-3. Further he deposed that at 6.30 p.m. he had also prepared GD No.62. He also proved it by comparing it with the original GD as Ex.Ka-4. In cross-examination this witness deposed that he had given statement to the IO on 27.06.2005.

P.W.3 Anupam Sharma, SI deposed that on 27/28.6.2005 he was posted as SI at P.S. New Agra and had prepared inquest of deceased Amar Sharma @ Jivan and Victor @ Potan. This witness has proved inquest Ex.Ka-5 and related papers such as challan nash, photonash letter to RI and CMO as

Ex.Ka-6 to Ex.Ka-9 and Ex.Ka-11 to Ex.Ka-14. In the cross-examination this witness admitted that skin and flesh of both the dead bodies were rotten. Bones were visible. There was no identification mark on the corpse. The flesh of nose, ear were also rotten.

It is noteworthy that no suggestion has been given to this witness that dead bodies were not of the alleged persons.

P.W.4 Banwari Lal Sharma son of Rameshwar Lal Sharma aged about 50 years resident of Vaijnath, P.S. Devghar, Jharkhand has deposed on oath that deceased Amar Sharma @ Jivan Sharma was his real nephew. Another deceased Potan @ Victor Barnwal was friend of his nephew. Accused Pawan Mishra who was present in the Court is his nephew (sister's son) who after committing murder of his cousin (brother) in Raniganj Bardwan, West Bengal had come to Agra. He used to visit the informant's house regularly. Pawan Mishra called the first informant's nephew Amar Sharma to Agra on the pretext of getting him a job. On 12.06.2005 Amar Sharma reached Agra with his friend Victor @ Potan. His nephew thereafter phoned up the first informant and told him that he and his friend had reached Agra and were with Pawan Bhaiya. When till 15.06.2005 the nephew could not get any job then P.W. 4 told his nephew to come back to Devghar on 15.06.2005. Pawan Mishra told P.W.4 on the phone that both the boys had been sent back by the Purva Express. When on 16.06.2005 they did not reach home on the scheduled time, the P.W.4 was informed by Pawan Mishra that the children had not reached home yet. Then Pawan Mishra told the first informant that the children would reach only when he would send them. Further he told the first informant that he had kidnapped both the boys and after saying so the accused Pawan Mishra hung up. On 17.06.2005 Pawan Mishra called him up again and said that only if money was given to him would he release the children. On 18.06.2005 he informed DSP, Devghar about the incident who in his turn gave him a departmental letter in the name of the DSP, Agra. On 18.06.2005 in the evening Pawan Mishra again made a call that only if Rs. 7 lac were given would he release the children else he could cut them into pieces. Pawan Mishra used to talk through his mobile phone till the 15th June, 2005 and after 15.06.2005 he called from a P&T booth (STD). Pawan Mishra had again made a call on 20.06.2005 and had said that the money could be delivered in Gwalior. He had said that he would, ofcourse, tell later as to where and when the money would be given. Further this witness deposed that on 22.06.2005 he had left Devghar for Agra and had reached Agra and met the DM Agra and had given the application regarding the incident. The D.M. in his turn sent him to the SP, Agra. Thereafter he, with his companion, Munna Kumar, elder brother of the deceased Victor and others met the S.S.P., Agra and also gave him the departmental letter. Further, he deposed that he with other persons remained busy with the searching of the children. The S.S.P. asked him to report the matter at the PS New Agra. Resultantly on 27.06.2005 he presented a tahrir written by one Sri Amit Kumar on his direction on which a report was lodged in PS New Agra. This witness admitted that Amit Kumar had written what he had told him. This witness has admitted his signature on the tahrir which is exhibited as Ex.Ka-15. According to him IO had recorded his statement. On 27.06.2005 when he and his friends were searching his nephew and his friend with SHO PS New Agra on a government vehicle and were going from Deevani Cross Road to Khandari via Bhagwan

Talkies, he found Pawan Mishra who was coming from the side of the RBS College. On the pointing of the P.W.4 the Inspector saw Pawan Mishra for the first time. Seeing the police Pawan Mishra started running and the police chased him and ultimately caught him and told him that a case was registered against him and brought him to the police station and interrogated him. He admitted his guilt and also confessed that he with his friends Kripal Kumar Sahu and Dinesh Kumar Sahu had administered sleeping pills in lassi and thereafter has strangulated the two boys and had buried them in the temporary hut of Dinesh Sahu near Friends Apartment at Mau Road. When the present witness with the police and Pawan Mishra reached the house of Kripal Sahu and Dinesh Kumar Sahu they were found there. Pawan Mishra recognized them and confessed that he along with them had committed the murder. On the pointing of the accused persons they went to the hut of accused Dinesh Sahu where two shovels/hoes used for digging the earth were also recovered. For hiding the dead bodies, the floor was cemented. When the floor was dug the dead body of Victor appeared first and after some more digging the dead body of Amar Sharma @ Jivan Sharma was also found. Both the dead bodies were taken out and recognized. Police prepared inquest report and made him witness of the inquest. The police had made the recovery memo by taking two shovels and plain soil from the spot. IO had recorded his statement on 28.06.2005.

The witness has been cross-examined by the accused persons Dinesh and Kripal. In the cross-examination this witness admitted that the tahrir was written by Amit Kumar while sitting in the hotel President. On 27.06.2005 he knew that accused Pawan Mishra lives in the house of Natholi Ram at Bichpuri Road. He deposed that Pawan Mishra himself had taken the deceased from the railway station. He had deposed that he had faith in Pawan and had thought bonafidely that he would help the boys in getting the jobs and, therefore, he had sent the two boys. This witness admitted that he had come to Agra on 23.06.2005 and had searched for the accused and the deceased at his own level while staying at Hotel President. Further he deposed that he was not knowing the accused Dinesh and Kripal prior to the recovery of the dead bodies. He admitted that he had visited the place of occurrence twice, once at the time of recovery and again when IO was preparing the site plan. He admits that at the time of recovery he saw that there was under garment on the body of deceased Victor @ Potan but the dead body of deceased Amar @ Jivan was naked. According to him Pawan Mishra had informed that the hut was of Dinesh. Dinesh and Kripal had admitted before him and the police that they had killed both the boys. Accused Pawan Mishra had not cross-examined the witness in spite of many opportunities being given by the court.

P.W.5 Sawar Mishra has deposed that on 27.06.2005 he had come to Agra after receiving the information of the informant Banwari Lal Sharma. He has deposed that informant Banwari Lal Sharma narranted to him the story that Pawan Mishra had called the deceased Amar @ Jivan and his friend Victor for providing them employment in Agra. When after 2-3 days they had informed that they had not found any job then Banwari Lal Sharma had asked them to come back. When they did not reach then Banwari Lal Sharma had contacted Pawan Mishra who informed that he had sent them by Purva Express. When still both the boys did not reach at the scheduled time, Banwari Lal Sharma again had

contacted Pawan Mishra who had informed that the boys had been kidnapped by him. On this information he also came to Agra and had met the District Magistrate who had sent them to SSP, Agra who had assured help and thereafter on 27.06.2005 Banwari Lal went to P.S. New Agra and had given the written tahrir. Thereafter police with their assistence had arrested the accused Pawan Mishra who was present in the court at the time of deposition of this witness. This witness further deposed that Pawan Mishra confessed before him and the police that he with the help of Dinesh and Kripal had killed both the boys. Thereafter when they reached the place of occurrence with him, Dinesh and Kripal were also found. All the three accused persons also confessed that after killing Jeevan Sharma and Victor they had buried them under the earth and had cemented the floor after keeping bricks below the cement. There were two Shovels inside the hut. On asking by police all three dug the the floor and the earth. First the dead body of Victor was found and there after the dead body of Jeevan was recovered. The legs of deceased Amar and Jeevan were tightened with ropes. They recognized the dead bodies. Recovery memo was prepared on the spot. This witness recognized his signature on the recovery memo. This witness has been cross examined by Accused Dinesh and Kripal where he admitted in the cross examination that he was brother-in-law of Banwari Lal. According to him all the accused persons had pointed out the place of burial of the dead bodies. He admitted that it is not in his memory as to whether the recovery memo was read over or not. He admits that he signed the recovery memo without reading. He admitted that the dead bodies were rotten but they could be recognized. According to him the last ritual of dead bodies were conducted by him, Banwari Lal and Munna on the cremation ghat at Agra. Accused Pawan Mishra did not cross-examine this witness.

P.W. 6 Tejbeer Singh, Inspector, I.O. of the case has deposed that on 27.6.2005 he was posted as SHO New Agra where, in his presence at 6.30 p.m., informant Banwari Lal Sharma had lodged the FIR. He started investigation, copied FIR, G.D., wrote the statements of constable Moharir, Satya Veer Singh and informant Banwari Lal Sharma. According to him informant had told him that Pawan Mishra had demanded ransom money from him. When he, the S.P., Sri R.K. Tiwari with the informant and his companions reached Bhagwan Talkies, the SOG team met there. When he, along with the first informant and his companion, was going towards Khandari Chauraha, Banwari Lal and his friends informed that the person who was coming from the side of the RBS College was Pawan Mishra. Thereafter the vehicle was stopped and after chasing and after using the usual force, arrested him at 7.45 p.m. Accused Pawan Mishra was lodged in the lockup of New Agra P.S. as per G.D. No. 65 at 8.15 p.m. When Pawan Mishra was interrogated before the informant Banwari Lal and Sawar Mishra, he had informed that due to family enmity he had killed his cousin Shiv Mishra aged about 1-1/2 years. After being released from jail he had gone to Agra for labour work. During the course of construction in Pushpanjali Mariya, Katra he came in contact of Dinesh Sahu and Beldar Kripal Sahu and started labour work together. His house at Raniganj was occupied and sold by his uncle. He therefore wanted to repurchase it and for that he needed money. For this purpose he thought that his maternal Uncle Puran Lal Sharma and Banwari Lal Sharma could be used. He used to talk with Jeevan.

On 11.6.2005 Jeevan informed that he was coming to Agra with his friend Victor by express train. They had stayed with him for two to three days in the Shalimar Hotel. On 14.6.2005 he with the two boys had gone to the room of Dinesh Sahu at Mau Road where Dinesh and Kripal met him. They had already made up a plan. After reaching there he procured Lassi and diluted Sleeping Pills therein. After drinking the same they became unconscious. There after a problem arose that where they would be kept. As no proper place was available for hiding them and there was fear of exposure of the plan, they strangulated both the deceased persons in the hut of Dinesh and after digging the earth buried them. After keeping some bricks on the dead bodies they cemented the floor. Clothes and shoes of the deceased were burnt in the vacant plot of land. After the confession of the accused Pawan Mishra, he was taken from the lock up to the house of Dinesh Sahu, where on Pawan Mishra's pointing two persons namely Dinesh Sahu and Kripal Sahu were found who also informed that they had killed the Deceased Jeevan Sharma and Victor. The other two accused persons were also arrested. They were apologetic for their act and informed that owing to their greed for money they had killed the deceased persons and had buried them after digging a pit in the hut of Dinesh Sahu. They also pointed out the two shovels and told that with those two shovels they had dug the pit and had buried the dead bodies. This witness proved both the shovels as material Ext.-1 and 2. All the three accused persons after removing the bricks from the cemented floor had dug further for three feet and took out the corpse of the deceased Victor which was recognized by his brother Munna and informant Banwari Lal. After digging a further one and half feet soil another dead body which was of Jeevan was taken out by the accused persons which was recognized by Banwari Lal Sharma and his friends. After recognizing both the corpses he prepared fard of shovels and plain soil in the hand writing of R.K. Tiwari which was signed by the accused persons also. The witness proved this recovery memo as Ext. Ka-17. Recovery of dead body was also prepared in the hand writing of R.K. Tiwari which has been signed by the witnesses. This witness has proved the recovery memo as Ka-16. The box of plain soil was marked as material Ext.-3 and Soil as material Ext.-4. According to this witness in the night after making arrangement of light, inquest and map of the place was prepared there in his hand writing and signature. Map is exhibited as Ext.-Ka-18. He recorded the statements of Accused Dinesh and Kripal on the spot and also recorded the statements of Munna Kumar elder brother of the deceased Victor and informant Banwari Lal Sharma, Amit Kumar and Sawar Mishra. He copied the inquest on 29.6.2005 and recorded the statements of the witnesses of the inquest. He recorded the statements of SI, Anupam Sharma and Ram Ratan on 3th July, 2005. He again recorded the statements of accused Pawan Mishra on 13.8.2005 with the permission of the Court and on 30.8.2005 he submitted charge-sheet Ext-Ka-19 against the accused Pawan Mishra, Dinesh Sahu and Kripal Sahu.

Only accused Dinesh and Kripal cross-examined the witness. Accused Pawan Mishra was provided ample opportunity but he did not cross-examine this witness also. In cross-examination he has admitted that the copy of the chick FIR was provided to the informant. He admitted that he had taken photographs of the deceased persons but they were not on record. He admitted that in the map which was Ext. Ka-18 date

of preparation had been left but denied the suggestion that it was made prior to the lodging of the FIR. According to this witness there were 10-12 huts in the shape of rooms where labourers used to live. He admitted that except the informant and his companions no other person had been made a witness. He admitted that he had not written the length and width of shovels and its sticks. He admitted that a part of one of the shovels was broken but it is not written in recovery memo. He admitted that no chemical poison was found in the viscera. The rope by which the legs of the deceased were tied was not before him in the Court. He admitted that mobile number 9219799101 was in the name of Ajanta Agarwal and not in the name of accused Pawan Mishra. He denied the suggestion that both the deceased are alive and they had not died. He denied that accused Dinesh and Kripal were caught from the place of thekedar Om Prakash and they were not living at the place of occurrence.

Documentary evidence

(a) Ext. Ka-1 and Ka-2 Post-mortem report of Jeevan Sharma and Victor respectively

Ext. Ka-3 Chik FIR

Ext. Ka-4 kayami GD regarding lodging FIR on 27.6.2005

Ext. Ka-5 Inquest report regarding deceased Amar Sharma alias Jeevan

Ext. Ka-6 Police form-13

Ext. Ka-7 letter to RI

Ext. Ka-8 letter to CMO

Ext. Ka-9 photo nas deceased Amar Sharma alias Jeevan

Ext. Ka-10 Inquest report regarding deceased Victor alias Potan

Ext. Ka-11 Police form-13 regarding deceased Victor alias Potan

Ext. Ka-12 Letter to RI about deceased Victor

Ext. Ka-13 Letter to CMO about P.M. of deceased Victor

Ext. Ka-14 Photo Nas about deceased Victor

Ext. Ka-15 Tahrir

Ext. Ka-16 Recovery memo regarding dead bodies of the deceased persons

Ext. Ka-17 Recovery memo regarding two shovels and plain soil

Ext. Ka-18 map

Ext. Ka-19 Charge-sheet

The FSL report is on record as Paper No. Ka-24 which has not been exhibited but it is liable to exhibited being admissible in evidence under Section 293 Cr.P.C.

Material Exhibits

1- M Ext. 1 and 2- Shovels

2. M Ext. 3 box of the plain soil

3. M Ext. 4 plain soil

Accused Pawan Mishra has denied all the allegations in his statement under Section 313 Cr.P.C. and though he had stated that he was filing papers in his defence but had not filed any documentary evidence in defence. He said nothing about the incident.

Accused Dinesh has also denied all the questions asked under Section 313 Cr.P.C. and has said that he was living in Bichpuri and used to work with Thekar Om Prakash wherefrom the Police had caught him.

Accused Kripal Kumar Sahu has also denied all the questions asked under Section 313 Cr.P.C. and had stated that he had come for doing labour work from Bilaspur and was living with Om Prakash and used to do labour work.

During the course of trial accused Pawan Mishra did not properly participate. He neither arranged for any private counsel nor took the help of any amicus curiae. Lastly, an advocate was arranged by him but he did not permit him to argue the case. On several dates he had not signed the order sheet. He moved several complaints against the investigating officer and the Presiding Officer due to which investigation was also transferred many times. Several times he did not cross-examine the witnesses, therefore, the trial took long to conclude. The trial however had ended in conviction.

(11) Being aggrieved, the present appeals have been preferred.

(12) **The appellants in Criminal Appeal No. 3490 of 2010 have taken following grounds:**

(i) That the conviction and sentence is against the weight of evidence on record, contrary to law and very severe. No independent witness has been examined by prosecution during the trial. The impugned judgment and order is wholly illegal, arbitrary and not sustainable in the eye of law and is liable to be quashed as it has been passed without considering the facts and evidence used by prosecution. The impugned judgment and order is against the principles of law and cannot be sustained in the eyes of law, therefore, the appeal be allowed and the impugned judgment and order dated 13.4.2010 be set aside.

(ii) **In Jail Appeal No. 3367 of 2010 appellant Pawan Mishra** has simply forwarded an application from the jail treating the same to be memo of appeal.

It is noteworthy that the appellant Pawan Mishra has not cooperated during the course of trial. He did not engage any private counsel and when he was asked to take the help of amicus curiae he had refused to take the help of any legal professional as amicus curiae and even he himself did not cross examine any of the witnesses.

Though he had denied the charges as levelled against him and had sought trial but when the lower court provided opportunities for cross examining the witnesses, he refused to do so and lastly the trial court had closed the cross examination on his behalf.

(13) **This appeal is being decided as under :-**

The *Tehrir Ex. Ka -1 5* to lodge F.I.R was lodged before the S.H.O, P.S New Agra, District Agra, by the first informant Banwari Lal Sharma. It was reduced into writing by one Sri Amit Kumar. Thereafter *Chik* F.I.R was prepared as Exhibit Ka-3, in which it was mentioned that there was delay in lodging the F.I.R. Under Section 154 Cr.P.C information in cognizable case can be given orally or in writing, which information shall be entered in the General Diary. A copy of the same is given free of cost to the informant. According to the F.I.R, Banwari Lal Sharma his nephew Amar @ Jeewan were residents of Pandey Lane, Deoghar, P.S and District Deoghar, (Jharkhand). Banwari Lal Sharma who was the first informant had a bhanja (nephew, sister's son), Pawan Mishra who was a resident of Musahuli Bazar, P.S. Raniganj, District Burdwan (West Bengal). The informant had mentioned in the FIR that Pawan Mishra had after killing his cousin (brother) he had left Raniganj and had shifted to Agra. It was also mentioned that some times he used to visit the house of the

informant and also talked at times from his mobile no. 9219799101. He had assured that he would land a job for the informant's nephew Amar @ Jeewan Sharma son of Puran Mal Sharma. On the assurance of the accused Amar @ Jeewan Sharma had gone to Agra on 11.06.2005 with one Victor @ Potan son of Vishnu Deo Baranbal, R/o Bhanutola, District Deoghar (Jharkhand). On 12.06.2005, Amar @ Jeewan Sharma had informed that he along with Victor had reached Agra and had met Pawan Mishra. Two or three days later Amar had informed the informant on phone that no arrangement for job/service was there. Upon knowing this the first informant had asked him to return.

(14) On 15.06.2005, Pawan Mishra had informed the informant that the boys had been sent back by train Purwa Express. However, when the boys did not reach on 16.06.2005, then the informant contacted Pawan Mishra on his mobile phone regarding the fact that the boys had not returned. Pawan Mishra, therefore, had said that the abducted boys had infact not been sent by him and that they would be only returned once the ransom is paid. This was told by Pawan Mishra on phone on 17.06.2005 On 18.06.2005, the informant informed the C.O. Deoghar regarding the incident. Thereafter C.O. Deoghar had contacted D.S.P. Agra, (UP). In the evening of 18.06.2005, Pawan Mishra again rang up the first informant and demanded Rs.7,00,000/- (seven lac) and also threatened that in case of non-payment of the said money, he shall cut the boys into pieces. On 20.06.2005 Pawan Mishra again rang up the first informant and asked him to give the money in Gwalior. On 23.06.2005 he rang up to inform as to whom the money had to be paid. Thereafter the first informant came to Agra and met the District Magistrate, who in his turn sent the first informant to the Superintendent of Police, Agra. The said information was entered in the G.D and Chik F.I.R was prepared accordingly. About this fact, it has already been enumerated earlier in this judgment.

(15) According to the defence counsel, the F.I.R was ante timed and it was lodged only after the recovery of the dead bodies. In this regard he could not create any substantive doubt in the mind of the Court. As per *Tehrir* Exhibit Ka-15, it was moved before the S.H.O, Police Station New Agra on 27.06.2005 and the same was also entered in the G.D (Exhibit Ka-4) on the very same day, at 6:30 p.m. at Rapat no. 62 and Chik No. 224/2005. Consequently a Case U/s 364-A I.P.C was lodged.

(16) It is also noticed by this Court that on the back of the *Chik* F.I.R, the contents of *Tehrir* had not been copied. On this basis also the defence counsel had argued that *Chik* F.I.R was not in accordance with law. He, therefore, questions the veracity of the F.I.R. According to the Court, it was the duty of the concerned Constable Moharrir to get the Tehrir copied on the back of *Chik* F.I.R, if it is not so copied then it was not the fault of the informant, and in fact it was the mistake of Constable *Moharrir.* This fact would definitely not affect the merit of the case. On the basis of Tehrir, a Chik F.I.R was prepared on the same day. In the *Chik* F.I.R only Section 364-A I.P.C, has been entered. This proves that till the lodging of F.I.R, the dead bodies were not recovered on the pointing of the accused persons. If the F.I.R would have been ante timed then Sections 302 and 201 I.P.C would have been mentioned in the Chik F.I.R. There is no averment in Chik F.I.R that dead bodies

of the deceased persons had also been recovered. Another argument of the appellants counsel is that lodging of the FIR in New Agra was unnatural does not find favour with the Court.

(17) It is very much mentioned in the FIR that the informant had informed the Police that accused Pawan Mishra used to call him from Mau Road, which falls under the P.S. New Agra, therefore the F.I.R was lodged in P.S New Agra. It is obvious from the Tehrir Exhibit Ka-15 that before lodging the F.I.R, the first informant had contacted the D.S.P, District Deoghar (Jharkhand), who had contacted D.S.P. Agra. Thereafter initially the informant had gone to District Magistrate, Agra. Thereafter upon the direction of District Magistrate, Agra he had approached Superintendent of Police, Agra, wherefrom he was directed to go to Police Station, New Agra. Therefore there was nothing unnatural in the lodging of the FIR in Police Station, New Agra.

(18) On the basis of aforesaid discussions, the defence plea that why F.I.R was not lodged in any other Police Station, is fully explained.

(19) It is true that no time has been mentioned in Exhibit Ka-17 which is the *Recovery Memo*, regarding the recovery of the two Shovels/Hoes, and the sample of the plain soil. Also, no time is mentioned in the recovery memo of the dead bodies which is Ext. Ka-17. From the evidence of the Investigating Officer and the case diary it is proved that after lodging of the FIR the Investigating Officer of the case proceeded on the same day with the complaint for arresting the accused and for searching the abducted persons. Accused Pawan Mishra was arrested on the pointing out of the first informant when he was going past the RBS College. When the informant saw him he recognized the accused and, police, thereafter, chased him and arrested him. As per the case diary the accused was arrested at about 7.45 p.m. and an arrest memo was also prepared and information about it was also entered in the General Diary at serial No. 65. The FIR was lodged on 6.30 p.m. and the accused was thereafter arrested about about 7.45 p.m. It can, therefore, be said that the FIR was lodged prior in point of time and that the arrest had followed the lodging of the FIR. The police upon the arresting of the accused Pawan Mishra interrogated him who thereafter confessed the commission of the offence on 27.6.2005 itself. During the interrogation the accused confessed that he had killed his cousin (mamera bhai) Shiv Mishra aged about 1-1/2 years for which he was in jail for two years. Upon his release he had left home and had gone to Agra and had started working there. At Agra he used to work as a labour. In Agra he came in contact with Dinesh Sahu (Mistri) Kripal Sahu (Beldar). As he was in the need of money for repurchasing his paternal house at Raniganj which was sold away earlier by his uncle, he divulged that he had hatched a plan whereby he would asked for money from Puran Lal Sharma and Banwari Lal Sharma after kidnapping Amar and his friend Victor. For operating in a planned fashion he had purchased a mobile phone and had got the mobile No. 9219799101 at the address of Anjali Agrawal, Sanjai Palace, Agra. From this very phone he used to talk to the first informant, Jeevan Sharma and his friend Victor. Accused during investigation had also narrated as to how Jeevan and Victor were kept in a hotel and how thereafter they were taken on 14.6.2005 to the place where Dinesh Sahu and Kripal had taken rooms on rent. Upon

reaching the rented accommodation, they mixed sleeping pills in the lassi. After consuming the lassi they became unconscious. Thereafter they were stripped off their clothes, strangulated to death and then were buried in the room. Thereafter the dead bodies were covered with mud. Bricks were laid and the floor was plastered with cement. The clothes and the shoes were burnt in the neighbouring plot. On 21.6.2005 upon reading in the newspaper about the abduction the accused destroyed the sim cards and threw the mobile in the nala (sewer) near Kaushalpur. On 27th June, 2005 he made a call from Belanganj STD booth and made the demand for ransom.

(20) On the pointing of the accused-Pawan Mishra, two other accused persons Dinesh Sahu and Kripal Sahu were also arrested from the place they were staying at Mau Road, near Friends Apartment. The three accused, thereafter, took the police to the place of occurrence where from the dead bodies of the deceased persons were recovered along with the Shovels/Hoes, which were used in digging and burying the two dead bodies; Jeevan and Victor.

(21) As noted earlier in the judgment, recovery memo of dead bodies was marked as Exhibit Ka-16, the recovery of the two Shovels/Hoes and that of the plain soil was marked as Exhibit *Ka*-17. After ascertaining that the abducted persons had been killed, the I.O. added Sections 302 & 201 of I.P.C in the *Parcha* of C.D. and therefore these two Sections were mentioned in the above two recovery memos.

(22) Thus, from the above discussion, it is crystal clear that the F.I.R is not ante timed. Certainly in the inquest of Amar @ Jeewan Sharma Exhibit Ka-5 and in the inquest of Victor @ Potan Exhibit Ka-10, the I.O. had not mentioned the Sections and Case Crime Number regarding which the F.I.R was lodged but at the bottom of both these inquest reports, a mention was there of the fact that copies of Chik F.I.R, were entered as Annexure. This goes to prove that when the inquest was initiated, the copy of *Chik* F.I.R which was prepared on the basis of *Tehrir* was there with the I.O. of the case. Though the defence counsel had not pointed out these defects, the Court is dealing with them as it occurred to it at the time of the passing of the judgment. It may be noted that it is an established principle of law that *Chik* F.I.R and inquest reports are not substantive pieces of evidence.

(23) In the case of ***Bable @ Gurdeep Singh vs State Of Chattisgarh A.I.R 2012 S.C. 2621***, the Hon'ble Supreme Court has held that an FIR is not a substantive piece of evidence. In this case the scribe Amit Kumar of the Tehrir (informant) had not been examined. It has also been held by the Supreme Court in the case of *Moti lal Vs. State of U.P. (2010) 1 SCC 581* that non examination of the scribe would not be fatal for the prosecution.

(24) In ***Jarnail Singh Vs. State of Punjab (2009) 9 SCC 219***, the Hon'ble Supreme Court has held that F.I.R. is not an encyclopedia of all the facts relating to the FIR.

(25) Similarly in the case ***Radha Mohan Singh alias lal Saheb Vs. State of U.P, (2006) 2 SCC 450 (Hon'ble Supreme Court (Three Judges Bench)***, it has been held that there is no requirement in the law to mention the details in the F.I.R. Names of the accused or names of the eye

witnesses or the gist of their statements need not be mentioned in the report.

(26) In the instant case it is noteworthy that in the ***Tehrir*** and the ***Chik*** F.I.R the name of Pawan Mishra was mentioned as an accused. If the F.I.R would have been ante timed, the names of the remaining two accused persons would also have been mentioned.

(27) On the basis of aforesaid discussions till now, this Court is of the opinion that in the present case, the F.I.R is not ante timed and the cause of delay has been properly explained.

(28) The importance of an inquest report has been discussed in the case of ***Brahm Swaroop Vs. State of U.P., A.I.R 2011 S.C. 280***, by the Hon'ble Supreme Court and has held that it is not a substantive piece of evidence. Omission of crime number, name of the accused persons, provisions under which the offence was being investigated etc would not be fatal for the prosecution case. Such omission would definitely not lead to the inference that F.I.R was ante timed. The whole purpose of preparing the inquest report under Section 174 Cr.P.C. is to investigate into the cause of death and also to draw up a report of the apparent cause of it. The object of the proceedings under Section 174 Cr.P.C is only to ascertain whether a person had died under suspicious circumstances or on account of an unnatural death. The effort is also to find out the apparent cause. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, or who were the witnesses of the assault is foreign to the ambit and scope of such proceedings.

(29) The occurrence and the case both are based on circumstantial evidence and the **motive** for the crime from all the evidence present is also established. As the evidence is dealt with it becomes clear that Pawan Mishra had made several demands on the phone from Sri Jeewal Lal Sharma. Details of the phone calls are mentioned in the case diary. The informant P.W-1, Jeewan Lal Sharma, was informed by his deceased nephew through telephone on 12.06.2005 regarding the fact that he and his friend had contacted the accused Pawan Mishra. After 2- 3 days, his nephew had again informed through the telephone that he would not get any job.

(30) On 15.06.2005, according to the first informant P.W 4, Pawan Mishra, the accused had informed him that he had sent back the boys by Purwa Express Train and when they did not reach home then on 16.06.2005, the informant had called up Pawan Mishra and had informed him about the fact that boys had not reached home. Thereafter the first informant that Pavan Mishra had narrated that the accused had told him that the boys would reach home only if he would send them. He told him that in fact he had kidnapped them. According to informant, accused Pawan Mishra had made a demand of ransom on the 17th 18th & 20th June of 2005. The accused Pawan Mishra had not cross-examined the informant P.W 4 Banwari Lal Sharma and other witnesses. Rest accused persons did the cross-examination. However, there is no cross examination on the point of motive from the side of any of the accused. However, the informant P.W 4 had constantly deposed about the fact that there was demand of ransom from the side of the accused Pawan Mishra. Thus, this fact about the demand and ransom has remained unrebutted and uncontroverted. It is, therefore, proved that the co-accused persons had motive to kill the deceased persons as has been held in ***Nagaraj***

Vs. State Rep. (2015) 4 SCC 739 (para 13) and in Babu Vs. State of Kerala (2010) 9 SCC 189. If a conviction is to be based on circumstantial evidence motive should be clear and proved.

(31) In this case electronic documents are also very relevant and which also assisted the Investigating Officer in submitting the charge-sheet against the accused persons. During the course of investigation the investigating officer found following electronic evidence through C.D.R. against the main mastermind accused Pawan Mishra.

(32) Followings are the the details of telephone and mobile numbers of the informant and the accused Pawan Mishra. Call details have been annexed by the Investigating Officer with Charge-sheet (Paper No. 10B/9 and 10B/23 and 24). From the papers attached with charge-sheet and case diary it is established that followings are the telephone and mobile numbers of **informant Banwari Lal Sharma:-**

(i) Telephone No. - 06432222399, 06432225476,

(ii) Mobile No.- 9431150613

Mobile number in the possession and use of the accused Pawan Mishra:-

(i) 09219799101 (Tata Indicom, in the name of Smt. Ajali Agarwal, 36, Bhagya Nagar, Agra. It has come in evidence that Accused Pawan Mishra was working as a thekedar for the construction of the house of Smt. Anjali Agarwal. Since accused Pawan Mishra was not having proper ID proof, therefore, a mobile sim was provided to him by her on her ID)

In connection of commission of crime accused Pawan Mishra had contacted the informant Banwari Lal Sharma on following dates and time. The mobile and telephone numbers namely number 06432222399 are being reproduced herein below:

S. No	Date	Time	Mobile andTelephone Numbers used by the accused Pawan Mishra	Purpose of the conversation
1	15.6.2005	2.10 pm	9219799101	Telephone No. 06432222399 that boys are sitting in the train at 8.30 p.m.
2	16.6.2005	8 p.m.	0562 2253256	Children have been kidnapped
3	17.6.2005	6.40 p.m.	0562 2253148	I will tell later, how much money is needed
4	17.6.2005	6.50 p.m	0562 2253148	Do
5	18.6.2005	7.50 p.m.	9219799101	Seven lac rupees are needed otherwise the body of the boys shall be spread in 150 pieces.
6	20.6.2005	5.05 p.m.	9219799101	Missed call
7	20.6.2005	5.10 p.m.	9219799101	Missed call
8	20.6	7.35	0562	Money has

	.2005	p.m.	2524679	to be sent at Gwalior
9	Do	8.30 p.m.	0562 2524773	When and where money has to be sent, will inform on Thursday (23.6.2005)

From the above, paper No. 10B/23 and 24 it is also established that during the relevant period and with respect to commission of crime accused Pawan Mishra had talked with the informant Banwari Lal Shamra 17 times from the mobile number 9219799101 at his telephone number 06432 222399 (16 times) and 06432 225476 (once).

(33) In this case, there are no eye witnesses. Only P.W.4, P.W.5 and police witnesses were the witnesses of recovery of the dead bodies and that too on the pointing out of the accused. Thus the chain of evidence also gets completed. In the case of ***G. Parshwanath vs State of Karnataka A.I.R 2010 S.C 2914,*** it was held that in a case of circumstantial evidence the chain of evidence should be complete and should be proved by cogent evidence.

(34) The Hon'ble Supreme Court in the Case of ***Sadik Vs. State of Gujarat (2016) 10 SCC 663*** and in ***Dasin Bai Vs. State of Chhattisgarh (2015) 89 ACC 337 SC*** has held that in the event the link of chain of circumstances is well established, proof of motive or ill-will is always not necessary. In the case of ***Sanjeev Vs. State of Haryana (2015) 4 SCC 387 (para 16),*** the Supreme Court has held that to establish an offence (murder) by an accused, motive is not required to be always proved. Motive is something which prompts a man to form an intention. The intention can be formed even at the place of incident at the time of commission of the crime. It is only either intention or knowledge on the part of the accused which is required to be seen in respect of the offence of culpable homicide. In order to read either intention or knowledge, the courts have to examine the circumstances, as there cannot be any direct evidence as to the state of mind of the accused.

(35) In this case the motive of the accused persons to get the ransom has been proved beyond doubt by cogent oral and documentary evidence.

(36) In this case only two witnesses of fact P.W. 4 informant Banwari Lal Sharma and P.W. 5 Sawar Mishra have been examined. The occurrence was committed far away from the residences of P.W 4 and P.W 5. When the deceased boys did not reach home, the informant P.W 4 and P.W 5 Sawar Mishra started their journey to Agra after informing the C.O. Police in District Deoghar (Jharkhand). It is from no where established that the informant P.W 4 and P.W 5 had any intention of falsely implicating the accused persons. Only the accused Pawan Mishra was known to the first informant and when Pawan Mishra had promised job for the boys the first informant had sent the boys in the hope that the accused Pavan Mishra shall provide them jobs. They had absolutely no dispute or enmity with the accused person. Therefore there is no occasion of false implication from the side of informant and Sawar Mishra.

(37) In ***Mahavir Singh Vs. State of Haryana (2014) 6 SCC Page 716*** Para 16, the Supreme Court has settled the legal

proposition that in the event a witness is not cross-examined with regard to a particular issue, the correctness or legality of that issue cannot be questioned. Undoubtedly, it is the prosecution's duty to prove its side of story. However, in the light of section 3 of the Indian Evidence Act, the Apex Court has observed in ***Harendra v. State of Assam AIR. 2008 Supreme Court 2467 & Himanchal Prashasan v. Om Prakash AIR. 1972 Supreme Court page 975*** that benefit of doubt should be given only on the basis of logical, reasonable and honest conclusion.

(38) Further in ***Ramanand v. State of Himanchal Pradesh AIR 1981 Supreme Court page 3617*** the Apex Court held that proving a case beyond reasonable doubt is a guideline not a-fetish.

(39) In the case of ***State of U.P. v. Ramveen Singh and another 2007 (6) Supreme Court page 164*** the Apex Court has held that the ultimate object of any court is to avoid miscarriage of justice.

Hence, in the light of above analysis we embark upon the evaluation of the evidence as is available in the case.

(40) The defence counsel has questioned the identity of the deceased persons by arguing that the dead bodies were in such a state that no person could have recognized them and it was not proved beyond reasonable doubt that these two dead bodies were of Amar @ Jeewan Sharma and Victor @ Potan. In this respect it has to be kept in mind that the dead bodies were recovered upon the pointing of accused persons especially on the pointing of the accused Pawan Mishra, who had called the deceased to Agra for giving them employment. He had informed the informant on phone that both the boys had been sent back by Purwa Express Train, but the fact was that they never reached their destination. Nobody else claimed the dead bodies to be known to them.

(41) From perusal of the Exhibit Ka-6, recovery memo regarding dead bodies, it is evident that the accused had confessed about the killing of the two and had also definitely pointed to the place where the deceased persons were buried. On their pointing the pit was dug and the dead bodies of Victor alias Potan and Amar were exhumed and were also recognized by Munna and the informant Banwari Lal Sharma and the friends of the deceased. Though the dead bodies were in a rotten stage but they were not in the form of skeleton. During cross-examination also no question was raised with regard to the identity of the dead bodies. This question cannot now be allowed to be raised in this appeal. It was never the case of the defence/appellants that the police had recovered the dead bodies of some other persons and that the deceased persons were still alive.

(42) It is also noteworthy that family members recognise their near and dear ones even in very bare conditions, on account of their height, weight, colour, hair, toe, fingers nails, face, arms etc.

(43) From a perusal of the inquest Exhibit Ka-5 and Exbibit ka-10, it is clear and proved that before sending the dead bodies for post mortem, the dead bodies were recognized by their family members. Exhibit Ka-5 is the inquest report regarding deceased Amar @ Jeewan Sharma, in which it is mentioned that after seeing the dead body of the deceased Amar @ Jeewan Sharma, the informant Banwari Lal

Sharma, was convinced that it was the dead body of Amar @ Jeewan Sharma. Similarly, as per the inquest report of Victor @ Potan his brother was convinced that it was the dead body of his brother Victor @ Potan therefore we are of the opinion that no question regarding identity of the deceased persons arises. Therefore the contention of the defence counsel regarding non-identification of the dead bodies is not tenable, hence is being rejected.

(44) The appellant's counsel argued that though viscera was preserved and the same was sent to the forensic laboratory for expert opinion/examination, it was not evaluated in its correct perspective as no poison was found in it. Quite contrary to what the appellant's counsel has argued, the court finds that prosecution case is based on the confessional statements of accused persons which was that the sleeping pills were used to make the deceased unconscious. The sleeping pills were diluted in the Lassi and the same was given to the deceased to drink, therefore, they became unconscious. The two boys were put to death and thereafter buried. The dead bodies were exhumed from the place where they were buried in the same sequence as it was mentioned by the accused. Thus, non-finding of poison in viscera does not adversely affect the prosecution case.

(45) The post mortem report also corroborates the oral evidence. Except the accused person none else saw the commission of crime. The hyoid bones and the necks were broken, therefore there was no occasion to opine by the Doctor that the cause of death could not be ascertained. Hyoid bone can only be broken if the deceased has been strangulated forcefully. There was no injury whatsoever on the rest part of the body of both the deceased person. Thus, it is concluded that the deceased persons were strangulated by which the hyoid bones of both the deceased persons were broken, which caused death of both of the deceased persons and, thereafter they were buried there.

(46) It is a case based on **circumstantial evidence.** None else has seen the commission of crime but the witnesses are not inimical to the accused persons.

(47) In cases ***Nathiya Vs. State (2016) 10 SCC 298, Bhim Singh Vs. State of Uttarakhand (2015) 4 SCC 281 (para 23), Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116 (paras 120 and 121), State of West Bengal Vs. Dipak Halder, (2009) 7 SCC*** (Three Judge Bench) the Supreme Court has laid down the following principles regarding cases based on circumstantial evidence:

(i) The circumstance from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established;

(ii) 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;

(iii) the circumstances should conclusive in nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) 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 be so that in all human probability the act must have been done by the accused.

(48) In **Bhim Singh (supra)** it is held that when the conclusion is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances.

(49) In **State of Goa Vs. Pandurang Mohite, AIR 2009 SC 1066 and in State of U.P. Vs. Satish, 2005 (3) SCC 114** the Supreme Court held that circumstances of "last seen together" do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

(50) In **Rohtash Kumar Vs. State of Haryana, 2013 (82) ACC 401 (SC)** (para 25) and in **Prithipal Singh Vs. State of** Punjab (2012) 1 SCC 10 the Supreme Court held that if it is established that victim and the accused were lastly seen together then the burden of proof shifts on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

(51) In **Ashok Vs. State of Maharashtra, (2015) 4 SCC 393** the Supreme Court held that initial burden of proof is on the prosecution to adduce sufficient evidence pointing towards the guilt of the accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exactly as to what happened in the incident as the accused himself would have special knowledge of the incident and would have the burden of proof on himself as per Section 106 of the Evidence Act. But last seen together itself is not a conclusive proof. Along with other circumstances surrounding the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused etc. non-explanation of death of deceased, etc. may lead to a presumption of guilt of the accused.

(52) In this case the conversation between the informant Banwari Lal Sharma and the deceased Jeevan alias Amar Sharma with regard to their reaching Agra for employment and with regard to the fact that the latter was received by the accused Pawan Mishra, and that both the deceased boys stayed in hotel arranged by the accused and that the accused demanded of ransom everything is part of the same transaction. So, the connected facts and evidence thereon are relevant and admissible in evidence under Section 6 of The Indian Evidence Act and conversation of the deceased Jeevan alias Amar to the informant while coming from Devghar and also from Agra to the informant at Devghar is also relevant and admissible in evidence under Section 32 of the Indian Evidence Act. All evidence on the above facts shall be read against the accused appellants only. For reference Section 6 of the Indian Evidence Act is noted hereinbelo

S.6: Relevancy of facts forming part of same transaction.--Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the 1[Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

(53) Though hear-say evidence is not admissible in evidence but in the event the victim dies, his previous statements to any living person become relevant and admissible in evidence under Section 32 (1) of The Indian Evidence Act if it relates to cause of his death. If he had made any statement in this regard the same can be taken into consideration. The statement would be relevant in every case or proceeding in which the cause of death of that person is in issue. In Indian Law it is not necessary that the person who made any declaration was actually expecting an assault which would kill him. It is, therefore, unlike the English Law. (**Sharad Birdichand Sarda Vs. State of Maharastra AIR 1984 SC 1622), In Bhagirath Vs. State of Haryana (1977) 1 SCC 481**, Supreme Court held that if the declarant has in fact died and the statement explains the circumstances surrounding his death, the statement will be relevant even if no cause of death was stated at the time of the making of the statement.

(54) In **Pakla Narayan Swami Vs. Emperor AIR 1939 Privy Council 47**, the wife of the accused had taken a debt of Rs. 3,000 from the deceased at 18% interest about a year before the tragedy. A number of letters signed by the accused's wife were discovered from the house of the deceased had clearly proven this fact. On 20nd March, 1937, the deceased whose name was K.N. received a letter which was not signed by anybody but from which, it was reasonably clear that it had come from the wife of the accused, inviting him to come that day or next day to Berhampur. K.N.'s widow told the court that on that day her husband showed her a letter and said that he was going to Berhampur as Swami's wife had written to him, inviting him to come to receive payment of his dues. K.N. and the wife of accused were known to each other as she was the daughter of an officer in whose office K.N. was employed as a peon. K.N. left his house the next day in time to catch the train to Behrampur. On Tuesday, 23rd March, his body, cut into seven pieces, was found in a steel trunk in a third class compartment of a train at Puri, where the trunk had been left unclaimed.

The accused was convicted of murder and sentenced to death. The evidence against him was, f**irstly** his indebtedness to the deceased, **secondly,** the statement of the deceased to his wife that he was goint to the accused, thirdly, the steel trunk was purchased by a Dhobi (washerman) for and on behalf of the accused. **Some other details** about arrival of the deceased at the

accused's house, discovery of blood stained clothes and transportation of the trunk to the station were also proved. The accused appealed to the Privy Council on the ground that the statement of the deceased to his wife that he was going to the accused was wrongly admitted under Section 32 (1) and that the statement of the accused to the police that the deceased arrived at his place was admittedly in violation of Section 162 Cr.P.C. **Lord Etkin and other Lordships** were of the opinion that the natural meaning of the word used do not convey any of these limitations. The statement may be made before the cause of death had arisen or before the deceased had any reason to anticipate his murder. The circumstances must be circumstances of the same transaction; general expression including fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death would not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or any such statement which might give reasons for so proceeding, would be "circumstances" in the same transaction and would be so whether the person was known or was unknown to the accused. "Circumstances of the same transaction" is a phrase which no doubt conveys some limitation. It cannot be analogous to the term "circumstantial evidence", which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae." Circumstances must have proximate relations to the actual occurrence.

If we compare the fact of the case in hand with the facts of the case, of Pakla Naraya Swami (supra) we find any number of similarities. In Swami's case the deceased K.N. had gone to Behrampur in the hope getting the money lent back. Similarly in the case in hand both the deceased boys had gone to Agra in the hope of employment. Thus the information given by the deceased persons before their death to the informant was admissible in evidence against the accused persons under Section 32 (1) of The Indian Evidence Act and on this score also the accused persons are liable to be convicted and sentenced.

(55) After establishment of the fact that the deceased persons had gone to Agra where they were in the direct control of the accused Pawan Mishra and others, the burden of proving that what happened to the deceased persons and how hey died, lay on the accused Pawan Mishra and others. It is also established that deceased persons were in company of all the three accused persons, therefore, it is the burden of all the accused-appellants to discharge their burden of proof under section 106 of The Indian Evidence Act.

Section 106 of The Indian Evidence Act is as under:

S: 106. **Burden of proving fact especially within knowledge-**

When any fact is specially within the knowledge of any preson, the burden of proving that fact is upon him.

Where a fact is specially within the knowledge of a party the burden of proving that fact lies upon him. In a case of similar fact **Sucha Singh Vs. State of Punjab AIR 2001 SC 1436** the victim was first abducted and later on murdered. It was held that the court, depending on the factual situation, could draw the presumption that all the adbuctors were responsible for the murder. It was upon the abductor to explain that they were not guilty of the murder.

Here the abductors/appellants have not been able to give any explanation of the death of the deceased persons.

In **Sunder Vs. State AIR 2013 SC 777** the accused kidnapped a child of seven years for ransom, annihilated him on not receiving the ransom amount. There was no enmity between the accused and the child, nor the child was a stranger, nor there was any proof that the accused had released the child, yet it was held that Section 106 was attracted and the accused was under the responsibility to explain as to what happened to the child, failing which he became liable for the murder. The facts of the case cited are similar to the case in hand, therefore, the principle laid down in the cited case applies to the case at hand.

(56) During the course of investigation and recovery accused persons had admitted that legs of deceased Jeevan Sharma were tied with a rope and as there was no place to hide them, therefore, both were strangulated and buried one by one. Accused persons had also accepted in the recovery memo that they had administered sleeping pills in the Lassi and therefore both the deceased had become unconscious and they were easily strangulated.

(57) This admission and contents of recovery memo also finds support from the post-mortem report in which Hyoid bones of both the deceased were found broken and this occurs only when the dead are strangulated.

(58) From perusal of the facts and the evidence brought in case it is established that the accused had mens-rea to kidnap and abduct the deceased persons for obtaining ransom. For this first of all they prepared a plan and in furtherance of the plan, the accused Pawan Mishra contacted his maternal uncle to send the boys for employment which was never available for them and when they came to Agra they were killed and thereafter buried.

(59) From the prosecution evidence it is established that the deceased persons had not been seen in the company of any other criminal or group of criminals other than the accused persons before or after the commissioning of the crime and there was no one else known to them.

(60) It is further established from the evidence of P.W.4 and P.W. 5 that ransom was demanded by the accused Pawan Mishra on his behalf and on behalf of the other two accused persons who had actively participated in the crime. For Pawan Misra it was not possible to handle both the deceased persons all by himself.

(61) Thus the evidence in totality goes to prove that there was motive as also evidence for the accused to kill the two deceased persons.

(62) The course of this case began on 11.6.2005 when the deceased commenced their journey and reached Agra on 12.6.2005. Thereafter they ended in the hands of accused persons. In between the chain of all the facts and evidence have been fully connected and established by the prosecution. The chain of circumstantial evidence is intact and established without breaking. Therefore, this Court is of the opinion that by proving motive, *Mens-re*a, demand of ransom and lastly recovery of the dead bodies from the person who had demanded ransom, the prosecution has successfully proved the case beyond all reasonable doubt against the accused persons. It is established that except the accused persons none else would have committed the murder and have buried both the deceased persons under the earth at the place of occurrence. Therefore, we find no infirmity in the appreciation of evidence in connection with conclusion drawn by the trial court.

(63) In this case charges were framed under Sections 364A, 302 and 201 IPC. From the evidence produced by the prosecution it is fully proved that deceased were cleverly called by the accused persons and after they reached Agra they were kidnapped and abducted. There they were administered sleeping pills, and thereafter their hyoid bones were broken by strangulation and were buried under the earth. Thus the ingredients of Section 364A IPC is completed. They were thereafter buried alive and in an unconscious state of mind. The accused persons while committing such acts were always knowing that their acts were so imminently dangerous that they would in all probability, cause death. Thus the act of convicted accused persons is covered under Section 300 (4) IPC. By burying the deceased persons and by burning their clothes and shoes the accused persons had also committed the offence under section 201 IPC. Thus this court is of the considered view that charges against the all accused appellants have been proved beyond reasonable doubt and they were correctly convicted by the learned trial court.

(64) So far as the sentencing is concerned the lower court had opined that it is not a rarest of the rare cases and therefore awarded them minimum sentence. The State or the informant have not preferred any appeal against the order of sentencing. Under Sections 302 and 364A IPC the minimum sentence is life imprisonment and fine which has already been awarded by the trial court. The trial court has already awarded five years rigorous imprisonment and 5,000/- fine each under Section 201 IPC. Thus the sentence awarded by the trial court is neither excessive nor harsh.

(65) On the basis of above discussion, both the appeals fail and are liable to be dismissed accordingly.

(66) Accordingly, Jail Appeal No. 3367/2010 (Pawan Mishra Vs. State of U.P) and Criminal Appeal No. 3490 of 2010 (Dinesh Sahu & Kripal Sahu Vs. State of U.P.) are hereby dismissed. The order of conviction and sentencing passed by Special Judge (D.A.A.), Agra in ST No. 121 of 2005 (State Vs. Pawan Mishra and others) Crime No. 356/ 2005 under Section 364, 302/ 201 IPC, P.S. New Agra, District-Agra is hereby confirmed.

(67) Let a copy of this Judgement be sent to Jail Authorities and court concerned for compliance. Lower court's records along with a copy of this judgment be also sent back to the court concerned.

(2022) 10 ILRA 908
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Crl. Appeal No. 7788 of 2010

Ram Bhajan & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri P.N. Misra, Sri Apul Mishra, Ms. Mridul Tripathi, Sri P.N. Misra

Counsel for the Opp. Party:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 32- The dying declaration is generally accepted, but has to be accepted with caution. The declarant is not

available for cross examination. It is not the case of the prosecution that after receiving gunshot injury deceased was in a position to speak. Had it been so, the Medical Officer or the hospital staff would have said so or informed the police or the magistrate to record the statement of the deceased. Further, the prosecution has not produced any evidence to corroborate the testimony of dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case. The trial court committed an error in resting conviction of the accused on the dying declaration of the deceased alleged to have made to his father (PW-3).

Where the dying declaration is truthful and inspires confidence of the court then conviction can be secured solely upon the basis of dying declaration without further corroboration but where the dying declaration is suspicious then the court has to look for other evidence to corroborate the dying declaration and where the same fails to corroborate but contradicts the dying declaration then reliance cannot be placed on such dying declaration.

Indian Evidence Act, 1872- Section 27- The accused confessed of committing the crime with the other accused with the recovered weapon. The prosecution miserably failed to establish the link of the assault weapon with the crime- The word "distinctly' means "directly', "indubitably', "strictly', "unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery- The recovery of the alleged assault weapon has not been connected with the commission of the crime by the prosecution.

Disclosure made by the accused must be distinctly related to the discovery and recovery made in pursuance thereof and it is incumbent upon the prosecution to connect the recovery so made with the commission of the offence. (Para 21, 22, 28, 30)

Criminal Appeal allowed. (E-3)

Case Law/Judgements relied upon:-

1. Laxman Vs St. of Maha., 2002 (6) SCC 610

2. Arun Bhanudas Pawar Vs St. of Maha.,2008 (11) SCC 232

3. Heikrujam Chaoba Singh Vs St. of Manipur,1998 (8) SCC 458

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Ms. Mridul Tripathi, learned Amicus Curiae appearing for the appellant, Shri Om Prakash Mishra, learned Additional Government Advocate and perused the lower court record with the assistance of the learned counsel for the parties.

2. The instant appeal has been filed against the judgment and order dated 18 November 2010, passed by the Additional Sessions Judge/F.T.C. No. 7, Shahjahanpur, in Session Trial No. 526 of 2004, along with Session Trial No. 527 of 2004, arising out of Crime No. 283 of 2003 connected with Crime No. 287 of 2003, P.S. Kanth, District Shahjahanpur, whereby, convicting the appellant no.2 Ram Kishore under Section 302 IPC and further convicting the appellant no. 1 Ram Bhajan and appellant no. 3 Udai Veer under Section 302/34 IPC and sentencing them to imprisonment for life and fine of Rs. 5,000/- each, further convicting the appellant no. 1 Ram Bhajan

under Section 25/27 of Arms Act and sentencing him to 3 years rigorous imprisonment and fine of Rs. 1,000/-. In case of the default of payment, the appellant will have to undergo further 1 month simple imprisonment.

3. The prosecution case setup in the FIR is that on 5 November 2003, Mool Shankar, son of the complainant (P.W.-3) had gone to Kanntha town to get the quilt stuffed. The complainant had gone to the market, where he was informed by Jagdish and Pratap, residents of his village, that his son Mool Shankar (deceased) was caught by accused Rambhajan and Udayveer at about 2 PM on Kurriya Road and their brother Ramkishore shot his son in the stomach with a country-made pistol. The injured Mool Shankar was taken to the Shahjahanpur Hospital on a tempo by some persons. It is further stated that complainant reached the Government Hospital and found his son admitted. It is further alleged that injured Mool Shankar told the complainant that accused Ramkishore shot with a country-made pistol in his stomach while accused Udayveer and Rambhajan caught him. It was further alleged that 5-6 months earlier a case under Section 307 IPC was lodged by accused Rambhajan against the son of the complainant and Tej Ram. It is due to this enmity the accused have committed the crime. Mool Shankar (deceased) succumbed to the injury in the hospital during treatment on 8 November 2003.

4. A report came to be lodged and registered on the written complaint of the informant on 9 November 2003. The Investigating Officer (IO) recorded the statement of the witnesses, prepared the site plan on the pointing out of the complainant. Postmortem on the dead-body of the deceased was conducted on the same day at 3:30 PM. On the arrest of accused Rambhajan, the country-made pistol of 315 bore, empty cartridge and one live cartridge was recovered on the disclosure made by the accused on 15 November 2003. Recovery memo was prepared on the spot. On the basis of recovery memo, Case Crime No. 287 of 2003 was registered against accused Rambhajan under Section 25/27 of Arms Act.

5. The Investigating Officer prepared the site plan after investigating the spot. The blood stained clothes of the deceased, the bullet recovered from the body of the deceased and the country-made pistol, the empty cartridge and one live cartridge recovered on pointing of accused Rambhajan was sent to the Forensic Science Laboratory (for short "FSL') for chemical examination. The charge-sheet under Section 302 IPC came to be filed against all the accused persons, whereas, charge-sheet under Section 25/27 Arms Act was filed against accused Rambhajan.

6. Upon committal of both the cases Sessions court framed charges against the accused Ramkishore, Rambhajan and others under Section 302, read with, Section 34 IPC. The Sessions court framed charges against Rambhajan under Section 25/27 Arms Act. The accused denied the charges and claimed trial.

7. In support of the charge prosecution examined the following witnesses:

1. P.W.-1 Jagdish, eyewitness.

2 P.W.-2 Pratap Singh, eyewitness.

3. P.W.-3 Kaptan, complainant, father of the deceased.

4. P.W.-4 Inspector-in-Charge, Sri Babu Ram Sagar (I.O.), in the case of Section

302 IPC and complainant in the case of Section 25/27 Arms. Act.

5. P.W.-5 Dr. Prem Prakash, conducted post-mortem

6. P.W.-6 Sub-Inspector, Sri Hari Singh (I.O.), of case under Section 25/27 of the Arms Act.

7. P.W.-7 Constable Jitendra Kumar Singh, writer of the chick FIR and G.D. of the registered case

8. P.W.-8 Sub-Inspector, Sri Tej Bahadur prepared panchayatnama

9. P.W.-9 Constable Clerk Sri Mahesh Chandra, writer of the chick and G.D. of the registered case Section 25/27 of Arms Act.

8. The details of the documents which was proved on behalf of the prosecution are as follows:

1. Exhibit Ka-1, written report, which has been proved by P.W.-3 complainant Kaptan.

2. Exhibit Ka-2, site plan, regarding case of Section 302 of I.P.C.

3. Exhibit Ka-3, recovery memo of country-made pistol and cartridge.

4. Exhibit Ka-4, charge-sheet regarding case of Section 302 of I.P.C.

5. Exhibit Ka-5, letter sent to forensic science laboratory, Exhibit Ka-2 to Exhibit Ka-5 has been proved by Dr. Prem Prakash.

6. Exhibit Ka-6, post-mortem report, which has been proved by Dr. Prem Prakash.

7. Exhibit Ka-7, site plan regarding the case of Section 25/27 of Arms Act.

8. Exhibit Ka-8, sanction for prosecuting, regarding Section 25/27 of Arms Act.

9. Exhibit Ka-9, charge-sheet regarding Section 25/27 of Arms Act. Exhibit Ka-7 to Exhibit Ka-9 have been proved by P.W.-6 Sub-Inspector Hari Singh.

10. Exhibit Ka-10, chick F.I.R. regarding Section 302 of I.P.C.

11. Exhibit Ka-11, G.D. of the registered case regarding Section 302 of I.P.C. Exhibit Ka-10 and Exhibit Ka-11 has been proved by P.W.-7 Jitendra Kumar.

12. Exhibit Ka-12, panchayatnama which has been proved by P.W.-8 S.I. Tej Bahadur Singh.

13. Exhibit Ka-13, challan body.

14. Exhibit Ka-14, sealed samples.

15. Exhibit Ka-15, photo of the body.

16. Exhibit Ka-16, report of C.M.O. Exhibit Ka-12 to Exhibit Ka-16 has been proved by P.W.-8 Tej Bahadur Singh.

17. Exhibit Ka-17, chick F.I.R. regarding section 25/27 of Arms Act.

18. Exhibit Ka-18, G.D. of the registered case regarding Section 25/27 of Arms Act. Exhibit Ka-17 and Exhibit Ka-18 have been proved by P.W.-9 Constable Mahesh Chandra.

9. The accused persons on being confronted with the prosecution evidence, denied of having committed the crime. They further stated that they have been falsely implicated due to enmity. In defence the accused persons did not produce any evidence.

10. The trial court upon scrutiny of the oral and documentary evidence reached a finding that the prosecution has been able to prove the charges beyond reasonable doubt against the accused persons, accordingly, recorded conviction and sentence, hence, the present appeal.

11. Learned Amicus Curiae appearing for the appellants submits that the witnesses of fact P.W.-1 and P.W.-2 claim to be eye-witnesses of the incident, but

have not supported the prosecution case and stated that they had not seen the accused either catching hold the deceased or being shot by the accused Ramkishore. The witnesses were declared hostile. The conviction of the appellants rests on the testimony of P.W.-3 complainant/father of the deceased who admittedly is not an eye-witness and his testimony rests of the information given by the deceased during treatment that the accused-appellants had committed the crime.

12. Learned counsel submits that the testimony of P.W.-3 is not corroborated by any independent evidence, therefore, is merely a hearsay evidence. He further submits that recovery of the assault weapon from accused Rambhajan is planted and the weapon has not been connected with commission of the offence. It is urged that the finding reached by the trial court is per se perverse and the conviction is not based on credible evidence, but merely on the uncorroborated confessional statement of the accused.

13. As per prosecution case, complainant (P.W.-3) is not the eye-witness of the incident. At the market he received information from Jagdish (P.W.-1) and Pratap Singh (P.W.-2) that his son has been shot by accused Ramkishore while the other accused held him. It is further stated by P.W.-3 that during treatment deceased informed him that the accused persons had committed the crime. The eye-witness i.e. P.W.-1 and P.W.-2 have not supported the prosecution case and were declared hostile. P.W.-3 in examination-in-chief reiterates the prosecution version and further states that injured was taken to the hospital by some police personnel. He further states that he first directly went to the thana where his son was not found and was informed that his son is admitted in the hospital. From thana complainant went to the hospital where his son informed him that accused had committed the offence.

14. He further stated that a civil case is pending against accused persons, therefore, are inimical, and 4-5 months earlier a report was lodged against his son by accused Udayveer. He further stated that his son succumbed to the injury in the hospital after three days (08.11.2003). Complainant got the report transcribed by Chhavi Nath and was submitted to the thana on the following day i.e. 9 November 2003, the report came to be registered at 12:45 PM. In cross-examination, he admitted that he first visited the thana and then the spot of the incident where Ramavtar a shop owner told him about the incident of firing on his son. He reached the hospital at about 4-5 PM and found his son admitted. He further stated that his son had informed him about the incident being committed by the accused. He further admitted that he alone was attending his son in the hospital. P.W.-3 further admitted that he is one of the witnesses to the Panchayatnama and further stated that he had informed the police officer preparing the Panchayatnama about the accused persons who had committed the crime.

15. He further stated that he had got arrested the accused Rambhajan from a sugarcane field.

16. P.W.-4 Babu Ram Sagar the Investigating Officer stated that the FIR came to be registered on the written complaint of the complainant on 9 November 2003, the statement of the complainant was taken on the same day and that of Jagdish (P.W.-1). The site of the incident was inspected in the presence of

the complainant and the witnesses; the site map (exhibit-Ka-2) was prepared. Accused Rambhajan came to be arrested on 14 November 2003 (7:30 AM) on the information of Mukhbir. The assault weapon, country-made pistol of 315 bore, an empty cartridge and live cartridge was recovered on the disclosure and at the pointing out of the accused. The accused confessed of committing the crime with the recovered weapon.

17. P.W.-5 Dr. Prem Prakash Srivastava conducted autopsy on the body of the deceased on 9 November 2003 at 3:30 PM. The following injuries were found on the body of the deceased:

"1. Gunshot wound of entry was 0.9 cm x 0.8 cm (illegible) abdominal cavity deep. The said wound was present on the left side of the chest and was 10 cm below the left nipple. It was from inside to outside. There was blackening and tattooing around the wound. The left lung was lacerated. The diaphragm was lacerated. The horizontal collar was lacerated. The stomach was also lacerated. The right side of the liver was lacerated.

Rigor mortis was present on the upper part and lower part of the body i.e. on the whole body. In the internal examination of the deceased, he found that the brain, spleen and both kidneys were dry. There was no blood. The left pleura was lacerated. Semi-digested food was present in the small intestine. The urine bag and heart were empty. Feces were present at many place in the large intestine. The right side of the liver was lacerated and dry. A metallic bullet was found on the right side of the cavity. About 2 liters of blood mixed with feces were present in the abdominal cavity. In his opinion, the death of the deceased Mool Shankar was due to the bleeding caused by the bullet and the shock caused by it. The injuries of the deceased was possible to come on the date of 5.11.2003 at 2:00 pm. Injuries were possible to come from firearms such as country-made pistols.

The deceased died on 8.11.2003 at around 6:10 pm in the district hospital."

18. The trial court on the evidence of P.W.-3-complainant and the confessional statement recorded by the accused-Ram Bhajan and recovery of the assault weapon on his pointing out recorded conviction. The relevant portion of the trial court order is extracted:

"The son of the complainant i.e., the deceased Mool Shankar had told the complainant about the incident. The complainant says that there was no one there at that time. There is no reason not to believe his statement. When the complainant's son narrated the incident to the complainant, no one else was present there.

The complainant also states that deceased Mool Shankar did not have any other attendant other than the complainant. The complainant has got his report written from Chhavinath Singh. It is true that Chhavinath Singh is not an eyewitness to the incident. The non-appearance of Chhavinath Singh in evidence does not adversely affect the prosecution story.

Before lodging the report in police station, Kanth, Sub-Inspector P.W.-8 Tej Bahadur Singh of police station Kotwali, District Shahjahanpur has filled the panchayatnama of deceased Mool Shankar in District Hosapital, Shahjahanpur, and the dead body was sealed there. At that time complainant himself was present there. If the complainant has stated the names of the accused to the witness filling the

Panchayatnama i.e. P.W.-8 Tej Bahadur Singh and he has not written the names of the accused on the Panchayatnama, then it does not adversely affect the prosecution story because the case was not investigated by Sub-Inspector Tej Bahadur nor this witness recorded the statement under Section 161 Code of Criminal Procedure.

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Recovery memo was made by the police on the spot and the pistol and cartridges was sealed. It is recorded in the recovery memo Exhibit Ka-3 that on 15.11.2003, S.H.O. Babu Ram Sagar, along with other police personnel, arrested accused, Rambhajan S/o Ramdulare, resident of Bhudhia police station, Shahjahanpur, at present in lock-up, after handcuffing, in the hope of recovery of murder weapon [country made pistol] regarding the main crime number 283/03 under Section 302 Indian Penal Code, Police Station Kanth, in a government jeep, No. UP 27 B/ 6000, left from police station with constable driver Shrikrishna, and handing over report number 6, at 6:45 A.M., before the saw machine of Munshilal Lohar R/o Rawatpur, on Kurriya road, accused asked to stop the vehicle and the accused got out of the jeep, the persons commuting were asked to testify stating the purpose of arrest, but everyone went away without revealing their names and addresses. That after searching each other's clothes and on being assured that no one has any firearm, cartridge, then the accused Rambhajan went ahead and recovered a country made pistol 315 bore, wherein, a empty cartridge was stuck in the barrel and a live cartridge 315 bore, from the bunch of patail and the accused stated that this is the same country made pistol that I had given to my brother Ramkishore on the day of the incident, all three of us shot Mool Shankar in front of the agency of Ram Avatar at 2:00 P.M. All three of us had run away after shooting. The police station was nearby from the spot, so out of fear, the pistol with empty cartridge and the cartridge was hidden in this patail. Mool Shankar shot my brother. All three of us have avenged his killing. This pistol belongs to him. Therefore, the crime of accused Rambhajan reaches the extent of Section 25/27 Arms Act. The police took possession of the country made pistol, cartridges at 7:30 A.M., on the spot, the signatures of fellow officials were made after reading aloud the recovery memo written by HCP Shri Krishna Yadav. The country made pistol and cartridge was sealed. Samples were sealed.

The evidence collected by the investigator under Section 27, Evidence Act, is credible.

To prove a criminal incident, it is not necessary that the eyewitnesses should be available on the spot, because the accused wants to execute any criminal incident in such a way that no one can see or recognize them at the time of causing the incident and are able to escape safely after causing the incident. As happened in this case. Those who are said to be eye-witness of the incident have not supported the incident. In this case, the deceased Mool Shankar did not die on the spot and he told his father in the hospital about the incident caused by the accused.

Thus, in the opinion of the Court, the prosecution has proved its case beyond doubt."

(English Translation by the Court)

19. In the given facts, prosecution case rests upon motive; the testimony of PW-3, father of the deceased, and

confession of the accused made in the disclosure statement before the police that the accused committed the offence with the recovered assault weapon.

20. The question that arises is as to whether the dying declaration made by the deceased to his father during treatment in secrecy is reliable and credit worthy. PW-3 is not the eye witness. PW-1 and PW-2 setup as eyewitnesses in the FIR did not support the prosecution case. They flatly denied their presence on the spot and at the time of the incident. As per PW-3 he was informed by PW-1 and PW-2, while he was in the market that his son was shot by Ramkishore while other accused were catching hold the deceased. In cross examination PW-3 admits that first he went to the thana, where he was informed that his son has been hospitalised. He, thereafter, went to the hospital. PW-3 reached the hospital between 4 to 5 PM, whereas, the incident is of 2 PM. He further, deposed that his son succumbed to the injuries after three days of the incident on 8 Nov 2013. He (PW-3) further stated that he was the lone person attending to his son in the hospital; the deceased during treatment informed him that the accused had committed the offence. Ramkishore shot him while others held him. PW-3 further clarifies in cross examination that he was alone, Medical Officer or staff of the hospital was not present at the moment deceased informed him the names of the accused persons.

21. The dying declaration is generally accepted, but has to be accepted with caution. The declarant is not available for cross examination. It is not the case of the prosecution that after receiving gunshot injury deceased was in a position to speak. Had it been so, the Medical Officer or the hospital staff would have said so or informed the police or the magistrate to record the statement of the deceased. Further, the prosecution has not produced any evidence to corroborate the testimony of dying declaration. The eye witnesses setup in the FIR (PW-1 and PW-2) have not supported the prosecution case. PW-3 being an interested witness and his statement is without corroboration from independent witness, is not sufficient to prove the prosecution case.

22. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case.

23. In the case of **Laxman Vs. State of Maharashtra**1, at para 3, it was observed as follows :-

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. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness.

24. In ***Arun Bhanudas Pawar Versus State of Maharashtra***2, Supreme Court declined to accept the testimony of the mother of the deceased that deceased upon regaining consciousness disclosed the name of the accused to her. The mother of the deceased categorically deposed that when she went to civil hospital she found her son in unconsciousness condition, however, later on, deceased regaining consciousness informed her the names of accused who assaulted him with knife. She further stated that doctor was present when the deceased made oral dying declaration to her. The Court declined to accept her testimony being an interested witness and her testimony was not without corroboration from independent witness, including, medical officer. The court observed as follows:

"21....It is well-settled law that the oral dying declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the present case, admittedly, the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother...The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother."

26. Similarly **Heikrujam Chaoba Singh vs. State of Manipur**3, Supreme Court declined to accept the testimony of the brother of the injured made to him in the ambulance by the injured/deceased. The relevant portion of the report is extracted:

We are, therefore, called upon to examine the evidence of PW 2 and 5 to find out whether the Courts below were justified in relying upon their testimony and in believing the statements alleged to have been made by the deceased while being carried to the hospital in ambulance and thereafter while he was an indoor patient in the hospital itself. So far as the statement in the ambulance is concerned, it was made to PW 2 who is the brother of the deceased. He stated in his evidence that on inquiry about the injuries sustained by his brother, Hera Singh the injured told him that he had been given blows by Heikrujam Chaoba Singh with a dao, Yumlembam Paka Singh with a hockey stick and another person with a lathi. In his cross-examination, he candidly admitted that there were three or four persons inside the ambulance when his brother told him the names of his assailants but none of those disinterested persons have been examined by the prosecution to corroborate said PW 2. He also admitted in his cross-examination that those persons who were in the ambulance were present near him when his brother stated the words and yet the prosecution has not offered any explanation as to why none of those persons were examined who could have been disinterested persons deposing about the dying declaration said to have been made by the deceased inside the ambulance while he was being carried to the hospital. ..... In the aforesaid premise, we do not think it safe to hold the evidence of PW 2 to be reliable and, therefore, the oral dying declaration as deposed to him by him cannot be pressed into service for bringing home the charges leveled against the accused/appellant.

27. Further, no suggestion was given to the doctor (PW-5), as to whether the deceased was conscious or able to communicate verbally or by gestures. The postmortem report notes blackening and

tattooing, meaning thereby, that the deceased was shot from a close range. The wound is abdominal cavity deep. Left lung lacerated; diaphram lacerated; stomach lacerated, right side of the liver lacerated. In internal examination PW-5 noted that brain, spleen and kidneys were dry. There was no blood. About two litre blood was present in the abdominal cavity. The condition of the deceased was not such to suggest he was conscious, his vital organs were dry and blood had drained and collected in the abdomen. The prosecution had not produced the Bed-Head ticket of the deceased. The Investigating Officer PW-4 had stated that he had not recorded the statement of the treating doctor or medical staff. In the circumstances, the trial court committed an error in resting conviction of the accused on the dying declaration of the deceased alleged to have made to his father (PW-3). The finding reached by the trial court is perse perverse.

28. Further, the conviction of the accused rests upon the disclosure/confession made to the police. The trial court found the evidence collected by the Investing Officer under Section 27 of the Evidence Act credible. Investigating Officer PW-4, arrested accused Rambhajan after five days of lodging of the FIR (14.11.2013); on his pointing out a 315 bore country made pistol, one empty cartridge and live cartridge was recovered. The accused confessed of committing the crime with the other accused with the recovered weapon. The prosecution miserably failed to establish the link of the assault weapon with the crime. The recovery of the assault weapon is one circumstance in the chain of circumstances. The statement of the accused during arrest that he shot the deceased cannot be read in evidence.

29. Section 27 of Evidence Act reads thus:-

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

30. The expression "provided' that together with the phrase "whether it amounts to a confession or not' show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly' means "directly', "indubitably', "strictly', "unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which

is the direct and immediate cause of the discovery.

31. The testimony of P.W.-3 having been found to be unreliable, doubtful and fails to inspire confidence of the Court, in the circumstances the prosecution case stands demolished. The independent witnesses P.W.-1 and P.W.-2 claiming to have witnessed the incident have turned hostile. They decline their presence on the spot. Ram Avtar, before whose shop the incident is alleged to have occurred was not examined. Chabinath, scribe of the complaint, visited P.W.-3 at the hospital and was informed of the incident by P.W.-3 was not examined by the prosecution to support the version of P.W.-3 that the injured was in a state of consciousness and was in a position to speak. The police personnel that carried the injured and admitted him to the hospital was not examined. It is not the case of the prosecution that initially FIR was lodged under Section 307 IPC. The medical officer/staff of the hospital was not examined, nor, their statement taken of the I.O.

32. Having regard to the postmortem report and the testimony of the doctor P.W.-5 it appears in all probability the injured was not in a position to speak. The FSL report was not produced by the I.O. In this backdrop, the trial court committed gross error in resting the conviction on the disclosure statement of the accused, that they committed the crime with the recovered weapon which is not admissible in evidence. The recovery of the alleged assault weapon has not been connected with the commission of the crime by the prosecution.

33. Having regard to the facts and circumstances of the case we are unable to persuade ourselves to uphold the impugned judgment and order of conviction and sentence, therefore, appeal is liable to be allowed and the impugned judgment and order of conviction and sentence is liable to be set aside.

34. The criminal appeal is, accordingly, allowed. The impugned judgment and order of conviction and sentence is set aside. The appellants are directed to be released forthwith, if not required in any other offence.

34. The appellants on being released the mandate of Section 437-A Cr.P.C. to be complied.

35. Let the lower court record be sent back to court below along with a copy of this judgment, for ascertaining necessary compliance.

36. It is provided that fees assessed at Rs. 20,000/- shall be released in favour of Amicus Curiae.

(2022) 10 ILRA 918
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 6058 of 2018
with Criminal Misc. Appl. (Leave to Appeal)(D) No. 108 of 2018

Mahendra Kumar ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Raj Karan Patel, Sri Ram Milan Mishra

Counsel for the Respondents:
G.A., Sri Vikas Tripathi

Criminal Law- Indian Penal Code, 1860- Section 498 A- Section 304B- Dowry Prohibition Act- Section 4- Indian Evidence Act, 1872- Section 3- So far Section 498A IPC is concerned, the accused was sentenced to two years rigorous imprisonment and fine of Rs. 5,000/-, under Section 304B IPC, he was sentenced to ten years rigorous imprisonment and under Section 4 of D.P. Act, he was sentenced to one year imprisonment and fine of Rs. 1,000/- All these sentences were to run concurrently. Accused is under trial convict having incarceration of 5 years and more, therefore, it can be safely said that he has undergone the punishment under section 498A IPC read with section 4 of the Dowry Prohibition Act- Evidence of P.W. 1 and P.W. 2 corroborates each other- It cannot be said that the evidence of the witnesses should not believed because they are family members of the deceased. There is no need for any independent witness to be examined. There is no delay in lodging the FIR- The death in fact was in an unnatural condition- Sentence of 10 years is reduced to 7 years fine and default sentence maintained.

Where the testimony of the prosecution witnesses corroborates each other and appears to be truthful then there is no need for examination of any independent witnesses, however as the accused has already served out the sentence u/s 498A and u/s 4 of the D.P Act and half of the sentence awarded u/s 304B of the IPC, hence sentence reduced to 7 years. (Para 11, 16, 19)

Criminal Appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

Trimukh Maruti Kirken Vs St. of Mah. 2006 (3) 1426 SC

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal- While exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court- The appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper- The appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court.

The appellate court should not disturb the finding of acquittal recorded by the trial court as the presumption of innocence in favour of the accused stands fortified by his acquittal and the appellate court can also not substitute its findings unless the judgement of the trial court is wholly perverse or illegal. (Para 10,15,19)

Criminal Appeal rejected. (E-3)

Case Law/Judgements relied upon:-

1. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr., (2006) 6 S.C.C.

2. Chandrappa Vs St. of Kar., (2007) 4 SCC 415

3. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 S.C.C. 75

4. St. of U.P Vs Ram Veer Singh & ors., 2007 AIR SCW 5553

5. Girja Prasad (dead) by l.r.s Vs St. of M.P, 2007 AIR SCW 5589

6. Luna Ram Vs Bhupat Singh & ors.,(2009) SCC 749

7. Mookkiah & anr. Vs St. rep. by the Insptr. of Police, T.N, AIR 2013 SC 321

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J. & Hon'ble Nalin Kumar Srivastava, J.)

1. Heard Sri Ram Milan Mishra, learned counsel for the appellant, Sri Vikas Goswami, learned AGA for the State and Sri Vikas Tripathi, learned counsel for respondent informant and perused the record. There is a connected defective criminal appeal which is of the year 2018, preferred by the original informant. This appeal is also heard along with the present appeal.

3. Appeal No. 6058 of 2018 has been preferred by the appellant Mahendra Kumar against the judgment and order dated 25.09.2018 passed by Additional Session Judge/FTC (Crime against Women) Jaunpur, in S.T. No. 306 OF 2015, arising out of Case Crime No. 262 of 2015, under Sections 498A, 304B IPC and ¾ D.P. Act (State vs. Mahendra Kumar and another), P.S. Sujanganj, District Jaunpur, whereby the appellant is convicted and sentenced for the commission of offence under Section 498A IPC, for 2 years R.I. and fine of Rs. 5,000/- and in default of payment of fine for two months additional imprisonment to the accussed appellant and further sentincing under Section 304B IPC for 10 years R.I., under section 4 D.P. Act for one year imprisonment and fine of Rs. 1,000/- and in default of payment of fine one month additional imprisonment and all the sentences shall run concurrently. .

4. The brief facts as revealed from the record and proceedings are that the incident occurred on 16th May, 2015 namely within one year of the marriage, as the marriage took place on 08.06.2014 between appellant Mahendra Kumar and the deceased. The father of the deceaed lodged the FIR alleging therein that his daughter was being harassed for not bringing proper dowry. It was alleged that her in-laws demanded a sum of Rs. 1,00,000/- (Rs. One lakh) and a gold chain. Immediately before the death for harassing her she has also been physically tortured. After having knowledge of this atrocity of the in-laws, the complainant along with his family members went to house of the in-laws of his daughter and showed their inability to pay a sum of Rs. 1,00,000/- and a gold chain, but they were threatened with dire consequences. On 16.05.2015 in the night, the accused persons/in-laws of his daughter along with her husband committed murder of the deceased and hanged her. The informant or his family members were not communicated about anything regarding the death of the deceased. The informant got the information about the incident from village people. The first information report was lodged by the complainant / father of the deceased on 27.05.2015. The investigation was conducted by investigating officer and after recording statement of the witnesses under section 161 Cr.P.C. and preparing the punchanama, and after the post mortem of the deceased, conducted by Dr. Ashutosh Pandey who opined that the cause of death was Asphyxia as a result of ante-mortem hanging, the Investigating Officer submitted the charge sheet against the accused Mahendra Kumar and Champa Devi.

5. The learned magistrate before whom charge sheet was laid, as the offences were triable by court of sessions, committed the case to the court of sessions, The Additional Sessions Judge framed the charges on 04.07.2016 and accused persons denied the charges and claimed to be tried.

6. The prosecution examined following witnesses:-

1.	Ram Awadh Patel	P.W.1
2.	Ramdeen Patel	P.W.2
3.	Dr. Ashutosh Pandey	P.W. 3
4.	Arvind Kumar Mishra	P.W. 4
5.	Deep Narayan Singh	P.W. 5
6.	Surya Nath Singh	P.W. 6

7. Apart from aforesaid witnesses prosecution submitted following documentary evidence which were exhibited as they were proved by leading oral evidence:-

1.	Tehrir	Ex. Ka. 1
2.	Panchayatnama	Ex. Ka. 2
3.	Postmortem Report	Ex. Ka. 3
4.	Photonas	Ex. Ka. 4
5.	Police papers	Ex. Ka. 5
6.	Namunamohar	Ex Ka. 6
7.	Letter to Pratisar Nirikshak	Ex. Ka 7
8.	Letter CMO	Ex, Ka 8
9.	Nakshanajari	Ex. Ka 9
10.	Charge-sheet	Ex. Ka 10
11.	FIR	Ex. Ka 11
12.	Carbon copy of GD	Ex. Ka 12

8. After completion of prosecution evidence, the statement of accused persons were recorded under Section 313 of Criminal Procedure Code,1973 (Cr.P.C.), in which they denied their involvement in the crime and contended that false evidence was led against them. The accused persons have not examined any witness in defence.

9. The accused Mahendra Kumar has been convicted by the trial court whereas acquittal order for accused Champa Devi has been passed.

10. The learned court below returned the finding of guilt and sentenced Mahendra Kumar to undergo rigorous imprisonment for 10 years of commission of offence under Section 304 (B) and 498A IPC and Section 4 of Dowry Prohibition Act.

11. So far Section 498A IPC is concerned, the accused was sentenced to two years rigorous imprisonment and fine of Rs. 5,000/-, under Section 304B IPC, he was sentenced to ten years rigorous imprisonment and under Section 4 of D.P. Act, he was sentenced to one year imprisonment and fine of Rs. 1,000/-. All these sentences were to run concurrently. Accused is under trial convict having incarceration of 5 years and more, therefore, it can be safely said that he has undergone the punishment under section 498A IPC read with section 4 of the Dowry Prohibition Act. The matter is now being argued for acquital/ sentencing under Section 304B IPC, learned counsel Sri Mishra has taken us through the oral testimony of all the witnesses who have been examined by the prosecution.

12. As against this, Sri Goswami has submitted that it is a homicidal death and the learned Trial Judge has rightly come to the conclusion from the evidence on record that it was a homicidal death. It is further submitted that death occurred in the matrimonial home of the deceased.

14. Learned counsel for the respondent State has heavily relied on the judgment of Apex Court in the case of **Trimukh Maruti Kirken vs.State of Maharastra 2006 (3) 1426 SC:-**

"If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Hon'ble Supreme Court further observed that 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."

15. While going through the testimony of the witnesses namely Ram Awadh Patel and Ram Deen Patel, the fact which comes before the Court is that the deceased was married to Mahendra on 8.6.2014. P.W.1 and P.W. 2 in their Examination-in-Chief categorically mentioned that the deceased was being beaten and the applicant was always demanding that the amount should be given by way of additional dowry, namely, Rs. one lakh and a gold chain. The informant had requested the accused and his mother and all relatives that he was not capable to fulfill their demand. Further, no information regarding the death of the deceased was given to informant. The informant P.W. 1 has also clearly mentioned that he came to know about the death of the deceased only when the people in the village started talking about her death. PW-2 has also deposed the similar facts and also stated that Mahendra, who was serving in Bombay had left for Bombay where he was serving. This witness does not know whether Mahendra was at his place (namely home) when the incident occurred or not. It was further submitted that at the third time when the deceased went to the matrimonial home the demand of dowry was also made.

16. While going through the judgment of the trial court which has convicted the accused, a finding of fact is recorded that evidence of P.W. 1 and P.W. 2 corroborates each other. After second time deceased came to her parental home and during third time when she visited her parental home, she complained about demand of dowry. The witnesses and her father went to her in-laws home and requested that he has no capacity to pay the said amount. Despite that, demand continued. The learned court below had also relied on the judgment which has been referred above namely **Trimukh Maruti Kirken (supra)** and, therefore, also it cannot be said that the

evidence of the witnesses should not believed because they are family members of the deceased. There is no need for any independent witness to be examined. There is no delay in lodging the FIR and in view of the judgment relied upon in the case of **Trimukh Maruti Kirken (supra)**, the finding of learned trial judge cannot be found fault with. The death in fact was in an unnatural condition. However, considering the facts that the appellant has also raised certain facts which required consideration namely he was serving in Bombay, that Mahendra Kumar and others were demanding Rs. 1,00,000/- and gold chain and they physically harassed the deceased but these facts did not find corroboration from the FIR. Be that as it may be, the death has occurred in the house of the accused. The Medical evidence which has been produced is as under:-

Skin under line ligature mark is ecchymosed and on cut section skin and musclesure are ecchymosed petechial hemorrhage are present on the face upper chest left hands, venus congestion on upperchest and hands,mouth. Partially opened and drivling of saliva present from right side of mouth finger nails are pale.

17. The oral testimony of P.W.3 Dr. Ashutosh Pandey, who had performed the post mortem of the dead body, it is clear that deceased died from asphyxia due to ante mortem injuries.

18. In the result, this appeal is partly allowed fine and default sentence maintained.

19. Sentence of 10 years is reduced to 7 years fine and default sentence maintained.

20. This court is thankful to both the counsels for assisting this Court.

Order Date :- 30.8.2022

Judgment in Crl. Misc. Application Defecetive U/S 372 Cr.P.C. (Leave to Appeal) No. 108 of 2018, Ram Awadh Patel vs. State of U.P. and another.

1. Heard Sri Vikas Tripathi, learned counsel for the appellant, Sri Vikas Goswami, learned AGA for the State and Sri Vikas Tripathi, learned counsel for respondent informant and perused the record. There is a connected defective criminal appeal which is of the year 2018, preferred by the original informant.

2. This appeal is also heard along with the present appeal.

3. This appeal has been preferred by the appellant Ram Awadh patel against the judgment and order dated 25.09.2018 passed by Additional Session Judge/FTC (Crime against Women) Jaunpur, in S.T. No. 306 OF 2015, arising out of Case Crime No. 262 of 2015, under Sections 498A, 304B IPC and ¾ D.P. Act (State vs. Mahendra Kumar and another), P.S. Sujanganj, District Jaunpur, whereby the appellant is convicted and sentenced for the commission of offence under Section 498A IPC, for 2 years R.I. and fine of Rs. 5,000/- and in default of payment of fine for two months additional imprisonment to the accussed appellant and further sentencing under Section 304B IPC for 10 years R.I., under section 4 D.P. Act for one year imprisonment and fine of Rs. 1,000/- and in default of payment of fine one month additional imprisonment and all the sentences shall run concurrently. .

4. The brief facts as revealed from the record of proceedings are that the incident occurred on 16th May, 2015 within one year of the marriage, as the marriage took place on 08.06.2014 between appellant Mahendra Kumar and the deceased. The father of the deceaed lodged the FIR alleging therein that his daughter was being harassed for not bringing proper dowry. It was alleged that her in-laws demanded a sum of Rs. 1,00,000/- (Rs. One lakh) and a gold chain. Immediately before the death for harassing her she has also been physically tortured. After having knowledge of this atrocity of the in-laws, the complainant along with his family members went to house of the in-laws of his daughter and showed their inability to pay a sum of Rs. 1,00,000/- and a gold chain, but they were threatened with dire consequences. On 16.05.2015 in the night, the accused persons/in-laws of his daughter along with her husband committed murder of the deceased and hanged her. The informant or his family members were not communicated about anything regarding the death of the deceased. The informant got the information about the incident from village people. The first information report was lodged by the complainant / father of the deceased on 27.05.2015. The investigation was conducted by investigating officer and after recording statement of the witnesses under section 161 Cr.P.C. and preparing the punchanama, the post mortem of the deceased was conducted by Dr. Ashutosh Pandey who opined that the cause of death was Asphyxia as a result of ante-mortem hanging. The Investigating Officer submitted the charge sheet against the accused Mahendra Kumar and Champa Devi.

5. The appellant Ram Awadh patel has challenged the judgment of acquittal. The case is that the deceased was married with son of respondent no. 2 Smt. Champa Devi. General allegation against family members have been levelled.

6. Nothing is brought on record to show that the judgment of learned court below has wrongly acquitted the accused.

7. Before we embark on testimony and appreciate the reasonings in the judgment of the Court below, the contours for interfering in Criminal Appeals where accused have been held to be not guilty would require to be discussed.

8. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of "**M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

9. Further, in the case of "**CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

10. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

11. In the case titled "**STATE OF GOA Vs. SANJAY THAKRAN & ANR.", reported in (2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in appeals against acquittal. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A

duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

12. Similar principle has been laid down by the Apex Court in cases titled "**STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in "**GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589**. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

13. In the case of "**LUNA RAM VS. BHUPAT SINGH AND ORS.", reported in (2009) SCC 749,** the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

14. In a recent decision of the Apex Court in the case titled "**MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU"**, reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

15. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "**STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

16. The Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

17. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

18. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219**, has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed

against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

19. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

20. We have relied upon the judgment of apex Court in the Case of **Jwala Prasad vs. State of Chhattisgarh, (2019) II SCC 702 and Mahesh Kumar vs. State of Haryana, (2019) 8 SCC 128**, in which it is held that there is no hesitation in holding that all the ingredients necessary to draw the presumption of commission of the offence under Section 304B IPC, do not exist.

21. We have perused the depositions of prosecution witnesses, documentary

evidence supporting ocular versions, arguments advanced by learned counsel for the parties. We have been taken through the record. We are unable to accept the submissions of the State counsel for the following reasons and the judgments of the Apex Court which lay down the criteria for consideration of appeals against acquittal. The chain has been found to be incomplete. While going through the judgment it is very clear that the court below has given a categorical finding that the evidence is so scanty that the accused cannot punished or convicted for the offences for which they are charged. The factual scenario in the present case will not permit us to take a different view than that taken by the court below. In that view of the matter we are unable to satisfy ourselves. Thus we concur with the findings of the court below.

22. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours laid down by the judgment of the Apex Court, we have no other option but to concur with the reasoning of acquittal recorded by the learned Sessions Judge for the aforesaid reasons.

23. The Government Appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below.

(2022) 10 ILRA 929
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

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

Capital Case No. 2 of 2021
connected with Crl. Appeal No. 704 of 2021 and
Jail Appeal No. 592 of 2021

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

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

Criminal Law- Indian Evidence Act, 1872- Section 3- Non-examination of independent witnesses-It is well known fact that when such a heinous occurrence takes place where two appellants caused death of three persons at 05.00 p.m., people were shutting their shops and hiding themselves behind their doors and crowd was terrorized, then there is least chance that the independent witness will dare to depose about the incident in the court. The evidence of witnesses cannot be discarded only because they are in any way related to the deceased if they are reliable and inspire confidence of truthfulness. Moreover, the witness no. 2, is an injured witness in the case, who tried to save her sons from assault of the accused and in turn, she sustained injuries. Thus, there is no reason to discard the evidence of prosecution witnesses just because they are related witnesses to the extent that they have inspired confidence.

Where the offence has been committed in a gruesome and heinous manner then there is no likelihood of any independent witnesses coming forward to depose out of fear and the testimony of related/ injured witnesses cannot be discarded merely because of their relation with the deceased so long as their testimony is truthful, credible and inspires the confidence of the court.

Indian Evidence Act, 1872 - Section 3 - It is clear that the Investigating Officer did not depose in court to support prosecution

case. However, learned counsel for the convict-appellants could not explain as to what damage was caused to the credibility and reliability in prosecution case, if Investigating Officer has not deposed in the court. The case is based on ocular evidence. The injured witness appeared in witness box and proved the case, therefore, merely absence of the Investigating Officer does not affect adversely of the complete prosecution case.

The case of the prosecution will not be adversely affected merely because the investigating officer did not testify during the trial as the case is based on ocular evidence and the defence has failed to show as to what prejudice was caused to it by the non examination of the investigating officer.

Indian Penal Code, 1860- Section 34- Common Intention- It is not necessary for constituting common intention that there must be meeting of minds or preponderance for commission of the crime days before. It is sufficient, if at the spur of moment, the meeting of minds arrived at besides, Mohd. Umar actively participated in the commission of crime. Therefore, it cannot be said that the ingredients for invoking section 34 I.P.C. are missing.

Common intention can be formed even at the spur of the moment and can be inferred from the act done by the accused during the course of commission of the offence.

Code of Criminal Procedure, 1973- Section 313- It is a settled principle of law that the statement of an accused under section 313 Cr.P.C. can be used as evidence against the accused, in so far as it supports the case of the prosecution. Equally true is that the statement under section 313 Cr.P.C. simplicitor normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 Cr.P.C. is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced- The reliance on the statements of the convict-appellants under section 313 Cr.P.C. by trial court is in consonance with the provisions of law.

Where the statement of the accused, under Section 313 of the Cr.P.C , supports the case of the prosecution then not only can the said statement be used against the accused, but also the same reduces the burden of proof upon the prosecution.

Quantum of Punishment- Proportionate punishment-Capital punishment- Aggravating and Mitigating Factors- Capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputed statement of law follows that it is neither possible nor prudent to state any universal formula which apply to all the cases of criminology where capital punishment has been prescribed. Thus, the Court must examine each case on its own facts, in the light of enunciated principles and before option for 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.There is no evidence to the effect that the convict-appellant, Laeek committed crime with pre-planning or preponderance. The occurrence happened suddenly when the hot exchanges arose due to urination in the lane of the complainant while Aamina was preparing for Wazu. The convict-appellant had no motive or intention to kill anybody at the time of occurrence. However, once he started stabbing, he continued to stab till the death of three persons caused at the spot and one person while he was being carried to the hospital and one person was badly injured. He himself admitted during his statement under section 313 Cr.P.C. that he lost control over himself- The circumstances of the crime and criminal do not go to show that instant matter falls into the category of rarest of

rare case or that the sentence of life imprisonment awarded to the convict-appellant-Laeek is unquestionably fore-closed-life imprisonment is a rule and the death penalty is an exception only when the life imprisonment would be inadequate in proportion to the crime committed and the death penalty is imposed only when alternative life imprisonment is totally inadequate. The instant case does not fall in the category of rarest of rare cases, where life imprisonment would suffice to the ends of justice.

Settled law that life imprisonment is the rule and death penalty is the exception hence, every case has to be considered on its own facts and circumstances for determining the quantum of punishment and even where the offence committed is heinous and has shocked the collective conscience of the society but the circumstances of the accused are also relevant for awarding the punishment. Accordingly, death sentence commuted to imprisonment for life.

Criminal Appeal partly allowed. (E-3)

Judgements/Case law relied upon:-

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

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

3. Darya Singh & ors. Vs St. of Pun., [(1964) 3 SCR 397 : AIR 1965 SC 328 : (1965) 1 Cri LJ 350]

4. Namdeo Vs St. of Mah., [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773]

5. St. of U.P. Vs Anil Singh reported at (1998) supp SCC 686:

6. (1983) 3 SCC,217, Bharwada Bhoginbhai Hirjibhai Vs St. of Guj.

7. Bachan Singh Vs St. of Pun. reported in AIR 1980 SC 898

8. Ramnaresh & ors. Vs St. of Chhattisgarh reported in (2012) 4 SCC 257

9. Dharam Deo Yadav Vs St. of U.P. reported in (2014) 5 SCC 509

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

1. Capital Sentence No. 02 of 2021, arises out of the reference made by the learned trial court under section 366(1) of Code of Criminal Procedure, 1973 to this court for confirmation of death sentence of convict-appellant, Laeek.

2. Jail Appeal No. 592 of 2021 under section 383 Cr.P.C. has been preferred by the convict-appellant Laeek against the judgment and order dated 09-03-2021 passed-by Smt. Poonam Singh, learned Additional Sessions Judge/F.T.C.-II, Sultanpur in Sessions Trial No. 40 of 2016, arising out of Case Crime No. 348 of 2015, under sections 302/34, 307/34,504,506(2) I.P.C., Police Station-Chanda, district-Sultanpur by which the convict-appellant Laeek has been awarded death penalty under section 302 readwith section 34 I.P.C. He was convicted and sentenced under section 307/34 I.P.C. for 7 years rigorous imprisonment with a fine of Rs. 10,000/- In default of payment of fine, the convict-appellant was further directed to undergo additional one month imprisonment. Under section 504 I.P.C., the convict-appellant, Laeek was convicted and sentenced for two years' imprisonment with a fine of Rs. 2,000/- In default of payment of fine, he was further directed to undergo 7 days additional imprisonment. Under section 506(2) I.P.C., convict-appellant, Laeek was convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 5,000/- In default of payment of fine, he was further directed to undergo 15 days

additional imprisonment and all the sentences were directed to run concurrently.

3. Criminal Appeal No. 704 of 2021 under section 374(2) Cr.P.C. has been preferred by convict-appellant, Mohd. Umar against the judgment and order dated 09-03-2021 passed by Smt. Poonam Singh, learned Additional Sessions Judge/F.T.C.-II, Sultanpur in Sessions Trial No. 40 of 2016, arising out of Case Crime No. 348 of 2015, under sections 302/34, 307/34,504,506(2) I.P.C., Police Station-Chanda, district-Sultanpur. Under section 302 readwith section 34 I.P.C., the convict-appellant, Mohd. Umar has been convicted and sentenced for life imprisonment with a fine of Rs. 10,000/- In default of payment of fine, he was further directed to undergo one month additional imprisonment. Under section 307/34 I.P.C., the convict-appellant, Mohd. Umar has been convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 10,000/- In default of payment of fine, he has further been directed to undergo one month additional imprisonment. Under section 506(2) I.P.C., the convict-appellant, Mohd. Umar was convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 5,000/- In default of payment of fine, he was further directed to undergo 15 days additional imprisonment and all the sentences were directed to run concurrently.

4. Shorn off the unnecessary details of the F.I.R., the brief facts of the case are that on 07-10-2015 at about 06.00 P.M., the convict-appellant, Laeek, was urinating in front of the door of the complainant. When the ladies of the house of the complainant objected to it, he started abusing them. The son of the complainant tried to restrain Laeek from abusing the ladies of the house, then convict-appellant, Laeek threatened him. Convict-appellant, Laeek alongwith co-accused, Mohd. Umar assaulted on the neck of Jauhar with meat chopper. When Jauhar Ali, Javed and Aamina, the wife of complainant and his elder son, Moinuddin reached the place of occurrence, the convicts-appellants, Mohd. Umar and Laeek started assaulting them by meat choppers. On the alarm raised by them, the brother of the complainant, Alauddin and his wife, Khairulnisha reached on the spot. The accused followed them having meat choppers in their hands. Many neighbours assembled there and witnessed the incident. When the crowd challenged the accused, then leaving the family members of the complainant, accused threatened the crowd that if any of them tried to come forward, they would kill them too. The convict-appellants created chaos and terror in the society. The crowd present there, started dispersing and saving their lives behind the doors of their houses. The shopkeepers also shut down their shops. Then the convict-appellants took to their heels threatening the complainant and his family members and crowd.

5. The complainant carried all the injured to the government hospital, Chanda, district-Sultanpur, but, due to serious injuries sustained to victims, the doctors referred all the injured to the district hospital. While taking to district hospital, injured, Gauhar Ali and Javed Ahmad died due to the ante-mortem injuries caused by both the convict-appellants and the remaining injured were admitted in the hospital.

6. On the basis of written report, Case Crime No. 348 of 2015, under sections 302, 307, 504, 506 I.P.C. was registered against convict-appellants, Mohd. Umar S/o Farookh and Laeek S/o Khalil at Police

Station-Chanda, district-Sultanpur on the very day i.e. 07-10-2015.

7. The inquest reports of the deceased, Jauhar Ali and Gauhar Ali, Javed Ahmad were prepared and dead bodies of all the three deceased were sealed and after preparation of all the required papers, their dead bodies were sent for autopsy. The Chik Report and the G.D. were prepared and the investigation was entrusted upon the Investigating Officer.

8. The Investigating Officer recorded the statements of the witnesses under section 161 Cr.P.C. He inspected the spot and prepared the site plan. He collected the clothes of all the deceased and sent it to the Forensic Science Laboratory for examination.

9. The police procured the custody of the convict-appellants, Laeek and Mohd. Umar from jail and recovered two meat choppers which were alleged to have been used in causing death to the deceased. The police prepared the recovery memo. The autopsy of all the three deceased were conducted by the doctors of the District Hospital, Sultanpur and the fourth deceased, who died in Civil Hospital, Lucknow, his autopsy was conducted by the doctors of the Civil Hospital, Lucknow.

10. After collecting all the relevant evidences against both the convicts-appellants, the Investigating Officer filed Chargesheet No. 153 of 2015 against the accused, Lallu @ Mohd. Shabbir S/o of Dauran @ Mohd. Hasan, Laeek S/o Khalil and Mohd. Umar S/o Farookh, under sections 302,307 readwith section 34 I.P.C. & section 506 I.P.C. The injury report of injured, Smt. Aamina is also filed with the Case Diary with the report of Forensic Science Laboratory dated 29-04-2016.

11. The convicts-appellants appeared in the court and after taking cognizance, the court concerned committed the case to the Court of Session for trial. The Sessions Court framed charges against accused,Laeek, Mohd. Umar and Lallu @ Mohd. Shabbir under sections 302,307,504 & 506 I.P.C. readwith section 34 I.P.C. and the charges were read-over to them. The convict-appellants abjured from the charges and claimed to be tried.

12. In order to prove the case against the convict-appellants, the prosecution adduced the following witnesses :-

1. Sri Sarfuddin, P.W.-1, complainant of the case.

2. Smt. Aamina w/o Sarfuddin, P.W.-2 and injured.

3. Sri Habib Ahmad, P.W.-3, witness of recovery memo

4. Sri Sagir Ahmad, P.W.-4, witness of the inquest of the deceased Moinuddin, who died in Civil Hospital, Lucknow.

5. Sri Azharuddin, P.W.-5, witness of the inquest of the deceased Gauhar Ali, Jauhar Ali & Javed Ahmad.

6. Dr. Kaushal Kishore Bhatt, witness of the autopsy of the deceased Gauhar Ali, Jauhar Ali & Javed Ahmad.

7. Sri Ajay Pratap Singh, P.W.-7, Sub. Inspector, the then Chauki Incharge, Police Station-Chanda Kotwali, district-Sultanpur. witness of inquest of deceased Gauhar Ali.

8. Sri Nirbhay Kumar Singh, P.W.-8, Sub. Inspector, witness of inquest of the deceased Jauhar Ali.

9. Dr. R.K.Gautam, P.W.-9, Senior Consultant, Dr. Shyama Prasad Mukherji

Hospital, Lucknow, witness of the autopsy of the deceased, Moinuddin.

10. Sri Rana Pratap Singh, P.W.-10, Sub. Inspector, who recovered two meat choppers, used in the alleged incident on the pointing of the accused. He identified his signatures on Recovery Memo, Exhibits 10 & 11 and proved them. He proved site plan, chargesheet etc. prepared by the Investigating Officer, Ramesh Chandra as secondary evidence.

13. Besides ocular evidences, the prosecution produced following documentary evidence :-

1. Exhibit Ka-1, Written Report.
2.Exhibit Ka-2, Inquest report of the deceased Moinuddin
3. Exhibit Ka-3, Inquest report of the deceased Gauhar Ali
4. Exhibit Ka-4, Inquest report of the deceased Jauhar Ali
5. Exhibit Ka-5, Inquest report of the deceased Javed Ahmad
6. Exhibit Ka-6, Autopsy report of the deceased Gauhar Ali
7. Exhibit Ka-7, Autopsy report of the deceased Javed Ahmad
8. Exhibit Ka-8, Autopsy report of the deceased Jauhar Ali
9. Exhibit Ka-9, Autopsy report of the deceased Moinuddin
10. Exhibit Ka-10, Recovery memo of knife recovered from the possession of accused Mohd. Umar.
11. Exhibit Ka-11, Recovery memo of knife recovered from the possession of Laeek.
12. Exhibit Ka-12, Site plan of incident.
13. Exhibit Ka-13, Chargesheet.

14. After concluding the evidence from the side of prosecution, statements of the accused under section 313 Cr.P.C. were recorded. In his statement recorded under section 313 Cr.P.C., the convict-appellant, Laeek Ahmad stated that he was urinating near the dustbin lying adjacent to Pant Nagar Chauraha on 07-10-2015. Immediately, Smt. Aamina came and abused him. When the convict-appellant, Laeek Ahmad was passing through the Pant Nagar Chauraha next day, Smt. Aamina, her son alongwith sons of Alauddin collectively assaulted him to the extent that he urinated in his clothes. One of the sons of Alauddin had meat chopper in his hands. He snatched the meat chopper from him and defended himself. It is also stated in the statement recorded under section 313 Cr.P.C. that he was a labourer with Lallu and he also served in the footwear shop of Mohd. Umar.

15. Convict-appellant, Mohd. Umar stated in his statement recorded under section 313 Cr.P.C. that he is a Hafiz and teaches Arbi and Urdu. On the fateful day, he was sitting by Taj Mohd., tenant of Sarfuddin and he intervened to resolve the dispute on humanitarian ground, but, all the four deceased alongwith Aamina assaulted badly upon co-accused, Laeek. The convict-appellant,Laeek defended himself. Smt Aamina caught hold of the convict-appellant, Laeek from the collar of his shirt, but, he managed to escape from the grip of Aamina. Mohd. Umar denied the recovery of meat chopper from himself. The accused was afforded the opportunity to adduce his defence. D.W.-3, Taj Mohammad was adduced as defence witness on behalf of the convict-appellant, Mohd. Umar and no witness was produced on behalf of the convict-appellant, Laeek in defence.

16. After hearing both the parties and perusal of the record, learned trial court

reached to the conclusion that evidences of P.W.-1 and P.W.-2 are genuine, natural and reliable and there is no reason to falsely implicate the two convict-appellants, Mohd. Laeek and Mohd. Umar. When convict-appellant, Laeek escaped from the place of occurrence, the other convict-appellant, Mohd. Umar also followed him. The incident occurred in furtherance of common intention of both the accused and the accused caused injuries to Smt. Aamina and caused death to four other persons of the same family.

17. Learned trial court convicted both the convict-appellants, Laeek and Mohd. Umar and punished them under sections 302/34, 307/34,504,506(2) I.P.C. in Sessions Trial No. 40 of 2016 Police Station-Chanda, district-Sultanpur.

18. Under section 302 readwith section 34 I.P.C., the convict-appellant, **Mohd. Umar** has been convicted and sentenced for life imprisonment with a fine of Rs. 10,000/- and in default of payment of fine, he was further directed to undergo one month additional imprisonment. Under section 307 readwith section 34 I.P.C., the convict-appellant, Mohd. Umar has been convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 10,000/- and in default of payment of fine, he was further directed to undergo one month additional imprisonment. Under section 506(2) I.P.C., the convict-appellant, Mohd. Umar was convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 5,000/- and in default of payment of fine, he was further directed to undergo 15 days additional imprisonment and all the sentences were directed to run concurrently.

19. Under section 302 readwith section 34 I.P.C., the convict-appellant, **Laeek** has been awarded death penalty. He was convicted and sentenced under section 307/34 I.P.C. for 7 years rigorous imprisonment with a fine of Rs. 10,000/- In default of payment of fine, the convict-appellant was further directed to undergo additional one month imprisonment. Under section 504 I.P.C., the convict-appellant, Laeek was convicted and sentenced for two years' imprisonment with a fine of Rs. 2,000/- In default of payment of fine, he was further directed to undergo 7 days additional imprisonment. Under section 506(2) I.P.C., convict-appellant, Laeek was convicted and sentenced for 7 years rigorous imprisonment with a fine of Rs. 5,000/- In default of payment of fine, he was further directed to undergo 15 days additional imprisonment and all sentences were directed to run concurrently.

20. Aggrieved by the judgment of conviction and punishment, two separate appeals are filed by the convict-appellants, Laeek and Mohd. Umar. Convict-appellant, Laeek has filed appeal from jail.

21. Besides these two appeals, Reference No. 2 of 2021 is made by District Judge, Sultanpur for confirmation of the death penalty to the convict-appellant, Laeek.

22. Heard Sri R.B.S.Rathaur, learned counsel for the convict-appellants in both the appeals and learned A.G.A. for the State-respondents.

23. Learned counsel for the convict-appellants argued that the witnesses, P.W.-1 & P.W.-2 are highly interested witnesses and they are relatives inter-se to the deceased also. The incident occurred at the public place, inspite of this fact, no public witness is produced by the prosecution in

order to prove its case. The Investigating Officer conducted the investigation with too much lacuna. The name of the Investigating Officer is missing from the chargesheet and convict-appellants cannot be convicted on the basis of such a shoddy investigation. The dispute arose between accused and family members of the complainant on a minor issue and when the family members of the complainant started assaulting convict-appellant, Laeek with meat chopper, then he snatched the meat chopper and attacked with the meat chopper in self-defence. The punishment awarded to the convict-appellant, Laeek is very severe in relation to the crime committed by him.

24. It is also argued that the trial court based its conviction on the basis of statements of the accused recorded under section 313 Cr.P.C., which is completely beyond the scope of permissibility to base judgment on the statements of the accused. Recovery of weapons is doubtful. There was no prior meeting of mind of the accused. The convict-appellant, Mohd. Umar just intervened on humanitarian ground to disperse the crowd at the time of the incident. Convict-appellant, Mohd. Umar has not done any overt act in the commission of crime, therefore, the judgment and punishment awarded by the trial court is liable to be set aside.

25. On the other hand, learned A.G.A. opposed the submissions of learned counsel for the convict-appellants and argued that it is a brutal murder of four persons who belongs to one family at the public place by stabbing and three of them expired on the spot and one of them expired when he was being carried to the hospital. The convict-appellants created chaos and terror in the public at large. People started closing the doors of their houses and the shopkeepers started shutting down their shops. The Investigating Officer after taking the accused in police custody recovered blood stained meat choppers on pointing out of the convict-appellants and made recovery under section 27 of the Indian Evidence Act. The prosecution witnesses including the injured, Aamina proved the prosecution case beyond reasonable doubt, therefore, learned A.G.A. requested to uphold the judgment passed by the learned trial court.

26. Before proceeding with the analysis of evidence, it will be proper to mention here the evidences produced by the prosecution in brief.

27. P.W.-1,Sarfuddin stated on oath before the court that he is an illiterate person and on the very fateful day of the incident when the women of his house were preparing for Wazu in the adjoining lane on 07-10-2015 at about 06.00 p.m., the accused started urinating and when the women of his house objected to it, he started abusing them. His son, Javed Ahmad forbade Laeek from abusing, threatening his son Javed convict-appellant, Laeek went away alongwith Mohd. Umar and they returned with meat choppers and assaulted Gauhar Ali and Jauhar Ali, sons of his brother, Alauddin. Laeek attacked on the neck of Gauhar Ali. When he made hue and cry, his nephew Jauhar Ali & Javed and his wife Aamina and his elder son, Moinuddin arrived at the place of occurrence. Then, convict-appellants, Umar and Laeek assaulted all of them by meat choppers. The wife of his younger brother, Khairulnisha and Alauddin shouted for help. The people arrived at the place of occurrence, but, on account of the terror of both the convict-appellants, none could come forward to save them. Gauhar Ali,

Jauhar Ali, Javed, Moinuddin and Aamina received grievous injuries and they became unconscious. In the meantime, someone called ambulance and they brought all the five injured to Community Health Centre, Chanda, district-Sultanpur from where they were referred to district-hospital, Sultanpur. Jauhar Ali, Gauhar Ali and Javed could not survive and died on the way to hospital while Aamina and Moinuddin were referred to Trauma Centre, Lucknow. P.W.-1 further stated that convict-appellants Laeek and Mohd. Umar assaulted his children infront of him with meat choppers. In this assault, one of his sons sustained deep cut on the neck and intestine of his other son came out due to the assault on his stomach. His wife was preparing for Wazu at that time. She caught the accused to save his children, but, accused attacked on her abdomen with meat chopper and she fell down and became unconscious.

28. P.W.-2, Smt. Aamina corroborated the statement of P.W.-1, Sarfuddin and deposed that when she was preparing for Wazu, convict-appellant, Laeek started urinating at about 06.00 p.m. on 07-10-2015. When she forbade him from doing so, he started abusing her and came with co-accused, Mohd. Umar, having meat choppers in their hands and attacked on the neck of Gauhar Ali and on the stomach of Javed. When she tried to defend her son, Laeek attacked on her chest and abdomen also. In the Trauma Centre, Lucknow, she came to know that Gauhar Ali, Jauhar Ali and Javed expired on the very day and Moinuddin expired during his treatment in Lucknow.

29. P.W.-3, Habib Ahmad is a witness of recovery who proved that the meat chopper was recovered on the pointing out of the accused,Laeek and proved the meat chopper as Item Exhibit-Kha-1. P.W.-3 also proved the recovery of meat chopper on the pointing out of accused Mohd. Umar and proved the meat chopper used in the incident as Item Exhibit Kha-2.

30. P.W.-4, Sagir Ahmad certified his signatures on inquest report, Exhibit Ka-2.

31. P.W.-5, Azharuddin certified his signatures on Exhibits Ka-3, Ka-4 & Ka-5 i.e. inquest reports of deceased, Gauhar Ali, Jauhar Ali and Javed.

32. P.W.-6, Dr. Kaushal Kishore Bhatt conducted autopsy of deceased Jauhar Ali and declared him "brought dead' in the district hospital, Sultanpur at 08.15 P.M. on 07-10-2015. The following ante-mortem injuries were found on the dead body of the deceased Jauhar Ali :-

Ante-mortem Injuries.

"(1) Incised wound 1 cm. x 0.5 cm. on back of left elbow.

(2) Incised wound 2 cm. x 1 cm. on lateral aspect of left thorax 3 cm. below axilla (left) cavity deep.

(3) Incised wound 2 cm. x 1 cm. on left lateral side of upper abdomen 20 cm. below anterior axillary fold (left) cavity deep

4). Lacerated wound 2.5 cm. X 1 cm. on left lateral side of back 1 cm above left iliac crest underlying intestine coming out.

Cause of death occurred due to Hemorrhage & Shock as a result of ante-mortem injuries.

33. P.W.-6, Dr. Kaushal Kishore Bhatt also conducted autopsy of deceased Javed & Gauhar Ali in the district hospital, Sultanpur. The following ante-mortem injuries were found on the dead bodies of the deceased Javed & Gauhar Ali :-

Ante-mortem injuries of Javed

(1) Incised wound 5 cm. X 2 cm. X cavity deep on front of chest 12 cm. Below the manubrium sterni.

(2) Incised wound 2 cm. X 1 cm. on left side of abdomen at 5 O'Clock position 6 cm. away from umbilicus.

(3) Linear abrasion 7 cm. x 0.2 cm. on left side of abdomen 5 cm. away from umbilicus

(4) Abrasion 1 cm x 0.1 cm. on left side of face just above lateral end of left eye brow.

Cause of death occurred due to Hemorrhage & Shock as a result of ante-mortem injuries.

Ante mortem injuries of Gauhar Ali

1. Incised Wound 4 cm. X 1 cm. on left side of neck 4 cm. below left angle of mandible, underlying tissue(let carotid artery lacerated).

Cause of death occurred due to Hemorrhage & Shock as a result of ante-mortem injuries.

34. P.W.-7, Sub. Inspector,Ajay Pratap Singh Yadav, the then Chowki Incharge,Laxmanpur, Police Station-Kotwali Nagar, Sultanpur prepared inquest report of the deceased Gauhar Ali.

35. P.W.-8, Sub. Inspector, Nirbhay Kumar Singh prepared inquest report of the deceased Jauhar Ali and identified his signatures on the inquest report,Exhibit Ka-4; prepared relevant papers to be sent for conducting autopsy of the deceased; sealed Photo lash, Challan lash, Memorandum of specimen signature, letters to R.I. & C.M.O. etc. and sent the dead body of the deceased Jauhar Ali through Constable Abhishek Dwivedi in the sealed condition to Mortuary House.

36. P.W.-09, Dr. R.K.Gautam, Senior Consultant, Dr. Shyama Prasad Mukherji Civil Hospital, Lucknow, prepared post mortem report of deceased Moinuddin in the hospital and found the following ante-mortem injuries on the dead body of the deceased Moinuddin :-

Ante-mortem Injuries

"(1) Stitched wound 2cm long alongwith two stitches present on outer aspect of both side chest.

(2) Stitched wound 12 cm long, alongwith 12 stitches present on left side chest just, Medial, below left nipple.

(3) Stitched wound 3cm long alongwith 4 stitches present on outer aspect of Lt. side chest 2 cm. lateral to left nipple on opening ecchymosis present underneath all injuries made and above 4th rib of left side of chest and cut above place. Left side with pleura few cut at C.A. pavet About 500 ml clotted blood present in thoracic."

Cause of death is due to shock and hemorrhage as a result of ante-mortem injuries.

37. It is stated in grounds of appeal that the injury report of injured Aamina is not on record as such it cannot be said that she sustained injuries during the incident. The injured-Aamina also received injuries in the incident and she was referred to Trauma Centre, Lucknow. Her injury report paper no.70-Ka/1 is on record. Medical report reveals that "minimal peritoneal" collection noted. No c/o pleural collection noted through abdominal window. Supplementary report paper no 20-Kha/2

prepared by doctor in the Trauma Centre is on record which is as under :-

"MLC noted from District Hospital Sultanpur.

Patient came to Trauma Centre on 08-10-2015 was admitted and emergency management was done.

Patient presented as an alleged case of stab injury over abdomen.

Emergency surgical management done. Exploratory laparotomy with peritoneal lavage with jejunojejunal resection anastomois at approx. 3 feet distal to dudenojejunal junction with bilateral drain placement.

Patient's hospital course was uneventful and discharged on 16-10-2015."

38. P.W.-10, Sub. Inspector, Rana Pratap Singh, recovered two meat choppers on the pointing of the accused and proved the recovery memo in court. This witness deposed that the incident was very sensitive and police force remained at the place of occurrence for many days. The village was turned into police cantonment.

39. D.W.-01, Haseena, in her statement recorded on 19-02-2021 stated that the incident took place five years ago, but, she did not remember the exact date of the incident. She stated that she was busy in the engagement ceremony of her daughter. After knowing about the incident from the neighbours, she did not go to the place of the incident and she stated about Lallu only.

40. D.W.-02, Lallu, in his statement recorded on 19-02-2021 stated that the incident took place five years ago. He knew both the convict-appellants, Mohd. Umar & Laeek and he had no enmity with them. He deposed all the things about himself only.

Since, D.W.-01 & D.W.-02 in their statements stated only about the fact that Lallu was not present on the spot, therefore, their statements are irrelevant in regard with the involvement of present convict-appellants.

41. D.W.-3, Taj Mohd., corroborated the happening of the incident, but, he stated that convict-appellant, Laeek was attacked by complainant's son and other family members. Laeek snatched the meat chopper and attacked on the victims in self defence.

42. Learned counsel for the convict-appellants submitted that there is no independent witness of the incident. The crowd is stated to have gathered at the place of occurrence, but, no independent witness was adduced and the witnesses produced by prosecution are the highly interested witnesses.

43. In **Kartik Malhar Vs. State of Bihar (1996) 1 SCC 614,** the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of

seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavored to idspeal in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must he laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth.

In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567,*** *the Hon'ble Apex Court in this regard has held as under:-*

*"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an ''interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between ''interested' and '' related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298). Receltly, this difference was reiterated in Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549, in the following terms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possib*le eye witness in the circumstances of the case cannot be said to be "interested".."

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

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against

the accused, to whish to implicae him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person..."

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

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

"29. In the case of ***Bhaskarrao V. State of Maharashtra reported in (2018) 6 SCC, 591,*** *Hon'ble Supreme Court held as under :-*

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

34. In **Darya Singh and Ors. v. State of Punjab, [(1964) 3 SCR 397 : AIR 1965 SC 328 : (1965) 1 Cri LJ 350]** *this Court held that evidence of an eye witness who is a near relative of the victim, should be closely scrutinized but no corroboration is necessary for acceptance of his evidence. In Harbans Kaur and Anr. v. State of Haryana, [(2005) 9 SCC 195 : 2005 SCC (Cri) 1213 : 2005 Cri LJ 2199], this Court observed that: (SCC p. 277, para 6)*

"6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the Accused."

35. In the case of **Namdeo v. State of Maharashtra, [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773**] wherein this Court after observing previous precedents has summarized the law in the following manner: (SCC p. 164, para 38)

"38. .....it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable,

inherently probable and wholly trustworthy conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

44. It is well known fact that when such a heinous occurrence takes place where two appellants caused death of three persons at 05.00 p.m., people were shutting their shops and hiding themselves behind their doors and crowd was terrorized, then there is least chance that the independent witness will dare to depose about the incident in the court. The evidence of witnesses cannot be discarded only because they are in any way related to the deceased if they are reliable and inspire confidence of truthfulness. Moreover, the witness no. 2, Aamina is an injured witness in the case, who tried to save her sons from assault of the accused and in turn, she sustained injuries. Thus, there is no reason to discard the evidence of prosecution witnesses just because they are related witnesses to the extent that they have inspired confidence.

45. It is stated that the Investigating Officer of the case was not produced as a witness in the court. From perusal of the file of the trial court, it transpires that initial investigation of the case was conducted by the Investigating Officer, Sri Jasbir Singh and later on by the Investigating Officer, Ramesh Chandra Singh, who prepared the site plan and submitted chargesheet in court, but, the Investigating Officers, Jasbir Singh and Ramesh Chandra Singh were not produced in the court rather P.W.-10, Sub. Inspector, Rana Pratap Singh proved these documents by way of secondary evidence. However, it is stated by P.W.-10 that the Investigating Officer is alive.

46. Considering these facts, it is clear that the Investigating Officer did not depose in court to support prosecution case. However, learned counsel for the convict-appellants could not explain as to what damage was caused to the credibility and reliability in prosecution case, if Investigating Officer has not deposed in the court. The case is based on ocular evidence. The injured witness appeared in witness box and proved the case, therefore, merely absence of the Investigating Officer does not affect adversely of the complete prosecution case.

47. Learned counsel for the convict-appellants argued that the recovery of alleged weapons of assault from convict-appellants is highly doubtful. It transpires from the record that the accused were arrested and admitted to jail and the Investigating Officer had taken the accused in police custody by the order of the concerned court and subject to the conditions imposed by the court concerned; the recovery was made by the Investigating Officer on the pointing out of the accused from the space between the roof of latrine and the roof of his house. Appellant Laeek confessed during recovery that this is the weapon with which he assaulted the sons of Sarfuddin and Alauddin. P.W.-3 recovered one meat chopper on the pointing out of convict-appellant, Mohd. Umar from under roof of his house who confessed that with the recovered weapon, he assaulted the sons of Sarfuddin and Alauddin. Both the meat choppers were stained with dry blood. Recovery memo is proved by P.W.-3 and no explanation is given by the accused about the recovery of the meat choppers from their respective houses. Therefore, there is

no doubt in the recovery of weapons from convict-appellants.

48. Learned counsel for the convict-appellants argued that the learned trial court did not address the controversies and contradictions in the statements of the witnesses. However, the incident ignited when the injured Aamina forbade Appellant Laeek from urinating in home where she was preparing for Waju. She also sustained injuries when she tried to save deceased.

49. Hon'ble Apex Court relying upon the judgment in **State of U.P. Vs. Anil Singh** reported at **(1998) supp SCC 686:**

"17. It is also our experience that invariably the witnesses add embroidery to prosecution story perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform" It has been further emphasized that if discrepancies in the depositions are minor, that that witnesses contradict themselves during their testimonies as opposed to their previous police statements what is important is that the nature of contradictions.

50. In **Rammi @ Rameshwar Vs. State of Madhya Pradesh,** Hon'ble Supreme Court held that:

"24. ... Courts should bear in mind that it is only when discrepancies in the evidence of a witnesses are so incompatible with the credibility of his versions that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny"

51. He further argued that there are vital discrepancies in the statements of P.W.-1 and P.W.-2 recorded before the trial court, but, trial court did not address the said controversies. From the perusal of statements of P.W.-1 and P.W.-2, it transpires that P.W.-1 and P.W.-2 who are the witnesses of facts; unequivocally stated in so many words that convict-appellant, Laeek Ahmad assaulted deceased, Jauhar Ali, Gauhar Ali, Javed Ahmad and Moinuddin and injured Aamina by meat choppers. There is no discrepancy on the point of genesis of dispute, on the "place of occurrence', or on the weapons used to commit the crime. P.W.-2, Aamina was herself injured in the case, who proved the incident in details. Therefore, there are no contradictions, discrepancies or controversy in the statements of witnesses. We do not consider it appropriate or permissible to embark upon the reappraisal or re-appreciate of the evidence in the contest of the minor controversies or discrepancies in view of he law laid down by the Apex Court reported in **(1983) 3 SCC,217, Bharwada Bhoginbhai Hirjibhai Versus State of Gujarat.**

52. It is also submitted by the learned counsel for the convict-appellants that no overt act has been assigned to convict-appellant, Mohd. Umar and necessary

ingredients for invoking section 34 I.P.C. are missing. However, from perusal of the record, it is proved that convict-appellant, Mohd. Umar picked the meat chopper from the shop of meat seller, Lallu and supplied the said meat chopper to convict-appellant, Laeek Ahmad. It is not necessary for constituting common intention that there must be meeting of minds or preponderance for commission of the crime days before. It is sufficient, if at the spur of moment, the meeting of minds arrived at besides, Mohd. Umar actively participated in the commission of crime. Therefore, it cannot be said that the ingredients for invoking section 34 I.P.C. are missing.

53. Learned trial court discussed the evidence at length. From perusal of the record of the trial court, it transpires that initially the incident occurred between Aamina and convict-appellant Laeek and when convict-appellant Laeek attacked on Aamina with meat chopper, his son reached at the spot to save Aamina, then convict-appellant, Laeek assaulted all the four persons with meat chopper.

54. All the witnesses proved the incident against convict-appellants, Mohd. Umar and Laeek beyond reasonable doubt and the injuries inflicted upon the deceased. The injuries are well corroborated by the statements of doctors who conducted autopsy of the dead bodies of the deceased. The injuries on the person of injured Aamina are also corroborated by medical evidence on record. The evidences of all the witnesses of facts inspire confidence of veracity and truthfulness. There is nothing on record which can create doubt on the evidence of witnesses.

55. Hon'ble Apex Court in the case of **Sachchey Lal Tiwari Vs. State of U.P.** reported in **(SCC, 414-15, para 7),** held as under :-

"Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses.

In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

56. Learned counsel for the convict-appellants submitted that learned trial court placed reliance on the statements of the convict-appellants recorded under section 313 Cr.P.C. and based the conviction of the convict-appellants on their own statements.

57. It is a settled principle of law that the statement of an accused under section 313 Cr.P.C. can be used as evidence against the accused, in so far as it supports the case of the prosecution. Equally true is that the statement under section 313 Cr.P.C. simplicitor normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 Cr.P.C. is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced as has been held in the case

of (***Brajendra Singh Vs. State of M.P. dated 28th February,2012***).

58. In the light of this argument, we have perused the statement of the convict-appellant, Mohd. Umar recorded under section 313 Cr.P.C. Initially, convict-appellant, Mohd. Umar denied the allegations levelled against him and stated that he intervened on humanitarian ground to defend the quarrel, but, when he was asked to explain in his defence, he narrated the story in the line of prosecution case. It is also stated that convict-appellant, Laeek continued to stab the deceased and injured. Likewise, convict-appellant, Laeek Ahmad also denied all the prosecution evidences in his statement recorded under section 313 Cr.P.C. and when he was asked to explain in his defence, he narrated the story in the line of the prosecution case. It is further submitted that the dispute in question arose on trivial issue but, when the sons of complainant started beating him and one of the deceased had meat chopper in his hands, he snatched meat chopper and assaulted them in self defence and lost control over himself.

59. It is also pertinent to mention here that the statements of both the convict-appellants under section 313 Cr.P.C. are also reliable on the tune that both the convict-appellants were taken by the Investigating Officer in police custody remand from jail and meat choppers were recovered from the pointing of said convict-appellants from their houses between the roof of latrine and under roofs. Therefore, the reliance on the statements of the convict-appellants under section 313 Cr.P.C. by trial court is in consonance with the provisions of law and the recovery of meat choppers on their pointing out is under section 27 of the Indian Evidence Act. Thus, there is no infirmity in the judgment passed by the trial court and the judgment of the trial court is based on factual and legal aspects of law.

60. The facts of this case lead that convict-appellants terrorized all the residents of the village and continued to stab till the three deceased died at the spot and one, Moinuddin expired when he was being carried to the hospital and injured, Aamina was badly injured on her chest and abdomen. The evidence of prosecution also proves that during this incident, the villagers of the village shut the doors of their houses and the shopkeepers also shut down their shops as they were put to terror by the brutal act of convict-appellants. Therefore, the judgment of the trial court is in conformity with the facts on record and is liable to be upheld.

61. Now, while upholding the conviction of the convict-appellants, we proceed to consider the question of death sentence awarded by trial court under Section 302 IPC to convict-appellant Laeek.

62. Capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputed statement of law follows that it is neither possible nor prudent to state any universal formula which apply to all the cases of criminology where capital punishment has been prescribed. Thus, the Court must examine each case on its own facts, in the light of enunciated principles and before option for 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.

63. Before going into the legality and propriety of question of sentence imposed upon the convict/appellant, 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 had 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 farmers 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 vs. 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":*

57. 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 consequent 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 not 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

(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 condition 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 conditional 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 the 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 imponderable and 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 blood thirsty. Hanging of murders has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India , show that 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 police 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 through law's instrumentality. That ought not to be done save the rarest of rare cases when the alternative option is unquestionable foreclosed."

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 to 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'be Supreme Court has summarized the instances on which death sentence may be imposed, which reads thus:*

"38.xxxx

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

(ii) Before option for the death penalty the circumstances of the ''offender' also requires 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 question 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)

64. The issue again came up before the 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 judgments, 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 aspect and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to the classes under any of the following beads 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 crime like murder, rape, armed dacoity, kidnapping etc. By the accused with prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convicts.

(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 with 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 an 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 behaviour possible and cold 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 behaviour 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 the death resulted in the course of commission f 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 guilty of the accused."

65. In the matter of **Dharam Deo Yadav Vs. State of U.P**. reported in **(2014) 5 SCC 509,** the Hon'ble Supreme Court had held thus:

"36. We may not 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 vs. 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 fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspect 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 the 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.

In Kalu Khan v. State of Rajasthan report in (2015) 16 SCC 492, the Hon'ble Supreme Court had 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, socioeconomic 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 Vs. State (Govt. Of NCT of Delhi) as follows: (Mahest 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'."*

66. In the light of above proposition of law, we require to scrutinize the case in hands mainly to find out whether this case falls within the category of rarest of rare case and imposition of death penalty would be the only appropriate sentence and imposition of life imprisonment which is a rule would not be adequate to meet out the ends of justice.

67. By awarding death sentence to the convict-appellant, Laeek, learned trial court has mentioned the mitigating circumstances as such that convict-appellant is a young man and is married and having his family liabilities. Convict-appellant, Laeek assaulted the injured and the deceased in his self defence.

68. The following aggravating circumstances are noted in the judgment of the trial court (i) that four members of the same family were murdered with meat choppers and one sustained injuries on her chest and abdomen; (ii) that all three injured persons lost their lives on the spot and the intestines came out of their bodies;(iii) Injured, Aamina is still under treatment and she could lead her normal life after this incident; (iv) the incident occurred by the convict-appellants challenging the law and order and creating terror in whole of the village and after this incident, the lives and business of the villagers remained obstructed for months; (v) the incident in question occurred only on the petty issue of urination by the convict-appellants and the convict-appellants reacted in such a brutal way which deprived of a family from his four members. After evaluating, mitigating and aggravating circumstances, the trial court reached to the conclusion that the convict-appellant, Laeek is liable be hanged till death for this brutal genocide.

69. It is also found by the trial court that convict-appellant, Mohd. Umar by his overt act assisted in the commission of crime, therefore, learned trial court punished the convict-appellant, Mohd. Umar with the imprisonment for life.

70. The convict-appellants committed the crime which is abominable, vicious and ferocious in nature. If the crime is said to be of such a brutal depraved & heinous in

nature so as to fall in the category of rarest of rare, accused convicts should be adequately punished for that, but, we have to consider the circumstances of convicts before awarding punishment.

71. There is no evidence to the effect that the convict-appellant, Laeek committed crime with pre-planning or preponderance. The occurrence happened suddenly when the hot exchanges arose due to urination in the lane of the complainant while Aamina was preparing for Wazu. The convict-appellant had no motive or intention to kill anybody at the time of occurrence. However, once he started stabbing, he continued to stab till the death of three persons caused at the spot and one person while he was being carried to the hospital and one person was badly injured. He himself admitted during his statement under section 313 Cr.P.C. that he lost control over himself.

72. We also find ourselves unable to agree with the view of the trial court that the convict-appellant-Laeek is menace to the society that he cannot be allowed to stay alive. On the other hand, we are of the view that the prosecution could not establish that convict-appellant-Laeek is beyond reform. We are also mindful that the convict-appellant-Laeek has no criminal antecedents prior to the commission of this crime, that too, was committed in the spur of moment. Therefore, the circumstances of the crime and criminal do not go to show that instant matter falls into the category of rarest of rare case or that the sentence of life imprisonment awarded to the convict-appellant-Laeek is unquestionably fore-closed.

73. Before proceeding further, it would be pertinent to mention here that life imprisonment is a rule and the death penalty is an exception only when the life imprisonment would be inadequate in proportion to the crime committed and the death penalty is imposed only when alternative life imprisonment is totally inadequate. The instant case does not fall in the category of rarest of rare cases, where life imprisonment would suffice to the ends of justice. Therefore, in totality of facts and circumstances of this case, we find it a fit case to commute the death sentence of the convict-appellant, Laeek into life imprisonment.

74. While affirming the conviction of the convict-appellant-Laeek under Section 302 IPC, we set aside the death penalty of the appellant, Laeek awarded by the trial court and modify his sentence from death penalty to life imprisonment without remission.

75. The Jail Appeal No. 592 of 2021 is ***partly allowed***. In the light of the above discussion, Reference No. 02 of 2021 for confirmation of death penalty is liable to be rejected and is accordingly ***rejected.***

76. So far as conviction of convict-appellant, Mohd. Umar is concerned, he was convicted with convict-appellant, Laeek under sections 302/34,307/34,504 & 506 I.P.C., However, initially he had no prior meeting of mind with co-appellant, Laeek but he assisted with his overt act and played an active role in commission of crime. His role is not less than convict, Laeek. Therefore, the punishment awarded to convict-appellant, Mohd. Umar does not call for any interference by this court. Hence, the Criminal Appeal No. 704 of 2021 filed by convict-appellant, Mohd. Umar is ***dismissed*** accordingly.

77. The convict-appellants,Laeek and Mohd. Umar are in jail and shall serve out

their sentences as have been awarded by the trial court and modified by this Court respectively.

78. Let a copy of this judgment along with lower court record be transmitted to the trial court forthwith for necessary information and compliance.

(2022) 10 ILRA 953
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 726 of 2022

Sonu ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri D.S. Pandey, Sri Dharmendra Kumar Chaubey, Sri Mahendra Kumar Yadav, Sri Namit Srivastava, Sri Piyush Shukla

Counsel for the Respondents:
Govt. Adv.

Criminal Law- Indian Evidence Act, 1872- Section 32-The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required- A dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

Where the dying declaration is found to be true and reliable and has been recorded by a magistrate then the same requires no further corroboration and conviction can be secured solely on the basis of the dying declaration.

Indian Penal Code, 1860- Section 304-B- Section 304 Part- I- Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream- Perusal of record goes to show that motive is absent for causing death of the deceased by the appellant as it is evident from the statement of P.W.1 and P.W.3. The allegation of demand of dowry was also not proved by the prosecution as P.W.2 mother of the deceased in her statement herself admitted that the deceased never made any complaint about her husband or about his family members. Therefore, only on the basis of dying declaration, learned trial court has awarded very harsh and severe punishment, which is life imprisonment-Sentence is reduced to the period of 10 years under Section 304 part-I of I.P.C. Fine imposed is reduced to Rs.5,000/- and sentence in default payment of fine is also maintained.

Settled law that the judicial trend in our Country is reformative and not retributive hence punishment awarded should be proportionate and undue harshness has to be avoided. As motive has not been proved by the prosecution, the deceased has died after four days of the occurrence and the intention and knowledge was present that the act was likely to cause death of the deceased, hence the offence would

come within the purview of Section 304 Part – I of IPC. (Para 18, 19, 21, 29, 31, 32)

Criminal Appeal partly allowed. (E-3)

Judgements/Case law relied upon:-

1. Khokan @ Khokhan Vishwas Vs St. of Chhattis. 2021 0 Supreme (SC) 73

2. St. of U.P Vs Subhash @ Pappu 2022 0 Supreme (SC) 260

3. Smt. Sudha & anr. Vs St. of U.P. 2021 0 Supreme (All) 1220

4. Lakhan Vs St. of M.P (2010) 8 Supreme Court Cases 514

5. Krishan Vs St. of Har. (2013) 3 Supreme Court Cases 280

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

7. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926

8. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

9. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

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

1. The appeal has been preferred by the appellant- Sonu against the judgment and order dated 11.02.2015, passed by learned Additional District and Sessions Judge, Fast Track Court, Gautam Budh Nagar in Session Trail No. 144 of 2012 (State of UP vs. Sonu and another), arising out of Case Crime No. 581 of 2011, under Sections 498-A, 304B Indian Penal Code, 1860 (in short "I.P.C.') and Section 3/4 of Dowry Prohibition Act, Police Station-Dadri, District Gautam Budh Nagar whereby the appellant is convicted and sentenced for the offence under Section 302 I.P.C. for life imprisonment with a fine of Rs.25,000/- and in default of payment of fine, further imprisonment for one year. Accused Krishnapal Sharma was acquitted by the Court below, therefore this appeal has been preferred only for appellant-Sonu.

2. Brief facts of the case giving rise to this appeal are that a written report was submitted by complainant Brahm Deo (father of the deceased) at Police Station Dadri, District Gautam Budh Nagar with the averments that marriage of his daughter Priyanka was solemnized with accused-Sonu on 14.7.2010. He had given dowry as per his capacity. After marriage accused-Sonu and his family members demanded additional dowry. It is further averred that on 07.11.2011, appellant- Sonu and his family members poured kerosene on his daughter and set her ablaze. It is a fact that during treatment the deceased succumbed to the injuries.

3. On the basis of above written report, a case crime no.581 of 2011 was registered at Police Station Dadri, under Sections 498-A, 304-B I.P.C. and Section 3/4 of Dowry Prohibition Act. Investigation was taken up by Circle Officer, who visited the spot, prepared the site plan and recorded the statement of witnesses. the dying declaration of the deceased was also recorded on 10.11.2011. F.I.R. was registered as written report on 24.11.201. Inquest report was prepared and post-mortem of the dead body was conduced and its report was also prepared by doctor. After completion of investigation, I.O. submitted the charge sheet against accused-Sonu and Krishnapal, who are the husband and father-in-law of the deceased.

4. Case being exclusively triable by the court of session was committed to the court of session for trial. The accused pleaded not guilty and wanted to be tried.

5. Learned Sessions Court framed the charges against accused- Sonu and Krishnapal, under Section 3 r/w 4 of Dowry Prohibition Act, under Section 498-A and 304-B I.P.C. Charges were read over to the accused, who denied the charges and claimed to be tried.

6. To bring home the charges, the prosecution examined following witnesses:

1.	Brahm Deo Dubey	P.W.-1
2.	Arti Devi	P.W.-2
3.	Neha	P.W.-3
4.	Dr. Mohit Gupta	P.W.-4
5.	Krishna Mohan Uppu	P.W.-5
6.	Bheem Singh	P.W.-6
7.	Udayveer Singh Pokhar	P.W.-7
8.	Brajesh Singh	P.W.-8

7. In support of oral evidence, prosecution submitted following documentary evidence, which were proved by leading oral evidence and proving the contents of the said documents.

1.	FIR	Ex.ka-11
2.	Written report	Ex.ka-1
3.	Dying Declaration	Ex. ka-6/10
4.	Medico-Legal Report	Ex. ka-7
5.	Post-mortem report	Ex.ka-3
6.	Letter of Executive Magistrate	Ex. ka-4
7.	Brief Facts	Ex. ka-5
8.	Death Summary	Ex. ka-8
9.	Death Report	Ex. ka-2
10	Death Report	Ex. ka-9
11.	Charge-sheet (Mool)	Ex.ka-14
12.	Site plan with index	Ex.ka-13

8. After completion of prosecution evidence, the statement of accused was recorded under Section 313 of Criminal Procedure Code (Cr.P.C.), in which the accused denied involvement in the crime and deposed that false evidence was led against accused. The accused examined D.W-1 Smt. Vijay and D.W.-2 Radhey Shyam in defence.

9. Heard Shri Dharmendra Kumar Chaubey, learned counsel for the appellant and Shri N.K. Srivastava, learned counsel for the State. Record has been perused.

10. Leaned counsel for the appellant has submitted that as per the F.I.R., father of the appellant was also involved in the offence but no evidence was found against him, which goes to show that entire F.I.R. is fabricated and false averments were made by the complainant to rope in all the family members of the appellant. The FIR was also lodged much after the incidence. Such type of delayed F.I.R. raises refutable proof and is highly suspicious and cannot be relied upon so as to convict the accused. It is further submitted there are no specific allegations against the appellant so far as demand of dowry is concerned which is also evident from the version of F.I.R.

11. It is next submitted by learned counsel for the appellant that prosecution has examined P.W.-1, Brahm Deo Dubey, father of the deceased and P.W.-2 Arti Devi, mother of the deceased, as a witnesses of fact but their testimony has material contradictions, which go to the root of the case. Demand of additional dowry is not proved, even the F.I.R. does not mention any demand of any article as dowry on the part of the appellant.

12. It is borne out from the record and dying declaration that deceased was hospitalised after the occurrence. The deceased died after 7 days of the occurrence during the course of treatment and therefore the conviction of accused under section 302 of I.P.C. was not warranted.

13. After the aforesaid arguments, learned counsel for the appellant submits that he would press the appeal only for quantum of sentence and it is also submitted that learned trial court has awarded very severe punishment of life imprisonment while it is proved that there was no torture either mental or physical on the part of the accused-appellant, which is finding returned by the court below.

14. It is further submitted that death of the deceased was due to septicaemia and therefore the punishment be converted from 302 to 304 Part-I in view of the recent decisions of Apex Court in ***Khokan @ Khokhan Vishwas Vs. State of Chhattisgarh 2021 0 Supreme (SC) 73, State of Uttar Pradesh Vs. Subhash Alias Pappu 2022 0 Supreme (SC) 260 and Smt. Sudha and Another Vs. State of U.P. 2021 0 Supreme (All) 1220*** cited by learned counsel for the appellant.

15. Learned A.G.A. for the State has vehemently objected to the submissions of learned counsel for the accused-appellant and submitted that death of deceased had taken place within 7 years of her marriage. It is also submitted that even the death was caused due to burn injuries which is covered within the category of dowry death. Learned trial court has rightly convicted and sentenced the accused-appellant. Learned A.G.A. has submitted that the court below has given cogent and sufficient reasons for awarding punishment of life imprisonment which does not require any interference by this Court

16. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, the death was homicidal death. The evidence and dying declaration are correlating each other. The dying declaration is as follows :-

"1) What is your name ?
Priyanka Sharma
2) Age ?
25Yrs
3) Where do you live ?
Dadri, U.P.
4) How long were you married ?
Since 14th July, 2010
5) Do you have any children ?
8 month old child (Shaurya) and pregnant for 2 months
6) name of your husband ?
Sonu Sharma
7) who do you live with ?
I live with my husband and in-laws
8) What happened after yours marriage ?
First two months were good but latter we started having quarrels. My, husband started beating me as I opposed him from having liquor. These quarrels became big in course of time
9) How did the burning happen ?
On 07.11.11 at around 0800 pm I had a quarrel with my husband. He beat me up

very badly and took out oil from his bike and poured over me. I tried to oppose but he pushed me to the stove on which milk was being boiled and I caught fire. My sister (neha) and brother-in-law (bhumesh) were in another room in the house. My sister and brother-in-law thought that we were only quarrelling but when I started shouting they came and stopped the fire with clothes and blankets."

17. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

18. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

19. Deceased survived for 7 days after the incident took place. Her dying declaration was recorded by Krishna Mohan Uppu, District Magistrate after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by PW-5, Krishna Mohan Uppu, District Magistrate. These witnesses have absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana*** [(2013) 3 *Supreme Court Cases 280*] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be

necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

20. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat***, [(2002) 7 SCC 56], the Hon'ble *Apex Court* held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

21. From the above precedents, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

22. In dying deceleration of the deceased, it is also relevant to note that deceased died after four days of recording it. It means that she remains alive for four days after making dying declaration, therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for four days. After making it from which it can reasonably be that inferred she was in a fit mental condition to make the statement at the relevant time.

23. In this regard, we have to analyse the theory of punishment prevailing in India as to whether the case would be one causing murder or culpable homicide not amounting to murder.

24. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted as punishment under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

*"**299. Culpable homicide:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

25. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the

Courts. The confusion is caused, if Courts lose sight of the true scope and meaning of the terms used by the legislature in these sections and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.C. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

26. 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."

27. 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the

court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

28. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme Court referred the judgments in cases titled ***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.

29. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

30. Since the learned counsel for the appellant has not pressed the appeal on its merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the conviction of the appellant requires to be upheld but whether under section 304 part-I & 2 or section 302 I.P.C. will have to be decided.

31. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded

by learned trial court for life term is harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

32. Perusal of record goes to show that motive is absent for causing death of the deceased by the appellant as it is evident from the statement of P.W.1 and P.W.3. The allegation of demand of dowry was also not proved by the prosecution as P.W.2 mother of the deceased in her statement herself admitted that the deceased never made any complaint about her husband or about his family members. Therefore, only on the basis of dying declaration, learned trial court has awarded very harsh and severe punishment, which is life imprisonment.

33. Keeping overall facts and circumstances of this case, in our opinion, ends of justice would be met if the sentence is reduced to the period of 10 years under Section 304 part-I of I.P.C. Fine imposed is reduced to Rs.5,000/- and sentence in default payment of fine is also maintained.

34. Accordingly, the appeal is **partly allowed**, as modified above.

35. Record be sent to trial court immediately.

(2022) 10 ILRA 961
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.10.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.

THE HON'BLE MRS. RENU AGARWAL, J.

Capital Case No. 1 of 2018
connected with
Crl. Appeal No. 1004 of 2018

State of U.P. ...Appellant
Versus
Govind Pasi ...Respondent

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondents:
Manish Bajpai

Criminal Law- Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- "Last Seen Theory"- Prosecution proved last seen evidence. The chain of circumstances is also closely related and proves that the victim was going to school and the accused was near the field of Shri Pal and when the deceased "X' reached near the field, the convicted appellant Govind Pasi lifted her in her arms and moved towards the filed. Thereafter, she was found dead in the field of Shripal.

For proving the theory of last seeing the deceased in the company as one of the relevant links in the chain of circumstances, it has to be proved by the prosecution that the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

Criminal Law- Indian Evidence Act, 1872- Section 3 - It has been further emphasized that if discrepancies in the depositions are minor, that that witnesses contradict themselves during their testimonies as opposed to their previous police statements what is important is that the nature of contradictions.

Settled law that minor contradictions, improvements and embellishments in the testimony of the witnesses are to be ignored

unless the contradictions are major and go to the root of the case of the prosecution.

Criminal Law- Indian Evidence Act, 1872- Section 8- Insofar as the question of motive is concerned in the case of circumstantial evidence the prosecution has to prove the motive behind the crime but in cases of sexual assault motive loses its importance to be proved. Besides, the motive is something in the mind of accused which is not always possible to be proved by prosecution. Apparently accused/appellant raped the deceased who was a ten year oLd girl to satisfy his lust and murdered her in order to suppress the evidence against him- In case of circumstantial evidence motive assumes importance and it holds one of the link in the chain of circumstances however failure to provide motive is not fatal by itself.

Although motive is one of the relevant links in a case resting upon circumstantial evidence, but in cases involving sexual assault motive can merely be lust and hence even if not proved, the same would not be fatal for the prosecution.

Indian Evidence Act, 1872, Section 3- Section 134 - Evidence of relative witness cannot be brushed aside only for the reason that he is related to the complainant if they inspire confidence to the level of independent, impartial, cogent and consistent witness.

Where the testimony of a person related to the deceased is found to be cogent and credible then the same is to be relied upon by the court.

Criminal Law- Indian Evidence Act, 1872- Section 3- The prosecution established a complete chain which leads to the conclusion that only convicted appellant can commit the alleged crime and none other than the convicted appellant can be suspected to have committed this crime similarly every hypothesis suggesting innocence of appellant is ruled out by such evidence and the irresistible inference which follows is his guilt.

Settled law that in a case of circumstantial evidence it is incumbent upon the prosecution to connect all the links of the circumstances in such a manner that the only inescapable conclusion is the guilt of the accused and no other.

Death Sentence - Proportionate Punishment- Aggravating and Mitigating Circumstances- One indisputed statement of law follows that is is neither possible nor prudent to state any universal formula 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 option for 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-The convict/ appellant committed the crime which is abominable, vicious and ferocious in nature and has caused scar on the society. If crime is said to be of such a brutal, depraved or heinous nature so as to fall in the category of rarest of rare, he must be adequately punished for that. But we have to consider the circumstances of accused also before awarding punishment. Convict/appellant was of 20 years of age at the time of commission of crime now he has dependents in the form of wife and children. There is no evidence that the accused committed the crime with pre-planning or pre-ponderance. There is no evidence on record that there is no possibility of improvement in the conduct of the accused. No such evidence is adduced in the trial court that the accused is a hardened criminal. No criminal history of the appellant is stated during the trial- The instant case does not fall in the category of rarest of rare case warranting capital punishment. Before proceeding further, it would be pertinent to mention that death penalty is an exception only when life imprisonment would be inadequate to the crime. Therefore, the death sentence awarded to the convict under Section 302 IPC is liable to be

commuted into life imprisonment which will accomplish the ends of justice.

Settled law that life imprisonment is the rule and death penalty is the exception hence, every case has to be considered on its own facts and circumstances for determining the quantum of punishment and even where the offence committed is heinous and has shocked the collective conscience of the society but the circumstances of the accused are also relevant for awarding the punishment. Accordingly, death sentence commuted to imprisonment for life. (Para 36, 43, 44, 45, 48, 50, 56, 64, 65)

Criminal appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

1. Manoj & ors. Vs St. of M.P, 2022 LiveLaw (SC) 510

2. St. of U.P. Vs Satish (2005) 3 SCC 114

3. Duryodhan Rout Vs St. of Orissa 2014 (86) ACC 574

4. Purna Chandra Kusal Vs St. of Orissa 2012 (78) ACC 957

5. St. of U.P. Vs Anil Singh (1998) supp SCC 686

6. St. of U.P. Vs Krishanpal 2008 (16) SCC 73

7. Shriaji Genu Mohite Vs St. of Maha. 1973 Supreme Court 55

8. Amitava Benerjee @ Amit @ Bappa Banerjee Vs St. of W.B, AIR 2011 SC 2193

9. Darga Ram Vs St. of Raj. 2015 (88) ACC 634

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

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

12. Bachan Singh Vs St. of Punj. AIR 1980 SC 898

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

14. Ramnaresh & ors.. Vs St. of Chhattis. (2012) 4 SCC 257

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

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

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

1. The capital reference No. 1 of 2018 arises out of reference made by learned trial court under Section 366 (1) of Cr.P.C, 1973 to this Court for confirmation of death sentence awarded to appellant Govind Pasi.

2. The Criminal Appeal No. 1004 of 2018 has also been preferred by the convict appellant Govind Pasi s/o Hari Prasad Pasi R/o Gram Kumbh Police Station Gyanatnagar District Faizabad against the judgment and order dated 17. 5.2018 passed by the Additional Sessions Judge, F.T.C.-I, Faizabad in Sessions Trial No. 122 of 2013 State Vs. Govind Pasi, arising out of Case Crime No. 27 of 2013 Police Station Inayat Nagar District Faizabad vide which the accused has been convicted and punished with imprisonment for life and fine of Rs. 20,000/- under Section 376 IPC, imprisonment for the period of three months in default of payment of fine and has been convicted and punished with death penalty with 20,000/- fine under Section 302 IPC.

3. The facts of the case in brief are that:

4. An FIR was lodged by the complainant Jamuna Prasad on 29.01.2013 that his niece aged about 10 years went to school but did not return. On search the dead body of deceased "X' was found in the field at about 7:30 p.m. Her scarf was wrapped around her neck.

5. On the basis of written report in Police Station Inayat Nagar District Faizabad, a case was registered as Case Crime No. 27 of 2013 on the same day i.e. on 29.01.2013 at about 08:30 p.m. against some unknown persons under Section 302 IPC and the same was entered in general diary No. 38 at 20:30 p.m. The investigation was entrusted upon the Station House Officer, Ajay Prakash Mishra who recorded the statement of witnesses under Section 161 Cr.P.C, inspected the spot and prepared the site plan, collected plain and blood contained earth, prepared recovery memo and prepared recovery memo of under-garments, leggings (Pajama), shoes and school bag of the deceased "X' and conducted inquest and prepared inquest report and all the relevant papers relating to the postmortem of the deceased "X'. The postmortem of the deceased "X' was conducted by Dr. S.K. Tripathi.

6. The name of convicted/appellant Govind Pasi came into light during investigation. The arrest and recovery memo of under-garments of accused were also prepared. The Investigating Officer collected evidences against the convicted/ appellant Govind Pasi and filed the chargesheet in the Court.

7. The accused was provided copies of the police papers in compliance of the provisions of Section 207 Cr.P.C and the concerned court committed the case to the Court of Session.

8. The charges were framed against the convicted/appellant Govind Pasi under Section 302, 376 IPC and read over to convicted/ appellant Govind Pasi. The accused abjured himself from charges and claimed to be tried.

9. The prosecution, in order to prove its case produced 11 witnesses:

(A) P.W.-1 Jamuna Prasad-complainant;

(B) P.W. -2 Ram Prakash, last seen witness of the deceased "X';

(C) P.W.-3-Phool Chand, who has seen the deceased "X' being carried by the appellant Govind Pasi towards the sugarcane field of Shri Pal.

(D) P.W.-4- Vinod Kumar, who is also the witness of fact and said to have seen the deceased "X' when she was running towards her school to the north west near the grove.

(E) P.W.-5 Dr. S.K. Tripathi, who assisted Dr. S.P. Bansal in conducting post mortem of deceased. P.W.-5 deposed that the dead body of the deceased was identified by Jamuna Prasad who revealed his identity as the uncle of the deceased. The postmortem was conducted at 8:15 a.m. on 30.01.2013. P.W.-5 also narrated the ante mortem injuries found on the body of the deceased.

(F) P.W.-6 constable clerk Rahul Singh proved the Chik report No. 7/13. P.W-6 prepared and signed the chik report in his hand writing. The chik report is exhibited (Ka-3).

(G) P.W-7 Uma Shankar Yadav, Principal of M.D. Public School deposed that the name of the deceased "X' was entered in register prepared in the school in due course of business and the name of the deceased "X' was registered at page number 42 in the register. Her name was deleted by red pen after her death.

(H) P.W.-8 Dinesh Kumar is the witness of recovery of the under- garments of the appellant recovered at the pointing out of the appellant. He has proved the recovery memo 9A/1 exhibit (Ka-7).

(I) P.W.-9 Raj Kumar Kannojiya is also the witness to recovery of undergarments recovered at the pointing of the appellant from the fields of Shri Pal. He has also corroborated the exhibit (Ka-7).

(J) P.W.-10 Dr. Vipin Kumar Verma, who medically examined the appellant on 31.01.2013 and prepared medico-legal report exhibit (Ka-8).

(K) P.W.-11 Ajay Prakash Mishra, the Investigating Officer of the Case No. 27/13, who recorded the statement of witnesses under Section 161 Cr.P.C, inspected the spot wherefrom the dead body of the deceased "X' was recovered and prepared the map exhibit (Ka-9). This witness collected blood contained and simple earth and prepared the recovery memo exhibit (Ka-10), and further prepared the recovery memo of under-garments and other materials recovered from the body of the deceased "X' exhibit (Ka-11), recovery memo of black shoes of deceased "X' is exhibit (Ka-12). The Investigating Officer prepared inquest report and other relevant papers relating to postmortem, photo-lash, challan-lash, letter written to CMO, and letter written to R.I. etc (exhibits Ka-14 to Ka-19), site plan of recovery (exhibit Ka-20) and after completing investigation submitted charge-sheet (exhibit Ka-21), in Court.

10. Besides ocular evidence following relevant documents were also produced by the prosecution:-

(a) Written report (exhibit Ka-3),

(b) FIR of case crime No. 27 of 2013 (exhibit Ka-7),

(c) Recovery memo of under-garments of accused (exhibit Ka-7).

(d) Medico-legal report of accused Govind Pasi (exhibit ka-8).

(e) Site plan of Crime No. 27 of 2013 (exhibit Ka-9).

(f) Recovery memo of blood contained and plain earth (exhibit Ka-10).

(g) Recovery memo of undergarments and leggings of deceased "X' (Exhibit Ka-11).

(h) Recovery memo of shoes of deceased "X'(exhibit Ka-12).

(i) Recovery memo of school bag containing copies and books of deceased "X' (exhibit Ka-13).

(j) inquest report (exhibit Ka-14).

(i) The site plan of Crime No. 27 of 2013 (exhibit Ka-20).

11. After completion of ocular and documentary evidence adduced by the prosecution, the statement of accused was recorded under Section 313 Cr.P.C. The appellant denied the allegations levelled against him and stated that he has been falsely implicated in the case. The appellant also denied the recovery of article on his pointing out and the site plan prepared by the Investigating Officer. The appellant stated that he was arrested from his house by showing fabricated recovery from the accused and has falsely been implicated in this case. The medico-legal report is also prepared under the pressure of complainant. All the witnesses are interested witnesses and therefore, their evidence cannot be relied upon.

12. The appellant adduced defence evidence in his favour to rebut the case of prosecution. D.W 1 Bihari Lal appeared in Court and deposed that he is residing in village after his retirement since 31.07.2008. The appellant resides in front of his house. On the relevant date i.e. on 29.01.2013, the accused Govind was sitting with his grand parents in his chappar around the bonfire. Due to cold weather the accused including his grand parents and three sisters were at home.

13. No other witnesses was adduced by the accused in his defence.

14. After hearing the submission of D.G.C and learned counsel for accused and upon perusal of record, learned trial court found that the accused was guilty of offence under Section 376, 302 IPC and sentenced the accused with life imprisonment and Rs. 20,000 as fine under Section 376 IPC further simple imprisonment in default of payment of fine and further sentenced the accused with death penalty and with fine 20,000 under Section 302 IPC.

15. Being aggrieved with the impugned judgment and order of the trial court the accused/appellant has filed this criminal appeal No. 937 of 2015 from jail.

16. Heard Shri Manish Bajpai, learned Amicus Curiae, for the convicted/appellant and Shri Vimal Kumar Srivastava, learned Government Advocate, assisted by Shri Chandra Shekhar Pandey, learned Additional Government Advocate for the State.

17. The learned counsel for the appellant has assailed the judgment and order passed by the learned trial court on the ground that it is neither warranted in law nor on facts. The judgment is perverse and contradictory to the facts on record. The trial court has committed error in the eyes of law. The accused is innocent and has been falsely implicated in the present case due to political rivalry with the help of police. He was not named in the first information report and his name was dragged in the case after the recovery of the dead body. P.W.-3 did not support the prosecution story and has been declared hostile. The case is based on circumstantial evidence and the chain of circumstances is not complete one.

18. No Forensic Science Laboratory report in respect of the alleged recovery of undergarments, semen and blood of the appellant is placed on record. No DNA test has been ever conducted by the prosecution. As per the prosecution story the blood stain spots were found on the alleged recovered undergarments of the appellant as well as on the undergarments of the deceased "X'. They were not send to Forensic Science Laboratory for obtaining report by the prosecution. Semen slide of the appellant was also unable to compete successfully with the semen slide of the deceased "X'. No Forensic Science Laboratory report was obtained to ascertain that the alleged scratch marks, found on the face of the appellant, were caused by the nails of the deceased "X'. The owner of the sugarcane field Shri Pal is not produced in court as a witnesses. The alleged recovery is highly suspicious. There was no material on record before the learned trial court to prove the story of the incident. Therefore, the judgment of the trial court is totally biased against the appellant.

19. Learned trial court has not taken into consideration the evidence of defence witness Bihari Lal who is an independent witness. The learned trial court has given fanciful presumption and reasons in the judgment in favour of the prosecution. There are major contradictions on material points in the statement of prosecution witness of fact and their statement did not inspire any confidence and the same are not reliable and trustworthy. The prosecution has failed to prove its case beyond reasonable doubt. The provisions of section 313 Cr.P.C has not been properly complied with. The investigation of the case is highly

tainted. The sentence awarded by the learned trial court against the appellant is too severe. The appellant is a young boy having no criminal history. Therefore by way of this appeal the appellant has prayed for setting aside the judgment and order dated 17/5/2018 passed by the trial court.

20. Learned counsel for the appellant argued that the learned trial court has erred in convicting and sentencing the appellant as there is no evidence against him. The prosecution has not proved its version. The post mortem report does not corroborate the version of eye witnesses. He was not named in the FIR which came into the light only after the recovery of the dead body. The sentence awarded by trial court is too severe, therefore, the judgment and sentence passed by trial court is liable to be set aside.

21 To the contrary, learned Government Advocate appearing on behalf of the State has argued that the victim was 10 years old and when she was returning from school, the appellant lifted her in his lap, carried her to sugarcane field of Shripal, committed rape and brutally murdered her. She was strangulated by her own scarf which she was wearing on her head at the time of going to school. It is also stated by learned A.G.A that this is a rarest of the rare case where the appellant has murdered 10 years old girl after committing rape therefore the judgment passed by the learned trial court is based on ocular and documentary evidence as well as the recovery of under-garments of the deceased "X' which were recovered at the pointing out of the accused appellant. Therefore the judgment of the trial court is sustainable and is liable to be upheld.

22. We have considered the rival submissions and perused the record of the lower court as well as record of this appeal and gone through the settled case law.

23. In the present matter FIR was lodged by the informant against the unknown person stating that the deceased "X' was his niece. She was studying in M.D. Public School in Class III. On the date of occurrence on 29.01.2013 she went to the school at about 9:30 a.m. but did not return from the school. During search the dead body of the deceased "X' was found in the field of Shripal. She was strangulated by her own scarf.

24. In order to prove the case, the prosecution adduced evidence of P.W.-1 who stated on oath that her niece was studying in M.D. Public School in Class III. She did not return from school at due time and on being searched the dead body was found in the field of Shripal.

25. P.W.-2 deposed in Court and stated that on 29.01.2013 when he was carrying paddy at his horse-cart he saw Govind Pasi standing at the chak road near the sugarcane field and he saw the deceased "X' running towards the school carrying her school bag thereafter P.W.-2 returned his home.

26. P.W.-3 deposed that at about 10 a.m. on 29.01.2013 he was passing through the road and when he reached the chak road near Gurwa Kumbhi he saw the appellant standing in front of sugarcane field of Shripal and the deceased "X' was going towards school via Gorwa Chak Marg. As soon as she reached near the sugar cane field of Shripal, the convict appellant Govind Pasi lifted her in his arms and moved towards the field of Shripal. Thereafter, the P.W.-3 got shaved and went to his duty. Afterwards on his return from duty when he came to know about the death of the deceased "X'. Then he became assured that the incident must have been

committed by the accused Govind Pasi and no one else.

27. P.W.-4 stated on oath that when he was returning from defecation on 29.01.2013 at about 10 a.m, he saw the deceased going to school carrying her school bag. The deceased did not return thereafter.

28. P.W.-5 stated on oath that he conducted autopsy on the body of the deceased along with Dr. S.P. Bansal. The dead body of the deceased was brought by Constable Sirajuddin and Constable Angad Verma in the sealed condition. The body was identified by the uncle of the deceased. The whole proceedings of postmortem was videographed. The following ante mortem injuries were found on the body of deceased "X'.

(i) Two contusions on the right side of the face 3cm below the eye, 0.3x0.2cm in lower jaw area.

(ii) Five contusions of area 0.2x0.2 cm to 0.3x0.3 cm extended up to left eye towards the left nose and contusions of 5x3cm on the cheek.

(iii) Ligature marks 0.8x3 cm on the upper side of the neck on the left side in the middle line.

29. After conducting postmortem both the doctors opined that the cause of death is asphyxia due to strangulation. P.W.-5 collected and prepared vaginal swab slide and sixth left rib for the purposes of DNA test.

30. P.W.-6 Constable Rahul Singh stated that he lodged the FIR on the basis of written report by Jamuna Prasad and reduced in writing the chik report No. 7 of 2013 at about 20:30 p.m. and the chik report (Ka-3) G.D No. 38 as K-4.

31. The P.W.-7 appeared in trial court with the S.R. Register and prove that the name of the deceased was entered at page No. 42 and her name was deleted when she passed away. P.W.-7 further stated that class teacher Sukh Raj Maurya marked absence of deceased in the attendence register on 29.01.2013. The copy of register is produced exhibit Ka-6.

32. P.W.-8 Dinesh Chand Chaurasiya deposed that on 30.01.2013 at 8:30 p.m., Investigating Officer recovered under-garments of appellant Govind Pasi at his pointing out which was hidden near the well situated on the western side of the sugarcane field. The convicted Govind Pasi gave his blood sample, semen and under-garments to Investigating officer who sealed them and prepared recovery memo which was signed by him and by witness Ram Kumar as well as by the accused Govind Pasi which is exhibit Ka-a7. P.W.-9 also corroborated the evidence of P.W.-8.

33. P.W.-10 Dr. Vipin Verma stated on oath that he medically examined the appellant and abrasions were found on the face of the appellant caused by pointed object which were 48 to 72 hours old. The witness also stated that these abrasions may be caused by nails of 10 years old girl. The following injuries were found on the accused appellant:

(1) Multiple abrasion (3.5x 1.5 cms) right side of face 03 cms away from right angle of mouth.

(2) Abrasion (01x0.3 cms) left side of face 3.5 cms away from left angle of mouth.

Duration: 48 to 72 hours.

Opinion: All injuries are caused by some hard and blunt object and simple in nature.

34. It is the case based on circumstantial evidence. Hon'ble Apex Court had laid down certain principles applicable to appreciation of evidence in cases involving circumstantial evidence in **Manoj and others Vs. State of Madhya Pradesh** reported at **2022 LiveLave (SC) 510:**

"149. In one of its earlier decisions this court had in Hanumant v. The State of Madhya Pradesh indicated that the correct approach of courts trying criminal cases involving circumstantial evidence should be that the circumstances alleged, be fully established;all the facts so established should be consistent only with hypothesis of the guilt of the accused; circumstances should be conclusive and of such tendency that they should be such as to exclude every hypothesis but the one proposed to be proved. This view was followed later in Tufail v. State of Uttar Pradesh and Ram Gopal v. State of Maharashtra. All these and other decisions were revisited in the three-judge bench decision in Sharad Birdi Chand Sarda v. State of Maharashtra and the court enunciated a set of principles that every court trying criminal cases entirely based on circumstantial evidence had to follow.

150. The conclusions recorded by this court in Sarda were listed in Para 152 (which were characterised in Para 153 as "five golden principles").They are extracted below:

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr v State of Maharashtra where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

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

These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

151. These principles have stood the test of time, and the evidence in all criminal cases, have been evaluated in their light, throughout the country. In light of these binding principles this court would now examine whether the circumstances supported by evidence, i.e., those accepted by this court in the previous part of the judgement, was of such conclusion as to stand the test of the five golden principles enunciated in Sarda (supra).

35. P.W.-1 Jamuna Prasad stated that deceased was his niece who was going to school on the fateful day. When she did not return from school at due time, he started search and during search he found the dead body of the deceased in the sugar case field. Her scarf was tied on her neck. Apparently, he presumed that she was murdered. This witness is not the witness of fact rather he proved exhibit-Ka 2. PW-2 in his statement proved the fact that at about 8 to 8:30 a.m. on 29.01.2013, he unloaded paddy in the field of Mata Badan r/o Village Kumbhi situated near government tubewell and loaded rice belonging to Ram Abhilash and delivered the same. As soon as he reached near the field of Shripal he saw convict/appellant Govind Pasi standing there and his bicycle was also lying there. This witness proved the the deceased "X' was running towards the school carrying her bag. When he returned home in the evening, he came to know that the deceased "X' did not return from school and he along with the complainant started searching the deceased "X'. As soon as they reached the place where the accused was standing in the morning and deceased "X' was moving towards the school, the dead body of the deceased "X' was found in the field of Shripal. The body of the deceased "X' was naked and pooled in blood at that time. P.W.-3 also corroborated the testimony of P.W.-2 and stated that he was going to government tube well in village Kumbhi and saw that convicted appellant Govind Pasi standing near the sugarcane field of Shri Pal and the deceased "X' aged about 10 years was going to school via Gorwa Chak Marg. The witnesses also deposed that as soon as the deceased "X' reached near the sugar cane field of Shripal, Govind Pasi lifted her in his arms and went towards the field. Thereafter the witnesses went on his duties and came to know in the evening that the dead body of the deceased "X' was found in the field of Shripal. He firmly believed that this must have been done by convict appellant Govind Pasi.

36. All the prosecution witnesses No. 2 to 4 had seen the accused Govind Pasi standing in front of the sugar cane field of Shripal and the victim running towards her school. P.W.-3 had also proved that the deceased "X' was being taken towards the field by the appellant. P.W.-7 who is the Principal has proved that the victim did not attend the school on the fateful day i.e. on 29.01.2013 which further corroborates that fact that the deceased "X' was picked up by accused-appellant before she reached her school. . She was not seen thereafter by any of the villagers. Thus prosecution proved last seen evidence. The chain of circumstances is also closely related and proves that the victim was going to school and the accused was near the field of Shri Pal and when the deceased "X' reached near the field, the convicted appellant Govind Pasi lifted her in her arms and moved towards the filed. Thereafter, she was found dead in the field of Shripal.

37. In **State of U.P. Vs. Satish (2005) 3 Supreme Court Cases page no. 114**, Hon'ble Supreme Court has held thus:

" 22. The last-seen theory comes into play where the time-gap between the point of time when the accusd and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In

the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guild in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses Pws 3 and 5, in addition to the evidence of PW 2."

38. **Duryodhan Rout Vs State of Orissa 2014 (86) ACC 574** Hon'ble Supreme Court has held thus:

"11. The trial court convicted the appellant on the basis of the chain of circumstantial evidence available against the accused. It was found that the accused carried the deceased on his cycle at about 4 pm but returned alone at 5p.m. He confessed to have murdered the deceased before Mulia Bhoi (P.W 5) ..... Thus, the accused was last seen with the deceased. There is nothing to indicate that within one hour, there was any scope for anybody else, other than the accused to commit rape and murder of the deceased. The chain of circumstances of the case thereby leads to the hypothesis that the accused and the accused alone was the author of the crime, and therefore, the trial court rightly convicted the accused under Sections 376 (2) (f)/ 302/201 IPC."

39. In **Purna Chandra Kusal Vs. State of Orissa 2012 (78) ACC 957**; Hon'ble Supreme Court has held as follows:

"6. We find absolutely no reason to interfere with the conviction of the appellant. In addition to the last seen evidence of P W 5 and PW10, we have the evidence of the recoveries made at the instance of the appellant. The clothes that the appellant and the deceased had been wearing had also been taken into possession by the investigating agency and were found to be stained with human blood. We find, therefore, that the last seen evidence finds full corroboration from the recoveries."

40. We have gone through all the documents and evidence produced in the impugned case by the prosecution. The witness produced by the prosecution unequivocally stated that the girl was seen by the witnesses in the arms of appellant who was carrying the victim towards the sugarcane field of Shri Pal. P.W.-7 deposed that she did not attend the school on that day as per the register and she was not seen by any one in village. It is also pertinent to mention here that in the present case abrasion were also found on the face of the accused. P.W.-10 Dr. Vipin Kumar Verma proved that convict Govind had injuries in the nature of abrasion 3.5 cm x 1.5. cm at the distance of 3 cm from the right side of the face of the appellant and 1.0x0.3 which is found 3.5 cm away from the left side of the lips. The injuries are proved by the doctor during the trial and it is stated that these injuries may be caused to the appellant by nails of 10 years old girl.

41. The accused denied the allegation in his statement under Section 313 Cr.P.C but did not explain how the injuries on his face were caused. P.W.- 3 though declared hostile in court under cross-examination made by the ADGC, has admitted that the accused confessed in the police station that he committed rape upon the victim and strangulated her.

42. Hon'ble Apex Court held in **State of U.P. Vs. Anil Singh reported at (1998) supp SCC 686** that:

"17. It is also our experience that invariably the witnesses add embroidery to prosecution story perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform"

43. It has been further emphasized that if discrepancies in the depositions are minor, that that witnesses contradict themselves during their testimonies as opposed to their previous police statements what is important is that the nature of contradictions. In **Rammi @ Rameshwar Vs. State of Madhya Pradesh**, Hon'ble Supreme Court held that:

"24. ... Courts should bear in mind that it is only when discrepancies in the evidence of a witnesses are so incompatible with the credibility of his versions that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny"

44. Thus in view of the above said facts prosecution has proved complete chain of circumstances to prove the guilt of appellant to the extent that no other conclusion can be arrived at except the guilt of the appellant. There is cogent evidence to prove that the the victim was subjected to rape and murder by convicted appellant only.

45. Insofar as the question of motive is concerned in the case of circumstantial evidence the prosecution has to prove the motive behind the crime but in cases of sexual assault motive looses its importance to be proved. Besides, the motive is something in the mind of accused which is not always possible to be proved by prosecution. Apparently accused/appellant raped the deceased who was a ten year od girl to satisfy his lust and murdered her in order to suppress the evidence against him.

46. In the case of **State of U.P. Vs. Krishanpal 2008 (16) SCC 73** it has been held by the Supreme Court that the motive can be considered as a circumstances which is relevant for evidence. Similarly in the case of **Shriaji Genu Mohite Vs. State of Maharashtra 1973 Supreme Court 55** it is observed by the Supreme Court that in case the prosecution is not able to discover motive the same shall not reflect upon the credibility of the witness proved to be reliable eyewitnesses. However, the evidence as to motive would not do away a case where the case is dependent upon circumstantial evidence, said evidence would fall as one of the link in the chain of circumstantial evidence.

47. In the case of **Amitava Benerjee @ Amit @ Bappa Banerjee Vs. State of West Bengal AIR 2011 Supreme Court 2193**, it was held by Apex Court that the motive for commission of offence no doubt assumes greater importance in cases of circumstantial evidence than those of direct

evidence yet failure to prove motive in cases rest on circumstantial evidence is not fatal by itself.

48. In view of the aforesaid pronouncement by the Supreme Court it is apparent that in case of circumstantial evidence motive assumes importance and it holds one of the link in the chain of circumstances however failure to provide motive is not fatal by itself.

49. In the instant case, as stated above, it has been established that P.W.-2 proved that the appellant was standing on the way of school and P.W.-3 though declared hostile yet stated that the accused confessed his crime to Sub-Inspector in his presence. P.W-4 has also proved the fact he saw the victim going to school victim was not seen thereafter. P.W.-7 proved her absence in school. Injuries of the victim are proved and the injuries sustained by the appellant are not explained.

50. Thus the prosecution established a complete chain which leads to the conclusion that only convicted appellant can commit the alleged crime and none other than the convicted appellant can be suspected to have committed this crime similarly every hypothesis suggesting innocence of appellant is ruled out by such evidence and the irresistible inference which follows is his guilt.

51. In **Darga Ram Vs. State of Rajasthan 2015 (88) ACC 634**, Hon'ble Supreme Court laid down that if recovery is made at the pointing out of the accused then this type of recovery shall be admissible in evidence under Section 27 of the Indian Evidence Act. Thus in view of the above the recovery of under-garments at the pointing out of the convict is covered by Section 27 of the Indian Evidence Act and admissible in evidence. The prosecution has also proved by medical evidence that private parts of the victim were found pooled in blood. Vagina was torned, Hymen was torned, stool was coming out of anus and abrasion was present 10 cm below the right eye 0.3x 0.2 cm and 0.3 x 02 cm on the lower jaw. Five abrasions were also found on the face below the left eye extended to the neck and cheek and ligature marks 0.8x3 cm were found on midline of neck. Dead body was recovered with her scarf tied around her neck which also corroborates the prosecution case that she was murdered by strangulation with her scarf after rape.

52. Learned counsel for the convicted appellant argued that all witnesses of fact are relative of the deceased "X' therefore they are highly interested witnesses hence their evidence could not be relied upon. This argument has no force. It is a well settled law that evidence of relative witness cannot be brushed aside only for the reason that he is related to the complainant if they inspire confidence to the level of independent, impartial, cogent and consistent witness.

53. In **Kartik Malhar Vs. State of Bihar (1996) 1 SCC 614**, the Hon'ble Apex Court has held as under:-

"We may also observe that the ground that the witness being a close relative and consequently, being a partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which this Court expressed its surprise over the impression which prevailed in the minds of the members of the Bar that relative were not independent

witnesses. Speaking through Vivian Bose, J., the Court observed :

We are unable to agree with the learned Judges of High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. The State of Rajasthan [1952] SCR 377= AIR 1952 SC 54. We find, however, that it is unfortunately still persist, if not in the judgments of the Courts, at any rate in the arguments of counsel."

In this case, the Court further observed as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such an enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. ` In another case of ***Mohd. Rojali Versus State of Assam: (2019) 19 SCC 567****, the Hon'ble Apex Court in this regard has held as under:-*

"As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now wellsettled that a related witness cannot be said to be an "interested' witnesses merely by virtue of being a relative of the victim. This court has elucidated the difference between "interested' and " related' witness in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see ***State of Rajasthan v. Kalki (1981) 2 SCC 752; Amit v. State of Uttar Pradesh, (2012) 4 Scc 107; and Gangabhavani v. Rayapati Venkat Reddy, (2013) 15 SCC 298). Recently, this difference was reiterated in Ganapathi v. State of Tamil Nadu, (2018) 5 SCC 549,*** *in the following erms, by referring to the three Judge bench decision in State of Rajasthan v. Kalki (supra): "14. "Related" is not equivalent to "interested". A witness may be called "interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case cannot be said to be "interested"."*

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

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

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

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

54. Having considered the fact and circumstances and the material in the record, we are of the view that the prosecution has established the case of circumstantial evidence beyond reasonable doubt and the chain is also complete so as to suggest that only accused can commit the crime and there is no possibility that can lead to the conclusion that any person other than the accused can commit this crime. After due consideration of evidence on record we are of the view that the trial court has rightly convicted the appellant Govind Pasi and there is no legal infirmity in the judgment with regard to the conviction of the convict appellant.

55. Now, while upholding the conviction of the convict-appellant, we proceed to consider the question of death sentence awarded by him by the trial court under Section 302 IPC.

56. Capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one indisputed statement of law follows that is is neither possible nor prudent to state any universal formula 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 option for 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.

57. Before going into the legality and propriety of question of sentence imposed upon the convict/appellant, it is desirable 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 had 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, 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 farmers 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 vs. 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 consequent 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 condition 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 conditional 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 the 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 and 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 blood thirsty. Hanging of murders has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India , show that 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 police 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 through law's instrumentality. That ought not to be done save the rarest of rare cases when the alternative option is unquestionable foreclosed."

58. 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 to shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In this Judgment the Hon'be Supreme Court has summarized the instances on which death sentence may be imposed, which reads thus:

"38.xxxx

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

(ii) Before option for the death penalty the circumstances of the "offender' also requires 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 question 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)

59. The issue again came up before the Hon'ble Apex Court in ***Ramnaresh & others v. State of Chhattisgarh*** reported in (2012) 4 SCC 257, wherein the Hon'ble Supreme Court reiterated thirteen aggravating and seven 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 judgments, 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 aspect and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to the classes under any of the following beads 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 crime like murder, rape, armed dacoity, kidnapping etc. By the accused with prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convicts.

(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 evidences total depravity and meanness.

(12) When there is a cold blooded murder with provocation.

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

Mitigating Circumstances:

(1) The manner and circumstances 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 behaviour possible and cold 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 behaviour 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 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 guilty of the accused."

60. In the matter of ***Dharam Deo Yadav Vs. State of U.P***. reported in ***(2014) 5 SCC 509***, the Hon'ble Supreme Court had held thus:

"36. We may not 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 vs. 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 fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspect 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 the 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.

61. In ***Kalu Khan v. State of Rajasthan*** report in ***(2015) 16 SCC 492,*** the Hon'ble Supreme Court had 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 Vs. State (Govt. Of NCT of Delhi) as follows: (Mahest 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'."

62. In the light of the proposition of law we are required to scrutinize the case in hand mainly to find out whether the case was in the category of rarest of the rare case and imposition of death penalty would be the only appropriate sentence and the imposition of life imprisonment, which is a rule, would not be adequate to meet the ends of justice. While awarding death sentence to the appellant, the trial court has drawn the conclusion that the convicted has committed rape of 10 years old innocent child hence she sustained grievous injuries on her private parts and was brutally murdered by appellant the same come under the category of rarest of the rare case.

63. From the perusal of the above it is clear that the aggravated circumstances assessed by the trial court for awarding the extreme penalty of death are that the crime was committed with an innocent child of 10 years who was living alone with her maternal grandparents (Nana and Nani) and her parents were living in Delhi for livelihood of family. The special reason assigned by the trial court held that the balance sheet of gravity and mitigating circumstances heavily weight against the appellant making it the rarest of rare case and consequently awarded death sentence.

64. However, the convict/ appellant committed the crime which is abominable, vicious and ferocious in nature and has caused scar on the society. If crime is said to be of such a brutal, depraved or heinous nature so as to fall in the category of rarest of rare, he must be adequately punished for that. But we have to consider the circumstances of accused also before awarding punishment. Convict/appellant was of 20 years of age at the time of commission of crime now he has dependents in the form of wife and children. There is no evidence that the accused committed the crime with pre-planning or pre-ponderance. There is no evidence on record that there is no possibility of improvement in the conduct of the accused. No such evidence is adduced in the trial court that the accused is a hardened criminal. No criminal history of the appellant is stated during the trial.

65. Hence after considering the above facts and circumstances we are of the view that each link in the chain of circumstantial evidence has been adequately established by prosecution and conviction is hereby affirmed but that the instant case does not fall in the category of rarest of rare case warranting capital punishment. Before proceeding further, it would be pertinent to mention that death penalty is an exception only when life imprisonment would be

inadequate to the crime. Therefore, the death sentence awarded to the convict under Section 302 IPC is liable to be commuted into life imprisonment which will accomplish the ends of justice.

Conclusion

66. While affirming the conviction of the appellant under Section 376 and 302 IPC we set aside the death penalty of the appellant awarded by the trial court under Section 302 I.P.C. and this Court modify his sentence from death penalty to life imprisonment without remission under Section 302 I.P.C.

67. The Criminal Appeal No. 1004 of 2018 is **partly allowed**. In the light of the above discussion reference for confirmation of death penalty is liable to be rejected and is accordingly **rejected**.

68. The appellant is in jail and shall serve out his sentence as has been ordered and modified by this Court.

69. We appreciate the able assistance of Shri Manish Bajpai, learned Amicus Curiae who assisted the Court in disposal of the present reference and appeal.

70. Let a copy of this judgment as well as lower court record be transmitted to the trial court forthwith for necessary information and compliance.

(2022) 10 ILRA 982
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Appeal No. 355 of 2018

Krishnakant ...Appellant (In Jail)
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Anuruddh Chaturvedi, Sri Ajay Kumar Giri, Sri Ram Milan Dwivedi, Sri Surendra Kumar, Sri Satya Sinha, Sri Lallu Singh Kanchan Ranjan, Sri Saurav Chaturvedi, Sri I.K. Chaturvedi (Sr. Advocate)

Counsel for the Respondents:
G.A.

Criminal Law- Indian Penal Code, 1860- Section 376- Protection of Children from Sexual Offences Act, 2012- Section 4 - Section 42- Punishment under Section 4 POCSO Act is greater in degree as under Section 376 IPC, the punishment of imprisonment for life was with no fine but punishment which was with fine was up-to ten years only- Hence as per Section 42 POCSO Act, in case of a conviction under Section 376 IPC and for penetrative sexual assault punishable under Section 4 POCSO Act, the sentence has to be awarded under Section 4 POCSO Act only because it is a sentence of greater degree- As such the sentence as awarded under Section 376 IPC is set-aside.

As per the mandate of Section 42 of the POCSO Act, sentence of the greater degree has to be awarded.

Indian Evidence Act, 1872- Section 64- Section 65- An unproved and unexibited document cannot be treated as evidence in a case- There is a departure from the said settled proposition of law as the trial court has during arguments taken the High School Certificate of the victim and considered it along with the date of birth mentioned in the protest petition for reaching to a conclusion with regards to the age of the victim. The same is an incorrect approach of the trial court- The radiologist has opined as per the radiological examination in his cross-examination as her being aged about 18

years of age. Thus, even by giving a benefit of variation of two years, she would be a major.

Settled law that an unproved and unexhibited document is inadmissible in evidence and hence the opinion of the radiologist opining the age of the victim shall be accepted.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1) 11- A perusal of the FIR shows that there is no such averment in it that the victim belongs to the caste which came in the category of SC/ST. There was no document filed to establish the caste of the prosecutrix. The prosecution has not established that the first informant belong to a caste falling within the SC/ST Act- POCSO Act, Section 4 of the Act deals with punishment for penetrative for sexual assault. The medical evidence does not corroborate with the prosecution story.

In order to bring home the charge under the SC/ST Act it is incumbent for the prosecution to prove that the victim belongs to the SC/ST category. (Para 25, 28, 29, 30, 32, 34, 35)

Criminal Appeal allowed. (E-3)

Case law/Judgements relied upon:-

Ram Murti Vs St. of Har. (1970) 3 SCC 21

(Delivered by Hon'ble Samit Gopal, J.)

1. The present Criminal Appeal under Section 374 (2) Criminal Procedure Code, 1973 read with Section 14-A (2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("SC/ST Act") has been filed by the accused appellant Krishnakant against the judgment and order dated 30.11.2017 passed in Special Criminal Case No. 73 of 2014 (State Vs. Krishnakant) convicting and sentencing the appellant under Section 376 Indian Penal Code, 1860 ("IPC") to 15 years Rigorous Imprisonment and a fine of Rs.15,000/-, under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") to 15 years Rigorous Imprisonment and fine of Rs.15,000/-, under Section 3 (1) 11 SC/ST Act to 2 years Rigorous Imprisonment and a fine of Rs. 2,000/-, under Section 506 IPC to 1 year Rigorous Imprisonment and a fine of Rs. 1,000/-. It is further ordered that in default of payment of fine under Section 376 IPC and Section 4 POCSO Act the appellant shall undergo 2 years each additional imprisonment, under Section 3 (1) 11 SC/ST Act to 2 months additional imprisonment and under Section 506 IPC to 1 month additional imprisonment. The sentences have been ordered to run concurrently. It is further ordered that out of the fine as deposited, Rs.15,000/- as compensation shall be paid to the victim.

2. The name of the prosecutrix is not being disclosed and mentioned in the present judgment in the light of directions of the Apex Court in various judgments and Section 228A of the IPC. She is, thus, referred to as 'X' in the judgment.

3. The prosecution case as per an application dated 9.6.2013 given by victim "X' to police of police station Kamasin, District Banda is that she is daughter of Shiv Poojan residing in village Pachauha, Police Station Kamasin, District Banda. On 23.5.2013 at about 10 a.m. she had gone towards the Southern Nala of the village to bring her buffaloes wherein Krishnakant Dwivedi of the village came from behind, caught hold of her, put a country-made pistol on her chest and committed rape on her. He threatened her that if she discloses it to anyone in the house then he would murder her brother and father. The incident has been witnessed by Chota S/o Babu Lal of the village. She came back home and

told about the incident to her mother and father. On 1.6.2013, she along with her mother Smt. Siya Sakhi and father Shiv Poojan went to Police Station Kamasin and gave information on which her medical examination was done at the District Hospital, Banda. Her date of birth is 28.6.1996. She prays that a case be registered and legal action be taken.

The said application is Exb : Ka-1 to the records.

4. On the basis of the said application, an FIR was lodged as Case Crime No.144 of 2013 under Section 376, 506 IPC and 3(Ka)/4 POCSO Act, 2012 and Section 3(1)XII of the SC/ST Act, P.S. Kamasin, District Banda against Krishnakant Dwivedi on 9.6.2013 at 12.30 hours.

The Chik FIR is Exb : Ka-3 to the records.

5. The victim 'X' was medically examined by Dr. Charu Gautam, Medical Officer, Female District Hospital Banda while being brought by Constable Jamuna Devi on 1.6.2013 at 3 p.m. On her general examination, the doctor noted as follows:-

"No injury over arm, fore arm, axilla, breast, abdomen, back, thigh and legs.

On examining the external genital, the doctor noted as follows:-

"No injury over labia majora, minora and clitoris."

On examination of internal genital, the doctor noted as follows:-

"Hymen torn old and healed. Vagina admits two fingers easily. Vaginal smear prepared and send to pathologist, P.H. Banda for confirmation of spermatozoa and urine pregnancy test for confirmation of pregnancy."

X-Ray was advised for determination of her age. The opinion as drawn by the doctor is as follows:-

"Final opinion to be given after radiology and pathology report."

The said report is Exb : Ka-5 to the records.

A supplementary report dated 10.06.2013 was prepared by Dr. Charu Gautam in which the finding as per pathological report is as follows:-

"Vaginal smear shows no dead or alive spermatozoa. Urine pregnancy shows negative results."

The opinion according to radiological examination is as follows:-

"Right Elbow joint- all epiphysis at right elbow joint are fused.

Left and right wrist- AP epiphysis at lower end of right and left ulna are fused. Line of fusion seen in right and left radius with partial fusion in wrist joint."

The opinion about rape is given as follows:-

"It is very difficult to say that rape is committed on her or not."

The said report is Exb : Ka-6 to the records.

The X-Ray examination report dated 3.6.2013 is Exb : Ka-7 to the records which has been given by Dr. Gyanendra Neekhra.

6. The investigation concluded and a final report was submitted in favour of the accused-appellant stating therein that no case is made out against him and he has been falsely implicated. On the said final report, a protest petition was filed on which the accused-appellant was summoned to face trial.

7. Subsequently vide order dated 1.1.2016 passed by Additional Sessions Judge/Fast Track Court, Banda, charge under Section 376 - Jha, 506 IPC, Section 4 POCSO Act, 2012 and 3 (1) XI SC/ST Act was framed against the accused appellant.

The accused pleaded not guilty and claimed to be tried.

8. The prosecution in order to prove its case produced and examined victim "X' as P.W.1, Shiv Poojan, the father of the victim as P.W.2, Smt. Shiv Dhuliya, the maternal aunt/mausi of the victim "X' as P.W.3, Smt. Siya Sakhi, the mother of the victim "X' as P.W.4, Head Constable Ayodhya Prasad as P.W.5, Dr. Charu Gautam as P.W.6 and Dr. Gyanendra Neekhra as P.W.7.

9. The statement of victim 'X' recorded under Section 164 Cr.P.C. was filed and proved as Exb : Ka-2 to the records.

10. The accused-appellant in his statement recorded under Section 313 Cr.P.C. has denied the prosecution case and has stated that he has been falsely implicated in the present case.

In defence he produced Anil Singh as D.W.1 and Sumer as D.W.2 and further filed the parivar register 57 Kha and papers of medical examination 58-Kha to 60-Kha.

11. The trial court after conclusion of trial convicted and sentenced the accused-appellant as stated above.

12. Heard Sri I.K. Chaturvedi, Senior Advocate assisted by Sri Saurav Chaturvedi holding brief of Sri Ram Milan Dwivedi, learned counsel for the appellant, Sri Ankit Srivastava, learned Brief Holder for the State of U.P. and perused the materials on record.

13. Learned counsel for the appellant argued that the appellant has been falsely implicated in the present case. It is argued that victim 'X' is a major girl. It is argued that there is an enmity of the accused-appellant with the mother and mausi of victim 'X'. The matter was investigated and it was found that the accused-appellant has been falsely implicated and as such a final report was submitted in his favour after which he was summoned on a protest petition filed in the matter. It is argued that the medical examination of victim 'X' does not corroborate with the prosecution case. The doctor did not opine of any rape being committed on her but to the contrary looking to the medical examination report dated 1.6.2013 (Exb : Ka-5) specifically the examination of internal organs, it is clear that victim 'X' was habitual to sexual intercourse. The doctor in the supplementary medical examination report has given an inconclusive finding with regards to the allegation of rape stating that it is difficult to say that rape is committed on her or not and as such an inference can be drawn that there was no rape committed on her. It is argued that the present FIR has been lodged after an unexplained delay of 16 days. The incident is alleged to have taken place on 23.5.2013 after which the present FIR has been lodged on 9.6.2013. There is no explanation whatsoever regarding the delay in lodging of the FIR. It is argued that the medical examination of the victim 'X' was conducted on 1.6.2013 which was prior to lodging of the FIR and even in the same there was no suggestion of rape being committed on her. Even till the time of her medical examination which was after about 8 days of the occurrence, there was no whisper regarding the accused-appellant being involved in the matter. It is argued that as per the FIR, the victim has disclosed her date of birth as 28.6.1996 and as such at the time of occurrence, she would be around 17 years of age. It is argued that the trial court in its

judgement and order of conviction has stated that at the time of arguments, the copy of the High School certificate of the victim 'X' was produced before the court in which her date of birth was written as 28.6.1997 which was taken to be true by the trial court and her age was assessed as about 15 years 10 months and 25 days at the time of occurrence which is an incorrect and illegal approach as the said document was not produced in evidence before the trial court and even the accused was not given an opportunity to challenge the same. It is argued that a document produced in the trial all of a sudden without it being proved and without the accused being given the opportunity to challenge it cannot be considered. It is argued that there is nothing on record to show that the victim girl belongs to a caste falling within the SC/ST. The accused-appellant cannot be convicted under Section 376 IPC as per Section 42 POCSO Act. It is further argued that Chota, the alleged eye-witness of the case has not been produced by the prosecution. It is argued that looking to the glaring irregularities, illegalities and lack of evidence, the accused-appellant deserves to be acquitted. He has been in jail since 30.11.2015 and as such has undergone about 6 years and 10 months of incarceration. The appeal deserves to be allowed.

14. Per contra learned counsel for the State has opposed the arguments of learned counsel for the appellant and argued that the occurrence of the present case is of 23.5.2013 of which the FIR was lodged on 9.6.2013. It is argued that the information about the incident was given by the victim herself at the police station on 1.6.2013 after which her medical examination was done. It is argued that there is no chance of false implication in the matter or even misidentity as the accused-appellant was known to the victim 'X'. It is argued that the contradictions in the statement of the witnesses are minor in nature as their statements have been recorded after 3 years of the incident and as such cropping of some contradictions is a natural consequence. The appellant is named in the FIR and there are allegations against him of committing rape on victim 'X'. The FIR has been lodged by the victim herself. There is no reason stated by the accused-appellant in his statement recorded under Section 313 Cr.P.C. for his false implication. The appellant has active role in the present case. The trial court after examining the evidence on record has convicted the appellant. The present appeal deserves to be dismissed.

15. Victim 'X' P.W.1 states that the incident is of 23.5.2013 when she was giving water to her buffaloes and the animals suddenly started running towards the South nala. She ran behind them wherein Krishna Kumar Dwivedi of the village caught hold of her from behind and threw her on the ground, threatened her with a country-made pistol and took out her salvar and committed rape on her. She tried to shout but he threatened her with a country-made pistol and stated that if she tells it to her family members, he would murder them. She came back home and told about the incident to her family members but the side of the accused were pressurizing them regularly for not lodging a report. After that on 9.6.2013, she went to the police station with her parents and gave a tehrir written by her which is on record. She proves the same as Exb : Ka-1 to the records. She states that on 1.6.2013 she had given an information at the police station on the basis of which her medical examination report was done and her statement under Section 164 Cr.P.C. was

recorded. She proves her statement under Section 164 Cr.P.C. and her signature on it. She states that she had given her statement before the Magistrate but in the same it is written that she did not know Krishna Kumar Dwivedi from before and came to know when with a boy Chotu disclosed about him and then she came to know of his name, is incorrect but he is of the same village and she knew him from before. She proves her statement which was marked as Exb : Ka-2 to the records.

In her cross-examination, she states that she is a student of B.A IInd year. She had studied class Xth at the time of incident. She does not remember when her class Xth board examination has finished. She was giving water to her buffaloes on 23.5.2013 at 10 a.m. Her house in village Pachauha on the Narayanpur Road at the corner. The South nala is about ½ km. away from her house where her buffaloes started running. Her buffaloes had run outside the village towards nala. They had reached the nala. They sat inside the nala. She tried to get them out of the nala but they did not come out and then she sat on the south corner. When she had reached the nala, Krishna Kant Dwivedi was not there. Chota @ Babu Lal Chamar was not there. She reached the nala at about 10 a.m. After about 2-4 minutes, the accused and Chota reached there. When the accused Krishna Kumar Dwivedi caught hold of her, Chota was about 2-4-10 steps away. The accused had caught her when she was sitting at the corner of the nala. The ground was rough and with rubbles. She was thrown on the ground from her back side. After throwing her down, her salvar was taken out. She tried to save herself at the time of incident and resisted the occurrence. She had received injury on her back at the time of incident. Her back did not get injured but there was pain which she is telling. The accused was on her top. The rape continued for 15-20 minutes. The accused was there for about 21-22 minutes and till that time Chota was also there. After that the accused went away along with Chota. She then wore her clothes and came back. She reached at about 10.30 a.m. She told about the incident after returning home to her parents. She went to the police station Kamasin with her parents on 1.6.2013. She reached police station at about 10 a.m. Prior to 1.6.2013 neither her parents nor she gave any complaint to the administration or police. On 1.6.2013, the police of police station Kamasin got her medical done. Her X-Ray was done after three days. After her medical examination, she did not return back to the police station but went to the house of her mausi in village Maki. She was called for her X-Ray examination at the police station. She went there with her parents and then she was taken for X-Ray by a police constable. On 1.6.2013, no report was lodged. The police got her medical examination and X-Ray done without any report. From 1.6.2013 to 8.6.2013 no Fax was done with regards to the incident. She does not have any copy of the Fax and neither is there any application on record. She went to the police station Kamasin on 9.6.2013 on her own. She did not call anyone. She reached the police station at 10 a.m. She got the report lodged on her own. Her report was lodged on 9.6.2013. Her statement was recorded before the Magistrate. Certain things had been written wrong in the statement and certain things are correct. There was no enmity at that time. She had stated that earlier her statement was recorded wrongly by the Magistrate but she does not know as to why the same was recorded as such. She states that it is incorrect that on the advice of her Advocate, she had given a wrong statement before the Magistrate. She

further states that it is incorrect that the accused Krishna Kumar Dwivedi did not commit rape on her and threatened her with a country-made pistol. She states that the incident is not a false incident and story is not a fabrication and untrue that no such incident took place. She states that on the basis of her report, the case was lodged in which after investigation, final report was submitted. She states that it is incorrect that the Investigating Officer found the story to be false and filed final report. She filed an application through her lawyer after filing of the final report and then the case again started. She denies that the entire story is false and with enmity. She further denies the suggestion that there was some dispute with regards to the harvesting of wheat and money between her parents and the family of the accused. She further denies that due to the said dispute, false case has been lodged and the accused-appellant has been implicated who threatened for it. She further denies that the accused has been falsely implicated under conspiracy. She further states that it is incorrect that after consultation and discussion her parents pressurized her for lodging of a report and under their pressure, she is given the false statement.

16. Shiv Poojan, P.W.2 is the father of victim "X'. He states about the incident to have taken place on 23.5.2013. He states that the age of victim 'X' was about 17 years at that time. The victim 'X' had gone to bring her buffaloes at about 10 a.m. who had run away. Krishna Kumar Dwivedi was hiding near the nala who caught-hold of his daughter, threatened her with a country-made pistol and committed rape on her. He then threatened her of not disclosing it to anyone otherwise he would kill her. His daughter when came back home, told him about the incident after which he went to the police station with his daughter but his report was not lodged. He then gave an application to higher officials after which his report was lodged. The medical examination of his daughter was done. His statement was recorded during investigation.

In cross-examination, he states that his original village is Babu Ka Purva. Pachauha is his Sasural. He had come to village Pachauha around 9-10 years ago and was living there. He had constructed a house around 5-6 years back. The land was given for construction of his house by Kailash Nath Dwivedi who is the grand-father of accused Krishna Kant Dwivedi. He does not work in the fields of Kailash Nath Dwivedi and the accused. To a suggestion given to him, he denies that due to present dispute he is being pressurized by the family members of the accused to vacate his house which is on their land and he has denied that he has threatened the accused of implicating him in a case. He further denies the suggestion that due to the said dispute after consultation he has implicated the accused in a false case.

17. Shiv Dhuliya, P.W.3 is the mausi of the victim 'X'. She states that the incident had taken place about 3 years ago. The victim 'X' is the daughter of her sister. She had gone to give water to the buffaloes. The victim is resident of village Pachaunha, Police Station Kamasin. She has reached on the information given by the father of the victim 'X'. She was told about the incident by victim 'X'. Her daughter was raped by Shivakant. After the incident, she went to the police station with her daughter and lodged an FIR. Shivakant is the son of Suresh Tiwari Brahmin and resident of village Pachauha. Her daughter was medically examined in P.H.C. Her statement was recorded in the said matter.

In her cross-examination, she states that she is not an eye-witness of the incident. She is telling about it on hearing it from someone.

18. Siya Sakhi, P.W.4 the mother of victim 'X' states that the incident is of 3 years ago. On that date the mother of Jagmohan of the village had died and she had gone there. Her husband Shiv Poojan had gone to do work in the village. Her daughter victim 'X' and one small child were in the house. Her buffaloes freed themselves and ran towards nala. Her daughter victim 'X' had gone behind the animals where Krishna Kant Dwivedi was present from before who called her daughter and threatened her with a country-made pistol and told her not to tell about the incident to anyone otherwise he would kill her parents and brother. He had committed rape on her. Her daughter told about the incident when she came back to her. Then she told it to her husband after which her daughter victim 'X' was taken by her husband to the police station where their report was not lodged. The report was lodged after ten days. Her daughter was medically examined in District Hospital, Banda.

In her cross-examination to a suggestion that there was some fight between the accused and her husband, she denies it. She states that it is incorrect that due to the said fight, the accused has told her husband to vacate the house which was constructed on his ancestral property. She states that it is correct that there is threat being extended of their being thrown out the house. She denies the suggestion that a false case has been lodged on the saying of persons.

19. Head Constable Ayodhya Prasad, P.W.5 transcribed the Chik FIR of the case and the corresponding G.D. He proves the same.

In cross-examination he states that the incident is of 23.5.2013. The FIR was lodged on 9.6.2013. He did not ask especially as to why the FIR is being lodged with delay. He states that Tejvali had also come with the first informant. He does not know as to which political party does he belong to. He states that he does not belong to Kamasin area and is of Maki area. Along with Tejvali, his wife had also come. No FIR has been lodged by the victim 'X' prior to 9.6.2013. She has not received any injury on her body otherwise the same would have been mentioned in the G.D. She did not bring any clothes which she was wearing at the time of the incident and also documents with regards to her age. He states that the Chik is on a printed proforma which is empty and is filled by him. It is his responsibility. He states that if any column is left blank then it is illegal but sometimes there is something left blank but the reference of the same in G.D. is important. He states that the page number is not filled in it. There is no signature of the first informant in it. He denies the suggestion that a FIR was lodged on the saying of politicians and S.O under pressure.

20. Dr. Charu Gautam, P.W.6 had conducted the medical examination of victim 'X' on 1.6.2013. The details of the same have already been given above. She has also prepared the supplementary medical examination report. The details of the same have also been given above. She proves the same.

21. Dr. Gyanendra Neekhra, P.W.7 states that on 3.6.2013, he was posted as Consultant in District Hospital, Jhansi. He was posted on the post of Radiologist.

Under his supervision X-Ray of victim 'X' was done and report was prepared. He proves the X-Ray report and X-Ray plates.

In cross-examination, he states that he did not give any opinion regarding age in the X-Ray report as he did not do the physical examination of the victim 'X'. He states that as per the X-Ray, victim 'X' was aged about 18 years.

22. Anil Singh, D.W.1 has stated that Shiv Poojan who is the father of victim has a dispute with regards to harvesting of wheat with accused Krishnakant. Shiv Poojan has constructed a house on the ancestral land of Krishnakant. Due to the dispute of harvesting of wheat, Krishnakant had told Shiv Poojan to vacate his land. The brother-in-law (Sardu) of Shiv Poojan lives in village Sarda Marka and is issue less who is a politician of Bahujan Samaj Party and is very close to the local MLA. Victim 'X' was living with Tejbali from before the incident. Tejbali is her Mausa. Victim 'X' was living in village Sarda Marka. Tejbali in conspiracy with the MLA Gaya Charan Dinkar, had got a false FIR lodged under pressure against Krishnakant for money. He was a village Pradhan at that time. He had got conducted a panchayat for both the parties but the dispute could not be settled due to greed of money. Around 25 people had given an affidavit to C.O. Baberu. He filed the affidavit which was marked as Exb : Kha-1 to the records and stated that the said affidavit was taken by the C.O on 28.06.2013.

23. Sumeru, D.W.2 has stated that he is not well educated. He is the neighbour of Shiv Poojan, the father of victim 'X'. Victim 'X' was living at the house of her Mausa in Sarda Marka at the time of incident. He states that there was a dispute between Krishnakant and Shiv Poojan relating to the harvesting of wheat and Shiv Poojan had told him that he would get him implicated in a case. He states that no such incident had happened with victim 'X'. Tejbali is brother-in-law (Sardu) of Shiv Poojan who for money got a false FIR lodged. Accused Krishnakant has been falsely implicated in the case.

24. This Court first deals with the argument of learned counsel for the appellant that the conviction of the accused-appellant under Section 376 IPC and Section 4 POCSO Act for a maximum sentence of 15 years in both is not justified as per Section 42 of the POCSO Act, the same would be illegal and incorrect.

25. Section 42 POCSO Act provides that the offender found guilty of such offence shall be liable to punishment either under the POCSO Act or under IPC whichever is greater in degree. It reads as under:-

"42:- Alternate punishment. - *Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000) then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."*

26. The sentence awarded to the accused-appellant by the trial court under Section 376 IPC is 15 years R.I., Rs.15,000/- as fine and in default of

payment of fine 2 years additional imprisonment. Then under Section 4 POCSO Act to 15 years rigorous imprisonment, Rs.15,000/- as fine and in default of payment of fine to 2 years additional imprisonment.

27. For determination regarding higher degree of sentence, Section 376 IPC is to be seen. It provides that whoever except in the cases provided in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, or for a term which may extend to ten years and shall also be liable to fine, unless the women raped is his own wife and is not under 12 years of age, in which case he shall be punished with either description for a term which may extend to two years or fine or both. Thus, the punishment is under two parts in this Section being:-

1. Not less than seven years, which may extend to life,

2. For a term which may extend to ten years and shall also be liable to fine.

Section 376 IPC reads as under:-

*"376. **Punishment for rape**. -*

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution lakes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years,

Explanation I.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.--"Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.--"Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

28. In the present case the trial court has resorted to the second part of the conviction under Section 376 IPC whereas under Section 4 POCSO Act while dealing with penetrative sexual assault, the trial court while holding the victim to be less than 16 years of age (being of 15 years, 10 months and 25 days old) has resorted to the punishment of 15 years being not less than seven years but which may extend to imprisonment for life and has also imposed fine as is also provided in it.

29. Hence punishment under Section 4 POCSO Act is greater in degree as under Section 376 IPC, the punishment of imprisonment for life was with no fine but punishment which was with fine was up-to ten years only.

30. The Court thus comes to the conclusion that the punishment under Section 4 POCSO Act is a graver punishment. Hence as per Section 42 POCSO Act, in case of a conviction under Section 376 IPC and for penetrative sexual assault punishable under Section 4 POCSO Act, the sentence has to be awarded under Section 4 POCSO Act only because it is a sentence of greater degree.

31. Hence the argument of the learned counsel for the appellant that the accused-appellant cannot be convicted under Section 376 IPC finds force. As such the sentence as awarded under Section 376 IPC is set-aside.

32. Now coming to the issue of the age of the victim 'X' in the FIR lodged by herself, she discloses her date of birth as 28.6.1996. Her medical examination was done and her X-Ray examination was done for ascertainment of her age but in the supplementary examination report, the doctor did not opine with regards to the estimation of her age. Dr. Gyanendra Neekhra, P.W.7 in his cross-examination has stated that as per the X-Ray examination, the victim was aged about 18 years. The trial court in the impugned judgement and order while giving a finding with regards to the estimation of age has stated that at the time of arguments, a copy of the High School Certificate of victim 'X' was produced which showed her date of birth as 28.6.1997. It is further stated that in the protest petition, the date of birth of the victim was stated as 28.6.1997 and since the incident is of 23.5.2013, the victim would be aged about 15 years 10 months and 25 days of age. It is trite law that for relying upon a document, it has to be proved in the trial. A document which has not been proved in the trial, cannot be

considered by just providing it at the fag end of trial by one of the parties and no finding can be based on the basis of the same.

33. The Apex Court in the case of **Ram Murti v. State of Haryana : (1970) 3 SCC 21** has held that an unproved and unexibited document cannot be treated as evidence in a case. The observations in paragraph 6 and 7 of the said judgment are as follows:

"6. The trial court, in support of its conclusion on the question of age of the prosecutrix, relied on the birth certificate Ex. PL and the report of Dr Ajmer Kaur, Ex. PA. The omission on the part of the prosecuting agency to get Satnam Kaur's bones X-rayed as advised by Dr Ajmer Kaur was not considered by that court to be very material. Considering that the prosecutrix was only a student of 9th Class at the time of the occurrence that court felt that Dr Ajmer Kaur's estimate other age was trustworthy and the prosecutrix was held to be definitely below 18 years of age. That court also took into consideration an unproved and unexhibited school certificate which appears to have been obtained by the Investigating Officer from the Dev Samaj School. According to this certificate the date of Satnam Kaur's birth is stated by the trial court to be August 5, 1948. We had a look at this document. It is dated April 9, 1965 and purports to certify the date of Satnam Kaur's birth according to the school register to be November 5, 1948 and is signed by someone describing herself as Head Mistress, Dev Samaj Girls' High School. We fail to understand how the trial court felt justified in taking this document into consideration and holding the date of birth as entered in this document to be August 5, 1948. We, however, need not say anything more about the merits of this document because the Counsel for the State in this Court has rightly declined to place any reliance on it. In the High Court the learned single Judge dealt with the question of age in the following manner:

"According to her medical examination by Dr Ajmer Kaur, mentioned above, the was between 16 and 17 years of age. During the course of investigation, her birth entry PL was obtained showing that a daughter was born to Hans Raj on 25th September, 1949, with the aid of Bhagwanti Dai. This entry was made in the register on 27th September, 1949. There is evidence on the record that Bhagwanti was acting as a Dai at the time of the birth of Satnam Kaur. Moreover it is also amply clear from the statements of Hans Raj and his wife that she was below 18 years of age. Besides the above, there is the school entry which shows that Satnam Kaur was born on 5th August, 1948. It is true that there is discrepancy between the school certificate and the birth entry PL. But in any case, her age was proved to be below 18 years at the time of the commission of this offence. The learned Counsel for the appellant submitted that Dr Ajmer Kaur advised X-ray examination of the prosecutrix to find out her age, but that was not done. The Counsel, therefore, maintained that there was no satisfactory evidence on the record to show that she was below 18 years at the time of this occurrence. As remarked above, I have no doubt in my mind that taking into consideration the statement of Hans Raj, father of Satnam Kaur, and her mother as also the medical examination by Dr Ajmer Kaur, entry PL, and school certificate, she was definitely below 18 years."

7. It is clear that in the High Court also it was not appreciated that the

unproved and unexhibited school certificate could not be treated as evidence in the case. Nor was it noticed that according to this document Satnam Kaur's date of birth was November 5, 1948. The question of age of the prosecutrix in cases under Sections 366 and 376 IPC is always of importance. It was particularly so in this case because according to the medical evidence the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old. The High Court having acquitted the appellant for an offence under Section 376 IPC, because the prosecutrix appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but even on earlier occasions, it was, in our opinion, a fit case in which that court should have examined the question of her age more closely. On the evidence on the record we are far from satisfied that there is any trustworthy evidence on the record on which the conclusion that Satnam Kaur, prosecutrix, was under 18 years of age in March, 1965 can safely be founded."

34. In the present case, there is a departure from the said settled proposition of law as the trial court has during arguments taken the High School Certificate of the victim and considered it along with the date of birth mentioned in the protest petition for reaching to a conclusion with regards to the age of the victim. The same is an incorrect approach of the trial court. In the FIR, the victim has disclosed her date of birth as 28.6.1996. The radiologist has opined as per the radiological examination in his cross-examination as her being aged about 18 years of age. Thus, even by giving a benefit of variation of two years, she would be a major.

35. The next question to be dealt with is with regards to the offence under the SC/ST Act. The accused-appellant has been convicted under Section 3(1) 11 of the said Act. The trial court has in it's finding with regards to the said offence stated that from the records it finds that charge has been framed under the SC/ST Act. It further opines that there is no dispute that the victim girl belongs to the category of SC/ST and the accused is not belonging to the said group. A perusal of the FIR shows that there is no such averment in it that the victim belongs to the caste which came in the category of SC/ST. There was no document filed to establish the caste of the prosecutrix. The prosecution has not established that the first informant belong to a caste falling within the SC/ST Act. The trial court while giving its finding with regards to the same has fallen back on the fact that charge has been framed under the SC/ST Act and there is no dispute that the victim belongs to the same which is not based on any evidence and is not a proper approach.

36. With regards to the offence under the POCSO Act, Section 4 of the Act deals with punishment for penetrative for sexual assault. The medical evidence does not corroborate with the prosecution story. The medical examination report Exb : Ka-5 and the statement of Dr. Charu Gautam, P.W.6 does not anywhere state that rape was committed upon the victim. The doctor in her statement stated that she has given a supplementary report and in her opinion it cannot be said as to whether rape was committed upon the victim or not. In such circumstances it is seen that there is no corroboration of the allegation that penetrative sexual assault was committed upon the victim 'X'.

37. Even the enmity between the first informant and the accused-appellant as has been stated by the accused in his statement recorded under Section 313 Cr.P.C. is corroborated by the statement of Anil Singh, D.W.1 and Sumeru, D.W.2. The same would go to show that the parties were enmical to each other. There was even a panchayat held for resolving their dispute but the same could not be resolved, as such it cannot be said that there was no enmity between the parties.

38. In view of the discussions as stated above, the present appeal deserves to be allowed. The appellant deserves to be acquitted of the charges levelled against him.

39. The appeal stands allowed. The judgment and order of the trial court is hereby set-aside. The appellant is acquitted of the charges levelled against him.

40. The accused-appellant is stated to be in jail since 30.11.2015. He is directed to be released from jail forthwith if not wanted in any other case.

41. The office is directed to send the certified copy of this judgment along with the trial court records to the trial court concerned forthwith for necessary information and follow-up action.

(2022) 10 ILRA 995
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2275 of 2017

&

Government Appeal No. 230 of 2021

Smt. Alka ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri Nirvikar Gupta, Sri Akhilesh Srivastava, Sri Bhanu Pratap Pal, Sri Mohammad, Sri Saksham Srivastava, Sri Kamlesh Kumar Dubey

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32- Dying declaration could have been acted upon as there is no material contradictions in the dying declaration. The dying declaration when taken in its totality goes to show that her sister-in-law had poured kerosene on the deceased and set her ablaze, her husband has saved her and she died after several days out of septicemic death.

Where the dying declaration is recorded by the magistrate and there is nothing to doubt the same then conviction of the accused can be secured solely upon the dying declaration.

Indian Penal Code, 1860- Section 302- Section 304 (Part-1)- On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer we are of the considered opinion that it was a case of homicidal death not amounting to murder-It appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that her act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC-The offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

As the deceased had died several days after the occurrence due to septicaemia, the offence was not premeditated and it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased, hence the offence would fall within the ambit of Section 304 (Part-1) IPC. (Para 18, 19, 24, 25, 26, 27)

Criminal Appeal partly allowed. (E-3)

Code of Criminal Procedure 1973- Section 378 (1)- Appeal against acquittal-It is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court- In acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper- While going through the finding of facts and even dying declaration which we have held is accepted under Section 32 of the Indian Evidence Act, name of only Alka was given by the deceased. There is no overt act perpetrated on any of the other accused and, therefore, we cannot agree with the submission of learned A.G.A. for the St. that the judgment is perverse and requires to be upturned.

Settled law that the presumption of innocence in favour of the accused stands fortified by his acquittal in the trial and therefore the appellate court will not interfere with the findings of the trial court unless they are wholly perverse and illegal. (Para 44, 46)

Government Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Lella Srinivasa Rao Vs St. of A.P, AIR 2004 SC 1720

2. Govindappa & ors. Vs St. of Kar., (2010) 6 SCC 533

3. Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St. of Guj.) dec. on 11.9.2013

4. Anversinh Vs St. of Guj., (2021) 3 SCC 12

5. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

6. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

7. Tukaram & ors.Vs St. of Mah., (2011) 4 SCC 250

8. B.N. Kavatakar & anr. Vs St. of Kar., 1994 SUPP (1) SCC 304

9. Veeran & ors. Vs St. of M.P. (2011) 5 SCR 300

10. M.S Narayana Menon @ ManiVs St.of Ker. & anr., (2006) 6 SCC 39

11. Chandrappa Vs St. of Kar.,(2007) 4 SCC 415

12. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 SCC 75

13. St. of U.P. Vs Ram Veer Singh & ors., 2007 AIR SCW 5553

14. Girja Prasad (dead) by l.r.s Vs St. of M.P, 2007 AIR SCW 5589

15. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749

16. Mookkiah & anr.Vs St. Rep. By the inspтr. Of Police, AIR 2013 SC 321

17. St. of Kar. Vs Hema Reddy, AIR 1981 SC 1417

18. Shivasharananappa & ors. Vs St. of Kar., JT 2013 (7) SC 66

19. St. of Punj. Vs Madn Mohan Lal Verma

20. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219

21. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750

22. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. Both these appeals arise out of common impugned order dated 28.3.2017 passed by the Additional Sessions Judge/Fast Track Court No.1, Aligarh in Sessions Trial No.67 of 2011 whereby the learned Additional Sessions Judge has convicted the accused-appellant, Alka, for commission of offence under Section 302 of Indian Penal Code, 1860 (for short 'IPC') and sentenced her to undergo imprisonment for life with fine of Rs.10,000/-.

2. Criminal Appeal No. 2275 of 2017 has been preferred by accused-appellant, Alka against her conviction whereas the Government Appeal No. 230 of 2021 has been preferred by the State against the acquittal of respondents, Sanjiv Kumar, Rajiv Kumar & Rajendra Prasad under Section 498A, 304B, 302/34 of IPC and Section 3/4 of Dowry Prohibition Act, 1961 (for short 'Act, 1961').

3. Heard Sri Noor Mohammad, learned counsel for accused-appellant, Alka and acquitted respondents in Government Appeal. Heard Sri Vikas Goswami, learned A.G.A. for respondent-State in Criminal Appeal and Sri Patanjali Mishra, learned A.G.A. in Government Appeal.

4. Brief facts of the case are that the informant Gopal Varshney, uncle of the deceased made a complaint before the police authority stating therein that marriage of his niece was solemnized with Sanjeev s/o Rajendra Prasad one and half years ago and the informant had given money and households as dowry as per his capacity. It was further alleged that the in-laws of the deceased were persistently demanding amount of Rs.20,000/- and one motorcycle as additional dowry. Many time settlements were taken place but the things were not pacified and on the fateful day of 13.4.2010 at 11.00 p.m., the in-laws of the deceased namely Sanjeev (husband), Manoj (brother-in-law/Jeth), Rajeev (brother-in-law/Devar), Anita (mother-in-law), Alka (Sister-in-law/Jethani) and Rajendra (father-in-law) poured kerosene on Julie and set her ablaze. It was further alleged by the informant that on being informed by his nephew, he reached at Medical College, Aligarh on 14.4.2010 where he found his niece, Julie unconscious and she was being treated there.

5. On the basis of above, complaint, Case Crime No.221 of 2010 under Sections 498A, 307 of IPC and Section 3/4 of the Act, 1961 was registered against the above accused.

6. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate.

7. The learned Magistrate summoned the accused and committed the case to the Sessions Court as the offences alleged to have been committed were triable by the Sessions Court as prima facie offences were alleged to be falling under Sections 498A, 304 B of the Indian Penal Code and Section 3/4 of Dowry Prohibition Act. Section 304B of IPC was included as the deceased died.

8. On being summoned, the accused-persons pleaded not guilty and wanted to be tried.

9. On 1.9.2011, the charges were framed under Sections 498A, 304B & 302 read with Section 34 of IPC.

10. The Trial started and the prosecution examined 11 witnesses who are as follows:

1	Gopal Varshney	PW1
2	Radha Raman	PW2
3	Kailash Chandra	PW3
4	K.K. Gupta	PW4
5	Ramendra Singh	PW5
6	K.L. Verma	PW6
7	Mohd. Gaffar	PW7
8	Atul Kumar Gautam	PW8
9	Sunil Kumar Singh	PW9
10	Dr. P. Kumar	PW10
11	Dr. Ahastan Ahmad	PW11

11. In support of ocular version following documents were filed and proved:

1	F.I.R. & G.D.	Ex.Ka.4 & Ex. Ka.5
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.10
4	Postmortem Report	Ex.Ka.3 &19
5	Papers relating to Postmortem	Ex.Ka.6, Ka.7, Ka.8 & Ka.9
6	Panchayatnama	Ex.Ka.2
7	Charge-sheet	Ex. Ka.18
8	Site Plan	Ex.Ka.11 & 12

12. At the end of the trial and after recording the statements of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused-appellant, Alka and acquitted the other accused as mentioned above.

13. It is submitted by learned counsel for the appellant that the incident occurred at the spur of moment as is clear from the dying declaration. The accused had not premeditated to do away with the deceased. Learned counsel for the appellant has vehemently submitted that dying declaration is not worth believing and it is an admitted position of fact that deceased died due to septicemia.

14. It is further submitted that conviction under Section 302 IPC is not made out as no overt act as per Section 300 IPC is made out. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court decides that the accused is guilty, then the accused may be granted fixed term punishment of incarceration.

15. Learned counsel for the State has submitted that though it is septicemic death, the dying declaration and evidence of other prosecution witnesses will not permit this Court to show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

16. While considering evidence of P.W.1, who is the uncle of the deceased, we find that he has proved the complaint lodged by him which has been exhibited and has opined that in his ocular version that the marriage took place before 1 & 1/2

years. About Rs.2,50,000/- was spent but her in-laws were not happy with the same. The husband and other family members started demanding additional dowry. The family members of the deceased tried to request the in-laws not to demand more dowry but the in-laws were not accepting the request and on 13.4.2010 the deceased was set ablaze. On 14.4.2010 when they went to Medical College Hospital they found her unconscious. The First Information Report was lodged after three days. P.W. 2 & 3 who are family members have also corroborated the evidence of P.W.1. As far as independent witness namely P.W.4, Doctor K.K. Gupta is concerned, he had performed postmortem of the deceased. P.W.5 & 8 are police officials and P.W.6, 7 & 9 are government officials who had jotted down the dying declaration. P.W.7, Mohd. Gaffar, Retd. District Magistrate has deposed before the Trial Court that he had recorded the dying declaration of the deceased. He has deposed that while giving her statement she was conscious and she told that uncle of her husband had admitted her in the hospital and that her husband had saved her. P.W.7 has further deposed that nothing else was stated by her in her dying declaration.

17. The learned Sessions Judge has not accepted the statement recorded by I.O. ten days after the recording of the dying declaration of the deceased by the Magistrate. The learned Sessions Judge has taken recourse of **Lella Srinivasa Rao Versus State of Andhra Pradesh, AIR 2004 SC 1720 and on** the basis of this judgment, he has opined that the statement recorded by the I.O. after recording of the dying declaration by the Magistrate was not reliable and has found that the dying declaration recorded by the Magistrate cannot be found fault with.

18. In the light of the decision in **Govindappa and others Versus State of Karnataka, (2010) 6 SCC 533,** there is no reason for us not to accept the dying declaration recorded by the Magistrate and its evidentiary value under Section 32 of Evidence Act, 1872.

19. Principle for accepting dying declaration will permit us to concur with the finding of the learned Sessions Judge that dying declaration could have been acted upon as there is no material contradictions in the dying declaration. The dying declaration when taken in its totality goes to show that her sister-in-law had poured kerosene on the deceased and set her ablaze, her husband has saved her and she died after several days out of septicemic death and, therefore, we are convinced that it is homicidal death but, it would be seen whether it is homicidal death punishable under Section 302 or Section 304 Part I or Part II of IPC?

20. It would be relevant to refer to Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

21. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and

application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

22. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280,** the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

*15.1 Similarly, in the case of **Maniben (supra)**, the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian

Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

23. In latest decision in **Khokhan @ Khokhan Supra** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

24. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that it was a case of homicidal death not amounting to murder.

25. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that her act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

26. We come to the definite conclusion that the death was due to septicemia. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

27. Therefore, accused-appellant, Alka, is punished under Section 304 (Part I) of IPC and sentenced to the period undergone. The fine is reduced to Rs.5,000/-. The fine if she has yet not deposited, will deposit the same within four weeks from the date of release from jail. The jail authority shall see that the accused-appellant is lodged in the jail to re-incarcerate for the default period if fine is not paid after she is released.

28. In view of the above, the criminal appeal is partly allowed.

Government Appeal No.2275 of 2017

29. As discussed above, this Government Appeal challenges the acquittal of Sanjiv Kumar, Rajiv Kumar & Rajendra Prasad.

30. In order the challenge the judgment of acquittal, learned A.G.A. for the state has submitted that the learned Sessions Judge has mistakenly disbelieved statements of the prosecution witnesses and without assigning any cogent reasons has disbelieved prosecution story. It is further submitted that the evidence on record and surrounding circumstances have not been properly appreciated by the Trial Court as far as acquittal of accused-respondents are concerned.

31. As against this, learned counsel for the respondents have submitted that judgment of the learned Sessions Judge is just and proper as no infirmity can be found in the finding given by the learned Sessions Judge. It is further submitted that this Court should go by the well settled principles concerning criminal appeal against acquittal and that the finding of the learned Sessions Judge are not so perverse as even in the dying declaration, nothing has been assigned against the present three acquitted respondents.

32. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

33. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C.** 39, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

34. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong

circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

35. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

36. In the case titled **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.",** reported in **(2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in appeals against acquital. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

37. Similar principle has been laid down by the Apex Court in cases titled **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in **"GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

38. In the case of **"LUNA RAM VS. BHUPAT SINGH AND ORS.",** reported in **(2009) SCC 749**, the Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

39. In a recent decision of the Apex Court in the case titled **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU",** reported in AIR 2013 SC 321, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

40. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **"STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981 SC 1417,** wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

41. The Apex Court in **"SHIVASHARANAPPA & ORS. VS.**

STATE OF KARNATAKA", JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

42. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

43. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219***, has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under

the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

44. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

45. We have perused the depositions of prosecution witnesses, documentary evidence supporting ocular versions, arguments advanced by learned counsel for the parties. **We have also perused the findings recorded by the learned Sessions Judge.**

46. While going through the finding of facts and even dying declaration which we have held is accepted under Section 32 of the Indian Evidence Act, name of only Alka was given by the deceased. There is no overt act perpetrated on any of the other accused and, therefore, we cannot agree with the submission of learned A.G.A. for the State that the judgment is perverse and requires to be upturned.

47. After considering the facts and circumstances of the present case and appraisal of the evidence available on record and on the contours of the judgment of the Apex Court, we have no other option but to concur with the judgment of acquittal by the the learned Sessions Judge.

48. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below.

(2022) 10 ILRA 1008
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2455 of 2017

Shailesh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Siya Ram Pandey, Sri Thakur Prasad Dubey, Sri Vijay Singh Sengar

Counsel for the Respondent:
G.A., Sri Amit Kumar Chaudhary, Sri Ashish Kumar, Sri Prashant Kumar Tripathi, Sri Tapa Kumar Mishra

Criminal Law- Indian Penal Cade, 1860- Sections 299 & 302 – Section 304 Part-I- The death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 above offence committed will fall under Section 304 Part-I-The factual scenario as it emerges would go to show that the incident occurred when the accused along with the deceased conveyed that he would pay on the next day that infuriated the accused and therefore they beat the deceased. The incident occurred out of a quarrel.

Where the offence resulted from a sudden quarrel, without pre-meditation and intention to cause death but the injuries were sufficient in the ordinary course of nature to have caused death, then the offence will be culpable homicide not amounting to murder and would be punishable u/s 304 Part- I of the IPC.

'Proper Sentence'-While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. In operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. 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 judicial trend in the country has been towards striking a balance between reform and punishment-Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

Settled law that punishment should be proportionate to the gravity of the offence and the manner of its commission and undue harshness should be avoided hence, while striking a balance between deterrence and reform, endeavour should be to provide an opportunity to the convict to be reformed and assimilated in the national mainstream. (Para 22, 23, 26, 27, 30, 31, 33, 37)

Criminal Appeal partly allowed. (E-3)

Case Law/Judgements relied upon:-

1. Nishan Singh Vs St.of Pun., 1994 0 Supreme (SC)273

2. Manjeet Singh Vs St.of H. P., 2014 LawSuit(SC) 341

3. Rajju son of Jagveer Singh Vs St.of U. P., 1992 0 Supreme(All) 546

4. Pinkoo @ Jitendra Vs St.of U.P., 2022 0 Supreme (All) 166

5. VencilPushpraj Vs St.of Raj., 1990 0 Supreme (SC) 662

6. Kala Singh @ Gurnam Singh Vs St.of Pun., 2021 LawSuit(SC) 536

7. Ramesh Alias Dapinder Singh Vs St.of H. P., 2021 0 Supreme (SC) 152

8. Virender Vs St.of Har., 2019 LawSuit(SC) 2024

9. Tukaram & ors. Vs St.of Mah., reported in (2011) 4 SCC 250

10. B.N. Kavatakar & anr. Vs St.of Karn., reported in 1994 SUPP (1) SCC 304

11. Veeran & ors. Vs St.of M.P. Decided, (2011) 5 SCR 300

12. Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St.of Gujarat) decided on 11.9.2013

13. Khokan@ Khokhan Vishwas Vs St.of Chattisgarh, 2021 LawSuit (SC) 80

14. Anversinh Vs St.of Guj., (2021) 3 SCC 12

15. Pravat Chandra Mohanty Vs St.of Odisha, (2021) 3 SCC 529

16. Pardeshiram Vs St.of M.P., (2021) 3 SCC 238

17. Mohd. Giasuddin Vs St.of AP, [AIR 1977 SC 1926

18. Deo Narain Mandal Vs St.of UP [(2004) 7 SCC 257]

19. Ravada Sasikala Vs St.of A.P. AIR 2017 SC 1166

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

1. Heard Heard Sri Siya Ram Pandey, learned counsel for appellants and Sri Vikas Goswami, learned counsel for State.

2. This appeal has been preferred by the accused-appellants against the judgment and order dated 4.5.2017, passed by learned Sessions Judge, Hapur in Sessions Trial No.71 of 2016 (State of Uttar Pradesh Vs. Shailesh and others) arising out of Case Crime No.328 of 2015 convicting the accused - appellants under Sections 302 read with 34 of Indian Penal Code, 1860 (in brevity 'IPC'), Police Station Gardhmukteshwar, District Hapur and sentenced the accused-appellants to undergo imprisonment for life with fine of Rs.5,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of one month.

3. The facts of the present case are that on 31.7.2015, while the informant and his father Babu Ram(deceased) were returning home after closing their tea shop, they were intercepted by accused - appellant-Raju, who asked them to pay Rs.150/-for the grocery items which were purchased by the deceased earlier. The accused- appellant Raju was told that the amount will be paid the next day, hearing which he got annoyed and abused the complainant-Sanjay, son of the deceased and his father (deceased). At this stage, while the complainant-Sanjay and the deceased were proceeding on their way, the accused- appellants surrounded them. The accused- appellants then started beating and kicking the deceased, till he breath his last.

After killing the deceased, the accused-appellants fled away. Pursuant to this an FIR, Case Crime No.202 of 2015 was registered by the complainant-Sanjay against the accused- appellants, under Section 302 read with Section 34 of IPC. Consequently, the accused- appellants were arrested.

4. On trial, the trial court vide order dated 4.5.2015 found the accused - appellants guilty under Section 302 read with Section 34 of IPC and sentenced them to imprisonment of life and a fine of Rs.5000/- each.

5. After investigation, the charge-sheet u/s 302 I.P.C. against the accused persons Shailesh, Mahadev, Kuldeep and Raju was filed. The cognizance was taken on the charge-sheet by the concerned Magistrate and the case was committed to the court of session under section 302/34 I.P.C. The charge against the accused; Shailesh, Mahadev, Kuldeep and Raju was ordered to framed, to which the accused persons pleaded not guilty and wanted to be tried. The prosecution was directed to produce the complete evidence in support of their statement.

6. On being summoned, the accused-appellants pleaded not guilty and wanted to be tried, hence, the trial started and the prosecution examined about 9 witnesses who are as follows:

1	Deposition of Sanjay@ Kalwa	29.4.2016 25.10.2016	PW1
2	Deposition of Sumit	7.6.2016	PW2
3	Deposition of Yad Ram	11.8.2016	PW3
4	Deposition of Dr. Gajendra Singh	29.11.2016	PW4
5	Deposition of Jitendra Kardam	29.11.2016	PW5
6	Deposition of Rajendra Singh	30.11.2016	PW6
7	Deposition of Arvind Kumar Nirwal	30.11.2016	PW7
8	Deposition of Peetam Pal Singh	16.12.2016	PW8
9	Deposition of Yatesh Kumar Puniya	20.1.2017	PW9

7. In support of ocular version following documents were filed and proved:-

1	F.I.R.	31.7.2015	Ex.Ka.4
2	General Diary	31.7.2015	
3	Written report	31.7.2015	Ex.Ka.1
4	Postmortum report	1.8.2015	Ex.Ka.2
5	Panchayatnama	31.7.2015	Ex.Ka.5
6	Final Form / Report	1.9.2015	Ex.Ka.9
	General diary		Ex.Ka.3
	Site plan		Ex.Ka.5 A

8. Learned counsel for the appellants has submitted that no offence as alleged has been committed by the accused. It is further submitted that the accused had no motive to do away with the deceased and that the

death of the deceased was due to petty dispute which had arisen and there is a single blow. P.W.-1 the informant Sanjay @ Kalwa was got examined on behalf of the prosecution who has proved the *tehrir* Ex.Ka-1 and supported the prosecution case. P.W.-2 namely is Sumit, the brother of informant who has been got examined. This witness too, has supported the prosecution case. P.W.-3 Yaad Ram has been examined. He has corroborated the evidence of PW-1 and PW-2.

9. P.W.-09 sub-inspector Yatesh Kumar Puniya has been examined who is also the investigating officer of this case. He too has conducted the investigation of the case who recorded the statements of sub-inspector Arvind Kumar Nirwal, C/- Manoj Kumar and C/- Kardam, who all got the post-mortem conducted and of the FIR scribe namely C/- Rajendra Singh and Dr. Gajendra Singh who conducted the post-mortem. After investigation, charge-sheet was forwarded against the accused. He has verified his signature present on the charge-sheet. Charge-sheet has been marked as Ext. ka-09.

10. After completion of the prosecution evidence, the statements of the accused persons u/s. 313 Cr.P.C. were recorded, wherein denying the prosecution version, they have stated that the witnesses have given wrong and false statements due to enmity, and all of the accused persons have also stated that the complainant has developed enmity with them and their family and therefore they have been falsely implicated in the aforesaid case, and that they didn't commit any offence and they were not present at the spot and that they are innocent. The accused persons claimed to adduce the evidence in defence, but even after providing adequate time, no evidence in defence was produced by the accused persons.

11. P.W.-1 the informant Sanjay @ Kalwa was got examined on behalf of the prosecution who has proved the *tehrir* Ex.Ka-1 and supported the prosecution case. P.W.-2 namely is Sumit, the brother of informant who has been got examined. This witness too, has supported the prosecution case. P.W.-3 Yaad Ram has been examined. He has corroborated the evidence of PW-1 and PW-2.

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13. After completion of the prosecution evidence, the statements of the accused persons u/s. 313 Cr.P.C. were recorded, wherein denying the prosecution version, they have stated that the witnesses have given wrong and false statements due to enmity, and all of the accused persons have also stated that the complainant has developed enmity with them and their family and therefore they have been falsely implicated in the aforesaid case, and that they didn't commit any offence and they were not present at the spot and that they are innocent. The accused persons claimed to adduce the evidence in defence, but even

after providing adequate time, no evidence in defence was produced by the accused persons.

14. Learned counsel for the appellant has relied on the decisions of Apex Court in (a) **Nishan Singh Vs. State of Punjab, 1994 0 Supreme (SC)273 (b) Manjeet Singh Vs. State of Himachal Pradesh, 2014 LawSuit(SC) 341 (c) Rajju son of Jagveer Singh Vs. State of Uttar Pradesh, 1992 0 Supreme(All) 546 (d) Pinkoo @ Jitendra Vs. State of U.P., 2022 0 Supreme (All) 166 (e) VencilPushpraj Vs. State of Rajasthan, 1990 0 Supreme (SC) 662 (f) Kala Singh @ Gurnam Singh Vs. State of Punjab, 2021 LawSuit(SC) 536 (g) Ramesh Alias Dapinder Singh Vs. State of Himachala Pradesh, 2021 0 Supreme (SC) 152 and (h) Virender Vs. State of Haryana, 2019 LawSuit(SC) 2024** so as to contend that the decision of imprisonment for life is bad and life could not be till the last breath and the conviction under Section 302 read with Section 34 of IPC is not made out and the accused are entitled to be acquitted. However, at the outset it is mentioned that on shifting their decisions as they lay down law about lessor sentence precisely under Section 304 read with Section 34 of IPC

15. Learned counsel for the appellants after submitting for clean acquittal submitted that he is not pressing this appeal on its merit, but he prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellants by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than five years.

16. Sri Vikas Goswami, learned counsel appearing on behalf of State submits that presence of all the accused is proved as per the evidence of PW- 1 and 2 and there is no denial of presence of the accused. Learned counsel further submits that Section 302 read with Section 34 of IPC is made out against all the accused - appellants.

17. As learned counsel for the appellant is not pressing this appeal on its merit, but prays only for reduction of the sentence as the sentence of life imprisonment awarded to the appellant by the trial court is very harsh. Learned counsel also submitted that appellant is languishing in jail for the past more than 5 years.

18. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind about the guilt of the present appellants as far as death of deceased is concerned.

19. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under **Section 302 read with Section 34** of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

"299. Culpable homicide: *Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

20. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of IPC. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

21. The deceased was aged 65 years. The postmortem of the deceased was conducted.

22. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304,** we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

23. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

24. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

*"12. In fact, in the case of **Krishan vs. State of Haryana reported in (2013) 3 SCC 280**, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused.*

Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of ***Maniben (supra)****, the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records.

However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

25. In latest decision in **Khokan@ Khokhan Vishwas Vs. State of Chattisgarh, 2021 LawSuit (SC) 80** on which the court relies wherein the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and sentenced under Section 304 of IPC. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

26. The factual scenario as it emerges would go to show that the incident occurred when the accused along with the deceased conveyed that he would pay on the next day that infuriated the accused and therefore they beat the deceased. The incident occuued out of a quarrel.

27. As narrated herein above the decision of commission of offence under

Section 302 IPC cannot be concurred by us in view of the As narrated herein above as on overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors** (supra) and we are fortified in our view by the judgment of Apex Court in the case of **B.N. Kavatakar and Another (supra)** and therefore , we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC and not under Section 302 of IPC or Section 304 Part -II of IPC.

28. 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."

29. 'Proper Sentence' was explained in ***Deo Narain Mandal vs. State of UP [(2004) 7 SCC 257]*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

30. 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.

31. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

32. Since the learned counsel for the appellant has later not pressed the appeal on merit, however, after perusal of entire evidence on record and judgment of the trial court, we consider that the appeal is required to be partly allowed.

33. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

34. We are unable to agree with the submission of learned learned A.G.A. as far as it relates to the finding of the court below that the death was a premeditated murder and falls within provisions of Section 300 of IPC and the sentence under Section 302 IPC is just and proper. The reason for the same is that the deceased did not die and insistence death had it been a premeditated murder, the injuries on the body would have caused his immediate death. We are unable to subscribe the submission of Sri Pandey that the matter would fall under Section 323 of IPC. The evidence is so clinching that we cannot accept the submission that the accused-appellants have not caused the death though it is the matter of fact that no weapons and instrument is used . There is a strong motive to do away that the deceased was 65 years of age. P.W.-1 the informant Sanjay @ Kalwa was got examined on behalf of the prosecution who has proved the *tehrir* Ex.Ka-1 and supported the prosecution case. P.W.-2 namely is Sumit, the brother of informant who has been got examined. This witness too, has supported the prosecution case. P.W.-3 Yaad Ram has been examined. He has corroborated the evidence of PW-1 and PW-2.

35. While perusing the FIR and other fact, it cannot be said that there was no common intention. All the accused had an unison after the incident come to the place of offence and assaulted the deceased though the incident occurred due to petty dispute which had arisen and there is a single blow.

36. We are in agreement with the submission of Sri Vikas Goswami, learned AGA that the presence of all the accused is proved as per the evidence of PW- 1 and 2 and there is no denial of presence of the accused. Section 302 read with Section 34 of IPC is made out.

37. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

Punishment:

38. The main accused- Kuldeep has died during the pendency of this litigation.

39. The accused is in jail since 4.5.2017. The Apex Court in such cases has converted the conviction under Section 302 read with Section 34 of I.P.C. to Section 304 Part I of I.P.C. which will come to the aid of the accused.

40. In view of the aforementioned discussion, we are of the view that the appeal has to be partly allowed, hence, appeal is partly allowed.

41. Appellant-accused is in jail since 4.5.2017. On completion of seven years of incarceration with remission is over for all the offences and if fine is not deposited, the default sentence would start after the period of seven years. The accused- appellants shall be released on completion of said period, if not required in any other case. The accused-appellants would be entitled to all remissions. The judgment and order impugned in this appeal shall stand modified accordingly.

42. Let a copy of this judgment along with the trial court record be sent to the Court and Jail Authorities concerned for compliance.

(2022) 10 ILRA 1018
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2601 of 2016

Devendra Singh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Mrs. Vatsala, Sri Pankaj Srivastava, Sri S.S. Rajput, Sri Shri Krishan Yadav, Sri R.S. Nisit

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32 – Dying Declaration recorded by Investigating Officer- The statement of the deceased under Section 161 CrPC recorded by the Investigating Officer is a cogent and reliable piece of evidence and is admissible as dying declaration and the

prosecution undoubtedly can rely upon this statement.

Settled law that the statement of the deceased recorded u/s 161 of the CrPc would be treated as a dying declaration as there is no reason for the police officer to falsely implicate the accused.

Indian Evidence Act, 1872- Sections 11 & 106- The fact that at the time of occurrence accused was not present on the spot was especially within the knowledge of the accused and since the prosecution had discharged its burden on the basis of dying declaration Ext. ka-9, the onus was shifted upon the accused to show that his plea of alibi was true. Section 106 Evidence Act is not intended to relieve prosecution from discharging its duty to prove guilt of accused. Prosecution must discharge its primary onus of proof and establish the basic facts against the accused in accordance with law and only thereafter may Section 106 be restored to, in the facts and circumstances of each case-The accused has not succeeded to discharge his onus / burden to prove his plea of alibi.

Once the prosecution discharges its initial burden by proving the dying declaration, which is admissible under section 32 of the Evidence Act, then the onus shifts upon the accused to prove the plea of alibi as well as the burden of giving a credible explanation of the facts especially within his knowledge that led to the death of the deceased.

Indian Penal Code, 1860- Section 304 IPC - life imprisonment – Quantum of Sentence- Proportionate Sentence- While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. 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 the sentence of life imprisonment awarded under Section 304 IPC by learned trial court to the appellant is too harsh and severe keeping in view the facts and circumstances of this case. The appellant is in jail for the last more than 9 years. Since the appellant has already served-out more than 9 years sentence, the sentence of life imprisonment under Section 304 IPC is converted into the sentence already undergone.

Settled law that punishment should be proportionate to the gravity of the offence and the manner of its commission and undue harshness should be avoided hence, while striking a balance between deterrence and reform, endeavour should be to provide an opportunity to the convict to be reformed and assimilated in the national mainstream. Accordingly sentence of life imprisonment modified to period already undergone by the accused/appellant. (Para 13, 15, 16, 23, 24, 25, 26, 27)

Criminal Appeal partly allowed. (E-3)

Judgements/Case law relied upon:-

1. Mukesh Bhai Gopal Bhai Barot Vs St. of Guj., 2010 AIR SCW 5614

2. Pradeep Bisoi Vs St. of Odisha, (2019) 11 SCC 500

3. Satye Singh & anr. Vs St. of U.K, (2022) 5 SCC 438

4. Shambu Nath Mehra Vs St. of Ajmer, AIR 1956 SC 404

5. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

6. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

7. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.
&
Hon’ble Nalin Kumar Srivastava, J.)

1. Present Criminal Appeal has been directed against the judgment and order dated 8.4.2016 passed by the Additional Sessions Judge Court No.1, Hathras in Sessions Trial No. 51 of 2014 (Case Crime No. 134 of 2013), P.S. Hasayan, District Hathras convicting and sentencing the appellant under Section 304 I.P.C. for life imprisonment and a fine of Rs. 20,000/- with stipulation of default clause.

2. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Yogesh Kumar son of Rohan Singh, resident of village Pakshi Bihar, Police Station Jalesar, Etah, at Police Station Hasayan, District Hathras with the averments that marriage of her sister, Vimlesh, was solemnized with Devendra Ram son of Tikam Singh, resident of Buzurg about 12 years back. Two children were born out from their wedlock. On 10.4.2013 at about 4.00 p.m. Devendra poured kerosene upon the sister of informant and set her ablaze due to which she received burn injuries. Devendra had brought the victim to Aligarh for treatment but he fled from hospital leaving the victim there. Informant brought the victim from the hospital to the police station in an injured condition to lodge the F.I.R..

3. On the basis of the written report (Ext. ka-1), chik First Information Report (Ext. Ka-11) was registered at Police Station concerned on 11.4.2013 at 11.35 p.m. against the applicant Devendra.

4. Matter was investigated by Sub-Inspector Jiya Lal. During the course of investigation, the Investigating Officer recorded the statement of witnesses and the victim /deceased, prepared site plan, inquest report was also prepared and post mortem was performed. After making thorough investigation, charge sheet was submitted against the accused appellant. The learned Magistrate summoned the accused and committed the case to Court of Sessions, as prima facie charge was for the sessions triable offence.

5. The charge framed was under Section 304 IPC. The accused pleaded not guilty and wanted to be tried. Trial started and in support of its case, prosecution examined 7 witnesses, who are as follows:

1	Yogesh Kumar	PW-1 informant (brother of the deceased)
2	S.I. Mohd. Aslam	PW-2 (performed the inquest and prepared other papers)
3	Dr. R.P. Singh	PW-3 (prepared injury report of the victim)
4	Radhapyari	PW-4
5	Rohan Singh	PW-5
6	S.I. Jiya Lal	PW-6 (Investigating Officer)
7	Dr. Iqrar Ahmad	PW-7 (performed the post mortem of the deceased)

6. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Inquest Report	Ext. A-2
3	Challan Nash	Ext. A-3
4	Letter to R.I.	Ext. A-4
5	Letter to C.M.O.	Ext. A-5
6	Photo Nash	Ext. A-6
7	Injury report	Ext. A-7
8	Site Plan	Ext. A-8
9	Copy of case diary	Ext. A-9
10	Charge sheet	Ext. A-10
11	Chik F.I.R.	Ext. A-11
12	Copy G.D.	Ext. A-12
13	Post mortem report	Ext. A-13

7. Deceased was hospitalised after the occurrence by her husband. She died after 7 days of the occurrence during the course of treatment.

8. After conclusion of evidence, statement of accused was recorded under Section 313 of Cr.P.C., in which he pleaded his false implication and claimed alibi. In support of its case defence has examined Ranvir Singh as DW-1.

9. Heard Shri S.S. Rajput, learned counsel for the appellant and Shri Patanjali Mishra, learned AGA for the State.

10. Learned counsel for the appellant submitted that accused has been falsely implicated in this case. He has not committed the present offence. Deceased was the wife of the appellant. It is further argued that on the basis of analysis of prosecution evidence, no guilt against the accused appellant is established and proved. Learned trial court misread the evidence and convicted and sentenced the appellant. In alternative, it is submitted that this appeal relates to the year 2016 and the appellant is in jail since 07.10.2013 i.e. for more than nine years. The sentence for life imprisonment awarded to the appellant by the trial court is very harsh and excessive. If the Court deems it appropriate, as the accused has been in jail for more than 9 years without remission, he may be granted fixed term punishment of incarceration.

11. No other point or argument was raised by the learned counsel for the appellant and he confined his arguments on above points only.

12. Learned AGA for the State vehemently opposed the submissions made on behalf of the appellant and submitted that PW-4, the mother of the deceased and PW-5, father of the deceased, have supported the prosecution case in their testimonies. Several burn injuries were found on the body of the deceased. Hence, while going through the evidence on record, it cannot be said that the offence under Section 304 IPC is not made out against he appellant. The learned trial court has not committed any error in convicting and sentencing the accused-appellant under Section 304 IPC. There is no merit in the appeal and the same may be dismissed.

13. Learned Judge has categorically relied upon the testimony of PW-7 Dr. Iqrar Ahmad and has opined that deceased died out of septicemia as a result of ante mortem thermal burn. The postmortem was conducted on 18.4.2013. Though P.W.-1 - informant in his examination-in-chief has supported the prosecution case yet in his cross-examination he did not support and resiled from his earlier statement. PW-4

and PW-5 have supported the prosecution case and stated that the accused used to beat the deceased. There was a quarrel between them for returning the borrowed money from one Jaipal Singh. Deceased has stated before the Investigating Officer that the appellant has set her ablaze by pouring kerosene due to which she was severely burnt. The genesis of setting her ablaze was non-payment of borrowed money. The said statement has been proved by PW-6 in verbatim, the Investigating Officer as Ext. K-9, which was admissible under Section 32 of Evidence Act. As per Ext. A-9 the deceased had stated before the Investigating Officer as under :

"मेरी शादी देवेन्द्र के साथ हुई थी और वो मुझे परेशान करता था, मारता-पीटता था। उधार के रूपये वापस करने के ऊपर मार-पीट की थी, झगड़ा हुआ था। इस कारण "दिनांक 10.4.13 को मेरे पति देवन्द्र ने खेत से जौ निकलवाकर बाजार में बेच दिया था------- इसी बात पर दिन के चार बजे मेरे पति देवेन्द्र ने मेरे ऊपर मिट्टी का तेल डाल आग लगा दी और मैं काफी जल गई।"

14. In ***Mukesh Bhai Gopal Bhai Barot vs. State of Gujarat, 2010 AIR SCW 5614*** it was held by the Hon'ble Apex Court that statement of a person recorded under Section 161 CrPC would be treated as dying declaration after his death. Likewise, in ***Pradeep Bisoi Vs. State of Odisha, (2019) 11 SCC 500,*** it was reiterated that the statement of victim recorded under Section 161 CrPC before three months of the death will cover under Section 32(1) of the Evidence Act and admissible as dying declaration after death of the victim.

15. PW-6, the Investigating Officer, is a responsible police officer. He has no grudge or enmity with the accused and there is no possibility of false implication of the accused by this witness. In the present case the statement of the deceased under Section 161 CrPC recorded by the Investigating Officer is a cogent and reliable piece of evidence and is admissible as dying declaration and the prosecution undoubtedly can reply upon this statement.

16. The accused has taken a specific plea in his statement under Section 313 CrPC that at the time of occurrence he was not present at his home and had gone to the market. To prove this fact, DW-1 Ranvir Singh has been examined on behalf of accused. Learned trial court has elaborately discussed the entire evidence of DW-1 and has found that his evidence is not cogent and trustworthy. We have also analyzed the evidence of DW-1 and found that in the facts and circumstances of the case and also in the light of topography of the place of occurrence, as has been shown in the site plan Ext. ka-8 prepared by the Investigating Officer, the evidence of DW-1 Ranvir Singh is not believable. It is also pertinent to mention here that the fact that at the time of occurrence accused was not present on the spot was especially within the knowledge of the accused and since the prosecution had discharged its burden on the basis of dying declaration Ext. ka-9, the onus was shifted upon the accused to show that his plea of alibi was true. It has been held by the Hon'ble Apex Court in ***Satye Singh and Another v. State of Uttarakhand, (2022) 5 SCC 438*** that Section 106 Evidence Act is not intended to relieve prosecution from discharging its duty to prove guilt of accused. Prosecution must discharge its primary onus of proof and establish the basic facts against the accused in accordance with law and only

thereafter may Section 106 be restored to, in the facts and circumstances of each case.

17. In ***Shambu Nath Mehra vs. State of Ajmer, AIR 1956 SC 404,*** wherein the basic law on the subject was discussed, has been relied upon in the case of **Satye Singh** (supra). It has been held by Hon'ble Apex Court that :

"11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor [Attygalle v. Emperor, 1936 SCC OnLine PC 20 : AIR 1936 PC 169] and Seneviratne v. R. [Seneviratne v. R., (1936) 3 All ER 36] , All ER at p. 49."

18. It has already been held above that the accused has not succeeded to discharge his onus / burden to prove his plea of alibi, hence, this legal position also stands against him.

19. The learned Sessions Judge has relied upon the testimony of PW-4, PW-5, PW-6 and PW-7 and convicted and sentenced the appellant for the offence under Section 304 IPC. As per the finding of the learned trial court, the incident happened out of quarrel and death has happened due to septicemia as a result of thermal burn.

20. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report and more particularly the dying declaration, there is no doubt left in our mind about the guilt of the present appellant, as concluded by the trial court. We concur with the same.

21. Now it takes us to the quantum of sentence, specifically under Section 304 IPC, where life imprisonment has been awarded by learned trial court. For awarding the sentence, we have to keep in mind the theories of punishment in our country.

22. 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."

23. The term 'Proper Sentence' was explained in ***Deo Narain Mandal Vs. State of UP*** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

24. 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.

25. Considering the facts and circumstances of the case and also keeping in view criminal jurisprudence in our

country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

26. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh keeping in view the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

27. Keeping in view the reformative theory of punishment and "doctrine of proportionality", it appears to us that the sentence of life imprisonment awarded under Section 304 IPC by learned trial court to the appellant is too harsh and severe keeping in view the facts and circumstances of this case. The appellant is in jail for the last more than 9 years. This fact is also admitted by learned AGA.

28. Hence, we are of the considered view that since the appellant has already served-out more than 9 years sentence, the sentence of life imprisonment under Section 304 IPC is converted into the sentence already undergone. Fine amount is reduced to Rs. 10,000/-. If fine is not paid within 12 weeks from the date of release, appellant shall undergo six months' further incarceration.

29. The appeal is accordingly **partly allowed**, as modified above.

30. The office is directed to transmit the record to the court below.

(2022) 10 ILRA 1025
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2022

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-B No. 978 of 2022

Chandrashekhar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law - Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 4-A, 6 & 44 - Issue - whether High Court can examine the legality and validity of issuance of notification under Section 4-A of the U.P.C.H. Act or not ? – Held - St. Government has power to promulgate the notifications, as required in it's opinion and such notifications are part of legislative functions which are not open in ordinary course for judicial review unless it suffers with the grounds of ultra vires or lack of competence of legislation or unreasonableness - it would not be proper to interfere in the notification issued by the St. Government to carry out consolidation operation or its cancellation - when the Director of the Consolidation issues a notification u/s 4 or 6 of the Act, he performs neither a quasi-judicial function nor exercises any administrative power but performs a legislative function - The Director of Consolidation cannot be

required to give either a reasoned order or to accord hearing to the tenure holders concerned before issuing a notification under Section 6 of the Act (13, 14, 15, 16)

Grievance of the petitioner is that the village has illegally been brought under the consolidation operation by issuing notification under Section 4-A of 'U.P.C.H. Act - Held - Consolidation Commissioner has returned finding of fact emphasizing the need to carry out the consolidation operation in the village/unit in question - it was directed that minimal area should be disturbed/shifted while allotment of chaks to the chak holders considering their convenience - order under challenge passed by the Consolidation Commissioner on the representation moved by villagers is not a judicial order - He has returned finding of fact after conducting proper enquiry by the authorities concerned, who have submitted their report, and accorded proper opportunity of hearing to the parties concerned - petitioner failed to substantiate his submission in assailing the impugned notification under Section 4-A of the U.P.C.H. Act. (Para 21, 22)

Dismissed. (E-5)

List of Cases cited:

1. Agricultural & Industrial Syndicate Ltd. Vs St. of U.P. 1976 RD 35

2. Deo Nath Kewat Vs Dy. Director of Consolidation & ors. (1990 RD 177)

3. Rajaram Ojha Vs Consolidation Commissioner Writ Petition No. 337 of 1990 dt 31.03.2014 4. MANU/UP/2782/2014

4. Smt. Kalpi Devi Vs Consolidation Commissioner & anr. reported in 2016 (131) R.D., 738

5. Dalip & 3 Others Vs Vikram Singh & ors. reported in 2015 (128) R.D., 666

6. Jasmeet Singh Vs St. of U.P. & ors. Writ-B No. 8706 of 2016 dt 07.04.2016

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner and the learned Standing Counsel for the State-respondents.

2. Present writ petition has been filed challenging the order dated 04.03.2022 (Annexure-8) passed by the Consolidation Commissioner (respondent no. 4), rejecting the representation dated 31.12.2021 moved by one Awadhesh Mishra, in pursuance of the order dated 18.11.2021 passed by this Court in Writ-B No. 1764 of 2021; Awadhesh Mishra vs. State of U.P. & 3 Others (Annexure-7).

3. Grievance of the petitioner is that village Chandadih, Pargana Sikendarpur, Tehsil Belthara Road, District Ballia has illegally been brought under the consolidation operation by issuing notification under Section 4-A of the U.P. Consolidation of Holdings Act (in brevity 'U.P.C.H. Act') promulgated on 27.05.2016 and the Consolidation Commissioner has illegally rejected the representation without adverting to the grievance raised before him.

4. Facts culled out from the averments made in the writ petition are that some of the villagers have shown their dissatisfaction against the issuance of notification under Section 4-A of the U.P.C.H. Act, inter alia, on the grounds that previously, consolidation operation had already been finalized in the year 1971 and there was no occasion to carry out second round consolidation operation. Feeling aggrieved against the said notification under Section 4-A of the U.P.C.H. Act, one Awadhesh Mishra had filed writ petition before this Court challenging the said notification being Writ-B No. 1764 of 2021 (Awdhesh Mishra vs. State of U.P. & 3 Others). While deciding the said writ

petition, this Court has observed that there was a sharp division of opinion amongst the villagers qua carrying out second round consolidation operation. Some of the villagers are in favour of carrying out consolidation operation and some are in favour of cancellation of the notification, consequently, this Court, vide order dated 18.11.2021, has disposed of the writ petition with a direction to the Consolidation Commissioner to decide the representation of the petitioner, which is quoted herein below :-

"1. Heard Sri Deepak Kumar Jaiswal, Advocate holding brief of Sri Arun Kumar Srivastava, learned counsel for the petitioner as well as learned Standing Counsel for the State respondents.

2. Supplementary affidavit and instructions are taken on record.

3. Sri Girish Chandra Maurya, Advocate has filed impleadment application for impleadment of applicants as respondents as they are necessary party to the case. The impleadment application is not objected by learned counsel for the petitioner, same is accordingly allowed and learned counsel for the applicants is directed to incorporate necessary impleadment during course of the day.

4. In the present writ petition, notification under Section 4 of the Consolidation of Holdings Act was issued on 30.09.2021, but it seems that the petitioner is aggrieved by the said proceedings inasmuch as according to him majority of villagers are not in favour of such proceedings as according to him no fruitful purpose would be served by the same.

5. On the other hand an application for impleadment has been moved claiming to be representing majority of villagers, who, according to him are in favour of the consolidation proceedings. He further submits that a report has been submitted by the Consolidation Committee to the authorities concerned in favour of the consolidation proceedings.

6. The question involved in this writ petition is as to whether consolidation proceedings should proceed or not. In the present circumstances, as there are clearly two versions available contradicting each other and consequently it would be appropriate that the issue need be suitable considered by the Consolidation Commissioner, U.P. at Lucknow.

7. Accordingly, in the light of above, with the consent of learned counsel for the parties, present writ petition is disposed of with direction that the Consolidation Commissioner, U.P. at Lucknow shall look into the matter and pass reasoned and speaking order on the representation of the petitioner within two months, from the date of production of certified copy of this order, after giving opportunity of hearing to all the concerned, in accordance with law.

8. The effected persons who have approached this Court may approach the Consolidation Commissioner for redressal of their grievance along with the decision on the representation of the petitioner.

9. With above observations/directions the writ petition stands disposed of."

5. In pursuance of the order dated 18.11.2021, respondent no. 4 has passed impugned order dated 04.03.2022 rejecting the representation dated 31.12.2021 moved by Awadhesh Mishra (petitioner in Writ Petition No. 1764 of 2021) for cancellation of the notification under Section 4A of the U.P.C.H. Act and has further directed to the authorities concerned for preparation of the provisional consolidation scheme as

enunciated under Section 19 & 19A of the U.P.C.H. Act.

6. Said impugned order dated 04.03.2022 passed by respondent No. 4 is being challenged in the presnt writ petition by third person namely Chandrashekhar (the petitioner herein) who is claiming himself to be the resident of said village.

7. Learned counsel for the petitioner submits that no justifiable ground was available to the State authority to put the village in question under consolidation operation. Representation moved by Awadhesh Mishra has illegally been rejected by the Consolidation Commissioner without adverting to the grievance as raised by the villagers in the representation. It is further submitted that material available on the record has illegally been ignored by the Consolidation Commissioner in deciding the representation. Counsel for the petitioner has drawn the attention of the Court towards the provisions as enunciated under Rule 17 of the U.P. Consolidation of Holdings Rules (in brevity 'U.P.C.H. Rules') in support of his submission that tenure holder of the village are generally satisfied with the present position, therefore, they do not want any consolidation operation in the village and owing to party factions in the villagers, proper consolidation proceeding in the village is very difficult. It is further submitted that the Consolidation Commissioner has passed the impugned order in a very cursory manner without application of mind which is illegal, unwarranted under the law and tainted with irregularities, therefore, liable to be quashed and the consolidation authorities may be directed not to carry out consolidation operation in the village in pursuance of notification promulgated on 27.05.2016.

8. Per contra, learned Standing Counsel has contended that respondent No. 4 has rightly decided the matter after calling for the report from the District Magistrate/District Deputy Director of Consolidation and the joint report of Settlement Officer of Consolidation and the Additional District Magistrate. Before passing order the Consolidation Commissioner has given full opportunity of hearing to the villagers including the Village Pradhan and Awadhesh Mishra who was the petitioner in previous writ petition. It is further contended that the notification under Section 4-A of the U.P.C.H. Act is not assailable in the court of law being conditional legislation and the State is not under legal obligation to record the reason for exercising its legislative power in a peculiar way. It is also contended that the legislation cannot legislate on the sweet will of any person, therefore, the instant writ petition, challenging the order impugned and seeking a mandamus against the authorities concerned not to proceed with the notification under Section 4-A of the U.P.C.H. Act, is nothing but an abuse of process of law, misconceived and devoid of merits which is liable to be dismissed in limine.

9. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, the question for consideration in the present petition lies in a very narrow compass as to whether this Court can examine the legality and validity of issuance of notification under Section 4-A of the U.P.C.H. Act or not.

10. Before considering the scope of judicial review qua issuance of notification under Section 4-A of the U.P.C.H. Act, it

would be befitting to go through the relevant provisions relating to cancellation of notification under Section 4 or 4-A of the U.P.C.H. Act, as enunciated under Section 6 of the U.P. Act read with Rule 17 of the U.P.C.H. Rules which are reproduced hereinunder :-

" **Section 6. Cancellation of notification under Section 4**.--(1) It shall be lawful for the State Government at any time to cancel the [notification] made under Section 4 in respect of the whole or any part of the area specified therein.

[(2) Where a [notification] has been canceled in respect of any unit under sub-section (1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation.]

'**Rule 17'. Section 6.**--The [notification] made under Section 4 of the Act, may among other reasons, be cancelled in respect of whole or any part of the area on one or more of the following grounds, viz, that --

(a) the area is under a development scheme of such a nature as when completed would render the consolidation operations inequitable to a section of the peasantry;

(b) the holdings of the village are already consolidated for one reason or the other and the tenure-holders are generally satisfied with the present position;

(c) the village is so torn up by party factions as to render proper consolidation proceedings in the village very difficult; and

(d) that a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for this purpose."

11. Sections 4(1)(a), 4-A(1) and 6 (1) of the U.P.C.H. Act entrusts power to the State Government for issuing notification to bring a district or part thereof under the consolidation operation or its cancellation as mentioned in the said sections respectively. The State Government exercises its power for issuing notification through delegated legislation as enunciated under Section 44 of U.P.C.H. Act and to delegate its power under the provisions of Section 44 of the U.P.C.H. Act, the State Government has issued notification dated October 19, 1956 authorizing the Director of Consolidation (Consolidation Commissioner) of the State to issue notification under Sections 4(1)(a), 4-A (1) & 6 (1) of U.P.C.H. Act respectively. For ready reference, provisions as enunciated under Section 44 of the U.P.C.H. Act is quoted hereinunder:-

"**Section 44. Delegation**.-- The State Government may, by notification in the Official Gazette, and subject to such restrictions and conditions as may be specified in the notification.

(i) delegate to any officer or authority any of the powers conferred upon it by this Act; and

(ii) confer power of the Director of Consolidation, Deputy Director, Consolidation, the Settlement Officer, Consolidation, and the Consolidation Officer under this Act or the rules, made thereunder on any officer or authority."

12. The provisions, as mentioned above, succinct the power of State Government to promulgate the notifications, as required in it's opinion and such notifications are part of legislative functions which are not open in ordinary course for judicial review unless it suffers with the grounds of ultra vires or lack of competence of legislation or unreasonableness.

13. Scope of judicial review against the notification under Sections 4 & 6 of the U.P.C.H. Act has been examined by the Division Bench of this Court in the matter of **Agricultural & Industrial Syndicate Ltd. vs. State of U.P.** reported in **1976 RD 35** and it has been expounded that "when the Director of the Consolidation issued a notification under Section 4 or 6 of the Act, he performs neither a quasi judicial function nor exercises any administrative power but performs a legislative function. To judge the validity of the notification, the Court must apply the same as it would apply to a piece of legislation. Just as, it cannot be contended that any legislative authority should given reason in support of its legislation or give a hearing to those affected before proceeding to legislate. The Director of Consolidation also cannot be required to give either a reasoned order or to accord hearing to the tenure holders concerned before issuing a notification under Section 6 of the Act."

14. More over, the Division Bench has further held that "If the High Court allows the writ petition and quashes the notification issued under Section 6, the result would be in substance a direction to the State Government to continue the consolidation proceedings in the area in question in spite of the fact that it has not considered it fit to do so in exercise of powers vested in it by the legislature. As the notification under Section 4 & 6 are issued by the State Government in exercise of conditional legislative power, it cannot be conceivably contended that the High Court can issue a mandamus to the legislature to legislate on any subject or to apply any law to any area. The High Court cannot pass an order making it obligatory on the State Government to enforce the scheme of consolidation in an area where, in its opinion, such scheme should not be enforced. It would amount to compel the State Government to exercise its power of conditional legislation."

15. In case of **Deo Nath Kewat vs. Dy. Director of Consolidation and others (1990 RD 177),** co-ordinate Bench of this Court has held that as the issuance of notification under Section 6 for cancellation of the notification under Section 4 (four) is an administrative-cum-policy matter to be decided by the State Government, either to issue notification under Section 4 for the consolidation operation to commence in the area or to issue notification under Section 6. As a matter of fact the scope of writ of mandamus can not be extended to such an extent as to enforce administrative or legislative powers. In fact, either to issue notification under Section 6 for cancellation of notification is a sort of legislative power of the state. The jurisdiction of High Court under Article 226 need not be stretched to such an extent so as to compel the State Government to legislate on a particular subject, particularly when it does not give a corresponding right in favour of the petitioner.

16. Relying upon the judgment of the Division Bench in the case of Agricultural & Industrial Syndicate Ltd. (Supra), a Coordinate Bench of this Court in batch of cases, leading Writ Petition No. 337 of 1990 **(Rajaram Ojha vs. Consolidation Commissioner)** decided on 31.03.2014 reported in **MANU/UP/2782/2014**, has held as well that it would not be proper to interfere in the notification issued by the State Government to carry out consolidation operation or its cancellation. Relevant paragraph nos. 8 & 9 of this judgment is quoted hereinunder :-

"8. Coming to the authorities cited on behalf of the State, it is appropriate to refer to the Division Bench decision of this Court in the Case of the Agricultural and Industrial Syndicate Limited v. State of U.P. 1976 RD 35. In this case it was held that the notifications issued either under section 6 of the U.P. Consolidation of Holdings Act are not in exercise of an executive function but a legislative function. This judgment records as follows "As already held, the notifications under section 4 and 6 of the Act are issued by the State Government in exercise of conditional legislative powers. It cannot be conceivably contended that this Court can issue a mandamus to the legislature to legislate on any subject or to apply any law to any area. It was observed by the Supreme Court in The State of Bihar v. Sir Kamleshwar Singh MANU/SC/8741/2006:-

"It cannot possibly have been intended that the legislature should be under an obligation to make a law in exercise of that power, for no obligation of that kind can be enforced by the Court against a legislative body." Similarly, this Court could not pass an order which would make it obligatory on the State Government to enforce the scheme of consolidation in an area where in its opinion such scheme should not be enforced. It would amount to compel the State Government to exercise its powers of conditional legislation."

9. The Second judgment relied upon by the State is **Dev Nath Kewat v. Deputy Director of Consolidation 1990 RD 175.** This judgment, relying upon the ratio laid down in the case of Agricultural and Industrial Syndicate Limited (supra), has held as follows :--

"The scope of writ of mandamus is by now well settled that unless there is some denial of the statutory duty cast upon the State and authority and the State has refused to carry out the statutory duty, in that event writ of mandamus cannot be issued. In the instant case by refusing to issue notification under section 6(1) of the Act it cannot be said that the State Government has refused to carry out any statutory duty imposed upon it. In such matters no writ of mandamus can be issued. However, it is open to the petitioners to approach the State Government with their representation if so advised."

17. In the case of **Smt. Kalpi Devi vs. Consolidation Commissioner & Another** reported in **2016 (131) R.D., 738,** a Division Bench of this Court has shown its agreement with the decision of previous Division Bench of this Court in the case of Agricultural & Industrial Syndicate Ltd. (Supra). It is apposite to mention that in the said judgment the Division Bench has also considered the another judgment of the Division Bench of this Court rendered in the matter of **Dalip & 3 Others vs. Vikram Singh & 6 Others** reported in **2015 (128) R.D., 666**. Relevant paragraph no. 3 of the judgment in the case of Smt. Kalpi Devi (Supra) is quoted hereinunder :-

"3. This Court obviously cannot issue a writ which would make it obligatory upon the State Government to enforce a scheme of consolidation in an area where in its opinion such a scheme should not or cannot be enforced. It would amount to compelling the State Government to exercise its power of conditional legislation. The law as declared by the Division Bench in Agricultural & Industrial Syndicate Limited has been consistently followed by this Court and stood reiterated in the recent pronouncement of the Court in Dalip Singh. We therefore find no ground which would warrant interference with the

view taken by the learned Single Judge especially when the same was itself founded on what had been consistently held by the Division Benches of this Court."

18. So far as the applicability of Rule 17 of U.P.C.H. Rules is concerned, from perusal of Rules, it is clear that rules are made by the State Government by applying its power under Section 54 of the U.P.C.H. Act. Rule 17 of the U.P.C.H. Rules are neither exhaustive nor mandatory for the purposes of issuance of notification under Section 6(1) of the U.P.C.H. Act to cancel the consolidation operation carrying out in pursuance of notification promulgated under Section 4 or Section 4-A of the U.P.C.H. Act. It is noteworthy to state that all these rules as framed under Section 54 of the U.P.C.H. Act are subject to provisions as enunciated under Section 54(3) of the U.P.C.H. Act.

19. Considering the scope and nature of Rule 17 of the U.P.C.H. Rules, a Coordinate Bench of this Court in Writ-B No. 8706 of 2016 (Jasmeet Singh vs. State of U.P. & 2 Others) decided on 07.04.2016 has held as under :-

"The only other point which survives for consideration is as to whether the provisions contained in Rule 17 of the Act are mandatory. I have in the judgment dated 31.03.2014 in a bunch of cases, the leading case wherein was **Writ Consolidation No. 535 pf 2-15, Raja Ram Ojha Vs. Consolidation Commissioner and others**, already considered this aspect and have held that the opening words in Rule 17 are :'the notification made under Section 4 of the Act may among other reasons be cancelled" are such that the conditions mentioned in Rule 17 are rendered merely illustrative. Anything which is only illustrative cannot be mandatory. The wording of Rule 17 is not such that would lead to a conclusion that these conditions are comprehensive or mandatory. Besides the Division Bench decision in the case of Agricultural & Industrial Syndicate Limited has already laid down that no reasons are required to be disclosed for issuing the notification either under Section 4 or Section 6 of the Act. It therefore, necessarily follows that it is the subjective satisfaction of the Authority competent to issue the notification which alone is of any consequence. If reasons are not to be assigned for issuing the notification, it is not open for the writ Court to scrutinize the reasons for the same. The conditions enumerated in Rule 17 are therefore, mere guidance for the Authority taking the decision in this regard and for this reason also, the conditions in Section 17 cannot be held to be mandatory by any stretch of imagination."

20. Applying the legal proposition, as discussed above, in the facts and circumstances of the instant case, I am of the view that the present petition does not deserve any indulgence of this Court. Perusal of the impugned order dated 04.03.2022 reveals that before deciding the representation, the Consolidation Commissioner has called for the report dated 08.02.2022 from the District Magistrate/District Deputy Director of Consolidation and the joint report dated 03.02.2022 submitted by the Additional District Magistrate and the Settlement Officer of Consolidation. In the said reports it has been pointed out that the considerable area of Gaon Sabha is in the possession of illegal occupants. In the joint meeting with villagers, 97 chak holders have opposed the consolidation operation whereas 243 chak holders were in favour of carrying out the

consolidation operation. Total area of village is measuring 362 hectare and there are 1094 plots (holdings). During spot inspection only 263 plots were found along side the chak road and remaining 841 plots were found without facility of chak road. In the impugned order, the Consolidation Commissioner considered the points as raised on behalf of villagers including Awadhesh Mishra (petitioner in the previous writ petition) and the village Pradhan. Maximum villagers and the Village Pradhan have categorically stated that there is a shortage of drainage, chak road and place for public convenience. Having considered the rival submissions and the reports submitted by the authority concerned, the Consolidation Commissioner has given a categorical finding that the maximum land of public utility, belongs to the Gaon Sabha, are in the illegal occupation of miscreants. Apart from that only 253 plots (23.12%) are with the facility of chak road and remaining 75% of the land are without the facility of chak road which is causing difficulty to access the holdings. It is also observed by the Consolidation Commissioner that land of the maximum chak holders are in scattered position without the facility of drainage and chak road. A categorical finding has also been recorded that maximum number of villagers are in favour of carrying out the consolidation operation. Even Awadhesh Mishra (petitioner in previous writ petition) has also agreed to carry out the consolidation operation with the condition of minimum deduction and to avoid unnecessary shifting of chaks.

21. After discussing all the material available on record and the averments made by the parties concerned in detail, the Consolidation Commissioner has returned the finding of fact emphasizing the need to carry out the consolidation operation in the village/unit in question and issued a direction to proceed with the consolidation operation and issuance of notification under Section 19 & 19-A of U.P.C.H. Act to carry out the provisional consolidation scheme. It has also been directed that minimal area should be disturbed/shifted while allotment of chaks to the chak holders considering their convenience. Finding of fact as returned by the Consolidation Commissioner in the impugned order with respect to the necessity for carrying out the consolidation operation, as discussed in the impugned order, has not been challenged by the petitioner in this writ petition. It is also apposite to mention that the petitioner of earlier writ petition has accepted the carrying out of consolidation operation with a condition to avoid unnecessary shifting of chak which has appropriately been accepted by the Consolidation Commissioner and, accordingly, issued direction to complete consolidation operation. Moreover, order under challenge passed by the Consolidation Commissioner on the representation moved by villagers is not a judicial order. He has returned finding of fact after conducting proper enquiry by the authorities concerned, who have submitted their report, and accorded proper opportunity of hearing to the parties concerned.

22. In this conspectus as above, I am of the considered view that no justifiable ground is made out to interfere in the order under challenge. Counsel for the petitioner has failed to substantiate his submission in assailing the impugned order and the issuance of notification under Section 4-A of the U.P.C.H. Act. There is nothing on the record to demonstrate as to how the petitioner is prejudiced or is there any likelihood of causing miscarriage of justice to

him due to the order under challenge. There is no illegality, perversity and ambiguity in the order under challenge which may warrant indulgence of this Court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India. Even otherwise there is no justification to review the intent of legislation promulgated under Section 4-A of the U.P.C.H. Act.

23. Resultantly, instant writ petition, being misconceived and devoid of merits, is **dismissed** with no order as to costs.

(2022) 10 ILRA 1034
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 3822 of 1985

Gaya Din & Anr. ...Petitioners
Versus
Dy. Director of Consolidation & Anr. ...Respondents

Counsel for the Petitioners:
Sri Yogesh Agarwal, Sri Sanjay Singh, Mrs. Vatsala, Sri Ravi Kant

Counsel for the Respondents:
Sri A.N. Bhargawa, Sri Ashutosh Kumar Tiwari

A. Civil Law - U.P Consolidation of Holdings Act, 1953 – Section 9A - Res-judicata - decree of Civil Court passed in injunction suit in respect of agricultural land will not operate as res-judicata in the title objection under Section 9A (2) of the U.P.C.H. Act (Para 13)

B. Civil Law - U.P Consolidation of Holdings Act, 1953 – Section 9A - Indian Evidence Act, 1872 - Section 64, 65 & 90 - if certified copy has not been placed on record after satisfying the requirements of Section 64/65 of the Indian Evidence Act, 1872, the mere fact that it was a certified copy by itself, would not make it admissible in evidence since it is secondary evidence and can be adduced in evidence only as provided in statute and not otherwise (Para 15)

Petitioners' father was recorded over disputed plots till the basic year of consolidation - respondent no.2 (Jairaji) claimed that Gift deed was executed in her favour as such, she is the sole-bhumidhar - Respondent no.2 although was not recorded in the revenue records filed a civil suit for injunction in respect of Bhumidari disputed plots which was decreed in her favour which attained finality by dismissal of civil appeal filed by petitioners' father - On the basis of civil Court's injunction decree, respondent no.2 initiated proceedings for recording her name over disputed Khata - Against the Basic Year Entry objection was filed by respondent no.2 for recording her name after expunging the name of petitioners' father Kashi Ram - Original copy of gift deed was not filed before Consolidation Court rather certified copy was filed before Consolidation Officer without any explanation about the original Gift deed - Consolidation Officer, dismissed the objection of respondent no.2 and maintained the Basic Year Entry and held that original of the Gift deed has not been filed which goes against respondent no.2 & further held that judgment of civil Court passed in injunction suit will not operate as res-judicata in the proceeding initiated under Section 9A (2) of U.P.C.H. Act - Appeal filed by respondent no. 2 dismissed - Revisional Court directed to record the name of respondent no.2 over the disputed plots after expunging the name of petitioners - Revisional order passed on the ground that certified Gift deed is more than 20 years old as such, in view of the provisions contained under Section 90A of the Evidence Act, the Gift deed will be presumed to be executed genuine & on the basis of certified copy of Gift deed, right can be given to opposite party no.2 - Held - Revisional Court failed to notice about the original Gift deed and that

there was no explanation or pleading about the non filing of original Gift deed either in the courts below or before High Court - revisional order passed on the second ground that Gift deed is more than 20 year old, as such, on the basis of certified copy of Gift deed, right can be given to opposite party no.2 without examining anything cannot be sustained - injunction decree cannot operate as resjudicata in the proceedings arising out of Section 9A (2) of U.P.C.H. Act but revisional Court has illegally held that injunction decree passed by civil Court will operate as res - judicata - Impugned revisional orders passed by Deputy Director of Consolidation, Jaunpur quashed - order passed by consolidation office & order passed by Settlement Officer of Consolidation are maintained (Para 16, 18, 19, 20)

Allowed. (E-5)

List of Cases cited:

1. Dr. Jeevan Bahadur Samaddar Vs Govind Charan Samaddar & ors. 2013 (120) RD 717

2. Nathu Ram & ors. Vs Deputy Director of Consolidation Varanasi & ors. 2017 (136) RD 480

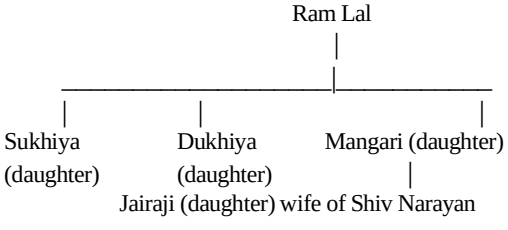
3. Ram Dular Vs Deputy Director of Consolidation Jaunpur & ors. 1994 RD 290 (SC),

4. Sheshmani & anr. Vs Deputy Director of Consolidation District- Basti U.P. & ors. 2001 RD 210 (SC)

5. Sri Jagdamba Prasad (dead) through LRs & ors. Vs Kripa Shankar (dead) through LRs & ors. 2014 (124) RD 1 (SC)

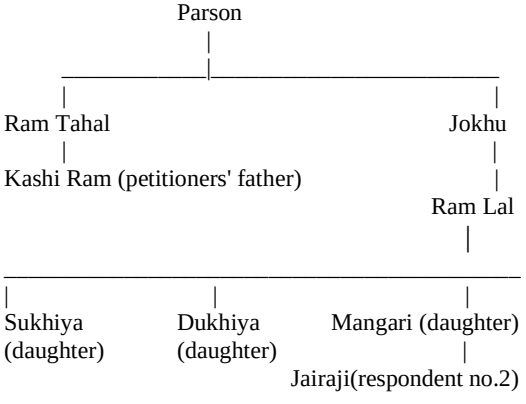
(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Brief facts of the case are that Khata No.116 situated in Village- Sultanpur Khas, Pargana-Garwara, Tehsil- Machhali Shahar, District- Jaunpur was recorded in the name of petitioners' father, Kashi Ram son of Ram Tahal. Against the Basic Year Entry, one objection under Section 9A (2) of the U.P.C.H. Act was filed by Shri Ram and Others in respect of Plot No.728 area 38 decimal of Khata No.161 that Kashi Ram is wrongly recorded over the same so his name be recorded after expunging the name of the Kashi Ram. Another objection against the Basic Year Entry was filed by respondent no.2, Smt. Jairagi daughter of Smt. Mangri in respect of Plot Nos.663, 664, 686, 687 and 695 of Khata No.161 to record her name exclusively after expunging the name of Kashi Ram. Respondent no.2 has placed following pedigree in support of her case:-



2. The basis of the claim of respondent no.2 (Jairaji) was that Ram Lal has executed Gift deed on 14.4.1950 in favour of his three daughters, namely, Sukhiya, Dukhiya and Mangri, who have died, as such, she is the sole-bhumidhar being daughter's daughter of disputed plots.

3. Another Pedigree has been mentioned in Para No.4 of the order of Revisional Court dated 11.8.1982 which is mentioned as undisputed, the same is as follows:-



4. Before Consolidation Officer following three issues were framed:-

(i) Whether Shri Ram is bhumidhar of Plot No.728 area 38 decimal.

(ii) Whether Smt. Jairaji daughter of Mangri is exclusive owner of plots in dispute as given in her objection.

(iii) Whether name of Kashi Ram is wrongly recorded over disputed plots.

5. Issue no.1 was decided in favour of objector Shri Ram as the same was wrongly recorded in 1360 fasli in the name of Ram Lal without any basis while earlier it was recorded in the name of ancestor of Shri Ram.

6. With respect to issue Nos.2 and 3 petitioners' father Kashi Ram and respondent no.2, Smt. Jairaji adduced oral and documentary evidences in support of their cases.

7. According to Kashi Ram his father Ram Tahal and father of deceased Ram Lal were real brothers, as such, Ram Lal was cousin of Kashi Ram. He further alleged that Smt. Mangari died first in the three daughters, Sukhiya died after Mangari and Dukhiya died after Sukhiya, all the three daughters were married in the life time of their father Ram Lal and all of them were residing in their in-laws house (Sasural).

8. From the side of respondent no.2, judgment of civil Court passed in ***Suit No.435 of 1959 (Sukhiya and Others Vs. Kashi Ram)*** was filed, the suit was for injunction, which was decreed on 10.11.1960 in favour of plaintiffs and ***Civil Appeal No.148 of 961*** filed by Kashi Ram was dismissed. From the side of petitioners' father Kashi Ram, order dated 26.7.1957 passed by Naib Teshildar in Case No.3488 was filed before Consolidation Officer by which name of Kashi Ram was ordered to be recorded after expunging the name of Ram Lal. Smt. Jairaji filed a case in revenue Court on the basis of civil Court decree for injunction was dismissed by Assistant Collector by order dated 28.5.1962 and further the case under Section 33/39 of U.P. Land Revenue Act filed by respondent no.2 was also dismissed by Sub-Divisional Officer which proves that petitioners' father remained recorded over disputed plots in pursuance of the order dated 26.7.1957 till the basic year of consolidation. Operation, objection and appeal against the Basic Year Entry were dismissed by Consolidation Courts. Both parties filed revenue entries in support of their cases. Consolidation Officer considered the oral evidences and documentary evidence adduced by both parties. Consolidation Officer noticed the fact that Sukhiya, Dukhiya and Mangri in whose favour Gift deed is alleged to be executed on 10.5.1950 had not filed an objection before Consolidation Court, respondent no.2 claimed right on the basis of alleged Gift deed which was not proved even before Civil Court as mentioned in the judgment of civil Court. Consolidation Officer further held that judgment of civil Court passed in injunction suit will not operate as res-judicata in the proceeding initiated under Section 9A (2) of U.P.C.H. Act. Consolidation Officer further held that original of the Gift deed has not been filed which goes against respondent no.2 accordingly, Consolidation Officer vide order dated 24.11.1976 dismissed the objection of respondent no.2 and maintained the Basic Year Entry, the objection of one Shri Ram in respect to one Plot no.728 was allowed. Appeal filed by respondent no.2 under Section 11 of U.P.C.H. Act against the order of

Consolidation Officer dated 24.11.1976 was dismissed vide order dated 13.12.1977. Respondent no.2 challenged the orders of Courts below before revisional Court under Section 48 of U.P.C.H. Act in which petitioners have put in appearance but on the date of hearing petitioners could not appear and the revision was allowed ex-parte vide order dated 11.8.1982 by which order of Consolidation Officer and Settlement Officer of Consolidation were set aside and further direction was issued to record the name of respondent no.2 over the disputed plots after expunging the name of petitioners. When petitioners came to know about the revisional order dated 11.8.1982, an application for setting aside the ex-parte order dated 11.8.1982 was filed on 21.8.1982, the same was dismissed by revisional Court vide order dated 22.2.1985 holding that earlier order dated 11.8.1982 was passed on merit hence this writ petition on behalf of petitioners challenging both the orders dated 11.8.1982 and 22.2.1985.

9. Learned counsel for the petitioners Shri Ravi Kant holding the brief of Mrs. Vatsala submitted that revisional Court has not afforded opportunity of hearing to the petitioners, as such, revisional order will be treated exparte against the petitioners. He further submitted that revisional Court has exceeded his jurisdiction while allowing the revision and expunging the Basic Year Entry which was continuing much before the basic year of consolidation operation. He further submitted that entire evidences (oral and documentary) as considered by Consolidation Officer and Settlement Officer of Consolidation have not been considered at all by revisional Court and the judgment of reversal has been passed. He next submitted that decree of Civil Court passed in injunction suit in respect of agricultural land will not operate as res-judicata in the title objection under Section 9A (2) of the U.P.C.H. Act, Consolidation Officer and Settlement Officer of Consolidation have rightly held that decree of injunction suit passed by Civil Court will not operate as res-judicata in the proceeding arising out of Section 9A (2) of U.P.C.H. Act but revisional Court has arbitrarily held that decree of Civil Court relating to injunction suit will operate as res-judicata in the title objection before Consolidation Court. He next submitted that original copy of gift deed dated 14.4.1950 has not been filed at all before Consolidation Court rather certified copy of the will-deed dated 10.5.1950 has been filed before Consolidation Officer without any explanation about the original Gift deed and the revisional Court arbitrarily relying upon Section 90 A of the Indian Evidence Act presumed its execution. He further submitted that oral evidences which were considered by Consolidation officer has not been taken into consideration and revision was outrightly allowed. He placed reliance upon ***AIR 1954 S.C. 340, Kiran Singh Vs. Chaman Paswan*** in which it is held that if the order and decree is ab initio void no reliance can be placed upon it at any stage, subsequently, counsel for the petitioner submitted written argument also in which it is mentioned that respondent no.1 mistakenly appreciated that unregistered Gift deed can be read as admissible evidence without considering the provisions contained under Section 17 (1) (a) of the Registration Act 1908. In point no.7 of the written argument, it is mentioned that respondent no.1 mistakenly appreciated that Section 90A of the Evidence Act does apply on the contrary certified copy of the Gift deed does not fulfil the ingredients of Section 74 and 76 of the Indian Evidence Act thus cannot be

read as secondary evidence when there is no pleading or explanation about the original Gift deed.

10. On the other hand, learned counsel for respondent no.2 Shri Ashutosh Kumar Tiwari submitted that revisional order dated 11.8.1982 was passed on merit and the Consolidation Court have no power of review in view of law laid down by full Bench of this Court reported in ***1997 R.D. 562, Smt. Shivraji and Others Vs. D.D.C. Allahabad and Others.*** He further submitted that Civil Court has decided the injunction suit in favour of respondent no.2 as such the same will operate as res-judicata in consolidation proceeding relating to title matter. He further submitted that Ram Lal had full and absolute right to transfer his agricultural land through Gift deed to his daughter as the disputed plots were the Sharamuian Abog before the date of vesting. He next submitted that Gift deed has been rightly believed to be a genuine document by revisional Court as provided under Sections 61, 63, 65 and 74 of the Evidence Act. Learned counsel for respondent no.2 has also submitted written argument which has been perused by me in which the above mentioned points have been taken. He finally submitted that revisional jurisdiction has been rightly exercised in view of provisions contained under Section 48 Explanation-3 of U.P.C.H. Act as such, no interference in required against the impugned revisional orders and writ petition is liable to be dismissed.

11. I have considered the argument advanced by learned counsel for the respective parties and perused the records.

12. There is no dispute about the fact that Ram Lal was real nephew of petitioners' father and respondent no.2 was daughter of married daughter of Ram Lal, petitioners' father Kashi Ram was recorded in revenue record since 1957 by the order of Naib Tehsildar in respect of plots of Khata No.71 and the name of recorded tenure holder Ram Lal was expunged from the revenue records. The name of petitioners' father continued over the disputed Khata No.71 even in the Basic Year of the consolidation operation. Respondent no.2 although was not recorded in the revenue records filed a civil suit in the year 1959 for injunction in respect of Bhumidari disputed plots which was decreed in her favour by judgment and decree dated 10.11.1960 which attained finality by dismissal of civil appeal filed by petitioners' father by judgment and decree dated 6.7.1961. On the basis of civil Court's injunction decree, respondent no.2 initiated two revenue proceedings for recording her name over disputed Khata but both the revenue proceedings were decided against the respondent no.2 in the year 1962. Against the Basic Year Entry objection was filed by respondent no.2 for recording her name after expunging the name of petitioners' father Kashi Ram. Objection under Section 9A (2) of U.P.C.H. Act was dismissed by Consolidation Officer and appeal filed by respondent no.2 under Section 11 of U.P.C.H. Act was also dismissed by Settlement Officer Consolidation. Revisional Court allowed the revision filed by respondent no.2 under Section 48 of U.P.C.H. Act setting aside the order of Consolidation Officer and Settlement Officer of Consolidation, the Basic Year Entry was expunged and name of respondent no.2 was ordered to be recorded over disputed plots. This Court while admitting the writ petition stayed the operation of the revisional order dated 11.8.1982 and 22.2.1985 vide order dated

20.3.85. On the stay vacation application filed by respondent no.2 interim order dated 20.3.1985 was confirmed with further direction that whichever party is in possession of the disputed land shall not be dispossessed till further orders.

13. Since the civil suit filed by respondent no.2 was for decree of injunction although respondent no.2 was not recorded in the revenue record, the injunction decree cannot operate as resjudicata in the proceedings arising out of Section 9A (2) of U.P.C.H. Act but revisional Court has illegally held that injunction decree passed by civil Court will operate as res judicata. The case law of Apex Court cited by counsel for the petitioners in ***Kiran Singh (supra)*** will be relevant on this issue. The revisional order passed on the first ground that injunction decree of Civil Court will operate as res-judicata in title proceeding before Consolidation Court cannot be sustained.

14. Revisional order passed on the second ground that certified Gift deed dated 14.4.1950 is more than 20 years old as such, in view of the provisions contained under Section 90A of the Evidence Act, the Gift deed will be presumed to be executed genuine. Revisional Court has failed to consider the oral evidence adduced by the parties before the Consolidation Officer which were taken into consideration while rejecting the objection under Section 9A (2) of U.P.C.H. Act filed by respondent no.2. Revisional Court has also failed to notice about the original Gift deed and there is no explanation or pleading about the non filing of original Gift deed either in the courts below or before this Court. Perusal of Section 64, 65, 74, 76 and 90 of the Indian Evidence Act, 1872 will be necessary to consider the arguments of respective counsel on the point of production of certified copy of Gift deed. Section 64, 65, 74, 76 and 90 of Indian Evidence Act, 1872 are as follows:

*"**64. Proof of documents by primary evidence**.--Documents must be proved by primary evidence except in the cases hereinafter mentioned.*

***65. Cases in which secondary evidence relating to documents may be given**.--Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:--*

(a) When the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) 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;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence; [India] to be given in evidence;"

(g) when the originals consists of numerous accounts or other documents

which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

***74. Public documents**.--The following documents are public documents :--*

(1) Documents forming the acts, or records of the acts--

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents.

***76. Certified copies of public documents**.--Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.*

Explanation.--Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

***90. Presumption as to documents thirty years old**.--Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Explanation.--Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This Explanation applies also to section 81.*

STATE AMENDMENTS

Uttar Pradesh.

(a) Renumber section 90 as sub-section (1) thereof;

(b) in sub-section (1) as so renumbered, for the words "thirty years", substitute the words "twenty years";

(c) after sub-section (1) as so renumbered, insert the following sub-section, namely:--

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any

particular person, it is that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested".

(d) After section 90, insert the following section, namely:--

*"**90A**. (1) Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a Court of Justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.*

(2) This presumption shall not be made in respect of any document which is the basis of a suit or of defence or is relied upon in the plaint or written statement."

The Explanation to sub-section (1) of section 90 will also apply to this section; [Vide Uttar Pradesh Act 24 of 1954, sec. 2 and Sch. (w.e.f. 30-11-1954).]"

15. On the point of Section 90 of Indian Evidence Act as well as on the point of proof of Gift deed this Court in a case of ***Dr. Jeevan Bahadur Samaddar Vs. Govind Charan Samaddar and Others 2013 (120) RD 717*** has held that if certified copy has not been placed on record after satisfying the requirements of Section 64/65 of the Indian Evidence Act, 1872, the mere fact that it was a certified copy by itself, would not make it admissible in evidence since it is secondary evidence and can be adduced in evidence only as provided in statute and not otherwise. Paragraph Nos.36 to 42 of ***Dr. Jeevan Bahadur Sammaddar (supra)*** will be relevant to appreciate the present controvercy which is as follows:

"36. In view of above reasoning the Court upheld the view taken by High Court that presumption under Section 90 would not be available on the certified copy produced by defendants and, hence it was rightly declined. The Court also said:

"We may also indicate that it is the discretion of the Court to refuse to give such presumption in favour of a party, if otherwise, there is occasion to doubt due execution of the document in question."

37. The above view however has to be applied in U.P. with slight variation. The U.P. Amendment in Section 90(1) has made difference only of the period from 30 years to 20 years but for all other purposes, it is the same. A Division Bench of this Court in Om Prakash Vs. Bhagwan, AIR 1974 All 389 has also said that benefit of Section 90 of Indian Evidence Act, as it stood un-amended would not be available to defendants-appellants as the original was not produced in evidence. However, here the legislature has introduced sub-section (2) for drawing a presumption in regard to a 'certified copy'. An argument was advanced that in that case, by virtue of sub-section (2), as amended in U.P. the presumption would be available. This was also considered by Division Bench in Om Prakash Vs. Bhagwan (supra) and it said:

". . . . learned counsel relied upon the amendment made to Section 90 by the U. P. Civil Laws (Amendment) Act, which permits a presumption to be drawn when a certified copy of a document, which has been registered under the Registration Act, is produced in evidence. However, the U. P. Civil Laws (Amendment) Act introduced Section 90-A also. Sub-section (2) of this new section lays down that the presumption shall not be made in respect of any document which is the basis of a suit or of a defence and is relied upon in the plaint or in the written statement. It is not disputed

by the learned counsel for the defendants-appellants that the sale deed in question was the basis of the defence and was relied upon by the defendants in their written statement. Nothing therefore, in Section 90 or Section 90-A of the Evidence Act as amended by the U. P. Civil Laws (Amendment) Act, 1954 will come to the assistance of the defendants-appellants and the Court will not draw a legal presumption in favour of the defendants-appellants that it was executed by Smt. Reoti Devi."

38. Here the Court clearly misconstrued Section 90(2) by reading it alongwith Section 90-A, though both are independent.

39. The correctness of aforesaid decision was doubted. The matter was considered by a Full Bench in Ram Jas Vs. Surendra Nath, AIR 1980 All 385. It was answered by Full Bench by overruling the decision in Omprakash Vs. Bhagwan (supra). The Full Bench dealt with Section 90 and 90-A, both at length. The Court traced the history of amendment made by U.P. Legislature, felt necessary in view of decision of Privy Council in Basant Singh v. Brji Raj Saran Singh (1935) ALJ 847, whereby certified copies were not held entitled for presumption under Section 90 in respect of document which is over 30 years when the original are not traceable or lost. The Court also referred to the interpretation given to U.P. Amendment in Dalsingar Vs. Sitaram 1969 All.W.R.(HC) 188 observing that Sections 90 and 90-A both are independent and not controlled by each other. Sub-section (2) of Section 90, therefore, shall not create a bar for raising a presumption under Section 90. This view was reiterated in Risal Vs. Deputy Director of Consolidation, U. P., Lucknow, 1970 All.W.R. (HC) 634 and Deo Chand Vs. Deputy Director of Consolidation 1971 All.L.J. 992. The Full Bench approving aforesaid three decisions and overruling Division Bench judgement said, when law permits presumption which a Court can draw under any provision of procedural law, in absence of any controlling provision available otherwise, such provision pertaining to presumption cannot be made inapplicable. The Court said that if presumption is available or would have been available under Section 90, it shall not be defeated by referring to Section 90-A, which is independent and does not control Section 90. The Court also highlighted distinction between Sections 90 and 90-A. Section 90 deals with documents which are more than 20 years old. Section 90-A is not confined to the documents which are more than 20 years old but it also includes documents from judicial record. The Court found that aforesaid provisions occupy different fields, different circumstances and permits different types of presumption.

40. Same view was reiterated by a learned Single Judge (N.N. Mithal, J.) in Smt. Vidya Devi and others Vs. Nand Kumar, AIR 1981 All 274 (para 17).

41.Thus presumption under Section 90(1) is attracted in respect of original document. However, sub-section (2) is applicable in respect of certified copies but it would be attracted only when certified copy has been adduced in evidence in accordance with procedure prescribed in law, or after satisfying the requirement of law, i.e., Sections 64 and 65 of Act, 1872 and not otherwise. Under Act, 1872 certified copy as such is not admissible in evidence being a secondary evidence unless the procedural requirement thereof is satisfied. It is only when a certified copy has been adduced in evidence in accordance with requirement of the statute, the question of presumption

under Section 90(2) would be attracted and not otherwise. Section 90(2) cannot be read in isolation. It has to be read in harmony with other provisions of the Act, 1872.

42. The above discussion also leads to the inference that, (1) presumption under Section 90 is discretionary, though the discretion is to be exercised judiciously; (2) sub-section (1) of Section 90 (as amended in U.P. or otherwise) is applicable only in respect to original document and not copies or certified copies; (3) the document must be 20/30 years old and must have come from proper custody; (4) the presumption is in respect of execution and attestation of document as also the handwriting of person concerned; (5) sub-section (2) (as available in U.P.) is applicable to certified copies when the same are adduced in evidence in accordance with law, i.e., as per the requirement of Sections 64 and 65 of Act, 1872. "

16. In view of ratio of law laid down by this Court in ***Dr. Jeevan Bahadur Sammadar (supra)*** as well as considering the provisions of Sections 64 and 65 of the Indian Evidence Act, 1872 as well as Section 90 and 90A of the Indian Evidence Act, 1872, the revisional order passed on the second ground that Gift deed is more than 20 year old, as such, on the basis of certified copy of Gift deed, right can be given to opposite party no.2 without examining anything cannot be sustained.

17. So far as revisional jurisdiction under Section 48 of Uttar Pradesh Consolidation of Holdings Act is concerned as argued by respective counsel for the parties, the decision of this Court in a case of ***Nathu Ram and Others Vs. Deputy Director of Consolidation Varanasi and Others 2017 (136) RD 480*** will be relevant in which this Court after considering the various amendment made in Section 48 of U.P.C.H. Act as well as the ratio of law laid down by Apex Court in ***Ram Dular Vs. Deputy Director of Consolidation Jaunpur and Others 1994 RD 290 (SC), Sheshmani and Another Vs. Deputy Director of Consolidation District- Basti U.P. and Others 2001 RD 210 (SC) and Sri Jagdamba Prasad (dead) through LRs and Others Vs. Kripa Shankar (dead) through LRs and Others 2014 (124) RD 1 (SC),*** has held that revisional power is not a power of first or second appellate Court, the finding recorded therein would be possible to be interfered under Section 48 of U.P.C.H. Act only on the grounds discussed in ***Ram Dular (supra), Sheshmani (supra)*** and ***Jagdamba Prasad (supra).***

18. Considering the entire facts and circumstances of the case as well as ratio of law laid down by this Court, the impugned revisional orders dated 11.8.1982 and 22.2.1985 passed by Deputy Director of Consolidation, Jaunpur cannot be sustained and are liable to be quashed accordingly, the impugned orders are quashed.

19. The writ petition is ***allowed***.

20. Since order of Consolidation Officer dated 24.11.1976 was passed after considering each and every evidence adduced by the parties on the point of injunction decree passed by Civil Court and Gift deed, as such, there is no need to remand the matter to revisional Court for any further consideration of fact and law. The order dated 24.11.1976 passed by consolidation office and order dated 23.12.1977 passed by Settlement Officer of Consolidation are hereby maintained.

21. No order as to costs.

(2022) 10 ILRA 1044
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Second Appeal No. 1284 of 2018

Matashiromani ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Anil Kumar Misra

Counsel for the Respondents:
Sri Jitendra Narayan Rai, Addl. C.S.C., Sri Pradeep Kumar Tiwari, S.C.

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Section 49 - Bar to Civil Courts jurisdiction - disputed Plot recorded as Navin Parti during consolidation operation and no proceeding was initiated by plaintiff during consolidation operation to get the entry corrected, as such, civil suit of plaintiff rightly held to the barred by Section 49 of the U.P.C.H. Act - if no claim is raised during consolidation operation, claim after close of consolidation operations would be barred by Section 49 of U.P.C.H. Act - civil suit by the plaintiff who is not recorded in revenue record cannot be entertained by civil Court - In respect to Abadi land title cannot be adjudicated by consolidation Court rather consolidation Court can only order to make entry of the nature of land as Abadi (Para 15, 18, 19)

Dismissed. (E-5)

List of Cases cited:

1. Ramdeo & ors. Vs Deputy Director of Consolidation & ors. 2007 (207) R.D. 761

2. Ram Prasad & ors. Vs. Deputy Director of Consolidation Pratapgarh & ors. 2004 (96) R.D. 303

3. Jai Narain & ors. Vs. Deputy Director of Consolidation Deoria 2004 (97) R.D. 705

4. 2007 (102) R.D. 761

5. Abhairaj & ors. Vs. Gaon Sabha / Gram Panchayat, LMC & anr. reported in 2017 (136) R.D. 603

6. Shri Ram Vs. First Additional District Judge & ors., J.T. 2001 (2) S.C. 573

7. Kamla Prasad & ors. Vs. Krishna Kant Pathak & ors. (2007) 4 Supreme Court Cases 213

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Anil Kumar Mishra, learned counsel for the appellant and Mr. Jitendra Narayan Rai, learned Additional Chief Standing Counsel along with Mr. Pradeep Kumar Tiwari, learned Standing Counsel for the State.

2. The present second appeal under Section 100 of Civil Procedure Code has been filed on behalf of plaintiff against the judgment and decree dated 30.8.2018 / 5.9.2018 passed by District Judge Bhadohi Gyanpur in Civil Appeal No.21 of 2018 arising out of Suit No.112 of 2013, the trial Court vide judgment and decree dated 2.4.2018/13.4.2018 dismissed the plaintiff's suit for declaration and injunction and the decree of trial Court has been maintained by lower Appellate Court.

3. The plaint case as pleaded in brief is that Plot No.146 area 0.183 hectare situated in Village- Sherpur Gopalaha, District Sant Ravidas Nagar Bhadohi is recorded as Navin Parti in the revenue

records. The old number of Plot No.146 before consolation operation was 3755, 3756, 3757, 3758, 3759, 3760, 3761 and 3763. It is further mentioned in the plaint that actual owner of the aforementioned plot were Hanuman Baksh Singh and others, Jokhai, Dangar, Kashav (plaintiff's father) and Ram Prasad Singh. It is further pleaded that aforementioned plots are situated adjacent to Abadi Plot No.317 (old no.3820) in which plaintiff's old residential house is situated. It is further pleaded that at the time of the partal during consolidation operation disputed plot was Abadi on spot but due to the fault of Consolidation Authorities, the plot in dispute was recorded as Navin Parti in the revenue records, as such, defendants threatened to interfere with the possession as well as to dispossess the plaintiff from the disputed Abadi land and further threatened to allot the same to other person, hence the suit.

4. Defendant No.1 and 2 (State and Gram Panchayat) have not filed any written statement in spite of service of notices upon them, hence suit was proceeded against defendant nos. 1 and 2 under Order 8 Rule 10 of Civil Procedure Code. Plaintiff adduced oral and documentary evidence in support of his case.

5. Before trial Court following issues were framed:

"1. क्या वादी वाद पत्र के कथनों के आधार पर विवादित भूमि का मालिक काबिज दाखिल है?

2. क्या वादी विवादित भूमि को व्यक्तिगत आबादी घोषित करा पाने का अधिकार है?"

6. While deciding the Issue No.1, trial Court after considering the oral and documentary evidences adduced by plaintiff recorded finding of fact that disputed land is recorded as Navin Parti and is a Gaon Sabha land, plaintiff is not allottee or Patta holder of the Gaon Sabha, as such, plaintiff is not entitled to any injunction against the owner of the land, accordingly, Issue No.1 was decided against the plaintiff in negative. While deciding the Issue No.2, trial Court recorded finding of fact that during consolidation disputed land was recorded as Navin Parti but plaintiff has not taken any step to get the entry corrected during consolidation operation, as such, Civil Court cannot pass decree in the nature of declaration or injunction in respect of disputed land that the same is plaintiffs Abadi, accordingly, Issue No.2 was also decided against the plaintiff in negative, the trial Court by judgment and decree dated 2.4.2018 dismissed the plaintiff's suit.

7. Against the judgment and decree of the trial Court dated 2.4.2018, plaintiff filed civil appeal under Section 96 of the Civil Procedure Code before District Judge which was registered as Civil Appeal No.21 of 2018. In Civil Appeal following points of determinations as provided under Order 41 Rule 31 of the Civil Procedure Code were framed:-

"1. क्या वादग्रस्त भूमि अपीलार्थीवादी की आबादी की भूमि है और इस पर वादी चकबन्दी के पूर्व से क्तौर आबादी का बिज दखील रहकर उस पर अपना मकान, नाद, खूटा, चरनी व पम्पिंगसेट कायम कर आबाद है?

2. क्या वादग्रस्त भूमि नवीन परती की भूमि है और उससे वादी अपीलार्थी से कोई वास्ता सरोकार नहीं है।

3. क्या दावा धारा 49 उ०प्र० जोत चकबन्दी अधिनियम से बाधित है?"

8. Lower Appellate Court while deciding the points of determinations considered the revenue entries, provisions of Uttar Pradesh Consolidation of Holdings Act as well as provisions of U.P.Z.A. and L.R. Act and came to the conclusion that civil suit filed by plaintiff for declaration and injunction in respect of Gaon Sabha Land (Navin Parti) to the effect that the same is Abadi of plaintiff since long is barred by provisions of Section 49 of the U.P.C.H. Act as plaintiff has not taken any step during consolidation operation to get the entry corrected from the Navin Parti to Abadi. Lower Appellate Court has also recorded finding that area of disputed plot is 14 Biswa, 10 Dhoor which cannot become Abadi of any person, accordingly, lower Appellate Court came to the conclusion that no interference is required against judgment and decree passed by trial Court and dismissed the civil appeal by judgment and decree dated 30.08.2018, hence present second appeal on behalf of plaintiff formulating following substantial questions of law in memorandum of second appeal:

"1. Whether the plot in dispute can be settled in favour of plaintiff/appellant in view of Section 123 (1) Of U.P.Z.A. and L.R. Act?

2. Whether, the possession and Sahan of the predecessor of the plaintiff/ appellant thereafter the plaintiff/ appellant starts from 1960 up till now, can be ignored when the land in dispute is subsequently recorded as Navin Parti?

3. Whether, the right and title of the plaintiff/appellant can be perfected over the land in dispute on the basis of long possession?

4. Whether, the Court Amin report regarding the possession over the land in question, which is unrebutted can be ignored?

5. Whether, the unrebutted claim/relief of the plaintiff/ appellant in the plaint suit can be ignored by the Courts below?"

9. Counsel for the appellant submitted that plaintiff is in possession of disputed plot since 1960, as such, plaintiff perfected his title over the land on the basis of long possession. He further submitted that plaintiff is entitled to the benefit of Section 123 (1) of U.P.Z.A. and L.R. Act but Courts below have illegally dismissed the plaintiff's suit without considering the plaintiff's case. He further submitted that defendants have not filed any written statement in the suit nor adduced any evidence, as such, the plaintiff's suit was to be decreed but Courts below have erred in dismissing the plaintiff's suit. Counsel for the appellant placed reliance upon the following judgments:

1. 2007 (207) R.D. 761, Ramdeo and Others Vs Deputy Director of Consolidation and Others.

2. 2004 (96) R.D. 303, Ram Prasad and Others Vs. Deputy Director of Consolidation Pratapgarh and Others.

3. 2004 (97) R.D. 705, Jai Narain and Others Vs. Deputy Director of Consolidation Deoria

4. 2007 (102) R.D. 761

10. On the other hand, learned Additional Chief Standing Counsel submitted that land in dispute is recorded as

Navin Parti in the revenue records and plaintiff has not filed any objection during consolidation operation, as such, civil suit is barred as provided under Section 49 of U.P.C.H. Act. He further submitted no right will accrue to the plaintiff in respect of Gaon Sabha / State land in spite of the fact that defendants have not contested the suit in Courts below. He finally submitted that second appeal filed by plaintiff-appellant is concluded by findings of fact, as such, is liable to be dismissed.

11. I have considered the argument advanced by learned counsel of the parties and perused the record of this Court as well as record of the Courts below which were summoned by this Court vide order dated 7.12.2018.

12. There is no dispute about the fact that Plot No.146 area 0.183 hectare was recorded as Navin Parti during consolidation operation which is supported by entry of C.H. Form 2 Ka, Paper No.30 Ga, the village in question came under consolidation operation in the year 1964 and village was de-notified under Section 52 of U.P.C.H. Act in the year 1979-80. There is also no dispute about the fact that plaintiff has not filed any objection etc. to get the entry corrected with respect to disputed Plot No.146 area 0.183 hectare.

13. In order to appreciate the argument of learned counsel for the appellant as well as substantial questions of law as framed in memorandum of second appeal as quoted above the perusal "Section 49 of U.P. Consolidation of Holdings Act" will be necessary which is as follows:

*"**49. Bar to civil Courts jurisdiction**.- Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of right of tenure-holders in respect of land lying in an area, for which a [notification] has been issued [under sub-section (2) of Section 4] or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act :*

Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 in respect of any land, possession over which has been delivered or deemed to be delivered to a Gaon Sabha under or in accordance with the provisions of this Act."

14. This Court in the case of ***Abhairaj and Others Vs. Gaon Sabha / Gram Panchayat, LMC and Another*** reported in ***2017 (136) R.D. 603*** has held that if no claim has been raised during consolidation operation, claim after close of consolidation operations would be clearly barred by Section 49 of U.P.C.H. Act. Paragraph No.18 of the judgment rendered in ***Abhairaj (supra)*** is as follows:

"18. Since, no claim was admittedly raised during consolidation operations, any claim after the close of consolidation operations was clearly barred by Section 49 of the U.P. Consolidation of Holdings Act. Moreover, no injunction could be granted regarding

land of public utility covered by Section 132 of the U.P. Zamindari Abolition and Land Reforms Act."

15. After considering the provisions of Section 49 of the U.P.C.H. Act as well as after considering the findings of Courts below on the basis of evidence on record it is very much clear that disputed Plot No.146 was recorded as Navin Parti during consolidation operation and no proceeding was initiated by plaintiff during consolidation operation to get the entry corrected, as such, civil suit of plaintiff was rightly held to the barred by Section 49 of the U.P.C.H. Act and no right will accrue to the plaintiff in respect of Gaon Sabha land.

16. So far as the argument advanced by appellant as well as substantial questions of law framed by appellant with respect to Section 123 of U.P.Z.A. and L.R. Act is concerned the perusal of Section 123 of U.P.Z.A. and L.R. Act will be necessary, the Section 123 of U.P.Z.A. and L.R. Act was as follows:

"123. Certain house sites to be settled with existing owner thereof. *-[(1)] Without prejudice to the provisions of Section 9, where any person referred to in sub-section (3) of Section 122-C has built a house on any land referred to in sub-section (2) of that section, not being land reserved for any public purpose, and such house exists on [May 13, 2007] the site of such house shall be held by the owner of the house on terms and conditions as may be prescribed.*

[(2) Where any person referred to in sub-section (3) of Section 122-C has built a house on any land held by a tenure-holder (not being a Government lessee) and such house exists on [June 3, 1995] the site of such house shall, notwithstanding anything contained in this Act, be deemed to be settled with the owner of such house by the tenure-holder on such terms and conditions as may be prescribed.

Explanation - For the purposes of sub-section (2), a house existing on [June 3, 1995] on any land held by a tenure-holder shall, unless the contrary is proved, be presumed to have been built by the occupant thereof, and where the occupants are members of one family by the head of that family.]"

17. After reading the provisions of Section 123 of U.P.Z.A. and L.R. Act and considering the revenue entry of Navin Parti in respect to disputed Plot No.146 as well as considering the plaint allegation that disputed land is Abadi of the plaintiff but the same was wrongly recorded as Navin Parti during partal of consolidation operation, there will be no application of Section 123 of U.P.Z.A. and L.R. Act. In the present dispute as the land in dispute was recorded as Navin Parti in the revenue record during consolidation operation, as such, the argument advanced on behalf of appellant has no merit and the substantial question of law also does not arise with respect to benefit of Section 123 of U.P.Z.A. and L.R. Act.

18. So far as case law cited by learned counsel for the appellant are concerned that will not apply in the present dispute as all the three case law relates to Abadi land and order was passed by consolidation Courts with respect to title of Abadi land, as such, this Court has held that in respect to Abadi land title cannot be adjudicated by consolidation Court rather consolidation Court can only order to make entry of the nature of land as Abadi.

19. So far as the maintainability of civil suit in respect of the land which is not recorded in the name of plaintiff the civil suit will not be maintainable at the instance of the plaintiff as held by Apex Court in the case of ***Shri Ram Vs. First Additional District Judge and Others, J.T. 2001 (2) S.C. 573***. The Paragraph No.7 of the judgment of ***Shri Ram (supra)*** is as follows:

"7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue court reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

20. Apex Court again in the Case of ***Kamla Prasad and Others Vs. Krishna Kant Pathak and Others (2007) 4 Supreme Court Cases 213*** has followed the decision of Shri Ram (supra), the Paragraph Nos.12, 13 and 16 of the judgment of ***Kamla Prasad (supra) are as follows:***

"12. Having heard the learned advocates for the parties, in our opinion, the submission of the learned counsel for the appellants deserves to be accepted. So far as abadi land is concerned, the trial Court held that Civil Court had jurisdiction and the said decision has become final. But as far as agricultural land is concerned, in our opinion, the Trial Court as well as Appellate Court were right in coming to the conclusion that only Revenue Court could have entertained the suit on two grounds. Firstly, the case of the plaintiff himself in the plaint was that he was not the sole owner of the property and defendant Nos. 10 to 12 who were proforma defendants, had also right, title and interest therein. He had also stated in the plaint that though in the Revenue Record, only his name had appeared but defendant Nos. 10 to 12 have also right in the property. In our opinion, both the Courts below were right in holding that such a question can be decided by a Revenue Court in a suit instituted under Section 229B of the Act. The said section reads thus:

"229B. Declaratory suit by person claiming to be an asami of a holding or part thereof.-

(1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the landholder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be a bhumidhar, with the amendment that for the word 'landholder' the words "the State

Government and the Gaon Sabha" are substituted therein."

13. On second question also, in our view, Courts below were right in coming to the conclusion that legality or otherwise of insertion of names of purchasers in Record of Rights and deletion of name of the plaintiff from such record can only be decided by Revenue Court since the names of the purchasers had already been entered into. Only Revenue Court can record a finding whether such an action was in accordance with law or not and it cannot be decided by a Civil Court.

16.The instant case is covered by the above observations. The lower Appellate Court has expressly stated that the name of the plaintiff had been deleted from Record of Rights and the names of purchasers had been entered. The said fact had been brought on record by the contesting defendants and it was stated that the plaintiff himself appeared as a witness before the Mutation Court, admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the property purchased by them. It was also stated that the records revealed that the names of contesting defendants had been mutated into Record of Rights and the name of plaintiff was deleted."

21. In view of ratio of law laid down by Apex Court on the question of maintainability of civil suit by plaintiff who is not recorded in revenue record the civil suit filed by plaintiff cannot be entertained by civil Court.

22. Considering the findings of fact recorded by both the Courts below to the effect the plaintiff is neither owner nor recorded in the revenue records rather disputed plots was recorded as Navin Parti, as such, suit is barred by Section 49 of U.P.C.H. Act. No substantial question of law arises in the second appeal. No interference is required against the impugned judgment and decree passed by Courts below.

23. The present Second Appeal lacks merit and same is hereby ***dismissed*** under Order 41 Rule 11 of Civil Procedure Code

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(2022) 10 ILRA 1050
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE CHANDRA KUMAR RAI, J.

First Appeal No. 723 of 2022

Smt. Shyamshri ...Appellant
Versus
Sumant Kumar ...Respondent

Counsel for the Appellant:
Sri Jamal Ahmad Khan

Counsel for the Respondent:
Sri Rajeev Upadhyay

Civil Law - Hindu Marriage Act, 1955 - Section 13 B (2) - relaxing the period of second motion of six months - period mentioned in Section 13 B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and it is open to the Court to exercise its discretion in the facts and circumstances of each case - For exercise of the discretion to waive the statutory waiting period of six months for moving the motion for divorce under Section 13B (2) of the Hindu Marriage Act, the Court would consider the following amongst

other factors: (i) the length of time for which the parties had been married; (ii) how long the parties had stayed together as husband and wife; (iii) the length of time the parties had been staying apart; (iv) the length of time for which the litigation had been pending; (v) whether there were any other proceedings between the parties;(vi) whether there was any possibility of reconciliation; (vii) whether there were any children born out of the wedlock; (viii) whether the parties had freely, of their own accord, without any coercion or pressure, arrived at a genuine settlement which took care of alimony, if any, maintenance and custody of children, etc." (Para 12)

Parties application u/s 13 B of the Act, 1965 for relaxing the period of second motion of six months rejected by the impugned order - Both parties jointly submitted that since all efforts for mediation/reconciliation to reunite the parties have failed and there is no likelihood of success in that direction, and the parties have genuinely settled their differences including alimony therefore breathing period of second motion as provided in Section 13 B(2) of the Act, 1955 will only prolong their agony - Held - impugned judgment set aside - Matter remitted back to the Principal Judge, Family Court, to pass an order afresh in accordance with law (Para 12)

Allowed. (E-5)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur, (2017) 8 SCC 746

2. Amit Kumar Vs Suman Beniwal, (Civil Appeal No.7650 of 2021 decided on 11.12.2021)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. &
Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Jamal Ahmad Khan, learned counsel for the defendant - appellant/wife and Sri Rajeev Upadhyay, learned counsel for the plaintiff - respondent/husband.

2. This First Appeal under Section 19 of Family Courts Act, 1984 has been filed praying to set aside the judgment and order dated 01.08.2022 in Case No.1542 of 2022 (Sumant Kumar Vs. Smt. Shyamshri) under Section 13-B of the Hindu Marriage Act, 1955, passed by the Principal Judge, Family Court, Ghaziabad, whereby joint application 16 Ga 2 filed by the parties for relaxing the period of second motion of six months, has been rejected.

Facts

3. Briefly stated undisputed facts are that the plaintiff and the defendant were married with each other on 02.12.2014. Some disputes developed between them and they started living separately since 26.12.2017. It also appears that the plaintiff - husband filed a divorce petition No.1248 of 2019 under Section 13 of the Hindu Marriage Act, 1955, in the Court of Principal Judge, Family Court, Ghaziabad, which according to both the parties; remained pending. It appears that in the mean time both the parties have agreed to dissolve their marriage with consent. Therefore, they filed a joint divorce petition No.1542 of 2021 (Sumant Kumar Vs. Smt. Shyamshri) under Section 13 B of the Act, 1955.

4. In paragraphs 6, 7, 8, 9 and 11 of the aforesaid joint divorce petition under Section 13 B, the parties has states as under :

"(6) यह कि वादीगण के विचारों में आए मतभेदों को समाप्त करके दोनों को एक साथ पति पत्नी के रूप में वैवाहिक जीवन यापन करने

के लिये दोनों वादीगण के परिवार वालों व रिश्तेदारों तथा समाज के लोगों द्वारा काफी समझाया गया, किन्तु वादीगण के विचारों मे इतना अधिक आपसी मतभेद हो गया है कि दोनों एक साथ पति पत्नी के रूप में रहकर वैवाहिक जीवन यापन करने के लिये किसी भी तरह से सहमत नहीं है।

(7) यह कि वादीगण 26.12.2017 से अलग–अलग निवास कर रहें है, इसीलिए वादीगण के मध्य पति पत्नी के रूप में किसी भी प्रकार के सम्बंध स्थापित नहीं हुए है।

(8) यह कि हाल ही वादीगण के मध्य हुए आपसी समझौते के अनुसार कुल अंकन राशि 8 लाख पचास हजार रूपये में तक हुआ है। जिसमें 4 लाख पच्चीस हजार डी0डी0 सं0 005315 जोकि वादी सं0 1 द्वारा वादी सं0 2 को प्रथम मोशन पर अदा कर दिया जायेगा तथा शेष 4 लाख पच्चीस हजार रूपये द्वितीय मोशन पर अदा किये जायेंगे।

(9) यह कि वादीगण द्वारा आज दिनांक तक एक दूसरे पर किये गये सभी मुकदमों को प्रथम मोशन के पश्चात् दोनों वादीगण द्वारा वापस ले लिया जायेगा।

(11) यह कि वादीगण के विचारों इतना अधिक मतभेद आ गया है कि आज भी दोनो एक साथ पति पत्नी के रूप में रहकर वैवाहिक जीवन यापन करने के लिये सहमत नही है और आपसी सहमती से विवाह विच्छेद हेतु उक्त वाद पत्र माननीय न्यायालय में दायर किया है ।'

5. It appears that matter of the parties was referred to mediation on 01.07.2022 but as report of Mediation and Conciliation Center, District - Ghaziabad, dated 01.08.2022 the mediation has failed as both the parties are adamant for divorce.

6. On these facts the parties have moved the application 16 Ga 2 dated 01.08.2022 in the Court of Principal Judge, Family Court No.1, Ghaziabad in divorce petition No.1542 of 2022, under Section 13 B of the Act, 1965 for relaxing the period of second motion of six months which has been rejected by the impugned order dated 01.08.2022.

Submissions

7. Both the learned counsels for the parties jointly submit that since all efforts for mediation/reconciliation to reunite the parties have failed and there is no likelihood of success in that direction, therefore, the parties have genuinely settled their differences including alimony. Therefore, the breathing period of second motion as provided in Section 13 B(2) of the Act, 1955 will only prolong their agony. They, therefore, jointly submit that the court below has committed manifest error of law not to allow the application for relaxing the period.

Discussion & Findings

8. We have carefully considered the submissions of learned counsels for the parties and perused the record of the appeal before us.

9. T he object of Section 13 B (2) of the Hindu Marriage Act, 1955 and its nature has been authoritatively explained by Hon'ble Supreme Court in the case of **Amardeep Singh Vs. Harveen Kaur, (2017) 8 SCC 746** (para 17 and 20), as under :

"17. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners

did not serve any purpose. The object of the cooling off period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

20. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation."

10. The law laid down in the case of **Amardeep Singh (supra)** has been reiterated by Hon'ble Supreme Court in the case of **Amit Kumar Vs. Suman Beniwal, (Civil Appeal No.7650 of 2021 decided on 11.12.2021)** and the factors to be considered for relaxing the period of second motion have been summarised in paragraph 27, as under :

"27. For exercise of the discretion to waive the statutory waiting period of six months for moving the motion for divorce under Section 13B (2) of the Hindu Marriage Act, the Court would consider the following amongst other factors:

(i) the length of time for which the parties had been married;

(ii) how long the parties had stayed together as husband and wife;

(iii) the length of time the parties had been staying apart;

(iv) the length of time for which the litigation had been pending;

(v) whether there were any other proceedings between the parties;

(vi) whether there was any possibility of reconciliation;

(vii) whether there were any children born out of the wedlock;

(viii) whether the parties had freely, of their own accord, without any coercion or pressure, arrived at a genuine settlement which took care of alimony, if any, maintenance and custody of children, etc."

11. Thus, we find no difficulty to hold that the period mentioned in Section 13 B(2) of the Hindu Marriage Act, 1955 is not mandatory but directory and it is open to the Court to exercise its discretion in the facts and circumstances of each case. The factors for exercising the discretion have been enumerated by Hon'ble Supreme Court in the cases of **Amardeep Singh (supra)** and **Amit Kumar (supra)** which have been reproduced above.

12. For the reasons aforestated, the impugned judgment and order dated 01.08.2022 can not be sustained and is hereby set aside. Matter is remitted back to the Principal Judge, Family Court, Ghaziabad, to pass an order afresh in accordance with law within one month from the date of presentation of a certified copy of this order. Liberty is granted to the parties to file a supplementary affidavit before the court below if they want to add

any circumstance in their application under Section 13 B(2) of the Act, 1955.

13. T**he appeal is allowed.**

(2022) 10 ILRA 1054
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.10.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal No. 420 of 2022

Prin./Chief Medical Superintendent Saraswati Medical College, Unnao & Ors.
...Appellants
Versus
Mohammad Shakir Hussain & Ors.
...Respondents

Counsel for the Appellants:
Apoorva Tewari, Aditya Tewari

Counsel for the Respondents:
Kapil Gupta, C.S.C., Gyanendra Kumar Srivastava, Kshitij Mishra, Savitra Vardhan Singh

A. Education Law – Rustication/Ragging - National Medical Commission (Prevention and Prohibition of Ragging in Medical Colleges and Institutions) Regulations 2021 - Regulations 23(1), 24 - National Medical Commission Act, 2019 - Section 57 - Regulations 2021 have been framed and published only recently as on 18.11.2021 and are, thus, in their nascent stage. Implementation of Regulations 2021…thus require some amount of understanding as to how the Regulations are to apply not only as a measure to check the menace of ragging, but also as a measure to conduct the inquiry/investigation as contemplated in Regulation 23 in a fair and appropriate manner. (Para 24)

B. Legal protection available to a student, accused of ragging, when he is subjected to an inquiry/investigation u/Regulation 23(2). The consequence of action against such a student which may ensue ultimately u/Regulation 24, may be far-reaching even to the extent that in a given case it may ruin his career. Having regard to the seriousness of the consequences in respect of future career of a student pursuing a vocational course, Regulation 23 of 2021 Regulations ought to be followed meticulously and in its letter and spirit.

C. Principles as a precautionary measure are laid down to aid the provisions of 2021 Regulations. The authorities of a Medical College or any other Institution are to be primarily, governed by the statutory regulations namely Regulations 2021. They may, however, seek some guidance from the observations. (Para 26)

These guidelines are not in any manner, in derogation of the 2021 regulations, rather only to facilitate appropriate implementation of the Regulations including Regulations 23 and 24 and accordingly observations are to be understood in this perspective and context alone. (Para 27)

In the present case, it is noticeable that the respondent no. 1-petitioner was neither provided the copies of the statements of the complainant/witnesses nor was he ever confronted with the copy of the report said to have been submitted by the Anti-Ragging Committee to the Head of the Institution and accordingly the inquiry as contemplated in Regulation 23 of 2021 Regulations 2021 against the respondent no. 1-petitioner be conducted afresh by furnishing him copy of the complaint, statement of the complainants and witnesses made before the Specific Committee on 21.7.2022 and inviting his reply to the same and permitting him to make statement in his defence. Thereafter the appellant-Institution shall complete the inquiry in terms of Regulation 2021 as also keeping in view the observations made hereinabove. (Para 28)

The order under appeal dated 13.9.2022 passed by the learned Single Judge in Writ-C No. 5622 of 2022 is hereby set aside. The decision of the Principal of the Institution, dated 25.7.2022

shall abide by the decision which may be taken finally in terms of this order. (Para 30)

Special appeal disposed off. (E-4)

Present special appeal lays a challenge to the judgment and order dated 13.09.2022, by which the learned Single Judge allowed Writ-C No. 5622 of 2022 and order of rustication dated 25.07.2022 has been set aside.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Saurabh Srivastava, J.)

1. Heard Sri Apoorva Tiwari and Sri Aditya Tiwari, learned counsel appearing for the appellant, Sri Akash Dixit, learned counsel representing the respondent no.1-petitioner, learned State counsel representing the State-respondent No. 2, Sri Kshitij Mishra, learned counsel representing the respondent no. 3, Sri Savitra Vardhan Singh, learned counsel representing the respondent no. 4 and Sri Gyanendra Srivastava, learned counsel representing the respondent no. 5.

2. This special appeal has been preferred challenging the judgment and order dated 13.09.2022 passed by the learned Single Judge, whereby Writ-C No. 5622 of 2022 filed by the respondent no. 1-petitioner therein has been allowed and the order dated 25.7.2022 passed by the appellant-Institution whereby respondent no. 1-petitioner was rusticated temporarily for a period of three months as intern in the Institution has been set aside. Learned Single Judge has also directed that the certificate which may be awarded to the respondent no. 1-petitioner on completion of internship shall not record that he was found guilty of ragging in the Institution.

3. Submission of the learned counsel for the appellants is that the finding recorded by the learned Single Judge that there was no material on record, which could form the basis of guilt of ragging against the respondent no. 1-petitioner, is not correct in as much as on record there was enough material to form the opinion that he was guilty of ragging.

4. It has further been argued by learned counsel for the appellants that while conducting the inquiry which culminated in passing of the order impugned in the writ petition before the learned Single Judge, the provisions contained in the statutory regulations known as National Medical Commission (Prevention and Prohibition of Ragging in Medical Colleges and Institutions) Regulations 2021 (hereinafter referred as 'Regulations 2021') were meticulously followed and as such the finding recorded by the learned Single Judge Bench that the respondent no. 1-petitioner was not given any opportunity to confront with the inquiry report, is misplaced for the reason that under the procedure prescribed in the said Regulations no such prescription is available. It is also argued that the finding recorded by the learned Single Judge that no show-cause notice inviting explanation/reply to the inquiry report was given, also does not have any bearing in the matters of inquiries to be conducted in terms of the Regulations 2021 for the reason that the Regulations do not contemplate any such procedure.

5. Lastly, Sri Apoorva Tiwari, learned counsel representing the appellant-Institution has submitted that in any eventuality in case any flaw in the procedure followed for conducting the inquiry was found by the learned Single

Judge, right of the Institution to complete the inquiry as per the legal procedure could not have been curtailed and in the instant case the conduct of the respondent no. 1-petitioner warranted that some exemplary action against the respondent no. 1-petitioner ought to have been taken in order to fulfil the aims and objectives for which Regulations 2021 have been framed.

6. On the other hand, Sri Akash Dixit, learned counsel representing the respondent no. 1-petitioner submitted that in view of the admission made by the appellant-Institution that the respondent no. 1-petitioner was not confronted with the inquiry report on the basis of which impugned action has precipitated, the judgment and order passed by the learned Single Judge, which is under appeal herein, does not warrant any interference by this court in this special appeal. He has also stated that as a matter of fact enough material was brought to the notice of the learned Single Judge depicting the clear bias of the parties/Management of the appellant-Institution against the respondent no. 1-petitioner and it is only on accout of this bias and mala fide that the impugned action against him whereby he was rusticated temporarily for a period of three months had actuated. In this view of the matter, the submission is that the special appeal is liable to be dismissed at its threshold.

7. We have considered the rival submissions made by the learned counsel representing the respective parties and have also perused the material available on record before us on this special appeal.

8. The respondent no. 1-petitioner after completing his 5-years study in MBBS Course got himself enrolled as an Intern, which is compulsory for award of MBBS degree. On 19.7.2022 the College administration received a complaint by two students of 2020 batch, who were pursuing their MBBS Course in the appellant-Institution, against the respondent no. 1-petitioner with the allegation that the respondent no. 1-petitioner has not only misbehaved with them, but as a matter of fact on account of the threat extended by him to the complainants they were not feeling secure to complete their studies. The complainants, thus, requested that appropriate action be taken against the respondent no. 1-petitioner. On the said complaint the Chief Medical Superintendent-cum-Officiating Principal of the appellant-Institution issued a notice, whereby a specific committee comprising of one Chairman, One Secretary, four Members and two Special Invitees was constituted in terms of the provisions contained in Regulation 23(1) of the 2021 Regulations. Constitution of the said specific committee was based on an urgent investigation report, which was approved by the Chairman, Anti Ragging Committee of the Institution. Consequently, by means of a notice dated 20.7.2021, intimation was given to the complainants, respondent no. 1-petitioner as also three other students, who are said to be witnesses and were pursuing their IIIrd Year MBBS Course, to participate in the proceedings of the Committee, which was held on 21.7.2020.

9. On 21.7.2022 in the proceedings before the specific committee, statements of the complainants, those of the witnesses and also that of the respondent no. 1-petitioner were recorded. The CCTV footage of 19.7.2022 at 12.30 p.m. was also summoned by the specific committee. The Specific Committee on a consideration of the material which could be gathered by it

submitted its report on 21.7.2022 and based on the said report decision by the Anti-Ragging Committee was taken in its meeting held on 22.7.2022, whereby it was resolved that the respondent no. 1-petitioner be rusticated temporarily for a period of three months from his internship in the appellant-Institution. On the basis of this decision and recommendation of the Anti-Ragging Committee dated 22.7.2022 that the order dated 25.5.2022 was passed by Head of the Institution which became the subject matter of challenge before the learned Single Judge.

10. Before adverting to the respective submissions made by the learned counsel appearing for the parties we may notice certain provisions of the Regulations 2021. Regulations 2021 have been framed by the National Medical Commission in exercise of its power vested in it under section 57 of the National Medical Commission Act 2019. "Ragging" is defined in Regulation 2(l) of the Regulations to mean "Any act of misconduct of students towards one another". Definition of 'Ragging' can also be found in Regulation (4). Regulation 3 mentions certain acts that may constitute "Ragging". Regulation 3 in Chapter 2 of the said Regulations states that Ragging shall mean any disorderly conduct, whether verbal or in writing, which has the effect of "teasing" "treating" or "handling" a student with rudeness, indulging in any rowdy or in disciplined activities, which may cause annoyance, hardship or psychological harms. Regulations 3 and 4 of Regulations 2021 are quoted hereunder:

*"**3. Definition of Ragging**-Ragging shall mean any disorderly conduct, whether by words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness any other student, indulging in rowdy or undisciplined activities which causes or is likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student or asking the students to do any act or perform something which such student will not in the ordinary course and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the physique or psyche of a fresher or a junior student.*

***4. Actions that may constitute ragging**-The following actions shall be included but not limited to those that may constitute ragging, namely*

(a) any conduct by any student or students whether by words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness a fresher or any other student;

(b) indulging in rowdy or undisciplined activities by any student or students which causes or is likely to cause annoyance, hardship, physical or psychological harm or to raise fear or apprehension thereof in any fresher or any other student;

(c) asking any student to do any act which such the student will not in the ordinary course do and which has the effect of causing or generating a sense of shame, or torment or embarrassment so as to adversely affect the physique or psyche of such fresher or any other student;

(d) any act by a senior student that prevents, disrupts or disturbs the regular academic activity of any other student or a fresher,

(e) exploiting the services of a fresher or any other student for completing the academic tasks assigned to an individual or a group of students;

(f) any act of financial extortion or forceful expenditure burden put on a fresher or any other student by students;

(g) any act of physical abuse including all variants of it, such as, sexual abuse, homosexual assaults, stripping, forcing obscene and lewd acts, gestures, causing bodily harm or any other danger to health or person:

(h) any act or abuse by spoken words, emails, post, snail-mails, blogs, public insults which would also include deriving perverted pleasure, vicarious or sadistic thrill from actively or passively participating in the discomfiture to fresher or any other student;

(i) any act of physical or mental abuse (including bullying and exclusion) targeted at another student (fresher or otherwise) on the ground of colour, race, religion, caste, ethnicity, gender (including transgender), sexual orientation, appearance, nationality, regional origins, linguistic identity, place of birth, place of residence or economic background;

(j) any act that undermines human dignity and respect through humiliation or otherwise;

(k) any act that affects the mental health and self-confidence of a fresher or any other student with or without an intent to derive a sadistic pleasure or off power, authority or superiority by a student over any fresher or any other student;

(l) any other act not explicitly mentioned above but otherwise construed as an act of ragging in the letter and spirit of the definition for ragging as provided under regulations 3 and 4."

11. From the aforequoted provisions of Regulations 3 and 4 as also the definition in Clause 2(l) of Regulations 2021 what can be noticed is that various kinds of acts having some adverse psychological or physical impact on a student constitute 'Ragging'. Ragging, thus, is not confined to physical assault alone. Regulation 7(3)(v) casts a duty on the Medical Colleges or other Institutions to device certain methods and measures which are necessary for checking menace of Ragging. One of the measures provided in the said Regulation under Clause (g) is that Medical Colleges and other Institutions should evolve a robust measure, so that message and intent of the Institution may be loud and clear enough to ensure report of every incident of Ragging and also to ensure that every case of Ragging is dealt with according to the provisions of the Regulations 2021 and any other applicable laws for the time being in force.

12. Regulation 8 of Regulation 2021 clearly mandates that migration certificate or transfer certificate or conduct certificate, which may be issued to the student after completion of his studies by the Institution, shall have an entry in addition to other entries as to whether the student concerned has been punished for the offence of committing or abetting Ragging or not and further as to whether the student has displayed persistent violent or aggresive conduct ?

13. The Regulations provide for other measures to be taken by the Institutions, such as constitution of Anti Ragging Squad and establishing Anti Ragging Control Room or Helpline/Monitoring Committee or Monitoring Cell etc.

14. Regulation 21(4) of the Regulations 2021 clearly mandates that without any exception, name of the complainant in all instances shall be kept confidential, unless of course it is otherwise permissible. The procedure for conducting the institutional inquiry or investigation and report etc. is provided in Regulation 23. Regulation 24 permits the administration of

Medical College or any other Institution to take any administrative action on the recommendation of the Anti Ragging Committee. Regulations 23 and 24 of the Regulations 2021 are extracted hereinbelow:

"23. Institutional inquiry or investigation and report.- (1) The Head of the Institution shall constitute specific committee to inquire into or investigate the incident of ragging without waiting for the report of any other authority, even if this is being investigated by the police or local authorities.

(2) The inquiry or investigation shall be conducted thoroughly including on-the-spot or site of the incident in a fair and transparent manner, without any bias or prejudice, upholding the principles of natural justice and giving adequate opportunity to the student or students accused of ragging and other witnesses to place before it the facts, documents and views concerning the incident of ragging, and considering such other relevant information as may be required.

(3) The entire process shall be completed and a report duly submitted within seven days of the information or reporting of the incident of ragging.

(4) The report shall be placed before the Head of the Institution or the Anti-Ragging Committee.

(5) The Anti-Ragging Committee shall examine the report, decide on and recommend further administrative action to the Head of the Institution.

24. Institutional administrative and penal actions.- (1) Every medical college or institution shall, after receiving the recommendations of the Anti-Ragging Committee under regulation 23, take necessary administrative action as it may deem fit,

(2) The Anti-Ragging Committee, on accepting the report of the institutional inquiry or investigation by the appropriate committee, shall recommend one or more of the actions provided under sub-regulations (5) and (6) depending on the nature, gravity and seriousness of the guilt established of the act of ragging as given under the provisions of Chapter II with the understanding that the action shall be exemplary and justifiably harsh to act as a deterrent against recurrence of such incidents:

(3) Where the individual person committing or abetting an act of ragging is not identified on the basis of the findings of the institutional inquiry or investigations, and the subsequent recommendations thereof, the medical college or institution thereof shall resort to collective punishment of more than one or a group of persons, as deemed fit, as a deterrent to ensure community pressure on the potential raggers.

(4) The broad ingredients that may call for punitive actions on receipt and approval of the recommendations include but is not limited to

(i) abetment to ragging;

(ii) criminal conspiracy to ragging;

(iii) unlawful assembly and rioting while ragging: public nuisance created during ragging;

(iv) public nuisance created during ragging;

(v) violation of decency and morals through ragging;

(vi) physical or psychological humiliation;

(vii) causing injury to body, causing hurt or grievous hurt;

(viii) wrongful restraint;

(ix) wrongful confinement;

(x) use of criminal force;

(xi) assault as well as sexual offences or even unnatural offences;

(xii) extortion in any forms;

(xiii) criminal intimidation;

(xiv) criminal trespass;

(xv) offences against property;

(xvi) any other act construed as provided under regulations 3 and 4.

(5) The nature of punitive actions that may be decided shall include the following, but shall not be limited to one or more of these actions that may be imposed, as deemed fit, namely :-

(i) suspension from attending classes and academic privileges:

(ii) withholding or withdrawing scholarship or fellowship and other benefits;

(iii) debarring from appearing in any test or examination or other evaluation process:

(iv) withholding results;

(v) debarring from attending conferences, and other academic programmes;

(vi) debarring from representing the institution in any regional, national or international meet, tournament, youth festival, etc.;

(vii) suspension or expulsion from the hostel;

(viii) imposition of a fine ranging from twenty-five thousand rupees to one lakh rupees

(ix) cancellation of admission;

(x) rustication from the medical college or institution for a period ranging from one to four semesters;

(xi) expulsion from the medical colleges or institutions and consequent debarring from admission to any other institution for a specified period.

(6) Without prejudice to the provisions of regulation 8, it shall be mandatory upon the medical college or institution to enter in the Migration Certificate or Transfer Certificate issued to the student as to whether the student has been punished for the offence of committing or abetting ragging, or not, as also whether the student has displayed persistent violent or aggressive behaviour or any inclination to harm others.

(7) Any other measure as directed by Courts of law shall be followed by the medical college or institution.

(8) The Head of the Institution shall follow-up the information regarding the incident of ragging provided under sub-regulation (4) of regulation 22, to the University to which the medical college or institution is affiliated with a report regarding the findings of the institutional level inquiry or investigation and the actions taken thereof.

(9) The Head of the Institution shall provide a report regarding the incident of ragging and the actions taken thereof to the Commission having informed earlier according to the provisions of sub-regulation (4) of regulation 22."

15. As per the aforesaid statutory prescriptions available in Regulation 23, Head of the Institution is to constitute a specific committee to inquire into or investigate the incident of ragging. Sub-Regulation (2) of Regulation 23 categorically provides that the inquiry or investigation has to be conducted thoroughly in a fair and transparent manner, without any bias or prejudice, upholding the principles of Natural Justice and giving adequate opportunity to the student or students accused of ragging. It also provides that the inquiry/investigation shall be conducted by providing opportunity to the witnesses to place the facts, documents and their views concerning the incident of ragging and by

considering any such material which may be relevant. The inquiry/investigation to be conducted by the specific committee is to be placed before the Head of the Institution or the Anti Ragging Committee. The Anti-Ragging Committee thereafter is to examine the report, decide and recommend further administrative action to the Head of the Institution. Under Regulation 24, as observed above, Head of the Institution is to take final decision.

16. The Regulations 2021 are statutory in nature having been framed under section 57 of the National Medical Commission Act 2019 and hence are binding and no deviation from the same is permissible under law.

17. While we applaud the purpose and object of framing such regulations, we may also notice that Regulations, on one hand, provide for adequate measures to check the menace of ragging, which is rampant in the Medical Colleges/other institutions and, on the other hand, it also provides for taking due care in conducting the inquiry against the students in respect of whom complaint or charges of ragging is received.

18. Regulation 23(2) clearly provides that the inquiry/investigation by the specific committee shall be conducted not only in fair and transparent manner, but also without any bias or prejudice. It further provides that the specific committee while conducting the inquiry/investigation shall uphold the principals of Natural Justice giving adequate opportunity to the student or students against whom charges/complaint of ragging are leveled/made. It, thus, clearly encompasses in its fold adequate protection to a studengt facing the charge of ragging. Occurrence of the words "Upholding the principles of Natural Justice and giving adequate opportunity to the students or students, accused of ragging" in Regulation 23(2) makes it more than clear that condemning a student of any alleged act of ragging is not permissible without affording him opportunity of hearing, placing the facts, making his statement as also confronting with any material, which is proposed to be relied upon by the Institution for taking action against such student.

19. Whether or not the material available on record forms/constitutes a conduct on the part of the respondent no. 1-petitioner, amounting to ragging, is an issue which this court while deciding the instant special appeal does not intend to dwelve upon for the reason that it is apparent that the respondent no. 1-petitioner was not only not confronted with all the material on the basis of which the impugned action has precipitated against him, but also that, in our considered opinion, he has been deprived of adequate opportunity in terms of the provisions contained in Regulation 23(2) of the regulations 2021 for putting forth his case.

20. There is no denial of the fact that neither the report submitted by the specific committee nor the report submitted by the Anti-Ragging Committee on the basis of which final decision was taken by the Principal of the Institution on 25.7.2022 was provided to the respondent no. 1-petitioner. We also notice that even copies of the statements made by the complainants as also by the witnesses were not provided to the respondent no. 1-petitioner.

21. Regulation 23(2), as quoted above, clearly prescribes that inquiry/investigation is to be held giving adequate opportunity to the

student/students, accused of ragging. It also clearly provides that inquiry/investigation is to be held in a manner which shall uphold the principles of Natural Justice. Holding institutional inquiry/investigation by the specific committee in terms of Regulation 23 may not be treated equivalent to a criminal trial, however, since the Regulations 2021, contain an unambiguous and unequivocal mandate that such inquiry/investigation shall be held upholding the principles of Natural Justice and giving adequate opportunity to the student accused of ragging, in our considered opinion, certain facets of principles of Natural Justice while conducting such an institutional inquiry need to be followed in every such inquiry/investigation.

22. We are also conscious of the fact that ragging in the Medical Colleges and other colleges of professional studies is a menace, which is rampant and if it is not checked appropriately, it causes great mental, physical and psychological harassment of the students entering into such institutions with a hope of completing their studies relating to professional courses. We are also conscious of the fact that in case any new entrant as a student in such courses of studies is subjected to ragging or any other misconduct, that too by a student who is quite senior to him, the same may have an impact on him which may be difficult to erase from his psyche throughout his life.

23. It is common knowledge that incidents of ragging and other misconducts by seniors in institutions of vocational studies sometimes have such a deep and long-lasting adverse impact on the junior students that it becomes difficult for such students to come out of the trauma and agony which may sometimes hamper his studies and in turn spoil his future as well. In this view of the matter, we have no doubt in our mind that the menace of ragging is to be dealt with the sternest of measures by the authorities of the institution as also by various regulatory authorities like the Universities and the National Medical Commission. It is for fulfillment of such objective that Regulations 2021 have been framed.

24. Having observed as above, we may fail in our duty if we do not discuss the legal protection available to a student, accused of ragging, when he is subjected to an inquiry/investigation under Regulation 23(2). The consequence of action against such a student which may ensue ultimately under Regulation 24, may be far-reaching even to the extent that in a given case it may ruin his career. Having regard to the seriousness of the consequences in respect of future career of a student pursuing a vocational course, we also are of the opinion that Regulation 23 of 2021 Regulations ought to be followed meticulously and in its letter and spirit. It is only when the Institution/Medical Colleges strictly follow and act upon the Regulation 23 in its entirety and in its true respect that a balance between the rights of the students accused of ragging and a student who is victim of ragging can be maintained. We are also conscious of the fact that Regulations 2021 have been framed and published only recently as on 18.11.2021 and are, thus, in their nascent stage. Implementation of Regulations 2021 will thus require some amount of understanding as to how the Regulations are to apply not only as a measure to check the menace of ragging, but also as a measure to conduct the inquiry/investigation as contemplated in

Regulation 23 in a fair and appropriate manner.

25. Since in this case we are primarily concerned with the nature and kind of inquiry/investigation to be conducted as envisaged in Regulation 23 of 2021 Regulations, we find it appropriate to lay down certain principles as a caution while conducting the inquiry in such matters, which are described below.

26. We may make it clear that the principles as a precautionary measure as are being laid down by us in this judgment are only to aid the provisions of 2021 Regulations and they are not in any manner to supersede or even to supplant the same. The authorities of a Medical College or any other Institution are to be primarily, thus, governed by the statutory regulations namely Regulations 2021. They may, however, seek some guidance from our observations, which are as follows:

(a.) On receiving report of any misconduct or ragging, the statutory mechanism, as provided in 2021 Regulations, shall be activated immediately, without any delay of any kind. Once the specific committee is constituted by the Head of the Institution to enquire/investigate and report into the complaint received by the authorities of the institution, the specific committee, the Anti-Ragging Committee as also the Head of the Institution shall maintain complete confidentiality about the name of the complainant, however, if it becomes necessary to disclose the name during the course of inquiry, such disclosure shall be confined only to the Members of the specific committee, Members of the Anti-Ragging Committee, Principal of the Institution and if deemed fit, to the student who is charged with ragging as well.

(b) On constitution of the specific committee, the committee shall give notice to the complainant, witnesses and the student accused of ragging, for being present in the inquiry to be conducted by it. If statement of the complainant or the witnesses are recorded, the student accused of ragging, shall be provided with a copy thereof, inviting his reply to such statements, however, having regard to the nature of inquiry it will not be permissible to the student accused of ragging, to cross-examine the complainant/witnesses.

(c) On recording the statement of the complainant/witnesses opportunity of making statement in defence shall be provided to the student against whom the charge of ragging has been made. The statement of complainant, that of witnesses, statement in reply to such statements to be made by the student accused of ragging, as also the defence statement of the student accused of ragging, shall be recorded and reduced in writing as far as possible on the same day and if for some reason it is not possible to record the statement on the same day, on the next working day.

(d) The specific committee shall thereafter prepare its report and submit it to the Anti-Ragging Committee in terms of the provisions contained in Regulation 23(3) and 23(4) of 2021 Regulations, which shall submit its report/recommendation to Head of the Institution as envisaged under Regulation 23(5).

(e) As observed above in (d), on receipt of report from the specific committee, the Anti-Ragging Committee shall examine the report and make recommendation for further administrative action to the Head of the Institution.

(f) The Head of the Institution before taking final decision/action in terms of Regulation 24 shall provide a copy of the report/recommendation

which may be made by the Anti-Ragging Committee, to the student facing the charge of ragging. The Head of the Institution will, thus, invite comments/explanation/reply from the student who is accused of ragging on the report/recommendation which may be made by the Anti-Ragging Committee and shall take decision on consideration of the report/recommendation of the Anti-Ragging Committee as also the reply/explanation which may be submitted by the student accused of ragging to the report/recommendation of the Anti-Ragging Committee and other relevant material which may be available on record.

(g) On receipt of report/recommendation made by the Anti-Ragging Committee, the Head of the Institution shall give not more than two days time to the student accused of ragging for furnishing his explanation/reply/comments to the report of the Anti-Ragging Committee and thereupon take a final decision, as aforesaid.

27. We have evolved these guidelines, as already observed above, not in any manner, in derogation of the 2021 regulations, rather only to facilitate appropriate implementation of the Regulations including Regulations 23 and 24 and accordingly our observations are to be understood in this perspective and context alone.

28. So far as the facts of the present case are concerned, it is noticeable that the respondent no. 1-petitioner was neither provided the copies of the statements of the complainant/witnesses nor was he ever confronted with the copy of the report said to have been submitted by the Anti-Ragging Committee to the Head of the Institution and accordingly we are of the opinion that the inquiry as contemplated in Regulation 23 of 2021 Regulations 2021 against the respondent no. 1-petitioner be conducted afresh by furnishing him copy of the complaint, statement of the complainants and witnesses made before the Specific Committee on 21.7.2022 and inviting his reply to the same and permitting him to make statement in his defence. Thereafter the appellant-Institution shall complete the inquiry in terms of Regulation 2021 as also keeping in view the observations made hereinabove.

We order accordingly.

29. The entire exercise under this order shall be completed within 15-days from today. The respondent no.1-petitioner is directed to cooperate fully with the authorities of the institution and in case at any point of time he is found not cooperating with the authorities of the appellant-Institution, the Institution shall proceed ahead in terms of the provisions of the regulations, as clarified above.

30. The order under appeal dated 13.9.2022 passed by the learned Single Judge in Writ-C No. 5622 of 2022 is hereby set aside. The decision of the Principal of the Institution, dated 25.7.2022 shall abide by the decision which may be taken finally in terms of this order.

31. The special appeal is, thus, disposed of in the aforesaid terms.

32. There will be no order as to costs.

(2022) 10 ILRA 1065
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal No. 43 of 2019

Amar Parasher ...Petitioner/Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Vishnu Shanker Gupta

Counsel for the Respondents:
C.S.C., Sri A.K. Ray, Addl. Chief Standing Counsel

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 5 - While the right to compassionate appointment is not a right in the sense a right is understood in law *stricto sensu*, it is certainly an entitlement which a member of the deceased's family eligible, can invoke for consideration in order to save the family from debilitating financial distress caused by the deceased's sudden exit from the mortal world. The State employer, where there is a regime for compassionate appointment introduced by Rules etc., cannot toss a claim by the deceased's dependent family member by application of a rigorous Rule of Limitation in a manner that defeats the very object for which the regime of compassionate appointment has been introduced. (Para 17)

The 1974 Rules postulate by presumption that in the course of 5 years, the deceased's family, by whatever means, would tide over the financial crisis caused by the breadwinner's death. The first proviso to Rule 5(1) of the 1974 Rules nevertheless acknowledges the possibility that in the facts of a particular case, the crisis may continue and unless the rule of limitation is dispensed with or relaxed to consider the case of a member of the deceased's family for compassionate appointment, 'undue hardship' may be caused. To blindfoldedly infer that the family have tided over the financial crisis within a period of 5 years, acting on the statutory presumption, is to defeat the wisdom that the proviso carries. (Para 17, 23)

B. Burden no doubt lies upon the applicant for compassionate appointment, where there is a delay in making the claim, taking it beyond the period of 5 years, to make out a case for relaxation by coming up with a justification for the same. At the same time, it is the duty of the employer to look into all relevant evidence, that is on record, to find out whether the financial distress, that is the direct result of the deceased government servant's untimely death, is still plaguing the family in a given case. If the deceased government servant's death has plunged the family into a lasting financial distress from which they are not able to emerge, there might be a case of undue hardship that merits relaxation of the Rule of Limitation. Mere count of the calendar, where the claim is made after 5 years, may not be decisive. It is no doubt relevant. (Para 18)

C. Utter disregard of the order of remand passed by this Court dated August 20, 2016 - In the present case, the Secretary in passing the impugned order has apparently flouted the directions of this Court carried in the judgment and order dated 20.08.2016, where the report of the Circle Officer, Hariparwat, Agra dated 22.07.2014 was referred to as indicative of relevant facts existing to show that the family were still facing financial crisis. The Secretary, while passing the impugned order, ought to have referred to the Circle Officer's report dated 22.07.2014 and in not doing so, it has acted contrary to the command of this Court, carried in the judgment and order dated 20.08.2016, which has become final inter parties. The learned Single Judge could not have remarked that the Judge who dealt with the earlier writ petition inter parties and passed the judgment and order dated 20.08.2016, did not independently deal with the decision of the Full

Bench in *Shiv Kumar Dubey's case (infra)* after noticing the principles laid down therein. The earlier judgment inter parties was as much binding on the learned Single Judge, who passed the impugned order, as it is on the parties, because the findings there are indeed *res judicata*. It is not a case, where the earlier decision was cited by way of precedent and ignored as *per incuriam*. (Para 19)

If the Secretary had carefully looked into either of the two reports dated 21.10.2016 or the earlier one dated 22.07.2014, it was not difficult to miss the fact that the writ petitioner in making his claim for compassionate appointment had to wait for two decisive events, i.e., attaining the age of majority and completing his education. It is not disputed that **for a compassionate appointment, it is not the age of majority alone that entitles one for consideration. The necessary educational qualification too has to be acquired.** (Para 20 to 22)

This Special Appeal, accordingly, succeeds and is allowed. The impugned judgment and order dated December 5, 2018 is hereby set aside and reversed. The writ petition is allowed. The impugned order dated December 7, 2016 passed by the Secretary, Department of Home Affairs (Police), Anubhag-10, Government of U.P., Lucknow is hereby quashed. A mandamus is issued to respondent no. 1 to consider the writ petitioner's claim for compassionate appointment afresh in accordance with the directions in this judgment. (Para 25)

Special appeal allowed. (E-4)

Precedent followed:

1. Shiv Kumar Dubey & ors. Vs St. of U.P. & ors., AIR 2015 All 47; (2014) ILR 1 All 266 (Para 13)

Special appeal against judgment dated 05.12.2018, passed by Hon'ble Mr. Justice Yashwant Verma, J. in WP No. 751/2017.

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

ORDER

1. This is a petitioner's appeal arising out of the judgment and order passed by the learned Single Judge, dated December 5, 2018, dismissing Writ - A No. 751 of 2017.

2. The late Brijesh Parasher, the writ petitioner Amar Parasher's father, was employed with the Uttar Pradesh Radio Police as a Head Operator and posted at the Police Radio Head Quarters, Firozabad. He died in harness on December 13, 2004. Not only did the writ petitioner's father die in harness, but it appears from a communication dated October 19, 2005, addressed to the Station House Officers of Police Station Etmadpur/ New Agra/ Bah by the Senior Superintendent of Police, Agra, that he died on duty. As a token of acknowledgment to the fact that the writ petitioner's father died on duty, his widow and dependent, Smt. Meera Parasher were called on the Police Commemoration Day to accept for her husband a Martyrs' Honour. There is on record an application made by the writ petitioner's mother, Smt. Meera Parasher and the deceased's widow, indicating the personal profile of the family members that the late Brijesh Parasher left behind. The application shows that the family comprised of minor children numbering two, including the writ petitioner, then aged 12 years and an aged mother of the deceased, who was of 74 years. The widow was 35 years and in the application, she indicated the need that the family had for a compassionate appointment to tide over the sudden financial crisis into which the family had plunged. Yet, she did not claim for herself on the ground that the children were young and pursuing their studies, which required the widow's complete attention and management. She requested that while she

considered herself disabled from seeking compassionate appointment on the above account, she was willing to seek appointment for her son/ daughter upon either turning a major. It was also indicated that the son or the daughter of the deceased would seek compassionate appointment upon attaining the age of majority and completing the requisite education.

3. On the application dated September 29, 2005, the Superintendent of Police, Firozabad passed an order dated October 15, 2005, saying that her son, the writ petitioner was 12 years old and still shy by 6 years of the age of majority, when he would be eligible for consideration under the Dying-in-Harness Rules. It was said in the order that once the writ petitioner turns 18, upon an application made for the purpose, necessary action would be taken. Upon the writ petitioner turning eighter years, an application seeking compassionate appointment for him was made by his mother, addressed to the Additional Director General of Police/ Director (Telecom), U.P. Police Radio Head Quarters, Lucknow, with copies to other Officers of the Police, mentioned at the foot of the application. The respondents do not seem to acknowledge this application and discount it from their record. Though the respondents say that this application by the writ petitioner's mother was not received, there is a communication dated March 21, 2013, addressed to the State Radio Officer (Administration), U.P., Police Radio Head Quarters, Lucknow from the Superintendent of Police, Firozabad forwarding the said application, as the writ petitioner asserts. A copy of the memo dated March 21, 2013 from the Superintendent of Police, Firozabad addressed to the State Radio Officer, Administration is on record of the writ petition as Annexure No.6.

4. There is then a communication by the State Radio Officer (Administration) to the State Government dated March 19, 2014 recommending consideration of the writ petitioner's case for compassionate appointment, after granting relaxation of the time period of 5 years from the death of the concerned government servant, within which an application for compassionate appointment must normally be made under Rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short, "1974 Rules'). The power is exercisable by the State Government to dispense with or relax the requirement of the time period of 5 years under the Proviso to Rule 5(1) of the 1974 Rules.

5. It appears that a report regarding the circumstances of the writ petitioner's family, particularly, the economic condition was called for by the State Government. The inquiry into the relevant circumstances was entrusted to the Circle Officer, Hariparwat, Agra vide an order dated July 4, 2014. In compliance with the last mentioned order, the Circle Officer conducted an inquiry and submitted his report dated July 22, 2014 to the Senior Superintendent of Police, Agra. A copy of the said report is on record as Annexure No.8 to the writ petition. The report has evaluated in minute detail not only the financial circumstances of the family that the writ petitioner's father left behind, but the impact that his untimely demise still had upon the surviving members. Allusion to the said report would be made during the course of this judgment.

6. The Deputy Secretary to the Government of U.P., before whom the writ

petitioner's claim for compassionate appointment came up for consideration after grant of relaxation in the stipulated time period, rejected it by his order dated March 3, 2015. The order noted the fact that the family were in receipt of an extraordinary pension of ₹10,346/-, and, thereafter referred to various authorities of this Court and the Supreme Court that say that compassionate appointment is not a source of employment. The report submitted by the Circle Officer, Hariparwat, Agra regarding the circumstances and status on various relevant parameters, that would be germane to determine if a case of "undue hardship' for relaxation in the period of 5 years under the Proviso to Rule 5(1) of the 1974 Rules was made out, did not find the slightest consideration in the order dated March 3, 2015, rejecting the writ petitioner's claim.

7. The writ petitioner challenged the said order by instituting Writ - A No. 58536 of 2015. This Court vide order dated August 20, 2016, after noticing the facts of the case and the law governing the principles on which a claim for compassionate appointment under the 1974 Rules is to be considered, also took note of all the details regarding the circumstances of the deceased employee's family and held:

"Considering the fact and circumstances of the present case, it is found that the petitioner had applied soon after attaining majority and certain material was placed before respondent no.1 to make out the case of undue hardship for grant of relaxation under first proviso to Rule 5. However, it appears that respondent no.1 has rejected the claim of the petitioner only on two grounds that the wife of the deceased did not apply for compassionate appointment and second was of delay and it is concluded that no case for relaxation under first Proviso to Rule 5 is made out. The hardship being faced by the family of the deceased employee is reflected from the enquiry report submitted by the Enquiry Officer namely the Circle Officer, Hariparvat Agra, as per the Government Order dated 23.02.2014 and 17.07.2014. It is indicated that the family is still facing financial crisis. They are dependent only upon the pension which is a meager amount of Rs.10,346/-. There are three female dependants of the deceased including his old mother and the family has no other source of income."

8. In view of the aforesaid findings in the judgment August 20, 2016 passed *inter partes* in Writ - A No. 58536 of 2015, this Court quashed the Deputy Secretary's order dated March 3, 2015 acting for the Government and remitted the matter for re-consideration to the Government, in terms of the following orders:

"All these attending circumstances have not been found reference in the order impugned at all. The rejection order dated 03.03.2015 passed by respondent no.1, therefore, cannot be sustained and is hereby quashed. The matter is remanded back to respondent no.1 to take a fresh decision on the merits of the application giving due consideration to all the attending circumstances and pass a reasoned and speaking order keeping in view the directions given by the Full Bench of this Court in **Shiv Kumar Dubey** (Supra) expeditiously preferably within a period of three weeks from the date of production of the certified copy of this order.

With the above observations and directions, the writ petition is allowed.

9. This is how the matter went back to the State Government and the writ petitioner moved the Government again seeking re-consideration of his case for compassionate appointment, after relaxing the normal period of 5 years. The writ petitioner for the purpose moved an application dated September 6, 2016 along with a copy of this Court's order dated August 20, 2016 passed in the writ petition last mentioned. The State Government again appear to have called for a report in the matter vide order dated September 22, 2016. In response to the said inquiry, the Circle Officer, Hariparwat, Agra once again inquired into the financial and other circumstances of the deceased employee's family, including the writ petitioner's. A report dated October 21, 2016 was submitted to the Competent Authority. The contents of the report dated October 21, 2016 shall also be referred to later in this judgment, together with those of the earlier report.

10. The writ petitioner's case was rejected once again by the State Government, taking note of this Court's judgment and order dated August 20, 2016. The Secretary to the State Government, who dealt with the writ petitioner's claim, remarked that the writ petitioner had laid his claim for compassionate appointment 8 years after his father's death. He has made it 3 years 2 months and 13 days beyond the prescribed time limit of 5 years. It has also been recorded by the Secretary that Amar Parasher attained the age of majority on October 9, 2010, but did not immediately apply. He waited for a further period of 2 years 4 months and 13 days after attaining the age of majority. It is remarked that the aforesaid delay is entirely on the writ petitioner's part. It is, therefore, explicit that upon death of the deceased government servant, no eligible member of his family applied promptly or immediately upon attaining majority. It could be done by them, but they did not. The affected family of the deceased waited for his son, the writ petitioner, to turn a major, in consequence whereof, the time period of 5 years, prescribed under the 1974 Rules elapsed.

11. Doing a calendaring of these events, the Secretary has drawn an inference that the members of the deceased's family have tided over the sudden financial crisis, which no longer appears to afflict them. It has then been remarked in the order impugned that under the 1974 Rules, 5 years is the prescribed period of time, within which an application for compassionate appointment can be entertained. The 1974 Rules envisage an immediate measure to bail out the deceased's family from the sudden financial crisis that have plunged into, upon the breadwinner's sudden demise. It is not the purpose of the 1974 Rules to guarantee a right of recruitment that can be retained to be availed at will and convenience in order to secure employment. It has been opined that considering the delay of 3 years 2 months and 13 days on the writ petitioner's part in applying for compassionate appointment, no case for granting relaxation from the prescribed time limit of 5 years is made out, and consequently by the order impugned dated December 7, 2016 passed by the Secretary, the writ petitioner's claim has been rejected.

12. The writ petitioner challenged this order before the learned Single Judge, who took note of the fact that rejection of the writ petitioner's claim for compassionate appointment earlier, had been quashed by this Court and the matter was remitted to the Government to consider afresh bearing

in mind the guidance in the judgment. It was noted by the learned Single Judge that this Court on the earlier occasion had held that the respondent has not correctly appreciated the ambit of the Proviso to Rule 5(1) while disposing of the writ petitioner's claim. The learned Single Judge has then gone on to remark about the judgment of remand rendered by the learned Judge in the earlier writ petition, preferred by the writ petitioner, in the following terms:

"Although, the learned Judge noticed the principles enunciated by the Full Bench of this Court in the case of ***Shiv Kumar Dubey and others vs. State of U.P. and others, 2014 (2) ADJ 312 (FB)***, the Court notes that the following principles as elucidated were not independently dealt with in this decision."

(emphasis by Court)

13. The learned Single Judge has then referred to principles culled out under Para (v) and (viii) of the decision of the Full Bench in **Shiv Kumar Kumar Dubey's case** (*supra*) to hold that the Secretary has rightly applied the law to reject the writ petitioner's claim. It has been remarked that appointment under the 1974 Rules is an exception to the principles of equality in employment under the State, guaranteed under Articles 14 and 16 of the Constitution. It has also been observed that that the Secretary while passing the impugned order had rightly come to the conclusion that no case for enlargement of time envisaged under Rule 10 of the 1974 Rules is made out by the writ petitioner. The learned Judge has, accordingly, dismissed the writ petition.

14. Aggrieved, the present Special Appeal has been filed.

15. The learned Counsel for the writ petitioner has assailed the impugned judgment saying that it runs in the teeth of the earlier judgment and order dated August 20, 2016 passed in Writ - A No. 58536 of 2015, which has attained finality inter partes. It is submitted that the impugned order has not at all considered the writ petitioner's case by reference to circumstances elucidated in the inquiry report dated July 22, 2014, which this Court had required them to do by the judgment and order dated August 20, 2016 for the purpose of determining whether a case of undue hardship, entitling the writ petitioner to a relaxation of the limitation in Rule 5 of the 1974 Rules, is made out.

16. The learned Standing Counsel has supported the impugned order and says that it accords with the law laid down by consistent authority, elucidating the principles governing consideration of claims for compassionate appointment.

17. Upon hearing the learned Counsel for parties, we are of opinion that there is no cavil about the fact that a claim for compassionate appointment cannot be considered a matter of right to employment under the State. It is not an additional source of employment. At the same time, the purpose of compassionate appointment is to bail out the family of a deceased government servant, who have plunged into a deep financial distress, on account of the breadwinner's sudden and untimely demise. The object and purpose of a compassionate appointment, therefore, survives so long as the financial deprivation brought about by the sudden death of the breadwinner lasts. The 1974 Rules postulate by presumption that in the course of 5 years, the deceased's family, by whatever means, would tide over the financial crisis caused by the

breadwinner's death. The first proviso to Rule 5(1) of the 1974 Rules nevertheless acknowledges the possibility that in the facts of a particular case, the crisis may continue and unless the rule of limitation is dispensed with or relaxed to consider the case of a member of the deceased's family for compassionate appointment, 'undue hardship' may be caused. The proviso directs that if the State Government is satisfied that undue hardship would be caused in a particular case on account of non-relaxation of the rule of limitation, it may consider the case for compassionate appointment, dealing with it in a just and equitable manner. While the right to compassionate appointment is not a right in the sense a right is understood in law *stricto sensu*, it is certainly an entitlement which a member of the deceased's family eligible, can invoke for consideration in order to save the family from debilitating financial distress caused by the deceased's sudden exit from the mortal world. The State employer, where there is a regime for compassionate appointment introduced by Rules etc., cannot toss a claim by the deceased's dependent family member by application of a rigorous Rule of Limitation in a manner that defeats the very object for which the regime of compassionate appointment has been introduced.

18. The rules by which a claim for compassionate appointment, including relaxation in the period of limitation under Rule 5 has to be considered, have been exhaustively laid down by the Full Bench decision in **Shiv Kumar Dubey's (*supra*)** and the same need not be recapitulated. Under the principles laid down in **Shiv Kumar Dubey's** case, burden no doubt lies upon the applicant for compassionate appointment, where there is a delay in making the claim, taking it beyond the period of 5 years, to make out a case for relaxation by coming up with a justification for the same. At the same time, it is the duty of the employer to look into all relevant evidence, that is on record, to find out whether the financial distress, that is the direct result of the deceased government servant's untimely death, is still plaguing the family in a given case. If the deceased government servant's death has plunged the family into a lasting financial distress from which they are not able to emerge, there might be a case of undue hardship that merits relaxation of the Rule of Limitation. Mere count of the calendar, where the claim is made after 5 years, may not be decisive. It is no doubt relevant.

19. The Secretary in passing the impugned order has apparently flouted the directions of this Court carried in the judgment and order dated August 20, 2016, where the report of the Circle Officer, Hariparwat, Agra dated July 22, 2014 was referred to as indicative of relevant facts existing to show that the family were still facing financial crisis. The Secretary, while passing the impugned order, ought to have referred to the Circle Officer's report dated July 22, 2014 and in not doing so, it has acted contrary to the command of this Court, carried in the judgment and order dated August 20, 2016, which has become final *inter partes*. With utmost respect, we must say that the learned Single Judge could not have remarked that the Judge who dealt with the earlier writ petition inter partes and passed the judgment and order dated August 20, 2016 in Writ - A No. 58536 of 2015, did not independently deal with the decision of the Full Bench in **Shiv Kumar Dubey's case (*supra*)** after noticing the principles laid down therein. The earlier judgment inter partes was as

much binding on the learned Single Judge, who passed the impugned order, as it is on the parties, because the findings there are indeed res judicata. It is not a case, where the earlier decision was cited by way of precedent and ignored as *per incuriam*.

20. The inquiry report dated July 22, 2014 notes down the following salient circumstances regarding the dependent family members of the deceased:

(1) After the death of the concerned employee, the family members are surviving on the extraordinary pension that they are receiving (a sum of ₹8,550/-) at the relevant time;

(2) The deceased's family comprises his widow, his mother, son and daughter;

(3) The members of the deceased's family do not have any agricultural land, on which they may depend for sustenance;

(4) During the period of time between the employee's death and the claim, his children were completing their education and the pension received was their source of income;

(5) The writ petitioner made his claim for compassionate appointment, because at the time of his father's death, he was aged a mere 10 years. The delay in making the claim was caused by the fact that the writ petitioner was awaiting attaining the age of majority and completing his education;

(6) The members of the deceased's family, apart from the pension they receive, do not own a house of their own.

In the concluding part of the report dated 22.07.2014 submitted by the Circle Officer, Hariparwat, it has been again emphasized that upon completing his education and turning a major, the writ petitioner applied for compassionate appointment.

21. It is this report of the Circle Officer, Hariparwat, Agra that this Court by the earlier judgment and order dated August 20, 2016 passed in Writ - A No. 58536 of 2015 had required consideration by the Government while judging the writ petitioner's claim for relaxation in the prescribed time period for consideration of his compassionate appointment claim. The impugned order does not show the slightest consideration of the report dated July 22, 2014, as required by this Court. Now, after the order of remand was passed by this Court, the subsequent report submitted by the Circle Officer, Hariparwat reports in identical terms on the continuing financial distress of the Parasher family. Surprisingly, this report was called for by the State Government and yet while passing the impugned order, the subsequent report dated October 21, 2016 submitted by the Circle Officer, Hariparwat has also not been referred to in the least by the Secretary, writing the order impugned. All that the Secretary has said in the impugned order is too harp on the numerical of delay that the writ petitioner's claim for compassionate appointment is hit by.

22. This Court must remark that if the delay of years and months by numerical figure alone were the only factor to be considered, there might have been no reason for the first proviso to Rule 5(1) of the 1974 Rules being there, envisaging relaxation in the period of time, prescribed by the 1974 Rules. It must also be remarked that if the Secretary had carefully looked into either of the two reports dated October 21, 2016 or the earlier one dated July 22, 2014, it was not difficult to miss the fact that the writ

petitioner in making his claim for compassionate appointment had to wait for two decisive events, to wit, attaining the age of majority and completing his education. It is not disputed that for a compassionate appointment, it is not the age of majority alone that entitles one for consideration. The necessary educational qualification too have been acquired. No doubt, the two inquiry reports dated July 22, 2014 and October 21, 2016 do not indicate what educational qualification the writ petitioner acquired and on what date after which he applied, a little sensitive handling of the claim by the Secretary would have led him to find out when the writ petitioner earned his essential eligibility educational qualifications. Perhaps, that would explain the delay that the Secretary has numerically counted to deny the writ petitioner relaxation in the prescribed period of time for making a claim. We must observe that the circumstances of the family that have come on record show that the deceased has an old mother, the widow and a daughter, of which this Court took due note in the judgment and order dated August 20, 2016 passed earlier, which has not at all been considered by the Secretary. There is a remark in the judgment dated August 20, 2016 that there are three female dependents of the deceased, including his old mother and the family have no other source of income, except the meager pension of ₹10,346/-.

23. We must remark that in these circumstances, to blindfoldedly infer that the family have tided over the financial crisis within a period of 5 years, acting on the statutory presumption, is to defeat the wisdom that the proviso carries. Also, the impugned order, we must observe, has been written in utter disregard of the order of remand passed by this Court dated August 20, 2016, which we do not appreciate.

24. We are satisfied for all the reasons indicated above that the learned Single Judge was in error in approving the Secretary's order, impugned in the writ petition, rejecting the writ petitioner's claim for compassionate appointment.

25. This Special Appeal, accordingly, succeeds and is allowed. The impugned judgment and order dated December 5, 2018 passed by the learned Single Judge in Writ - A No.751 of 2017 is hereby set aside and reversed. The writ petition is allowed. The impugned order dated December 7, 2016 passed by the Secretary, Department of Home Affairs (Police), Anubhag-10, Government of U.P., Lucknow is hereby quashed. A mandamus is issued to respondent no.1 to consider the writ petitioner's claim for compassionate appointment afresh in accordance with the directions in this judgment within a period of two months of receipt of a copy of this judgment. The writ petitioner shall be at liberty to file an additional memorandum explaining the delay, annexing therewith such evidence on which he relies to seek relaxation in the matter of limitation under the proviso to Rule 5(1) of the 1974 Rules.

(2022) 10 ILRA 1073
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE J.J. MUNIR, J.

Special Appeal Defective No. 324 of 2022

The State of U.P. & Ors. ...Appellants
Versus
Ankita Saxena & Anr. ...Respondents

Counsel for the Appellants:

Sri Ramanand Pandey, Additional Chief Standing Counsel

Counsel for the Respondents:
Sri Vikrant Pandey

A. Service Law – Appointment – Salary - Uttar Pradesh Recognized Basic Schools (Junior High Schools) Recruitment and Conditions of Service of Teachers) Rules, 1978 - Rule 4 - National Council for Teacher Education Act, 1993 - Section 12(d) read with Section 12A - Right of Children to Free and Compulsory Education Act, 2009 - Section 23 - Acting on the result drawn up by the Selection Committee, a proposal dated 08.07.2016 to obtain approval for the petitioner's appointment as the Headmistress of the institution, was forwarded to the District Basic Education Officer, Rampur, by the Manager of the institution. The District Basic Education Officer, Rampur, by means of his order dated 26.07.2016, declined the proposal to approve the writ petitioner's appointment on the ground that she does not hold the certificate of TET (Junior High School Level), an essential educational qualification for the post. (Para 5)

The writ petitioner was appointed as an assistant teacher with a recognised school on 01.07.2009 i.e. prior to amendment in the 1978 Rules w.e.f. 05.12.2012. **The writ petitioner was,** thus, **appointed as an assistant teacher with a recognised school at a time when the 1978 Rules had not been amended to bring in the qualification of passing the TET as essential for an assistant teacher.** (Para 16)

B. Central Law prevailing over State Law - Assuming that the National Council for Teacher Education (NCTE) Guidelines dated 11.02.2011, issued u/s 12(d) r/w S.12A of the National Council for Teacher Education Act, 1993 and S.23 of the Right of Children to Free and Compulsory Education Act, 2009, prevail over the 1978 Rules as they stood prior to the Sixth Amendment w.e.f. 05.12.2012, for reason of the Central law prevailing over the State law on a subject falling in the concurrent list, as held in *Om Prakash Tripathi's case (infra),* the writ petitioner was appointed as an assistant teacher in a recognized school on 01.07.2009. At that time, there were no NCTE Guidelines at variance with the 1978 Rules. Thus, at the time that the writ petitioner was appointed as an assistant teacher, there was no requirement of passing the TET. The writ petitioner, therefore, was validly appointed an assistant teacher and at the time of consideration of her candidature for the post of Headmistress, **neither the amendment made to the 1978 Rule w.e.f. 05.12.2012 nor the NCTE Guidelines, that came after the writ petitioner's appointment as an assistant teacher, can be read retrospectively to render her appointment as an assistant teacher a nullity.**

Her experience as such, in recognised schools, qualifies her for the post of a headmistress under the 1978 Rules. This is particularly so, inasmuch as **there is no requirement for a headmistress as such, passing the TET under the 1978 Rules.** No other provision has been brought to our notice, which may directly require a headmistress of a Junior High School to pass the TET for the purpose of maintaining her candidature as such. (Para 18)

Special appeal dismissed. (E-4)

Precedent followed:

1. Om Prakash Tripathi Vs St. of U.P. Through Secretary, Basic Education & ors., S.S. No. 22454 of 2018, decided on 22.12.2019 (Para 17)

Present special appeal is against judgment and order dated 01.04.2022, passed by Learned Single Judge, in Civil Misc. WP No. 10041/2017.

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

Hon'ble J.J. Munir, J.)

1. Heard Mr. Ramanand Pandey, learned Additional Chief Standing Counsel appearing on behalf of the appellants and Mr. Vikrant Pandey, learned Advocate appearing on behalf of the respondent.

2. There is a delay of 95 days reported by the Stamp Reporter. Upon a perusal of the affidavit filed in support of the delay condonation application, we find that there is sufficient cause made out to condone the delay. The delay in filing the appeal is condoned.

3. The application is **allowed.**

4. This appeal has been preferred by the five respondents-the State respondents of Writ-A No.10041 of 2017, questioning the judgment and order of the learned Single Judge dated 1st April, 2022, allowing the writ petition.

5. The writ petitioner is respondent No.1 to this appeal. She will hereinafter be called as "the writ petitioner'. The Manager, Public Balika Junior High School, Rampur, District Rampur sought and was granted prior approval by the District Basic Education Officer, Rampur, the fourth appellant here, permitting the institution aforesaid to initiate the process to recruit, select and appoint a suitable person as the Headmistress of the institution. Permission for recruitment of two Assistant Teachers was also sought and granted. Based on the permission granted by the District Basic Education Officer, the Manager of the Public Balika Junior High School, Civil Lines, Rampur (for short, "the institution') issued an advertisement dated 21.01.2016, published in the Hindi Daily "Hindustan', issue dated 22.01.2016 and also in the "Shah Times, Rampur', issue dated 22nd January, 2016. The advertisement indicated personnel eligibility qualifications for the post of Headmistress as the candidate being a woman, who should have attained the age of 30 years as on 1st July, 2016. The minimum education and experience required for the eligibility was indicated to the effect that the candidate should be a trained graduate with a minimum of five years teaching experience in a recognized school. There was no mention in this advertisement about the candidate being required to possess a certificate of passing the Teachers Eligibility Test (for short, "the TET') as an essential qualification to maintain a valid candidature. The writ petitioner is admittedly a trained graduate with five years of teaching experience in a recognized school. The writ petitioner was called for interview for the post of Headmistress, held on 05.07.2016. It is pleaded in the writ petition that out of ten candidates, who participated in the interview, the writ petitioner secured the highest marks and was ranked at the first place. Acting on the result drawn up by the Selection Committee, a proposal dated 08.07.2016 to obtain approval for the petitioner's appointment as the Headmistress of the institution, was forwarded to the District Basic Education Officer, Rampur, appellant no.5, by the Manager of the institution. A copy of the proposal is on record as Annexure No.8 to the writ petition. The District Basic Education Officer, Rampur, by means of his order dated 26.07.2016, declined the proposal to approve the writ petitioner's appointment on the ground that she does not hold the certificate of TET (Junior High School Level), an essential educational qualification for the post.

6. It is the absence of the aforesaid qualification with the writ petitioner that has become the bone of contention between parties. The writ petitioner questioned the

order dated 26.07.2016 passed by the District Basic Education Officer, Rampur, declining the Management's proposal to appoint her as the Headmistress, by instituting the writ petition giving rise to this appeal. After exchange of affidavits, the learned Single Judge by means of the judgment and order impugned has allowed the writ petition and quashed the order dated 26.07.2016 passed by the District Basic Education Officer, Rampur. A *mandamus* has been issued to the District Basic Education Officer, to grant approval to the petitioner's selection on the post of Headmistress of the institution within a period of four weeks and issue her the necessary letter of appointment. It has further been ordered by the learned Judge that the writ petitioner shall be paid arrears of salary from the date approval for her appointment was denied by the District Basic Education Officer i.e. 26.07.2016. The arrears have been directed to be paid within a period of two months, after the issue of her appointment letter. It has also been ordered that in case the arrears of salary are not paid to the writ petitioner within the time provided by the learned Judge, simple interest at the rate of 6% p.a. would also be payable to the writ petition till actual payment is made.

7. Aggrieved by the aforesaid judgment and order passed by the learned Single Judge, the State-respondents have appealed under Chapter VIII Rule 5 of the Rules of the Court.

8. Heard Mr. Ramanand Pandey, learned Additional Chief Standing Counsel appearing on behalf of the appellants and Mr. Vikrant Pandey, learned Advocate appearing on behalf of the writ petitioner.

9. It is argued by the learned Additional Chief Standing Counsel appearing for the State that the educational qualification of passing the TET, conducted by the Government of Uttar Pradesh or by the Government of India, is an essential qualification for appointment as an assistant teacher under Rule 4 of the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (for short, 'the 1978 Rules'). It is submitted with much emphasis by Mr. Ramanand Pandey, that the minimum qualification for appointment on the post of Headmaster/ Headmistress under Rule 4(2) of the 1978 Rules is a degree from a recognized university or an equivalent examination recognized as such, besides qualification of passing a Teachers Training Court, as specified in the Rule. In addition, the essential qualification also includes five years teaching experience in a recognized school. Carrying the submission further, it is urged on behalf of the State that the advertisement issued by the institution was not in accordance with the Government Orders, departmental instructions and the provisions of the 1978 Rules, as amended by the Sixth Amendment Rules, 2012. It is, therefore, argued on behalf of the appellants that in order to qualify for the post of a headmistress, the five years teaching experience postulated as an assistant teacher would mean experience earned as an assistant teacher, possessing the essential qualifications for the latter post. It is submitted that the writ petitioner not having passed the TET before she was appointed as an assistant teacher, her experience of five years teaching is a nullity. It would not qualify her for the post of Headmistress under Rule 4(2) of the 1978 Rules.

10. The submission of the learned Additional Chief Standing Counsel goes as

far as that the qualification of passing the TET being essential for an assistant teacher, it is a fortiori essential for a headmistress, because an assistant teacher of five years experience would postulate the candidate possessing qualification of having passed the TET. It is argued that the learned Single Judge has gone wrong in holding that passing the TET is not one of the essential qualifications for the post of a headmistress, stipulated by Rule 4(2) of the 1978 Rules.

11. On the other hand, Mr. Vikrant Pandey, the learned Counsel appearing for the writ petitioner, supported the impugned order and says that the writ petitioner was appointed as an assistant teacher in accordance with the 1978 Rules on 01.07.2009 and functioned as such up to 30.11.2012 in Smt. Shanti Devi Junior High School, Bareilly, and again earned two years teaching experience from 01.07.2013 to 03.12.2015 in Smt. Shanti Devi Children Academy, Bareilly. It is urged that the Sixth Amendment to the 1978 Rules were introduced w.e.f. 05.12.2012, whereas the writ petitioner was appointed on 01.07.2009, and thereafter, completed her experience as an assistant teacher in two spells, exceeding five years on the date she applied for the post of headmistress.

12. It is emphasized that when the writ petitioner was appointed as an assistant teacher on 01.07.2009, there was no requirement of passing the TET. It is for the said reason that she was permitted to continue as an assistant teacher even after the amendment of the 1978 Rules by the Sixth Amendment w.e.f. 05.12.2012. It is, therefore, the writ petitioner's case is that in her case, the requirement of passing the TET would not at all be attracted. The learned Single Judge has more or less accepted the writ petitioner's contention and allowed the writ petition in the terms indicate hereinabove.

13. Upon consideration of the submissions advanced by the learned Counsel for parties and perusal of the records, we are in agreement with the conclusions reached by the learned Single Judge. Rule 4 of the 1978 Rules are extracted below:

"4. Minimum Qualifications.- (1) The minimum qualifications for the post of Assistant Teacher of recognized school shall be a Graduation Degree from a University recognized by U.G.C., and a teachers training course recognized by the State Government or U.G.C. or the Board as follows-

1. Basic Teaching Certificate.

2. A regular B.Ed. degree from a duly recognized institution.

3. Certificate of Teaching.

4. Junior Teaching Certificate.

5. Hindustani Teaching Certificate

And

Teacher eligibility test passed conducted by the Government of Uttar Pradesh or by the Government of India.

(2) The minimum qualifications for the appointment to the post of head master of a recognized school shall be as follows-

(a) A degree from a recognized University or an equivalent examination recognized as such.

(b) A teacher's training course recognized by the State Government 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 recognised schools."

14. A reading of the Rule shows that it is nowhere prescribed as an essential qualification for a candidate to be appointed a headmaster/ headmistress that the person concerned must have passed the TET. There is no quarrel about the fact that the writ petitioner had earned her degree of Bachelor of Arts from Dr. Bhimrao Ambedkar University in the year 2003 and a degree of Bachelor of Education from the same University in the year 2007. She is, thus, a trained graduate within the meaning of Rule 4(2) of the 1978 Rules.

15. The issue is about the lack of her qualification relating to the TET. There is clear averment in Paragraph No.11 of the writ petition that the writ petitioner has teaching experience of five years from a recognised school i.e. Smt. Shanti Devi Junior High School, Bareilly, where she has taught from 01.07.2009 to 30.11.2012, and thereafter, in Smt. Shanti Devi Children Academy, Bareilly w.e.f. 01.07.2013 to 03.12.2015. Certificates of her experience have been issued by the two institutions, copies whereof are annexed as Annexure No. 5 to the writ petition. These certificates are countersigned by the District Basic Education Officer, Bareilly. In the counter affidavit filed by the State/ respondent no.5 in the writ petition, the contents of Paragraph No.11 to the writ petition have been admitted.

16. The inexplicable conclusion on facts, therefore, is that the writ petitioner was appointed as an assistant teacher with a recognised school on 01.07.2009 i.e. prior to amendment in the 1978 Rules w.e.f. 05.12.2012. The writ petitioner was, thus, appointed as an assistant teacher with a recognised school at a time when the 1978 Rules had not been amended to bring in the qualification of passing the TET as essential for an assistant teacher.

17. A learned Single Judge of this Court in **S.S. No. 22454 of 2018, Om Prakash Tripathi v. State of U.P. Through Secretary, Basic Education and others, decided on 22.12.2019,** before whom the same issue came up for consideration, after considering the law laid down by the Supreme Court and two Full Benches, held:

(22) In Full Bench's judgment of this Court in the case of **Shiv Sharma and others v. State of U.P. and others reported 2013 (6) ADJ 310 (FB)**, it has been held that Notification dated 23.8.2010 and the qualifications determined by the NCTE would have overriding effect in so far State Legislation Act, Rules or Regulations are in conflict with the notification issued by the NCTE which, therefore, has to be ignored.

(23) The principle has also been reiterated in the subsequent Full Bench's decision rendered in **Anand Kumar Yadav and others v. Union of India and others reported in 2015 (8) ADJ 338 (FB)**. The decision has been confirmed by the Hon'ble Supreme Court in the case of **State of U.P. v. Anand Yadav, 2017 Vol ADJ 173.**

(24) While dealing with the aforesaid provisions, the Hon'ble Supreme Court has held that in the State of Uttar Pradesh, the State Government in a clear violation of mandate of Section 23(2), which vests the power to relax the

minimum qualifications is in the Central Government has arrogated to its power which it lacks to grant exemption from the mandatory qualification which are laid down by the NCTE in their application to Shiksha Mitra in the State. Parliament has legislated to provide, in no uncertain terms, that any relaxation of the minimum educational qualifications can only be made by the Central Government.

(25) In **State of U.P. v. Shiv Kumar Pathak reported in 2017 (8) ADJ 164,** the question posed before the Supreme Court was with regard to the validity of the decision of the State of Uttar Pradesh in prescribing qualifications for a recruitment of teachers at variance with the guidelines of the National Council for Teachers Education (NCTE) dated 11th February, 2011 under Section 12 (d) read with Section 12 A of the National Council for Teachers Education Act, 1993 (NCTE Act) and Section 23 of the Right of Children to Free and Compulsory Act Education, 2009 (RTE Act) on the ground of repugnancy of State Law with the Central law on a subject falling in concurrent list.

(26) In pursuance to the Notification referred hereinabove, the State Government has issued notification dated 27 November, 2017, whereby notifications issued by the National Council for Teacher Education (hereinafter referred to as "N.C.T.E." on 23 August 2010, 29 July, 2011, 12 November 2014 and 28 November 2014, prescribing qualification for the post of Assistant Teacher in Primary Institutions of the State has been incorporated.

(27) The Full Bench of this Court as well as the Supreme Court in the decisions referred hereinabove leaves no room for doubt that the competent authority to determine the essential qualifications for appointment of teachers in primary schools throughout the country, is vested with the N.C.T.E. The notification issued by the N.C.T.E. would apply from the date, on which the qualification was notified by the N.C.T.E. and not from the date on which the N.C.T.E. notifications was incorporated in the State Act or Rules governing appointment and selection of Primary Teacher.

(28) In U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 which was added by way of amendment dated 5.12.2012 prescribing qualifications for the post of Assistant Teachers in addition to other qualifications. It has also been provided that a candidate must have possessed qualification of T.E.T.

(29) Under sub Rule (2) of Rule 4 of the Rules of 1978 it has been provided that essential qualification of possessing T.E.T. is must for the post of Assistant Teacher and Rule 4 sub Rule (2) reveals that the qualification for the post of Head Master is that he should have the qualification of five years of experience from a recognized Institution as a teacher.

(30) In the present case, the petitioner was granted appointment on the post of Assistant Teacher in Ram Sawak Inter College, Dhamoha, Babaganj, District Pratapgarh in July, 2007 prior to amendment incorporated under Rule 4 of the Rules of 1978.

(31) At the relevant point of time, there was no requirement of having T.E.T. qualification for the appointment on the post of Assistant Teacher in the year 2007. First time, amendment was incorporated on 23 August, 2010 and 29 July, 2011 by the N.C.T.E.

(32) On perusal of Rule 4 sub Rule (2), it is reflected that Head Master is the Principle and only such a teacher who

has five years experience from a recognized School in addition to other qualifications would be eligible for the post of Headmaster in order to qualify after amendment. A teacher is required to have an essential qualification of T.E.T. after amendment in Rule 4 on 5.12.2012, therefore it flows therefrom that the candidates from the post of Head Master also have possessed the qualification of T.E.T.. The petitioner being appointed prior to the amendment prescribing T.E.T. qualification on the post of Assistant Teacher is not required to have T.E.T. qualification for the post of Head Master.

18. In writing the impugned judgment, the learned Single has also followed the law laid down in **Om Prakash Tripathi's case** *(supra)* and we see no reason to differ from it. Assuming that the National Council for Teacher Education (NCTE) Guidelines dated 11.02.2011, issued under Section 12(d) read with Section 12A of the **National Council for Teacher Education Act, 1993** and Section 23 of the **Right of Children to Free and Compulsory Education Act, 2009,** prevail over the 1978 Rules as they stood prior to the Sixth Amendment w.e.f. 05.12.2012, for reason of the Central law prevailing over the State law on a subject falling in the concurrent list, as held in **Om Prakash Tripathi's case** *(supra)*, the writ petitioner was appointed as an assistant teacher in a recognized school on 01.07.2009. At that time, there were no NCTE Guidelines at variance with the 1978 Rules. Thus, at the time that the writ petitioner was appointed as an assistant teacher, there was no requirement of passing the TET. The writ petitioner, therefore, was validly appointed an assistant teacher and at the time of consideration of her candidature for the post of Headmistress, neither the amendment made to the 1978 Rule w.e.f 05.12.2012 nor the NCTE Guidelines, that came after the writ petitioner's appointment as an assistant teacher, can be read retrospectively to render her appointment as an assistant teacher a nullity. The writ petitioner was validly appointed as an assistant teacher. Her experience as such, in recognised schools, qualifies her for the post of a headmistress under the 1978 Rules. This is particularly so, inasmuch as there is no requirement for a headmistress as such, passing the TET under the 1978 Rules. No other provision has been brought to our notice, which may directly require a headmistress of a Junior High School to pass the TET for the purpose of maintaining her candidature as such.

19. No other point was pressed.

20. In view of the aforesaid facts, we do not find any merit in this appeal. It is **dismissed.**

(2022) 10 ILRA 1080
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Matters under Art. 227 (Civil) No. 4126 of 2019

Colonel Mukul Dev ...Petitioner
Versus
Smt. Deveshwari Devi ...Respondent

Counsel for the Petitioner:
Sri Vinayak Mithal

Counsel for the Respondent:
Sri Avneesh Tripathi, Sri Sikhar Tondon

A. Civil Law – Declaration and Injunction - Code of Civil Procedure, 1908 - Order VII Rule 14, Order XIII Rule 1, Order XVIII Rule 4, Order XVIII Rule 17-A, Order XIII Rule 1(3) - Under the specific provisions of CPC i.e. under Order VII Rule 14 and under Order XIII Rule 1, the Court had no power to allow the parties to adduce further evidence after the relevant stages were over. The relevant stages were: (i) when the suit was filed; and (ii) before the issues were settled. (Para 6)

B. U/Order XIII Rule 1(3) CPC, document could be produced for the cross-examination of the witnesses but this does not mean that documents could be produced even after the cross-examination had concluded. It was the bounden duty of the Court to have, even u/s 151 CPC, seen as to whether the documents which were being sought to be produced, were within the knowledge of the parties who were trying to produce the document or whether even after exercise of due diligence, the documents could not be produced by the party which was producing the document at the relevant point of time. (Para 7)

The plaintiff was required to file all the relevant documents, when the suit was filed and before the issues were settled. However, the Court finds that nowhere in the CPC is there any prohibition for bringing any document by way of additional evidence subsequently and, therefore, if in the interest of justice any document was to be produced then the Court had to use its power with circumspection and care and when the bona fide of the applicant could not be doubted and also when it was absolutely essential to bring on record the additional evidence to meet the ends of justice. (Para 8)

The plaintiff had not exercised the right which she had. The Court, finds that when the case of the plaintiff was dependent upon the two wills dated 29.4.1974 and 19.5.2002 then definitely the two wills ought to have been brought on record either at the time of filing of the suit or before the settlement of the issues. Keeping in mind that injustice may not occur, the Court under its powers under section 151 C.P.C. directs that the documents may be taken on record as additional evidence. (Para 8)

Under such circumstances, the impugned order by which the documents were allowed to be taken on record, is not being interfered with. Any other document should not be allowed to be taken as evidence. (Para 9)

The documents which have been permitted to be taken on record by this Court were available to the plaintiff at the time when the suit was filed and also at the time when the issues were settled, the Court concludes that the plaintiff for this carelessness and laxness should be penalized. (Para 10)

Writ petition partly allowed. (E-4)

Precedent cited:

Subhash Chander Vs Bhagwan Yadav, 2010 (114) DRJ 306 (Para 5)

Precedent distinguished:

K.K. Velusamy Vs N. Palanisamy, (2011) 11 Supreme Court 275 (Para 5, 7)

Present petition assails order dated 26.02.2019, passed by the Trial Court, permitting the plaintiff-respondent to bring on record some of the documents after the evidence was closed.

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

1. The respondent-plaintiff filed a suit being Suit No.848 of 2002 for declaration and also for a permanent injunction praying that the suit property situate at 142, Jattiwara, Meerut be declared as the property of the plaintiff and also the defendant be restrained by a permanent injunction from causing any interference in the peaceful possession and occupation of the property 142, Jattiwara, Meerut. The claim was set up by stating that the husband of the plaintiff-respondent namely late Surendra Dayal, who had expired on

17.6.2002, had bequeathed the property in question by a will dated 19.5.2002. A further allegation was there in the plaint that the father of the deceased-husband of the plaintiff late Sri Shiv Dayal had willed his self-earned property on 29.4.1974 to the deceased-husband of the plaintiff. The suit was filed sometime in the year 2002 and thereafter the petitioner-defendant Colonel Mukul Dev filed a written statement on 18.6.2002. Thereafter issues were struck and the parties submitted their affidavits by way of examination-in-chief. The plaintiff and the defendant were put to cross-examination and before the settlement of the issues and at the time of filing of the suit, all relevant documents, which were to be relied upon by the parties as documentary evidence in original, were also filed. After the cross-examination of the plaintiff who was produced as PW-1 and the cross-examination of PW-2 Smt. Payal Agarwal, the daughter of the plaintiff was concluded on 19.7.2018, the evidence viz.-a-viz. the plaintiff was closed. The defendant, after the production of his affidavit as examination-in-chief on 17.9.2018 was put to cross-examination with effect from 5.11.2018. While the evidence of the defendant-petitioner was being adduced in the cross-examination, the plaintiff filed an application no.155-C on 22.2.2019 and sought permission to file certain fresh documents as evidence. The documents which were to be filed were around 9 in number. The defendant-petitioner objected to the filing of fresh evidence on 25.2.2019. However, when the Trial Court by its order dated 26.2.2019 permitted the plaintiff-respondent to bring on record some of the documents which she had prayed for being brought on recor

2. From the perusal of the order impugned, it appears that Paper Nos.164-Ka to 166-Ga, which were sought to be brought in as additional evidence were refused but the other papers were admitted in evidence.

3. Learned counsel for the petitioner has assailed the order by stating that when the evidence viz.-a-viz. the plaintiff had been closed then without recalling the order by which the plaintiff's evidence was closed, the Trial Court could not have admitted in evidence/further documents. The additional documents which were sought to be brought in as additional evidence could not have been allowed to be filed. Learned counsel for the petitioner further submitted that when there was no law to permit the adducing of evidence by the plaintiff after the evidence of the defendant-petitioner had commenced then the additional evidence could not have been allowed to be brought on record. Learned counsel assailed the order by stating that the Trial Court had not given any reason as to why the additional evidence had been brought on record. Learned counsel for the petitioner submitted that bringing on record documents by way of additional evidence was a dilatory tactics which was being adopted by the plaintiff. Learned counsel for the petitioner relied upon Order VII Rule 14 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC") and submitted that at the time of the filing of the suit, the documents, which were to be relied upon and which were in the possession of the plaintiff, should have been entered in the list which had accompanied the plaint and those documents should have been produced in the Court when the plaint was presented by the plaintiff. He submitted that if the documents were not in the possession of the plaintiff, she should have stated that in whose possession exactly the documents

were. Learned counsel for the petitioner further submitted that the plaintiff's case in paragraph nos.2 and 3 of the plaint was specifically to the effect that initially Sri Shiv Dayal had willed the property in question to the husband of the plaintiff Sri Surendra Dayal on 29.4.1974 and thereafter the husband of the plaintiff namely Surendra Dayal had willed the property to the plaintiff on 19.5.2002. These facts when had been denied in the written statement then it was the bounden duty of the plaintiff to have filed the original documents under Order XIII Rule 1 CPC. Learned counsel for the petitioner-defendant further submitted that under Order XVIII Rule 4 CPC when the recording of evidence was done and when the plaintiff found that there were certain lacuna in her evidence then she could not have been permitted to file the additional documents. Learned counsel for the petitioner further submitted that earlier under Order XVIII Rule 17-A CPC, documents could have been submitted but thereto there was a condition that the documents which would have been submitted after the conclusion of the evidence were to be such documents/evidence which were not within the knowledge of the plaintiff or could not be produced by the plaintiff at the time when the plaintiff was leading his/her evidence.

4. Since, learned counsel for the petitioner states that, the provisions of Order XVIII Rule 17-A CPC were being misused by the litigants to prolong proceedings, the said provision of Order XVIII Rule 17-A CPC itself was deleted from the Code. Learned counsel for the petitioner, therefore, stated that the order impugned cannot be sustained in the eyes of law and may be set-aside.

5. Sri Avneesh Tripathi, learned counsel appearing for the plaintiff-respondent, however, submitted that when there was denial of certain existing facts by the defendant in his cross-examination then it was essential that the documents which the plaintiff was bringing on record be brought on record. This, learned counsel for the plaintiff-respondent submitted would facilitate the Court in passing the judgment in the case. Learned counsel for the plaintiff-respondent submitted that under Order XIII Rule 1(3) CPC any document could be produced for the cross-examination of the witnesses or other parties and, therefore, the document in question could have definitely been produced. He further submitted that even if there was no provision in the CPC for the production of additional documents then the same could be allowed to be done by the Court in its inherent powers under section 151 CPC. Learned counsel for the plaintiff-respondent to bolster his case relied upon a decision of Delhi High Court in **Subhash Chander vs. Bhagwan Yadav reported in 2010 (114) DRJ 306** decided on 25.11.2009 and submitted that under Order XIII Rule 1(3) CPC the document could be produced. Learned counsel for the plaintiff-respondent further relied upon a decision of the Supreme Court in **K.K. Velusamy vs. N. Palanisamy reported in (2011) 11 SCC 275** and submitted that even if there was no power bestowed upon the Court under the CPC to allow the parties to produce any material or evidence, the same could be done under section 151 CPC to facilitate the Court to adjudicate the case.

6. Having heard learned counsel for the parties, the Court is of the view that definitely under the specific provisions of CPC i.e. under Order VII Rule 14 and

under Order XIII Rule 1, the Court had no power to allow the parties to adduce further evidence after the relevant stages were over. The relevant stages were : (i) when the suit was filed; and (ii) before the issues were settled. For proper appreciation of the law, which is being dealt with, the provisions of Order VII Rule 14 CPC and Order XIII Rule 1 are being reproduced here as under :-

"Order VII Rule 14. Production of document on which plaintiff sues or relies

.--(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiffs witnesses, or, handed over to a witness merely to refresh his memory.

"

"Order XIII Rule 1. Original documents to be produced at or before the settlement of issues

.--(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents-

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory."

7. Definitely under Order XIII Rule 1(3) CPC, document could be produced for the cross-examination of the witnesses but this does not mean that documents could be produced even after the cross-examination had concluded. It was the bounden duty of the Court to have, even under section 151 CPC, seen as to whether the documents which were being sought to be produced, were within the knowledge of the parties who were trying to produce the document or whether even after exercise of due diligence, the documents could not be produced by the party which was producing the document at the relevant point of time. The powers under section 151 CPC could be exercised, as has been stated in the case

o**f K.K. Velusamy (supra**), only under the following circumstances :-

"(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court."

8. In the instant case, the Court finds that after the stages of Order VII Rule 14 and Order XIII Rule 1 CPC i.e. when the suit was filed and before the issues were settled, the plaintiff was required to file all the relevant documents. However, the Court finds that nowhere in the CPC is there any prohibition for bringing any document by way of additional evidence subsequently and, therefore, if in the interest of justice any document was to be produced then the Court had to use its power with circumspection and care and

when the bona fide of the applicant could not be doubted and also when it was absolutely essential to bring on record the additional evidence to meet the ends of justice. In the instant case the Court finds that, definitely the plaintiff had not exercised the right which she had, to file the relevant evidence at the time of filing of the suit and also before the settlement of the issues. The Court, however, finds that when the case of the plaintiff was dependent upon the two wills dated 29.4.1974 and 19.5.2002 then definitely the two wills ought to have been brought on record either at the time of filing of the suit or before the settlement of the issues. Keeping in mind that injustice may not occur, the Court under its powers under section 151 C.P.C. directs that the documents which find place in the list of documents at Serial Nos.4, 5 and 6, which were filed on 22.2.2019, may be taken on record as additional evidence.

9. Under such circumstances, the impugned order by which the documents at Serial Nos.4 to 6 were allowed to be taken on record, is not being interfered with. Any other document should not be allowed to be taken as evidence. These documents definitely, if proved or disproved, would give a different turn to the case. When the documents are taken on record, the parties shall be allowed to lead evidence which shall definitely be concluded within a period of one month and thereafter the suit itself would be decided within a period of six months.

10. Since, the Court finds that the documents which have been permitted to be taken on record by this Court were available to the plaintiff at the time when the suit was filed and also at the time when the issues were settled, the Court concludes that the plaintiff for this carelessness and laxness should be penalized and, therefore, the documents which are sought to be taken in as additional evidence which were there in the list of documents at Serial Nos.4, 5 and 6, be admitted only if the plaintiff deposits a cost of Rs.10,000/-.

11. The impugned order, accordingly, stands modified.

12. The instant application under Article 227 of the Constitution of India, accordingly, stands party allowed.

(2022) 10 ILRA 1086
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Matters under Art. 227 No. 4745 of 2019

Nagar Nigam Meerut ...Petitioner
Versus
Dr. Sharad Rohtagi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Srivastava, Archana Srivastava

Counsel for the Respondents:
Sri Vinayak Mithal, Sri P.K. Jain (Se. Adv.)

A. Civil Law – Reference of dispute to Arbitrator - Arbitration and Conciliation Act, 1996 - Section 8 - Transfer of Property Act, 1982 - Section 111(a); U.P. Municipal Corporation Act, 1959 - Section 571 – An agreement or a clause in an agreement can be construed as an arbitration agreement, only if,

(i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a Court or Tribunal) or decision;

(ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and

(iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.

Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement. (Para 25)

B. The definition of arbitration agreement and one of the necessary condition to construe an agreement to be an arbitration agreement is that the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by the decision. On the presence of such condition, there cannot be any difficulty to hold that the intention of the parties was to have an arbitration agreement, and thus, the arbitration agreement immediately comes into existence. **Though, it is true that the mention of word 'Arbitration' in the clause may not be necessary to construe an agreement to be an arbitration agreement, but the relevant clause which is being termed as 'arbitration agreement' has to conform to the requirement of arbitration as contained in Section 7 of the Arbitration Act** - It is evident from the clause extracted, which has been relied upon by the petitioner for referring the dispute to the arbitrator in the opinion of the Court lacks necessary ingredients of arbitration agreement that the decision of the arbitrator shall be binding upon the parties. (Para 26, 27)

Perusal of the clause does not in any way indicate the intention of the parties that the decision of the United Province shall be binding upon the parties, therefore, in absence of such a mandatory condition, the aforesaid clause cannot be termed as arbitration clause. Since, this Court has held that the clause referred, is not an arbitration clause, therefore, there is no question of referring the matter to the arbitration and application u/s 8Ga2 of the defendant/petitioner was not maintainable. (Para 28)

C. Parties to the lease deed - If the plaintiff/respondents have not stepped into the shoes of the lessor Haji Sheikh Alauddin and lease deed is not considered to have been executed between the plaintiffs/respondents and Chairman, Municipal Board, Meerut, the terms and conditions of the lease deed was not binding upon the plaintiffs/respondent which means that the above clause which the defendant/petitioner is referring to an arbitration agreement, even otherwise, shall not be binding upon the plaintiffs/respondents. (Para 30)

Writ petition dismissed. (E-4)

Precedent followed:

1. Bharat Sanchar Nigam Ltd. Vs Ashok Kumar, 2014 (138) L.I.C. 901, All. (Para 12)

2. P. Anand Gajapati Raju Vs P.V.G. Raju, 2000 (4) SCC 539 (Para 16)

3. Hindustan Petroleum Corp. Vs Pinkcity Midway Petroleums, 2003 (6) SCC 503 (Para 16)

4. Mallikarjun Vs Gulbarga University, 2004 (1) SCC 372 (Para 16)

5. Ford Credit Kotak Mahindra Ltd. Vs M. Swaminathan, 2005 (2) CTC 487 (Para 16)

6. National Agricultural Corp. Marketing Federation India Ltd. Vs Cains Trading Ltd., 2007 (5) SCC 692 (Para 16)

7. Punjab State & ors. Vs Dina Nath, 2007 (5) SCC 28 (Para 16)

8. M/s A.R.C. Overseas Pvt. Ltd. Vs M/s Bougainvillea Multiplies & Entertainment Centre Pvt. Ltd., 2008 (2) Alld. ALJ 663 (Para 16)

9. Branch Manager, Magma Leasing & Finance Ltd. & anr. Vs Potluri Madhavilata & anr., 2009 (10) SCC 103 (Para 16)

10. P. Dasaratharama Reddy Complex Vs Govt. of Karn. & ors., 2014 (2) SCC 201 (Para 18)

11. Bharat Sanchar Nigam Ltd. Vs Ashok Kumar, 2014 (5) ADJ 644 (Para 16)

12. Booz Allen and Hamilton Inc. Vs SBI Home Finance Ltd. & ors., 2011 (5) SCC 532 (Para 16)

13. Vidya Drolia & ors. Vs Durga Trading Corporation & ors., 2021 (2) SCC 1 (Para 16)

14. Syed Sughra Zaidi Vs Laeeq Ahmad (Dead) through L.Rs. & ors., 2018 (2) SCC 21 (Para 16)

Present petition assails order dated 21.08.2014, passed by Additional Civil Judge (Senior Division), Meerut, rejecting the application 28Ga of the petitioner for referring the dispute to the Arbitrator u/s 8 of the Arbitration and Conciliation Act, 1996, and order dated 28.02.2019 passed by 1st Additional District Judge, Meerut dismissing the revision of petitioner.

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

1. Heard Sri Pankaj Srivastava, learned counsel for the petitioner and Sri P.K. Jain, learned Senior Counsel assisted by Sri Vinayak Mithal, learned counsel for the respondents.

2. The petitioner, by means of the present writ petition under Article 227 of the Constitution of India, has assailed the order dated 21.08.2014 passed by Additional Civil Judge (Senior Division), Meerut in Original Suit No.539 of 2011 (Dr. Jagat Narayan Vs. Nagar Nigam, Meerut) rejecting the application 28Ga of the petitioner for referring the dispute to the Arbitrator under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act, 1996') and order dated 28.02.2019 passed by the 1st Additional District Judge, Meerut in Civil Revision No.05 of 2015 (Nagar Nigam Meerut Vs.Sharad Rohtagi) dismissing the revision of the petitioner.

3. The facts in brief are that Original Suit No.539 of 2011 has been instituted by respondent Nos. 1 to 7 (hereinafter referred to as "plaintiff/respondents) against the petitioner (hereinafter referred to as "defendant/petitioner') alleging that by a registered sale deed dated 18.06.2013, predecessor in title of the plaintiffs/respondents, Late Haji Sheikh Alauddin, son of Late Shaikh Gulam Muhiuddin of Lalkurti Bazar, Meerut had let out part of land measuring about 11 Bighas, 16 Biswas pukhta situated at Budhana Gate, Meerut, formally known as "Barfkhana' to the then Municipal Board, Meerut and now occupied under Gymkhana Maidan, Bachcha Park and Ladies Park under the terms and conditions stipulated in the said lease deed on payment of Rs.1/- per annum by the then Municipal Board to the lessor Late Haji Sheikh Alauddin. Besides others stipulation in the lease deed, the lease was for the term of 99 years commencing w.e.f. 01.04.1911. Another relevant clause of the lease deed in the instant case is that the lease shall be renewable at the option of the lessor at the expiration of original term of 99 years on same term for a period of not less than 30 years. If on the determination of the lease, the lessor shall not elect to renew the lease, it shall be the duty of the lessee to make over the land hereby demised, to the lessor in a condition not worse than its condition at present, but it shall not be bound in that case to restore any trees that may have been removed or otherwise have ceased to exist.

4. According to the plaint, the defendant/respondent i.e., Municipal Corporation (Nagar Nigam), Meerut now represents the former Municipal Board,

Meerut which is bound by the terms and conditions of the lease deed dated 18.06.2013. It is further stated that Late Haji Sheikh Allauddin, son of Sheikh Gulam Mohiuddin had transferred his rights in the land to Sheikh Manzoor Mohiuddin, son of Sheikh Gaush Mohiuddin of Lal Kurti, Meerut by registered Gift Deed dated 13.06.1939/21.06.1939 registered on 22.06.1941, therefore, Sheikh Manzoor Mohiuddin stepped into the shoes of original lessor. Subsequently the said Sheikh Manzoor Mohiuddin made an Exchange Deed with Gulzari Mal, the successor of plaintiff/respondent in respect of 2/3rd portion of the said leased land vide registered deed dated 11.07.1945 and transferred the remaining 1/3rd share in the said leased land to the said Gulzari Mal vide registered sale deed dated 18.04.1949.

5. In para-8 of the plaint, the plaintiffs/respondents had stated the details as to how the property has devolved on the plaintiffs/respondents. It is further stated that Late Gulzari Mal (predecessors of respondents) in the year1978 informed the then Municipal Board about his right to realize rent from the Municipal Board, Meerut under the said lease deed dated 18.06.1913 (herein-after referred to as the 'lease deed'). In reply to the said letter, the then Municipal Board, Meerut vide letter dated 179/ME/PWD dated 26.07.1978 asked for some clarification regarding his ownership and rights and other particulars. It is further stated that Sri Awadh Bihari Lal, son of Late Gulzari Mal replied the said letter addressing to the application of Civil Abhiyanta, Nagar Palika, Meerut on 15.07.1978, clarifying about his ownership and his rights as one of the lessor after the transfer of property by Haji Sheikh Allauddin.

6. Further case of the plaintiffs/respondents is that the period of lease has expired by efflux of time on 31.03.2010, and thereafter the possession of the defendant/revisionist is unauthorized, illegal and is that of trespasser. It is also stated that the defendant/revisionist in contravention of the terms and conditions of the lease deed had raised unauthorized constructions on the land which is absolutely illegal and liable to be removed.

7. It is further stated that since the tenancy has been determined by efflux of time under Section 111 (a) of the Transfer of of Property Act, 1982 (herein-after referred to as "T.P.Act'), therefore, there is no need to serve notice under Section 106 of the T.P. Act. The plaintiffs/respondents served a notice upon the defendant/revisionist through their counsel Sri Ashutosh Garga, Advocate, Meerut on 14.03.2011 under Section 571 of the U.P. Municipal Corporation Act, 1959 stating therein that after the expiry of period of two months, the suit for the arrears of rent, eviction and mesne profit shall be filed in the competent court having jurisdiction.

8. In the aforesaid backdrop, the plaintiff/respondents prayed for the following reliefs:-

"(a) That by a decree of this Hon'ble Court, the plaintiffs be got delivered the actual physical and vacant possession of the demised land and measuring about 11 Bigha, 16 Biswa situated at Budhana Gate Meerut formely known as Barf Khana and Now occupied under Gymkhana Maidan, Bachcha Park and Ladies Park, the boundaries of which are mentioned at the foot of this Plaint, from the defendant or any other person found in occupation thereof, after removing

the superstructures/ constructions raised on the said land.

(b) That the plaintiffs be got awarded a sum of Rs.3,00,000/- (Rs. Three lacs only) towards mesne profit for 17.05.2011.

(c) That the plaintiffs be got awarded mesne profit at the rate of Rs.3,00,000/- (Rs. Three lacs only) per day from the date of filing of the suit till the date of delivery of the possession of the demised property as mentioned in paragraph (A) supra the court fees on the said amount shall be paid at the time of execution.

(d) That such other relief as the Hon'ble Court may deem think fit and proper may kindly be awarded to the plaintiffs again the defendant under the facts and circumstances of the present case.

(e) That the cost of the suit be awarded to the plaintiffs against the defendant."

9. In the aforesaid suit, defendant/revisionist filed an application 28Ga2 under Section 8 of the Arbitration and Conciliation Act,1996 (herein-after referred to 'Act 1996') stating therein that under Clause 9 of the lease deed, if any dispute arises between the parties, the matter shall be referred to the State of U.P. and the decision taken thereon by the State of U.P. shall be final and binding upon the parties.

10. Plaintiff/respondents filed an objection against the said application 28Ga 2 of the defendant/revisionist taking a plea that Clause 9 of the lease deed cannot be termed to be an arbitration clause as alleged by the defendant/revisionist. It is further stated that there is no dispute in respect of covenants of the deed or proper fulfillment of the deed. The term mentioned in the lease deed has already expired, thus, the present case does not fall within the ambit of purview and scope of clause 9 of the lease deed as alleged by the defendant/revisionist.

11. It is further stated that it is not mentioned in the clause that the decision shall be binding on the parties to the deed as alleged by the defendant/revisionist.

12. The trial Court by order dated 21.08.2014 by placing reliance of a judgement of this Court in the case reported in **2014 (138) L.I.C. 901, All., Bharat Sanchar Nigam Limited Vs. Ashok Kumar** held that the terms and conditions of the lease deed are binding upon the parties during the subsistence of lease deed, and as the term of the lease deed has expired on 31.03.2010, therefore, the dispute is not referable under Section 8 of the Act, 1996.

13. In the revision, preferred by the petitioner/defendant, the revisional Court after considering various clauses of the agreement found that after expiry of the lease deed, the lessor i.e., plaintiffs/respondents are entitled to regain the possession of the leased property. The revisional court further held that the suit is for possession of the property leased out to the defendant/petitioner for a fixed period of 99 years and after expiry of the term of the lease, the lease has not been renewed between the parties. Accordingly, it held that as the dispute between the parties about the rights of the plaintiffs to regain the possession of the property is not one which relates to the rights and liabilities to

the parties under the terms of the lease deed and the claim of the plaintiffs/respondents is clearly one that arose only after expiry of the term of the lease, and thus, the dispute is beyond the term of lease deed executed between the parties in the year 1911. Accordingly, it held that the matter is not referable to the Arbitration under Section 8 of the Act, 1996 and accordingly,it dismissed the revision.

14. Challenging the said order, learned counsel for the petitioner has contend that the finding of the trial Court in rejecting the application 28Ga2 of the defendant/petitioner is perverse and illegal as there was no lease agreement between the plaintiffs/respondents and defendant/petitioner. It is further submitted that the Court below has incorrectly narrated the basic facts which clearly indicate that the impugned orders have been passed in a very casual manner. He further contends that the defendant/petitioner cited number of judgements before the Court below but none of the judgements cited by the defendant/ petitioner have been dealt with by the Court below and this reflects that very casual approach had been adopted by the Court below in deciding the application 28Ga2, therefore, the impugned orders are liable to be set aside.

15. Lastly, it is urged that there is an arbitration clause and even after the lease deed is expired, the arbitration clause shall remain in existence and is binding upon the parties, and thus, both the Courts below were obliged to refer the dispute under Section 8 of the Act, 1996 and it is only the domain of the Arbitrator to see whether the dispute falls within the ambit of the arbitration clause or not, and, thus, it is contended that the Court below has committed jurisdictional error in rejecting the revision of the defendant/petitioner.

16. In support of his case, learned counsel for the defendant petitioner has placed reliance upon the judgement of the Apex Court reported in ***2000 (4) SCC 539 P. Anand Gajapati Raju Vs. P.V.G Raju, 2003 (6) SCC 503 Hindustan Petrolium Corporation Ltd. Vs. Pinkcity Midway Petroleums, 2004 (1) SCC 372 Mallikarjun vs. Gulbarga University, 2005 (2) CTC 487 Ford Credit Kotak Mahindra Ltd., vs M. Swaminathan , 2007 (5) SCC 692 National Agricultural Corp. Marketing Federation India Ltd. vs Cains Trading Ltd., 2007 (5) SCC 28 Punjab State and Ors. Vs Dina Nath, 2008 (2) Alld. ALJ 663, M/S A.R.C Overseas Private Limited vs M/S Bougainvillea Multiplies and Entertainment Centre Pvt. Ltd.& 2009 (10) SCC 103, Branch Manager, Magma Leasing And Finance Ltd and Another vs Potluri Madhavilata And Another.***

17. Per contra, learned counsel for the plaintiffs/respondents has submitted that the Clause on which reliance is placed by the defendant/petitioner is not an arbitration agreement as it does not conform to Section 7 of the Arbitration Act,1996.It is further contended that the cause of action for filing the suit for eviction had arisen after expiry of the lease deed on 31/03/2010,therefore, there is no claim with regard to the period during which the lease was in subsistence, hence, there is no dispute regarding the terms and conditions of the agreement or breach of any terms and conditions of the agreement when lease deed was in force, therefore, the dispute does not come within the ambit of alleged arbitration clause.

18. It is further contended that the defendant/petitioner did not hand over the

actual physical vacant possession of the land after expiry of the lease deed on 31.03.2010. The plaintiffs/ respondents did not consent to the occupation of the tenant after the expiry of the lease deed, therefore, the status of the defendant/petitioner is that of a tenant at sufferance (unauthorized occupant), hence, is liable to be ejected forthwith without issuance of any prior notice. In support of his case, he has relied upon the upon the judgement of the Apex Court as well as this Court reported in ***2014 (2) SCC 201 P. Dasaratharama Reddy Complex vs. Government of Karnataka and Ors., 2014 (5) ADJ 644, Bharat Sanchar Nigam Limited vs. Ashok Kumar, 2011 (5) SCC 532 Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors., 2021 (2) SCC 1 Vidya Drolia and Ors. vs. Durga Trading Corporation and Ors & 2018 (2) SCC 21 Syed Sughra Zaidi vs. Laeeq Ahmad (Dead) through L.Rs. and Ors.***

19. I have heard learned counsel for the parties and perused the record.

20. The fact as to how the plaintiffs/respondents came to be the owner of the property has been delineated in the earlier part of the judgement. They claimed the eviction of the petitioner/ defendant from the property on the ground that the term of the lease period has expired and after expiration of the lease period, the possession of the petitioner/defendant is illegal and their status is that of a trespasser.

21. Now, the petitioner/defendant has instituted an application 28Ga2 under Section 8 of the Act, 1996 on the basis of stipulation referred as arbitration clause in the lease deed contending that the dispute in the instant case is covered under the said stipulation and as such, the suit is not maintainable and it is only the Arbitrator who has jurisdiction to decide the dispute. The stipulations on which the petitioner/defendant are harping is reproduced herein-below:-

"Provided further that should any dispute arise at any time in future between the parties to the deed as to the proper fulfillment or otherwise covenants or of any matter with reference to this deed, the dispute shall be referred to the Government of the United of Province of Agra and Oudh, and the decision of the Government shall be accepted as final by the parties and their representative and assigns;"

22. According to the defendant/petitioner, the aforesaid clause is an arbitration agreement and conforms to the requirement of Section 7 of the Act, 1996 which defines the arbitration agreement. It is contended that even if the word 'Arbitration' is not used in a clause relating to the settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement.

23. In support of the aforesaid contention, petitioner has relied upon the judgement of the Apex Court reported in 2007 (5) SCC 28. Paras- 8 & 10 of the said judgement are reproduced herein-below:-

"8. A bare perusal of the definition of arbitration agreement would clearly show that an arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if any dispute arises between them in respect of the subject matter of the contract, such dispute shall be referred to arbitration. In

that case, such agreement would certainly spell out an arbitration agreement. [See Rukmani Bai Gupta v. Collector of Jabalpur AIR 1981 SC 479. However, from the definition of the arbitration agreement, it is also clear that the agreement must be in writing and to interpret the agreement as an "arbitration agreement" one has to ascertain the intention of the parties and also treatment of the decision as final. If the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by that decision, there cannot be any difficulty to hold that the intention of the parties was to have an arbitration agreement, that is to say, an arbitration agreement immediately comes into existence.

10. We have already noted clause 4 of the Work Order as discussed hereinabove. It is true that in the aforesaid clause 4 of the Work Order, the words "arbitration" and "arbitrator" are not indicated; but in our view, omission to mention the words "arbitration" and "arbitrator" as noted herein earlier cannot be a ground to hold that the said clause was not an arbitration agreement within the meaning of Section 2[a] of the Act. The essential requirements as pointed out herein earlier are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final. As the conditions to constitute an "arbitration agreement" have been satisfied, we hold that clause 4 of the Work Order must be construed to be an arbitration agreement and dispute raised by the parties must be referred to the arbitrator. In K.K. Modi v. K.N. Modi [1998] 3 SCC5 73 this Court had laid down the test as to when a clause can be construed to be an arbitration agreement when it appears from the same that there was an agreement between the parties that any dispute shall be referred to the arbitrator. This would be clear when we read para 17 of the said judgment and Points 5 and 6 of the same which read as under:

5. that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law, and lastly

6. the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when reference is made to tribunal. "

24. On the other hand, learned counsel for the plaintiffs/ respondents has contended that stipulation extracted above, is not an arbitration clause, inasmuch as it does not fulfill the test laid down by the Apex Court for it to be a valid arbitration agreement. It is submitted that the aforesaid clause does not refer to word 'Arbitration' as the mode of settlement of dispute between the parties. The perusal of the said clause does not indicate the intention of the parties that the decision of the Government of United Province of Agra and Awadh is binding on either party, therefore, the aforesaid clause is not an arbitration clause.

25. In support of the said argument, learned counsel for the respondent has placed reliance upon the judgment of the Apex Court reported in 2**014 (2) SCC 201 P. Dasaratharama Reddy Complex vs. Government of Karnataka and Ors.** He has placed reliance upon paras-14 & 27 of the said judgement, which are being reproduced herein-below:-

"14. In Mysore Construction Co. v. Karnataka Power Corporation Limited and Ors. (supra), the learned Designated Judge referred to the passage from Russell on Arbitration (19th Edition, page 59), the judgments of this Court in K.K. Modi v. K.N. Modi and Ors. (supra), Chief Conservator of Forests, Rewa v. Ratan Singh Hans MANU/SC/0066/1966 : AIR 1967 SC 166; Smt. Rukmanibai Gupta v. the Collector, Jabalpur (supra); State of Uttar Pradesh v. Tipper Chand (1980) 2 SCC 341; State of Orissa v. Damodar Das (1996) 2 SCC 216; Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corporation Limited, Kanpur (1999) 2 SCC 166 and observed:

The above decisions make it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if,

(i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a Court or Tribunal) or decision;

(ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and

(iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.

Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement.

27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings, quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression 'in the first place' unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause.

26. Para-8 of the judgment in the case of **Punjab State and Ors vs Dina Nath (supra)** relied upon by the learned counsel for the petitioner, extracted above, also

defines the definition of arbitration agreement and one of the necessary condition to construe an agreement to be an arbitration agreement is that the parties had desired and intended that a dispute must be referred to arbitration for decision and they would undertake to abide by the decision. On the presence of such condition, there cannot be any difficulty to hold that the intention of the parties was to have an arbitration agreement, and thus, the arbitration agreement immediately comes into existence. Though, it is true that the mention of word 'Arbitration' in the clause may not be necessary to construe an agreement to be an arbitration agreement, but the relevant clause which is being termed as 'arbitration agreement' has to conform to the requirement of arbitration as contained in Section 7 of the Arbitration Act and elaborated by the judgement of the Apex Court .

27. The Court now on the principles set out by the Apex Court proceeds to find out whether in the instant case, the stipulation referred as an arbitration agreement, can be termed an arbitration agreement; it is evident from the clause extracted above, which has been relied upon by the petitioner for referring the dispute to the arbitrator in the opinion of the Court lacks necessary ingredients of arbitration agreement that the decision of the arbitrator shall be binding upon the parties.

28. Perusal of the aforesaid clause does not in any way indicate the intention of the parties that the decision of the United Province shall be binding upon the parties, therefore, in absence of such a mandatory condition, the aforesaid clause cannot be termed as arbitration clause. Since, this Court has held that the clause referred above, is not an arbitration clause, therefore, there is no question of referring the matter to the arbitration and application under Section 8Ga2 of the defendant/ petitioner was not maintainable.

29. It is also pertinent to note one of the arguments raised by the counsel for the petitioner that the Court below has noted wrong fact in the order that the lease deed was executed between the plaintiffs/ respondent and defendant/petitioner and this reflects that the impugned orders were passed in a most casual manner. In this regard, para-39 of the writ petition is being reproduced herein-below:-

"39. That the additional Civil Judge (Senior Division) Meerut in its order dated 21.08.2014 has incorrectly mentioned and discussed the facts which were not even the case of the plaintiff. The court below stated that there was a Lease deed dated 1.4.1911 between the plaintiff and defendant. But it was not even the case set up in the plaint.

A bare perusal of the lease deed also however shows that there was no lease deed executed between the plaintiffs and defendant Rather it was between Haji Sheikh Alauddin and Chairman Municipal Board, Meerut. The court below had incorrectly narrated the basis facts which clearly indicate that the impugned order was passed in a most casual manner."

30. If that argument of the learned counsel for the petitioner is accepted, which means that if the plaintiff/respondents have not stepped into the shoes of the lessor Haji Sheikh Alauddin and lease deed is not considered to have been executed between the plaintiffs/respondents and Chairman,

Municipal Board, Meerut, the terms and conditions of the lease deed was not binding upon the plaintiffs/respondent which means that the above clause which the defendant/petitioner is referring to an arbitration agreement, even otherwise, shall not be binding upon the plaintiffs/ respondents.

31. In view of the finding that the stipulation referred as 'arbitration agreement' of the lease deed is not an 'arbitration agreement', therefore, in the opinion of the Court, the application 8Ga2 under Section 8 of the Act, 1996 filed by the defendant/petitioner is misconceived and was not maintainable. In such view of the fact, the Court is not proceeding to deal with the other contentions of the parties to unnecessarily burden the judgement.

32. Thus, for the reasons given above, the writ petition lacks merit. It is, accordingly, **dismissed.**

(2022) 10 ILRA 1096
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Matters under Art. 227 (Civil) No. 6178 of 2022

Naval Kishor Sharma ...Petitioner
Versus
State Of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
In Person, Sri Mohammad Iftekhar

Counsel for the Respondents:
G.A.

A. Criminal Law – Hate Speech - Indian Penal Code: Section 295(A), 298, 419, 420, 501; Code of Criminal Procedure: Section 200, 202, 203.

Jurisdiction - Summoning of a person is a serious issue and a person cannot be summoned merely by making an allegation against him - The Apex Court in the case of *Mahendra Singh Dhoni* (*infra*) has specifically sounded word of caution to the Magistrates conferred with the power of taking cognizance and issuing summons to satisfy themselves with regard to concept of territorial jurisdiction apart from the other aspects of the matter. In the present case, the trial court has rightly followed the procedure and passed the impugned order dated 11.03.2022. The trial court was even cognizant of the fact that summoning of a person in a criminal case is a serious matter. The order of the trial court is thus found to be a proper and judicious exercise of its power. The revisional court while deciding the revision against the order dated 11.03.2022 passed by the trial court has also considered every aspect of the matter and then has come to its conclusion that the order impugned therein does not suffer from any illegality and has dismissed the revision. The place of occurrence in the present case is Malakheda, District Alwar (Rajasthan). The complaint, inquiry on it in the nature of statements u/s 200 and 202 Cr.P.C. are vague in so far as accruing of the cause of action to the complainant at the place of filing of the complaint is concerned. This Court does not find any irregularity, illegality or perversity in the judgment and order dated 26.04.2022 passed by the revisional court also. Thus looking to the facts and circumstances of the case, this Court comes to the conclusion that **the Court at Mau had no territorial jurisdiction to entertain the said complaint.** (Para 27, 28)

B. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case the only evidence relied upon is the newspaper reporting and nothing else. **As per the settled legal position, a newspaper report is not a "legal evidence".** (Para 21)

C. Conveying a press conference and/or giving an interview to the press is a totally different act than addressing a general public meeting in elections. A person holding a press conference and a person giving an interview to the press has a clear intention and message to the persons present that his speech or lecture or answers be published in newspaper and magazines. Addressing a general public meeting during elections for the purposes of canvassing in elections is a totally different act with a different intention and object. The same is to address the gathering present at the spot so as to imbibe a thought in them for supporting the said political party. (Para 23)

D. Words and Phrases – *'consequence' -* the word "consequence" appearing in S.179 of Cr.P.C., has been held as a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. It embraces consequences which modify or complete the acts alleged to be an offence. (Para 26)

Writ petition dismissed. (E-4)

Precedent followed:

1. Anoop Purie Vs Jayakumar Hiremath, (2017) 7 SCC 767 (Para 11)

2. Mahendra Singh Dhoni Vs Yerraguntla Shyamsundar, (2017) 7 SCC 760 (Para 11)

3. Samant N. Balkrishna Vs George Fernandez, (1969) 3 SCC 238 (Para 16)

4. Laxmi Raj Shetty Vs St. of T.N., (1988) 3 SCC 319 (Para 17)

5. Quamarul Islam Vs S.K. Kanta, 1994 Supp (3) SCC 5 (Para 18)

6. Ghanshyam Upadhyay Vs St. of U.P., (2020) 16 SCC 811 (Para 19)

7. Ganeshi Lal Vs Nand Kishore, 1912 SCC Online All 76; 1912 (Vol. X) A.L.J.R. 45 (Para 26)

Precedent distinguished:

1. Dr. Subramaniam Swamy Vs Prabhakar S. Pai & anr., 1983 (2) BomCR 129 (Para 8, 22)

2. P. Lankesh & anr. Vs H. Shivappa & another, 1994 0 CrLJ 3510 (Para 8, 22)

3. Dilip Hazarika Vs Nain Ch. Buragohain, 2002 CrLJ 1608 (Para 8, 22)

4. Pankaj Jyoti Borah Vs The State of Assam & ors., 2018 0 CrLJ 1908 (Para 8, 22)

5. Ashok Singhal Vs St. of U.P. & anr., 2005 2 Crimes (HC) 7 (Para 8, 22)

6. Lee Kun Hee, President, Samsung Corporation, South Korea & ors. Vs St. of U. P. & ors., (2012) 3 SCC 132 (Para 8, 22)

Present petition assails judgment and order dated 26.4.2022, passed by Sessions Judge, Mau as well as judgment and order dated 11.03.2022, passed by Civil Judge (S.D.)/Addl. Chief Judicial Magistrate/M.P. M.L.A. Court, Mau.

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Mohammed Iftekhar Farooqui, Advocate learned counsel for the petitioner, Sri Manish Goyal, learned Senior Advocate/Additional Advocate General, Sri S.K. Pal, learned Government Advocate, Sri A.K. Sand, learned Additional Government Advocate, all assisted by Sri Rupak Chaubey, Sri B.B. Upadhyay, Sri S.B. Maurya and Sri Raj Kumar Gupta, learned counsels for the State of U.P. and perused the records.

2. The present petition under Article 227 of the Constitution of India has been filed by Naval Kishor Sharma, S/o Deonath Sharma with the following prayers:-

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to set aside the judgement and

order dated 26.4.2022 passed by Sessions Judge, Mau in Criminal Revision No. 54 of 2022, Nawal Kishor Sharma Versus State of U.P. as well as judgement and order dated 11.03.2022 passed by Civil Judge (S.D.)/Addl. Chief Judicial Magistrate/M.P. M.L.A. Court, Mau in Misc. Case No.128 of 2019, Nawal Kishore Sharma Vs. Ajay Singh Vishtha @ Yogi Adityanath. Otherwise petitioner would suffer with irreparable loss.

It is further prayed that the court below may be directed to register complaint case against respondent no.2 and hear the matter accordingly.

Or may pass any such further order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case."

3. The brief facts of the case are that a complaint dated 11.1.2019 was filed by the petitioner against Ajay Singh Bist alias Yogi Adityanath for offences under Section 295 (A), 298, 419, 420, 501 IPC, Police Station Dohrighat, District Mau titled as Naval Kishor Sharma Versus Ajay Singh Bist alias Yogi Adityanath mentioning therein the date of occurrence as 28.11.2018, the names and addresses of the witnesses as Naval Kishor (complainant), Yugal Kishore Sharma, S/o Devnath Sharma, Santosh Prajapati, S/o Sidhari Prajapati and other witnesses and record keeper Superintendent Police, Mau alleging therein that the respondent-accused is a Mahant of Gorakshapeeth, Gorakhnath, Police Station Gorakhnath and at present the Chief Minister, Government of Uttar Pradesh. On 28.11.2018, he addressed a public meeting with regards to general Vidhan Sabha Elections in Malakheda, Alwar (Rajasthan) in which he stated certain words for Lord Bajrangbali due to which the religious sentiments of public who are followers of Sri Bajrangbali have been hurt. The respondent knowing that his speech will cause hurt to the sentiments of a specific group of people has stated about it in his general public meeting. He has also caused disrepute to his position as Chief Minister which is a constitutional post and has also not followed the circular issued by the Election Commission, Government of India. The said acts have been done by him for benefits in a wrongful manner to his party in elections and also to separate two group of persons so that they may start hating each other and may fight. The said fact has been read by the complainant and other persons in daily newspapers due to which the religious sentiments of other persons also got hurt. A legal notice dated 30.11.2018 was sent by the complainant but despite service of notice calling upon the respondent to tender apology to the public in writing and orally, he did not do it and by taking law in his hands the presiding deity of the complainant has been humiliated and to cause gain to his political party, humiliated Lord Bajrangbali in a public meeting. The faith of the complainant has been hurt. The complainant tried to lodge a report at the local police station and also gave a report to the Superintendent of Police, Mau on 1.1.2019 but no action has been taken and hence he has filed the present complaint. He prays that after taking the evidence, the accused be punished for offences under Section 295 (A), 298, 419, 420, 501 IPC.

4. In support of the complaint, the complainant was examined under Section 200 Cr.P.C. wherein he reiterated the version of the complaint. Under Section 202 Cr.P.C. Yugal Kishore Sharma, S/o Devnath Sharma was examined as P.W.1

and Anoop Kumar Yadav, S/o Rajendra Yadav was examined as P.W.2. The complainant also filed a copy of a newspaper named "Jansandesh Times" along with complaint, the copy of the same has been annexed as Annexure No. - S.A-1 to the supplementary affidavit dated 7.9.2022.

5. The complaint as filed was numbered as Criminal Complaint Case No.128 of 2019, Naval Kishor Sharma Versus Ajay Singh Bist alias Yogi Adityanath.

6. Vide order dated 11.03.2022 passed by the Civil Judge (Senior Division)/Additional Chief Judicial Magistrate, M.P. M.L.A, Mau the said complaint was dismissed under Section 203 Cr.P.C. with the observation that the court has no territorial jurisdiction to entertain the same. Against the said order dated 11.03.2022 the complainant/petitioner filed a criminal revision before the Sessions Judge, Mau which was numbered as Criminal Revision No.54 of 2022, Naval Kishor Sharma Versus State of U.P. and another. The said revision was also dismissed vide judgement and order dated 26.04.2022 passed by the Sessions Judge, Mau. The present petition under Article 227 o

7. Learned counsel for the petitioner argued that:-

1) The hate speech was a deliberate intention in the general rally during election campaign. The opposite party no.2 was in his knowledge that it would cause turmoil and agitation throughout the country.

2) Due to the deliberate speech against Lord Bajrangbali, crores of his followers were pained.

3) The words used against Lord Bajrangbali were to impress people of reserved constituency.

4) The hate speech was read by the petitioner which hurt his religious sentiments and thus he pursued the remedy available under law.

5) This is not the first incident by the opposite party no.2 but is a repeated incident by a person holding a prestigious and constitutional post.

6) The complaint is maintainable in view of Section 179 Cr.P.C. which states that the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued and in the present matter the consequence has ensued being the petitioner reading the said newspaper which has hurt his religious feelings.

8. Learned counsel for the petitioner has relied upon the following judgements:-

(i.) Dr. Subramaniam Swamy Vs. Prabhakar S. Pai and another, 1983 (2) BomCR 129 (para 9).

(ii.) P. Lankesh & another Vs. H. Shivappa & another, 1994 0 CrLJ 3510 (para 10).

(iii.) Dilip Hazarika Vs. Nalin Ch Buragohain, 2002 CrLJ 1608 (para 6).

(iv.) Pankaj Jyoti Borah Vs. The State of Assam and others, 2018 0 CrLJ 1908 (para 9).

(v.) Ashok Singhal Vs. State of U.P. and another, 2005 2 Crimes (HC) 7 (para 10).

(vi.) Lee Kun Hee, President, Samsung Corporation, South Korea and others Vs. State of Uttar Pradesh and others, (2012) 3 SCC 132 (para 35).

9. It is argued that in all the said cases, the courts concerned have held that the place where the consequence has ensued is the place where a court gets territorial jurisdiction.

10. Learned Additional Advocate General for the State of U.P. vehemently opposed the present petition and the arguments of learned counsel for the petitioner. It is argued that:-

1. The opposite party no.2 in the present petition who has been arrayed as the accused in the complaint is a non-existent person. A person who has renounced the world and has entered into Sanyasi world and has become a Yogi cannot be called by any other name except for the name which he has adopted after becoming a Yogi. It is argued that the complaint states of a non-existent person as the accused and even the same person has been made as a respondent no.2 in the present petition.

2. The complaint is totally silent inasmuch as where and when the complainant read the newspaper. The complainant has not even stated that he was a subscriber to the said newspaper. It is also not stated either in the complaint or in his statement that the said newspaper was having any circulation in his area. It is argued that the newspaper is the foundation of creation of territorial jurisdiction in the present matter. The description about the same is totally missing.

3. The complainant has not made the Editor of the newspaper as an accused. The bare reading of the said newspaper shows that it is some postal edition of the newspaper. There is no averment by the complainant that the said newspaper is circulated in his area. It is argued that Section 179 Cr.P.C. is not attracted at all in the present matter. The provision which applies is Section 177 Cr.P.C. The complainant does not anywhere stated about the credentials of the newspaper which would go to show that the same was a paper being circulated in his area. In the complaint he states of the news item to be read in daily newspaper but in his statement under Section 200 Cr.P.C., he states that the said news was heard, seen and read by him in print media and electronic media. The witnesses produced by him have also stated that they and other persons have read the news in daily newspaper but even the said witnesses have not stated about the date of the said newspaper, their names and the place where they have read it.

4. In so far as the alleged witnesses produced by the complainant are concerned, Yugal Kishore Sharma, P.W.1 who was examined under Section 202 Cr.P.C. is his real brother as is apparent from his parentage and also his address. The said fact has been concealed by the complainant and even by the said witness.

5. It is argued that the present petition is under Article 227 of the Constitution of India. The Court is a supervisory court under the said jurisdiction. There has been concurrent findings by two courts below being the trial court and the revisional court. This Court cannot act as a Court of first appeal to reappreciate, reweight evidence or facts upon which determination under challenge is based. When a final finding is justified or can be supported, the supervisory jurisdiction cannot be used to correct it.

6. The document at page 22 of the supplementary affidavit which is being stated to be the list of cases lodged against the respondent no.2 is a new document filed before this Court. There is no reference of the same before the trial court and even before the revisional court and as such the same cannot be considered at this stage.

11. Learned counsel has relied upon the following judgements:-

(I) Aroon Purie Vs. Jayakumar Hiremath : (2017) 7 SCC 767 (para 3).

(II) Mahendra Singh Dhoni Vs. Yerraguntla Shyamsundar : (2017) 7 SCC 760 (para 14).

12. By placing the judgement in the case of Aroon Purie (Supra), it is argued that the inquiry in the matter was completed by the learned Magistrate who then came to the conclusion that the court has no territorial jurisdiction over it and then by a detailed order dismissed the same. Further by placing the judgement in the case of Mahendra Singh Dhoni (Supra), it is argued that the Apex Court has put a word of caution that the Magistrates who have been conferred with the power of taking cognizance and issuing summons are required to carefully scrutinize whether the allegations made in the complaint proceeding meet the basic ingredients of the offence, whether the concept of territorial jurisdiction is satisfied and whether the accused is really required to be summoned and the said things are to be treated as the primary judicial responsibility of the Court issuing process. In the present case, the learned Magistrate has made an inquiry with regards to territorial jurisdiction of the matter and the jurisdiction of the said court and then has reached to its satisfaction that the court has no territorial jurisdiction to entertain the said complaint and as such dismissed the same under Section 203 Cr.P.C. It is argued that the present case is a case which deserves to be dismissed with exemplary cost as the petitioner is abusing the process of law and courts for vested interest knowing the actual position of law as he is an Advocate.

13. After having heard learned counsels for the parties and perusing the records, the facts which emerge out are that the petitioner herein had filed a complaint dated 11.1.2019 against the opposite party no.2 for offences under Section 295 (A), 298, 419, 420, 501 IPC for an incident which is said to have taken place on 28.11.2018 in Malakheda, District Alwar (Rajasthan). The complaint has been filed before the Chief Judicial Magistrate, Mau, District Mau by the petitioner who is a resident of Mau for attracting territorial jurisdiction there. The complainant states that he and other persons have read in daily newspaper a news item relating to a hate speech given by the accused in Malakheda, District Alwar (Rajasthan) on 28.11.2018 by which words being derogatory in nature

against Lord Bajrangbali were used which has hurt his religious sentiments. It is relevant to state here that it is stated that the said speech was addressed in a public meeting of general Vidhan Sabha Elections at the said place. The complainant in the inquiry under Section 200 Cr.P.C. then states that the accused with an intention to hurt the religious sentiments of a group of persons had given the speech which was heard, seen and read by him in print media and electronic media. Yugal Kishore Sharma, P.W.1 and Anoop Kumar Yadav, P.W.2 in their statements under Section 202 Cr.P.C. have stated that the complainant, they and other people have read in daily newspaper about the said speech due to which their religious sentiments have been hurt. The details of the newspaper and its credentials are conspicuously missing in the complaint, statement recorded under Section 200 Cr.P.C. of the complainant and the statements of the alleged witnesses under Section 202 Cr.P.C. The complainant does not anywhere state about the date and time when he read the said news item. His witnesses are also silent about the same. A copy of Jansandesh Times newspaper has been filed before the trial court which has also been filed before this Court as Annexure S.A-1 to the supplementary affidavit. The relevant paragraphs in which it has been addressed in the said supplementary affidavit is para no.4 in which the same has been described as newspaper dated 29.11.2018 and for the first time, it is stated in the said paragraph that the said newspaper is having its circulation and selling in district Jaunpur, Azamgarh, Mau and Gorakhpur and is published from Varanasi. The said averments are missing in the complaint, statement of the complainant and in the statement of his witnesses.

14. The backbone of the present complaint is the news published in a local newspaper. The basis for making allegations is an article relied by the petitioner said to have been published in a newspaper named as "Jansandesh Times". Admittedly the complainant and his witnesses were not present in the said meeting where the words as said to have been hurt their religious sentiments, faith and have caused disrepute to Lord Bajrangbali were said. The complainant in his statement under Section 200 Cr.P.C. states that he heard, saw and read the same in print media and electronic media but his witnesses in the inquiry under Section 202 Cr.P.C. stated of reading the same in daily newspapers but there is nothing on record to corroborate the same and it is too vague to be believed. Only a newspaper cutting has been placed by the complainant on record as evidence although he states to have seen and heard it in electronic media also.

15. The reporting in newspaper has to be fortified whether it is correct or not. It is a hearsay secondary evidence in itself and unless the person reporting it is examined, is not admissible. Any other person before whom the incident has occurred can also be examined to prove the said fact and make it admissible.

16. The admissibility of news paper reports in evidence has been considered and decided many times. In the case of ***Samant N. Balkrishna v. George Fernandez :*** **(1969) 3 SCC 238,** the Apex Court in paragraph 47 has held as under:-

"47. The meeting at Shivaji Park about which we shall say something presently, was not held in Mr Fernandez's constituency. The similarity of ideas or

even of words cannot be pressed into service to show consent. There was a stated policy of Sampurna Maharashtra Samiti which wanted to join in Maharashtra all the areas which had not so far been joined and statements in that behalf must have been made not only by Mr Atrey but by several other persons. Since Mr Atrey was not appointed as agent we cannot go by the similarity of language alone. It is also very significant that not a single speech of Mr Fernandez was relied upon and only one speech of Mr Fernandez namely, that at Shivaji Park was brought into arguments before us by an amendment which we disallowed. The best proof would have been his own speech or some propaganda material such as leaflets or pamphlets etc. but none was produced. The "Maratha" was an independent newspaper not under the control of the Sampurna Maharashtra Samiti or the S.S.P. which was sponsoring Mr Fernandez or Mr Fernandez himself. Further we have ruled out news items which it is the function of the newspaper to publish. A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well-known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. In the present case the only attempt to prove a speech of Mr Fernandez was made in connection with the Shivaji Park meeting. Similarly the editorials state the policy of the newspaper and its comment upon the events. Many of the news items were published in other papers also. For example Free Press Journal, the Blitz and writers like Welles Hengens had also published similar statements. If they could not be regarded as agents of Mr Fernandez we do not see any reason to hold that the "Maratha" or Mr Atrey can safely be regarded as agent of Mr Fernandez when acting for the newspaper so as to prove his consent to the publication of the defamatory matter. We are therefore of opinion that consent cannot reasonably be inferred to the publications in the "Maratha". We are supported in our approach to the problem by a large body of case law to which our attention was drawn by Mr Chari. We may refer to a few cases here : Bishwanath Upadhaya v. Hardal Das [1958 Ass 97] ; Abdul Majeed v. Bhargavan (Krishnan) [AIR 1963 Ker 18] ; Rustom Satin v. Dr Sampoornanand [20 ELR 221] ; Sarla Devi Pathak v. Birendra Singh [20 ELR 275] ; Krishna Kumar v. Krishna Gopal [AIR 1964 Raj 21] ; Lalsing Kesbrising Sehvar v. Vallabhdas Shankarlal Phekdi [AIR 1967 Guj 62] ; Badri Narain Singh v. Kamdeo Prasad Singh [AIR 1951 Pat 41] and Sarat Chandra Rabba v. Khagendranath Math [AIR 1961 SC 334] . It is not necessary to refer to these cases in detail except to point out that the Rajasthan case dissents from the case from Assam on which Mr Jethamalani relied. The principle of law is settled that consent may be inferred from circumstantial evidence but the circumstances must point unerringly to the conclusion and must not admit of any other explanation. Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words, the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election

agent. Since we have held that Mr Atrey's activities must be viewed in two compartments, one connected with Mr Fernandez and the other connected with the newspaper we have to find out whether there is an irresistable inference of guilt on the part of Mr Fernandez. Some of the English cases cited by Mr Jethamalani are not a safeguide because in England a distinction is made between "illegal practices" and "corrupt practices". Cases dealing with "illegal practices" in which the candidate is held responsible for the acts of his agent are not a proper guide. It is to be noticed that making of a false statement is regarded as "corrupt practice" and not an "illegal practice" and the tests are different for a corrupt practice. In India all corrupt practices stand on the same footing. The only difference made is that when consent is proved on the part of the candidate or his election agent to the commission of corrupt practice, that itself is sufficient. When a corrupt practice is committed by an agent and there is no such consent then the petitioner must go further and prove that the result of the election insofar as the returned candidate is concerned was materially affected. In Bayley v. Edmunds, Byron and Marshall [(1894) 11 TLR 537] strongly relied upon by Mr Daphtary, the publication in the newspaper was not held to be a corrupt practice but the paragraph taken from a newspaper and printed as a leaflet was held to be a corrupt practice. That is not the case here. Mr Patil's own attitude during the election and after is significant. During the election he did not once protest that Mr Fernandez charged his workers with hooliganism. Even after the election Mr Patil did not attribute anything to Mr Fernandez. He even said that the Bombay election was conducted with propriety. Even at the filing of the election petition he did not think of Mr Fernandez but concentrated on the "Maratha"."

17. In the case of **Laxmi Raj Shetty v. State of T.N. : (1988) 3 SCC 319** the Apex Court in paragraphs 25 and 26 has held as under:-

"25. As to the first, the accused Laxmi Raj Shetty was entitled to tender the newspaper report from the Indian Express of the 29th and the regional newspapers of the 30th along with his statement under Section 313 of the Code of Criminal Procedure, 1973. Both the accused at the stage of their defence in denial of the charge had summoned the editors of Tamil dailies Malai Murasu and Makkal Kural and the news reporters of the Indian Express and Dina Thanthi to prove the contents of the facts stated in the news item but they dispensed with their examination on the date fixed for the defence evidence. We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein.

26. It is now well settled that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. The accused should have therefore produced the persons in whose

presence the seizure of the stolen money from Appellant 2's house at Mangalore was effected or examined the press correspondents in proof of the truth of the contents of the news item. The question as to the admissibility of newspaper reports has been dealt with by this Court in Samant N. Balkrishna v.George Fernandez [(1969) 3 SCC 238 : (1969) 3 SCR 603 : AIR 1969 SC 1201] . There the question arose whether Shri George Fernandez, the successful candidate returned to Parliament from the Bombay South Parliamentary Constituency had delivered a speech at Shivaji Park attributed to him as reported in the Maratha, a widely circulated Marathi newspaper in Bombay, and it was said: (SCC p. 261, para 47)

"A newspaper item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

*We need not burden the judgment with many citations. There is nothing on record to substantiate the facts as reported in the newspapers showing recovery of the stolen amount from the residence of Appellant 2 at Mangalore. We have therefore no reason to discard the testimony of PW 50 and the seizure witnesses which go to establish that the amount in question was actually re*covered at Madras on the 29th and the 30th as alleged."

18. In the case of **Quamarul Islam v. S.K. Kanta : 1994 Supp (3) SCC 5** in paragraph 48 it has been held by the Apex Court as under:-

"48. Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and Publisher, PW 4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act. The learned trial Judge could not treat the newspaper reports as duly "proved' only by the production of the copies of the newspaper. The election petitioner also examined Abrar Razi, PW 5, who was the polling agent of the election petitioner and a resident of the locality in support of the correctness of the elereports including advertisements and messages as published in the said newspaper. We have carefully perused his testimony and find that his evidence also falls short of proving the contents of the reports of the alleged speeches or the messages and the advertisements, which appeared in different issues of the newspaper. Since, the maker of the report which formed basis of the publications, did not appear in the court to depose about the facts as perceived by him, the facts contained in the published reports were clearly inadmissible. No evidence was led by the election petitioner to prove the contents of the messages and the advertisements as the original manuscript

of the advertisements or the messages was not produced at the trial. No witness came forward to prove the receipt of the manuscript of any of the advertisements or the messages or the publication of the same in accordance with the manuscript. There is no satisfactory and reliable evidence on the record to even establish that the same were actually issued by IUML or MYL, ignoring for the time being, whether or not the appellant had any connection with IUML or MYL or that the same were published by him or with his consent by any other person or published by his election agent or by any other person with the consent of his election agent. The evidence of the election petitioner himself or of PW 4 and PW 5 to prove the contents of the messages and advertisements in the newspaper in our opinion was wrongly admitted and relied upon as evidence of the contents of the statement contained therein."

19. In the case of ***Ghanshyam Upadhyay v. State of U.P.*** **: (2020) 16 SCC 811** it has been held by the Apex Court in paragraphs 6, 7 and 8 as under:-

"6. As noted, the entire basis for making the allegations as contained in the miscellaneous petition is an article relied on by the petitioner said to have been published in the newspaper. There is no other material on record to confirm the truth or otherwise of the statement made in the newspaper. In our view this Court will have to be very circumspect while accepting such contentions based only on certain newspaper reports. This Court in a series of decisions has repeatedly held that the newspaper item without any further proof is of no evidentiary value. The said principle laid down has thereafter been taken note in several public interest litigations to reject the allegations contained in the petition supported by newspaper report.

7. It would be appropriate to notice the decision in Kushum Lata v. Union of India [Kushum Lata v. Union of India, (2006) 6 SCC 180] wherein it is observed thus : (SCC p. 186, para 17)

"17. ... It is also noticed that the petitions are based on newspaper reports without any attempt to verify their authenticity. As observed by this Court in several cases, newspaper reports do not constitute evidence. A petition based on unconfirmed news reports, without verifying their authenticity should not normally be entertained. As noted above, such petitions do not provide any basis for verifying the correctness of statements made and information given in the petition."

8. This Court in Rohit Pandey v. Union of India [Rohit Pandey v. Union of India, (2005) 13 SCC 702] while considering the petition purporting to be in public interest filed by a member of the legal fraternity had come down heavily on the petitioner, since the said petition was based only on two newspaper reports without further verification."

20. From the above judgements it is clear that newspaper report by itself does not constitute an evidence of the contents of it. The reports are only hearsay evidence. They have to be proved either by production of the reporter who heard the said statements and sent them for reporting or by production of report sent by such reporter and production of the Editor of the newspaper or it's publisher to prove the said report. It has been held by the Apex Court

that newspaper reports are at best secondary evidence and not admissible in evidence without proper proof of its content under the Indian Evidence Act, 1872. It is thus clear that newspaper report is not a "legal evidence" which can be examined in support of the complainant.

21. It is trite law that there has to be legal evidence in support of the allegations levelled against a person. In the present case the only evidence relied upon is the newspaper reporting and nothing else. For what has been stated above and as per the settled legal position, a newspaper report is not a "legal evidence".

22. In so far as the judgements relied by learned counsel for the petitioner are concerned, in the case of **Dr. Subramaniam Swamy** (Supra) the same related to a press conference which was held by the accused at Chandigarh in which he had made certain statements which were said to be defamatory. The same was made in the presence of several newspaper reporters and others and then on the next day it was published in the newspaper. In the case of **P. Lankesh** (Supra), the accused were the printer, editor and publisher of a news magazine "Lankesh Patrika" in which an article containing alleged defamatory imputations against the complainant was published. In the case of **Dilip Hazarika** (Supra), the two accused were the Managing Director and the Editor of a weekly "Raijer Prahri" which had published a news item against which a complaint was filed. In the case of **Pankaj Jyoti Borah** (Supra), the accused persons had held a press meeting at a press club which was covered by the electronic media and print media and was published in newspaper. In the case of **Ashok Singhal** (Supra), an article had appeared in a weekly news magazine "Panchjanya" which had carried an interview of the accused in which it was alleged that there were certain offending things said by him. The case of **Lee Kun Hee** (Supra), is totally different on facts and distinguishable from the present case. The said case arises out of an agreement between two parties with regards to supply of certain products and the dispute related to business transaction. It has no application as such in the present case.

23. Conveying a press conference and/or giving an interview to the press is a totally different act than addressing a general public meeting in elections. A person holding a press conference and a person giving an interview to the press has a clear intention and message to the persons present that his speech or lecture or answers be published in newspaper and magazines. Addressing a general public meeting during elections for the purposes of canvasing in elections is a totally different act with a different intention and object. The same is to address the gathering present at the spot so as to imbibe a thought in them for supporting the said political party.

24. Section 177 of Criminal Procedure Code, 1973 reads as under:-

"177. Ordinary place of inquiry and trial. *- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed."*

25. Section 179 of Criminal Procedure Code, 1973 reads as under:-

"179. Offence triable where act is done or consequence ensues. - *When an act is an offence by reason of anything which has been done and of a consequence*

which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

26. While dealing with the word "consequence" appearing in Section 179 of Cr.P.C., in the case of **Ganeshi Lal Vs. Nand Kishore : 1912 SCC Online All 76 : 1912 (Vol. X) A.L.J.R. 45**, it has been held as under:-

"The word "consequence" in this section, in my opinion, means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence. In Babu Lal Vs. Ghansham Dass : (1908) 5 A.L.J.R. 333, it is remarked: "it is contended that section 179 by reason of the words "contained in it' and "of any consequence which has ensued' gives the Magistrate at Aligarh in this case jurisdiction. But the only reasonable interpretation which can be put upon these words is that they are intended to embrace only such consequences as modify or complete the acts alleged to be an offence." The above remarks support the view I take."

27. The Apex Court in the case o**f Mahendra Singh Dhoni** (Supra) has specifically in para 14 sounded word of caution to the Magistrates conferred with the power of taking cognizance and issuing summons to satisfy themselves with regard to concept of territorial jurisdiction apart from the other aspects of the matter. In the present case, the trial court has rightly followed the procedure and passed the impugned order dated 11.03.2022. The trial court was even cognizant of the fact that summoning of a person in a criminal case is a serious matter. Times and again the Apex Court and this Court has been reminding the legal position that summoning of a person is a serious issue and a person cannot be summoned merely by making an allegation against him. The order of the trial court is thus found to be a proper and judicious exercise of its power. The revisional court while deciding the revision against the order dated 11.03.2022 passed by the trial court has also considered every aspect of the matter and then has come to its conclusion that the order impugned therein does not suffer from any illegality and has dismissed the revision. The place of occurrence in the present case is Malakheda, District Alwar (Rajasthan). The complaint, inquiry on it in the nature of statements under section 200 and 202 Cr.P.C. are vague in so far as accruing of the cause of action to the complainant at the place of filing of the complaint is concerned. This Court does not find any irregularity, illegality or perversity in the judgement and order dated 26.04.2022 passed by the revisional court also.

28. Thus looking to the facts and circumstances of the case, the legal pronouncements as enumerated above, this Court comes to the conclusion that the Court at Mau had no territorial jurisdiction to entertain the said complaint. The dismissal of the same vide order dated 11.03.2022 under Section 203 Cr.P.C. is just and proper. Further the dismissal of the revision vide judgment and order dated 26.04.2022 (wherein the order dated 11.03.2022 was challenged) is also without any illegality, irregularity and perversity.

29. The present petition is thus dismissed.

30. At this stage it would be apt to state that there has been a concurrent finding by two courts with regards to the question of territorial jurisdiction. The same is also been affirmed by this court.

31. The complainant/petitioner is an Advocate by profession as has been declared by him in the affidavit given in the present petition before this Court. Even in the alleged legal notice dated 07.01.2019 sent by him, the copy of which is annexed as Annexure No. S.A-3 to the supplementary affidavit dated 07.09.2022 in the bottom at the place of his signature he has disclosed himself to be an Advocate. He has clearly abused the process of law. In these circumstances, this Court imposes a token cost of Rs. 5,000/- on him to be paid within 30 days from today in the Mediation and Conciliation Centre of this Court for utilization therein.

(2022) 10 ILRA 1109
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2022

BEFORE

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

Matters Under Article 227 No. 1562 of 2022 (CIVIL)

Virendra Kumar Malik (Goyala)
...Petitioner/Defendant
Versus
Brigadier Subhash Chnada Jauhar (retired) & Anr. ...Plaintiffs/Respondents

Counsel for the Petitioner:
Sri Vikas Mani Srivastava, Sri Ravindra Kumar Srivastava

Counsel for the Respondents:
Sri Ashutosh Mishra, Sri Rahul Mishra

A. Civil Law – Tenancy – Code of Civil Procedure, 1908 - Order XV Rule 5 - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 30.

Tenant's Obligation - Deposit at the first hearing of the suit is to be made of all arrears of rent, admitted by the tenant to be due, together with interest at the rate of 9% per annum. This is one part of the tenant's obligation. The other is that, throughout the continuation of the suit, the tenant has to regularly deposit the monthly rent within a week from the date of its accrual. **In the event of default, either in the deposit of the admitted rent due on the first date of hearing, or the regular deposit of monthly rent within a week of its falling due, the Court is empowered to strike off the tenant's defence.** (Para 15)

There is a clear period of 10 days only during which, in respect of the first part of the obligation under sub-Rule (1) or under the second part, the Court may consider a representation regarding the delay in deposit. Beyond that period of time, that is to say, 10 days, in one case from the date of first hearing and in the other from the expiry of a week, when the rent falls due, the Court cannot consider the tenant's representation against the order striking off the defence. The first part of sub-Rule (1) of Rule 5 clearly relates to the accrued arrears of rent/damages for use and occupation at the time of institution of the suit, which have to be made good, on or before the first hearing of the suit. (Para 17)

In the present case, on two occasions, in the first round of agitation of his rights by the tenant, the Trial Court as well as the Revisional Court passed some non-conservative orders, granting indulgence of an extended time before defence of the tenant would stand struck off. It might have been a decision taken in the background of the Covid-19 pandemic, though not said so by the Courts in the orders impugned. (Para 24)

The Revisional Court in the earlier instance extended time for the tenant to comply with the order dated 15.02.2021 (which granted him indulgence of not striking off his defence by extending some time to deposit the rent due) passed by the Trial Court, the benefit whereof

he had lost, which the tenant again did not avail. Instead, he took up cudgels again against the landlords by moving the Trial Court for a different relief in the matter of deposit of rent. The aforesaid conduct of the tenant does not entitle him to any further indulgence. The provisions of Order XV Rule 5 CPC cannot come to the tenant's aid any further, the time for compliance thereunder having long expired. Moreover, the stand of the tenant, that has been consistently vacillating and smacking of in equity, does not entitle him to relief in the exercise of our jurisdiction u/Article 227 of the Constitution. (Para 25)

B. Words and Phrases – (i) *'entire amount admitted to be due'* - Explanation 2 to sub-Rule (1) of Rule 5 of Order XV defines the expression "entire amount admitted to be due" as the gross sum of money, due on account of rent or damages for use and occupation, calculated at the admitted rate of rent, for the admitted period that it is in arrears after deduction of nothing else but taxes, if any, paid to the Local Authority, relating to the tenanted premises on the lessor's account and the amount, if any, deposited u/s 30 of U.P. Act No. 13 of 1972. (Para 15)

(ii) *'monthly amount due'* - By virtue of Explanation 3, the monthly amount due has been defined as the amount due every month, whether on account of rent or damages for use and occupation, at the admitted rate of rent, without deducting anything except taxes paid to a Local Authority on the lessor's account, in respect of the tenanted premises. By the provisions of sub-Rule (2) of Rule 5 of Order XV, it has been made explicit that while making an order striking off defence, the Court may consider any representation made by the tenant in that behalf, provided the representation is preferred within 10 days of the first hearing or of the expiry of the week, referred to in sub-Rule (1) of Rule 5. (Para 16)

Writ petition rejected. (E-4)

Precedent followed:

1. Dr. Ram Prakash Mishra (Dead) Vs IVth Additional District Judge, Etah anr., 1999 (1) ARC 7 (Para 22)

2. Habiburahaman Vs District Judge, Jhansi & ors., 2000 (1) ARC 4 (Para 22)

3. Sanjay Agrawal Vs Ganga Prasad Agrawal & anr., 2009 (1) ARC 291 (Para 22)

4. Pushpa Gupta Vs Subhash Chandra & anr., 2019 (8) ADJ 376 (Para 22)

5. Haider Abbas Vs Additional District Judge & ors., 2006 (1) ADJ 197 (All) (DB) (Para 23)

Present petition assails judgment and order dated 16.08.2021 and 17.01.2022, passed by District Judge, Meerut.

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

1. This petition under Article 227 of the Constitution is directed against the judgment and order dated 16.08.2021 passed by the District Judge, Meerut in S.C.C. Revision No. 12 of 2021, dismissing the said revision preferred by the petitioner-tenant and upholding the order of the Judge, Small Cause Court dated 16.03.2021 in S.C.C. Suit No. 78 of 2014, clarifying the position that the tenant's defence stood stuck off in terms of an earlier order passed by the Trial Court on 15.02.2021. Also, under challenge is a judgment and order dated 17.01.2022 passed by the District Judge, Meerut, dismissing S.C.C. Revision No. 19 of 2021 and affirming an order dated 31.08.2021 passed by the Judge, Small Cause Court, Meerut in S.C.C. Suit No. 78 of 2014. The latter orders of the Revisional Court and the Trial Court are a sequel to the two earlier orders, hereinabove mentioned, passed by the Revisional Court and the Trial Court.

2. Heard learned Counsel for the petitioner in support of the motion to admit this petition to hearing.

3. According to the plaintiff-respondents (for short, "the landlords'), the

defendant-petitioner/ tenant (for short, "the tenant') is a tenant in a part of Bungalow No. 143, B.C. Lines, Civil Lines, Meerut since 12.08.2010. The rate of rent is Rs.6000/- per month. The tenancy is one from month to month. The provisions of the U.P. Act No. 13 of 1972 are not applicable. The tenancy has been determined through a notice to quit dated 23.08.2014, served upon the tenant on 26.08.2014. Upon receipt of notice, the tenant paid arrears of rent and electricity charges until August, 2014.

4. A suit for eviction has been instituted, where arrears of rent w.e.f. 01.09.2014 and damages for use and occupation at the rate of Rs. 250/- per day w.e.f. 25.09.2014 have been sought.

5. The tenant has contested the suit on various pleas raised in the written statement and amongst others has asserted the facts that for the months of September and October, 2014, he had remitted rent vide Cheque No. 184886 dated 01.10.2014 and Cheque No. 184894 dated 05.11.2014, which the landlords did not present to their Bank for collection. Again, rent for the month of November and December, 2014 was remitted by registered post, which was not accepted. Thereafter, the rent was remitted, according to the tenant, by money order dated 02.12.2014 together with electricity charge, but the landlords maliciously in connivance with the Postman, did not receive it. This part of the pleadings of the tenant this Court has referred to, because otherwise from a reading of the written statement, it is difficult to comprehend the tenant's stand.

6. From what this Court understands is that the suit for eviction has proceeded, wherein the landlords have moved two successive applications bearing Paper No. 58-C and 71-C, asking the Court to strike off the tenant's defence. In these applications, the case made out is that rent has not beeen paid for 41 months preceding, amounting to Rs.2,46,000/-. These applications were rejected so far as the prayer for striking off the defence is concerned, but the Court gave opportunity to deposit the entire rent etc. within 10 days. It has figured in the orders passed by the Courts below, to which reference shall shortly be made that the tenant filed objections to these applications bearing Paper No. 60-C, 62-C and 180-C urging a plea that he had spent a sum of Rs. 1,66,310/- on repairs, painting and maintenance of the tenanted premises under an oral permission by the landlords.

7. The Trial Court while disposing of the application dated 15.02.2021 noticed the landlords' stand about the plea for a set off against arrears of rent, of money claimed by the tenant to have been spent on repairs under an oral permission of the landlords. It is recorded that the landlords have denied granting any such consent. The Court has, therefore, remarked in the order dated 15.02.2021 that the issue can be determined at the trial or the tenant may bring a separate suit for recovery of the expenditure claimed to be made, if so advised. Still, as already noted, the Trial Court did not strike off the tenant's defence vide order dated 15.02.2021. The tenant did not comply with the order dated 15.02.2021. Instead, he moved an application bearing Paper No. 182-C pointing out discrepancies in the order passed by the Trial Court.

8. Amongst these, it was pointed out that the Trial Court, by its order dated 15.02.2021, on the one hand had remarked

that no finding about the expenditure incurred by the tenant on repairs etc. could be recorded at the stage of disposal of applications, Paper Nos. 58-C and 78-C by the landlord for striking off the tenant's defence, which has to await trial, but on the other the prayer for setting off the said expenditure incurred by the tenant was rejected. This was criticized as an inherent contradiction vitiating the order dated 15.02.2021 passed by the Trial Court. The order dated 15.02.2021 was also criticized for the reason that under Order XV Rule 5 CPC, according to the tenant, the Trial Court could either reject the application, which he did, but could not issue a direction to the tenant to deposit the dues within 10 days, going by the provisions of the Statute.

9. There was a prayer made in the application, Paper No. 182-C that the part of the Trial Court's order dated 15.02.2021, by which a direction had been made requiring the tenant to deposit the rent within 10 days, may be reviewed in terms of the lease deed and a proper order passed. The said application was objected to by the landlords putting in their reply to the effect that the application was moved to delay proceedings. A sum of Rs. 2,58,000/- had fallen due as arrears of rent, which the tenant had to make good. The rent that had accrued was for a period of 43 months at the rate of Rs. 6000/- per month. The application was not maintainable. The Trial Court vide order dated 16.03.2021 rejected the tenant's application, Paper No. 182-C and held that since the order dated 15.02.2021, earlier passed by the Court, had not been complied with by depositing all the dues of rent etc. within the time allowed, the tenant's defence stood struck off in terms of the order dated 15.02.2021.

10. The tenant preferred an S.C.C. Revision from the said order to the District Judge of Meerut, that was registered on the file of the learned Judge as S.C.C. Revision No. 12 of 2021. The revision has been heard and decided by means of the order dated 16.08.2021, substantially upholding the order made by the Trial Court, but as a matter of equity, justice and good conscience, much like the Trial Court, granting 14 days' further time to the tenant to comply with the order dated 15.02.2021, that is to say, w.e.f. the date of the Revisional Court's order. To the above extent alone, the revision was allowed, substantially upholding the Trial Court's order dated 16.03.2021.

11. After the Revisional Court's judgment dated 16.08.2021, the tenant did not take advantage of the relief granted by depositing the entire outstandings within 14 days of the said judgment. Instead, he made two applications bearing Paper No. 205ग and 208ग, to which replies bearing Paper Nos. 206ग and 209ग were filed by the landlords. On occasion the relief sought by the applications bearing Paper Nos. 205ग and 208ग, is substantially to the same effect as the one earlier sought and refused. It was urged in both these applications that on account of the unexpected loss of livelihood arising out of the Covid-19 pandemic, he was not in a position to make good the deposit of rent etc. as ordered by the Court within the time allowed. The tenant prayed that he may be permitted to make good the deposit of the entire outstanding rent in monthly installments of Rs.25,000/-. The said applications were held to be not maintainable, inasmuch as the Trial Court remarked that it was bound by the orders of the Revisional Court, which had not granted any such relief to the tenant. It was also held that the Court did

not have any jurisdiction to permit the tenant to deposit the rent due in installments. The applications 205ग and 208ग were accordingly rejected by the Trial Court vide order dated 31.08.2021.

12. Aggrieved by the said order, an S.C.C. Revsion was instituted by the tenant before the District Judge of Meerut. This revision came to be numbered as S.C.C. Revision No. 19 of 2021 on the file of the learned District Judge, Meerut. It was heard and dismissed by the Revisional Court vide judgment and order dated 17.01.2022. While dismissing the S.C.C. Revision No. 19 of 2021, the District Judge has expedited the trial of the suit, taking note of a Circular dated 29.10.2003 issued by this Court on the administrative side. This has been done bearing in mind that the landlords are senior citizens. The Trial Court has been directed to decide the suit within three months after normal functioning of the Court is restored.

13. The tenant has instituted this Petition under Article 227 of the Constitution challenging the order dated 31.08.2021 passed by the Judge, Small Cause Court, rejecting the tenant's applications, Paper Nos. 205ग and 208ग and the order dated 17.01.2022, affirming it in Revision No. 19 of 2022, passed by the learned District Judge, Meerut. The tenant has also prayed that the order dated 15.02.2021 passed by the Judge, Small Cause Court and the order dated 16.08.2021 passed by the learned District Judge in S.C.C. Revision No. 12 of 2021 be set aside. The tenant has further sought a direction to the Judge, Small Cause Court to accept the rent due in monthly installments of Rs.25,000/-.

14. Upon hearing the learned Counsel for the tenant and perusing the record, this Court is of clear opinion that this petition is singularly devoid of merit. The provisions of Order XV Rule 5 CPC, as amended in their application to the State of Uttar Pradesh, read:

*"5. Striking off defence on failure to deposit admitted rent, etc.--(*1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making, the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1.--The expression "first hearing' means the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2.--The expression "entire amount admitted by him to be due' means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account *[and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him] and the amount, if any,

deposited in any Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3.--(1) The expression "monthly amount due' means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account.

(2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

15. A reading of the provisions of Rule 5 does not spare a shadow of doubt that deposit at the first hearing of the suit is to be made of all arrears of rent, admitted by the tenant to be due, together with interest at the rate of 9% per *annum*. This is one part of the tenant's obligation. The other is that, throughout the continuation of the suit, the tenant has to regularly deposit the monthly rent within a week from the date of its accrual. In the event of default, either in the deposit of the admitted rent due on the first date of hearing, or the regular deposit of monthly rent within a week of its falling due, the Court is empowered to strike off the tenant's defence. Explanation 2 to sub-Rule (1) of Rule 5 of Order XV defines the expression "entire amount admitted to be due" as the gross sum of money, due on account of rent or damages for use and occupation, calculated at the admitted rate of rent, for the admitted period that it is in arrears after deduction of nothing else but taxes, if any, paid to the Local Authority, relating to the tenanted premises on the lessor's account and the amount, if any, deposited under Section 30 of U.P. Act No. 13 of 1972.

16. By virtue of Explanation 3, the monthly amount due has been defined as the amount due every month, whether on account of rent or damages for use and occupation, at the admitted rate of rent, without deducting anything except taxes paid to a Local Authority on the lessor's account, in respect of the tenanted premises. By the provisions of sub-Rule (2) of Rule 5 of Order XV, it has been made explicit that while making an order striking off defence, the Court may consider any representation made by the tenant in that behalf, provided the representation is preferred within 10 days of the first hearing or of the expiry of the week, referred to in sub-Rule (1) of Rule 5.

17. Thus, there is a clear period of 10 days only during which, in respect of the first part of the obligation under sub-Rule (1) or under the second part, the Court may consider a representation regarding the delay in deposit. Beyond that period of time, that is to say, 10 days, in one case from the date of first hearing and in the other from the expiry of a week, when the

rent falls due, the Court cannot consider the tenant's representation against the order striking off the defence. The first part of sub-Rule (1) of Rule 5 clearly relates to the accrued arrears of rent/ damages for use and occupation at the time of institution of the suit, which have to be made good, on or before the first hearing of the suit.

18. In this case, the condonable 10 days are to be reckoned with effect from the date of first hearing. For the second part of sub-Rule (1) aforesaid, it is after the lapse of a week during the course of every month, when the rent falls due and is not paid within the week, that the Court may consider a representation against striking off defence, if made within 10 days of the expiry of one week as aforesaid. This is a schedule of time, beyond which the Court has no discretion to consider any representation or extend time to deposit the rent due; both as regards the first part of the Rule as well as the second part.

19. Here, a reading of the impugned order dated 15.02.2021 passed by the Trial Judge shows that it is a case, where the tenant deposited monthly rent, lastly for the period 01.07.2017 to 31.07.2017 on 10.10.2017. Thereafter, for the period 01.08.2017 to 31.12.2020, for a period of 41 months, the tenant did not deposit the monthly rent due, within a week of its accrual, in accordance with his liability under the second part of Order XV Rule 5(1) CPC. Instead, he made applications for adjustment of rent due against expenses towards painting and repairs etc., which is not at all relevant under Order XV Rule 5 CPC. It was for a very valid reason and on good grounds that the Trial Court declined to accept the tenant's application to set off expenditure incurred towards panting and maintenance of the demised premises, as claimed by the tenant. Still, however, the Trial Court refused to strike off the tenant's defence and granted him one opportunity to deposit all the outstandings of rent within 10 days. It was, however, ordered that in case all outstandings of rent were not made good within the period of 10 days, the tenant's defence would automatically stand struck off.

20. In the opinion of this Court, the order dated 15.02.2021 is an instance of some error committed that goes to the tenant's benefit. And, that is that on the findings recorded, the Trial Court did not immediately strike off the tenant's defence. Rather, 10 days' time was granted to deposit the rent due with a default clause that upon failure to do so, the defence would stand automatically struck off. Obviously, if the Trial Court has erred in granting time to the tenant to make good the deposit of all rent due, failing which the defence would stand automatically struck off on the expiry of 10 days, it is an infirmity which the tenant cannot capitalize upon. Strangely enough, the tenant has criticized the aforesaid error in the order that is to his advantage, while assailing the order dated 15.02.2021 and the later order dated 16.03.2021, in Revision No. 12 of 2021 before the learned District Judge. Since the due rent was not deposited within 10 days and the tenant made a further application, Paper No. 182ग, asking the Judge, Small Cause Court, to review his order dated 15.02.2021, bearing in mind the terms of lease deed dated 28.09.2010 between parties and pass orders afresh, the Trial Judge rejected the said application, holding that the defence stood struck off for non-compliance of the order dated 15.02.2021. Both these orders when assailed in revision, were upheld on merits by the learned District Judge, Meerut vide

judgment and order dated 16.08.2021. But, again with an indulgence in favour of the tenant. This time, the tenant was granted 14 days' time to comply with the order dated 15.02.2021, failing which the consequences of the defence being struck off, would revive.

21. This Court must say again that this direction too was not warranted under the law. It was an equity, overstepping the law. That done, the tenant did not, as already said, take advantage of the order and has persisted in his dilatory efforts. He moved applications, Paper Nos. 205ग and 208ग for deposit of due rent in installments. Those applications were rightly rejected by the Judge, Small Cause Court and affirmed in revision, also rightly by the learned District Judge, vide judgment and order dated 17.01.2022.

22. Whatever the learned Counsel for the tenant has said in assail of these orders, is only stated to be rejected. The clear mandate of Order XV Rule 5 CPC, in the way it has been interpreted by this Court and the Supreme Court, do not spare any doubt about the limited right of a tenant to escape the rigours of the rule prescribing for his defence to be struck off. The rule cannot be applied in the manner, the tenant wants. There are some decisions, such as those in **Dr. Ram Prakash Mishra (Dead) v. IVth Additional District Judge, Etah and another, 1999 (1) ARC 7, Habiburahaman v. District Judge, Jhansi and others, 2000 (1) ARC 4, Sanjay Agrawal vs. Ganga Prasad Agrawal and another, 2009 (1) ARC 291**, which hold that the Court has the reserve power to reject the application seeking to strike off the defence, but that has to be done in a case where indeed there is material to show that the revisionist has substantially complied with his obligations and for some reason, there has been a technical default. These issues were considered by this Court in **Pushpa Gupta vs. Subhash Chandra and another, 2019 (8) ADJ 376,** where it was held:

50. The provisions contained under Order XV Rule 5 C.P.C., have been consistently held to be mandatory, and it has been held that the benefits conferred on tenants under the rent control legislation can be enjoyed only on the basis of strict compliance of the statutory provisions. There is no provision to claim exemption from complying with the conditions under Order XV Rule 5 C.P.C. apart from consideration of a representation made by the defendant as per Order 15 Rule 5 (2) C.P.C.

53. It has been consistently held that the tenant is required to comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained therein, and any deposit not made in consonance with the said rule cannot enure the benefit of the tenant. Also, the amount to be deposited by the tenant during the continuation of the suit is required to be deposited in the Court where the suit is filed failing which the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 after the first hearing of the suit cannot be taken into consideration.

54. The provisions under Order XV Rule 5(2) provides a locus poenitentiae to the defaulting tenant to make a representation, which must be made within ten days of the first hearing or within a week from the date of accrual of rent as the case may be, and if the representation is not made within the specified time the Court has no jurisdiction to consider a time barred

representation or condone the delay or extend time. Apart from the aforementioned provision of filing a representation there is no provision wherein exemption can be claimed from complying the conditions under Order XV Rule 5.

55. The judgments in the case of Dr. Ram Prakash Mishra (since deceased) v. IVth Additional District Judge, Etah and another, 1999 (1) ARC 7, Habiburahaman v. District Judge, Jhansi and others, 2000 (1) ARC 4 and Sanjay Agrawal v. Ganga Prasad Agrawal and another, 2009 (1) ARC 291, upon which reliance has been sought to be placed by the revisionist are to the effect that if there is sufficient material on record to indicate that there are good reasons for condoning the default the Court has a reserve power to reject the application for striking off the defence. There can be no quarrel with the aforementioned legal proposition that powers under Order XV Rule 5 are not to be exercised in the case of a mere technical default.

23. In this connection, the remarks of the Division Bench in **Haider Abbas v. Additional District Judge and others, 2006 (1) ADJ 197 (All) (DB)**, that bear upon the point, read:

23. The aforesaid decision of the Supreme Court in the case of Atma Ram (supra) emphasizes that if the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently the tenant must be held to be in default.

24. In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram (supra), it has to be held that the tenant must comply with the requirements of Order XV, Rule 5, CPC and make the deposits strictly in accordance with the procedure contained therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and, therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5 (1) of Order XV, CPC.

24. In this case, one could have thought that owing to the extraordinarily adverse circumstances that humanity faced in consequence of the Covid-19 pandemic, as a one time measure, the Court shal have exercised its reserve power to decline striking off defence and afforded opportunity to the tenant to comply with the provisions of Order XV Rule 5 CPC, saving his defence, but that situation would legitimately arise where the tenant simply prayed for some time to comply with the requirements of deposit under Order XV Rule 5 CPC. Here, the stand of the tenant has been very iniquitous. He has come up with different kinds of prayers, through various applications, to ward off of his liability under Order XV Rule 5 CPC. In the first instance, he asked for adjustment of the rent due against the expenditure incurred on the maintenance and painting of the demised premises, which could not be done. Later on, he moved another application,

seeking a review of the order dated 15.02.2021, which in fact granted him indulgence of not striking off his defence by extending some time to deposit the rent due. Still later, after losing before the Revisional Court, he did not avail of the opportunity to make good the deposit of rent under Order XV Rule 5 CPC and came up with a fresh prayer to deposit the rent due in installments of Rs.25,000/-, that could never be done under Order XV Rule 5 CPC. We think that on two occasions, in the first round of agitation of his rights by the tenant, the Trial Court as well as the Revisional Court passed some non-conservative orders, granting indulgence of an extended time before defence of the tenant would stand struck off. It might have been a decision taken in the background of the Covid-19 pandemic, though not said so by the Courts in the orders impugned.

25. The Revisional Court in the earlier instance extended time for the tenant to comply with the order dated 15.02.2021 passed by the Trial Court, the benefit whereof he had lost, which the tenant again did not avail. Instead, he took up cudgels again against the landlords by moving the Trial Court for a different relief in the matter of deposit of rent, which we have already mentioned above. The aforesaid conduct of the tenant does not entitle him to any further indulgence. The provisions of Order XV Rule 5 CPC cannot come to the tenant's aid any further, the time for compliance thereunder having long expired. Moreover, the stand of the tenant, that has been consistently vacillating and smacking of in equity, does not entitle him to relief in the exercise of our jurisdiction under Article 227 of the Constitution.

26. This petition is, accordingly, **rejected**.

27. The interim stay order dated 20.05.2022 is hereby **vacated**.

Order on Civil Misc. Application No. 2 of 2022

28. The application is **disposed of.**

29. For orders, see my order of date passed on Matter under Article 227 No. 1562 of 2022.

Order on Civil Misc. Recall Application No. 3 of 2022

30. The application is **disposed of.**

31. For orders, see my order of date passed on Matter under Article 227 No. 1562 of 2022.

(2022) 10 ILRA 1118
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 146 of 2021

State of U.P. ...Appellant
Versus
Sukhai @ Bhagwan Das ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Criminal Law – Murder – Causing disappearance of evidence – Indian Penal Code, 1860 - Sections 302 & 201 - Code of Criminal Procedure, 1973 - Section 378 – It is well settled that the prosecution has

to prove beyond doubt that every link in the chain of circumstances establishes the guilt of accused beyond reasonable doubt and all circumstances are consistently pointing out towards the guilt of accused. (Para 33)

B. Admissibility of extra-judicial confession – An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession os surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. (Para 38, 39)

C. Suspicion however strong it may be but it does not substitute place of prove. (Para 40)

In the present case, the prosecution story proceeds on weak evidence as firstly FIR was lodged against unknown persons, secondly, motive though alleged could not be proved by the prosecution. Thirdly, the accused is shown to have arrested and recovery so sought to be made from him of the incriminating article but in absence of any independent witness and also the fact that the time of arrest and recovery also does not match and even the forensic laboratory report does not support the prosecution version, fourthly, extra judicial confession so made loses its efficacy as the witness before whom the extra judicial confession is St.d to have been made turned hostile and lastly, the fact that circumstantial evidences do not support the prosecution case as the complete chain to link the accused to commit crime stands missing.

Learned Trial Court has meticulously scanned the depositions of the prosecution witnesses and adduced evidences and has come to a correct conclusion that the prosecution has miserably failed to link the accused w.r.t. commission of crime. The view taken by the learned trial Court is a possible and a plausible view as not other view is possible. (Para 41)

Appeal dismissed. (E-4)

<u>Precedent followed</u>:

1. Rajesh Prasad Vs St. of Bihar & anr., 2022 (3) SCC 471 (Para 11)

2. Chandrapal Vs St. of Chhattisgarh, Criminal Appeal No.378 of 2015, decided on 27.05.2022 (Para 34)

3. Mohd. Azad @ Samin Vs St. of W. B., 2008 (15) SCC 449 (Para 36)

4. Sansar Chand Vs St. of Raj., 2010 (10) SCC 604 (Para 37)

5. Sahadevan & anr. Vs St. of T, N., 2012 (6) SCC 403 (Para 38)

6. Ram Lal Vs St. of H. P., 2019 (17) SCC 411 (Para 39)

7. St. of Odisha Vs Banabihari Mohapatra & anr.., Special Leave Petition (Crl.) No. 1156 of 2021, decided on 12.02.2021 (Para 40)

Present Government Appeal assails the judgment and order dated 10.05.2019, passed by Learned Additional Sessions Judge/Special Judge (E.C. Act), District Jalaun at Orai.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal u/s 378 (3) of the Code of Criminal Procedure 1973 (hereinafter referred to as Cr.P.C.) challenging the judgment and the order dated 10.05.2019 passed by Additional Sessions Judge/Special Judge (Essential Commodities Act), District Jalaun at Orai in Session Trial No. 101 of 2015 (State of U.P. Vs. Sukhai alias Bhagwan Das), in Case Crime No. 288 of 2015, u/s 302, 201 IPC, P.S. Kalpi, District Jalaun.

2. Essential facts emanating to the filing of the present appeal as transcribed are that the first informant Mohd. Naseem S/o Mohd. Nizam R/o Bazar Ward, Amraudha, P.S. Bhognipur, District Kanpur Dehat had submitted a written

report on 04.03.2015 before Police Station Kalpi, District Jalaun with an allegation that his brother Azeem and partner Iqbal S/o Razzaq R/o Mohalla Katra, Kasba Amraudha, P.S. Bhognipur, Kanpur Dehat he along with them had gone to Jolhupur in connection with purchase of cattle and after purchase of two cattle he along with his brother Azeem and partner Iqbal return back to Kalpi and after leaving Azeem and Iqbal at Karbala (Eidgah) he proceeded to Kasba, Kalpi for purchase of an additional cattle and when he returned at 10 in the night after purchasing a cattle, then in Karbala he met Iqbal and asked about the whereabouts of his brother Azeem and he was apprised by Iqbal that Azeem had gone to answer nature's call however, after waiting for some time when Azeem did not return then he called from his mobile number 9794780802 to the mobile number of Azeem 8423904201 however, despite the fact that the bell was ringing but the phone was not picked up then the first informant along with Iqbal went to trace about the whereabouts of his brother and at 02 in the night 100 meters from Karbala near a neem tree the dead body of the deceased was found which also occasioned injuries and according to him his brother had been disposed of some where else and thrown in the Eidgah.

3. On the written complaint of the first informant an FIR was lodged on 04.03.2015 at 06:20 being case crime no. 288/2015, u/s 302/201 IPC. One Sri Yogendra Pratap Singh was nominated as Investigating Officer and thereafter, one Sri Awdhesh Kumar was appointed as the Investigating Officer who has submitted the charge sheet u/s 302, 201 IPC against the accused herein.

4. The case was committed to Sessions by virtue of the order dated 15.06.2015.

5. Charges were read over to the accused herein. He pleaded innocence and claimed to be tried.

6. The learned trial court by virtue of the judgment and the order dated 10.05.2019 passed by Additional Session Judge/Special Judge (E.C. Act) , Jalaun at Orai passed in Session Trial No. 101 of 2015 acquitted the accused. Challenging the judgment and the order of acquittal now the State-appellant is before this Court.

7. The prosecution in order to bring home the charges, has produced the following prosecution witnesses as P.W. 1 S.I. Jaiveer Singh, P.W. 2, Naseem, P.W. 3 Atarur Rehman, P.W. 4 Mohd. Ishtiyaq, P.W. 5 Iqbal, P.W. 6 Dr. Bhanu Pratap Singh, P.W. 7 Yogendra Pratap Singh retired inspector (First I.O.), P.W. 8 Constable 1465 Sanjeev Kumar, P.W. 9 Awadhesh Kumar Singh, I.O. (Second I.O.).

8. Besides the ocular testimony the following documents were also exhibited, namely, Ex. A-1 Panchayatnama, Ex. A-2 Written Complaint, Ex. A-3 Recovery memo of weapon and mobile, Ex. A-4 Blood stained and plain earth, **Ex. A-5 and Ex. A-8** letter to Inspector, letter to C.M.O., Photonash, Challan Nash, **Ex. A-9 and Ex. A-10** Copy of FIR and Copy of G.D., Ex. A-11 Postmortem report of the deceased Azeem, Ex.A-12 site plan and place of recovery of dead body, Ex.A-13 site plan of murder and recovery of two mobile phones, Ex. A-14 carbon copy of Kaymi G.D., Ex.A-15 Copy of Chik FIR,

Ex.A-15 Charge sheet, Ex.A-17 Forensic Science Laboratory report of U.P. Agra.

9. Heard Ms. Nand Prabha Shukla, learned A.G.A. appearing for the State-appellant.

10. Before delving into the exercise so sought to be undertaken for determining as to whether the judgment and the order of acquittal has been proceeded in correct perspective or not this Court is to bear in mind that that the present proceedings emanates against the judgment and the order of acquittal so bestowing double presumption of innocence upon the accused. To put it otherwise this Court cannot venture into the judgment in a routine and cursory manner until and unless the circumstances are such which explicitly show that there has been palpable illegality committed by the learned trial court while recording perverse finding and misread the evidences on record. Without burdening the present judgment while reciting the mandate of the Hon'ble Apex Court as reduced in plethora of judgments this Court finds appropriate to refer to the recent judgments which itself is pregnant with the judgment which are on the same line right from inception.

11. Nevertheless in the Case o**f Rajesh Prasad Vs. State of Bihar And Another** reported in ***2022 (3) SCC 471*** the Hon'ble Apex Court in following paragraphs have observed as under:-

"21. Before proceeding further, it would be useful to review the approach to be adopted while deciding an appeal against acquittal by the trial court as well as by the High Court. Section 378 of the Cr.P.C deals with appeals in case of acquittal. In one of the earliest cases on the powers of the High Court in dealing with an appeal against an order of acquittal the Judicial Committee of the Privy Council in Sheo Swarup vs. R. Emperor, AIR 1934 PC 227(2) considered the provisions relating to the power of an appellate court in dealing with an appeal against an order of acquittal and observed as under:

"16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice."

It was stated that the appellate court has full powers to review and to reverse the acquittal.

22. In Atley vs. State of U.P., AIR 1955 SC 807, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same. To a similar effect are the following observations of this Court speaking through Subba Rao J., (as His Lordship then was) in Sanwat Singh vs. State of Rajasthan, AIR 1961 SC 715:

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) ''substantial and compelling reasons', (ii) ''good and sufficiently cogent reasons', and (iii) ''strong reasons' are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

The need for the aforesaid observations arose on account of observations of the majority in Aher Raja Khimavs. State of Saurashtra, AIR 1956 SC 217 which stated that for the High Court to take a different view on the evidence "there must also be substantial and compelling reasons for holding that the trial court was wrong."

23. M.G. Agarwal vs. State of Maharashtra, AIR 1963 SC 200 is the judgment of the Constitution Bench of this Court, speaking through Gajendragadkar, J. (as His Lordship then was). This Court observed that the approach of the High Court (appellate court) in dealing with an appeal against acquittal ought to be cautious because the presumption of innocence in favour of the accused "is not certainly weakened by the fact that he has been acquitted at his trial."

24. In Shivaji Sahabrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793, Krishna Iyer, J., observed as follows:

"In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

"While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question

whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can thenand then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

26. In Ajit Savant Majagvai vs. State of Karnataka, (1997) 7 SCC 110, this Court set out the following principles that would regulate and govern the hearing of an appeal by the High Court against an order of acquittal passed by the Trial Court:

"16. This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:

(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness box.

(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

27. This Court in Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225 observed visàvis the powers of an appellate court while dealing with a judgment of acquittal, as under:

"7. ... While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then--and then only--reappraise the evidence to arrive at its own conclusions."

28. This Court in Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415, highlighted that there is one significant difference in exercising power while hearing an appeal against acquittal by the appellate court. The appellate court would not interfere where the judgment impugned is based on evidence and the view taken was reasonable and plausible. This is because the appellate court will determine the fact that there is presumption in favour of the accused and the accused is entitled to get the benefit of doubt but if it decides to interfere it should assign reasons for differing with the decision of acquittal.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence

is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30. In Nepal Singh vs. State of Haryana- (2009) 12 SCC 351, this Court reversed the judgment of the High Court which had set aside the judgment of acquittal pronounced by the trial court and restored the judgment of the trial court acquitting the accused on reappreciation of the evidence.

31. The circumstances under which an appeal would be entertained by this Court from an order of acquittal passed by a High Court may be summarized as follows:

31.1. Ordinarily, this Court is cautious in interfering with an order of acquittal, especially when the order of acquittal has been confirmed upto the High Court. It is only in rarest of rare cases, where the High Court, on an absolutely wrong process of reasoning and a legally erroneous and perverse approach to the facts of the case, ignoring some of the most vital facts, has acquitted the accused, that the same may be reversed by this Court, exercising jurisdiction under Article 136 of the Constitution. [State of U.P. v. Sahai, AIR 1981 SC 1442] Such fetters on the right to entertain an appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. [Arunachalam v. Sadhananthan, AIR 1979 (SC) 1284] An appeal cannot be entertained against an order of acquittal which has, after recording valid and weighty reasons, has arrived at an unassailable, logical conclusion which justifies acquittal. [State of Haryana v. Lakhbir Singh, (1990) CrLJ 2274 (SC)] B)

31.2. However, this Court has on certain occasions, set aside the order of acquittal passed by a High Court. The circumstances under which this Court may entertain an appeal against an order of acquittal and pass an order of conviction, may be summarised as follows:

31.2.1. Where the approach or reasoning of the High Court is perverse:

a) Where incontrovertible evidence has been rejected by the High Court based on suspicion and surmises, which are rather unrealistic. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207] For example, where direct, unanimous accounts of the eyewitnesses, were discounted without cogent reasoning; [State of UP v. Shanker, AIR 1981 SC 879]

b) Where the intrinsic merits of the testimony of relatives, living in the same house as the victim, were discounted on the ground that they were "interested' witnesses; [State of UP v. Hakim Singh, AIR 1980 SC 184]

c) Where testimony of witnesses had been disbelieved by the High Court, on an unrealistic conjecture of personal motive on the part of witnesses to implicate the accused, when in fact, the witnesses had no axe to grind in the said matter. [State of Rajasthan v. Sukhpal Singh, AIR 1984 SC 207]

d) Where dying declaration of the deceased victim was rejected by the High Court on an irrelevant ground that they did not explain the injury found on one of the persons present at the site of occurrence of the crime. [Arunachalam v. Sadhanantham, AIR 1979 SC 1284]

e) Where the High Court applied an unrealistic standard of "implicit proof' rather than that of "proof beyond reasonable doubt' and therefore evaluated the evidence in a flawed manner. [State of UP v. Ranjha Ram, AIR 1986 SC 1959]

f) Where the High Court rejected circumstantial evidence, based on an exaggerated and capricious theory, which were beyond the plea of the accused; [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] or where acquittal rests merely in exaggerated devotion to the rule of benefit of doubt in favour of the accused. [Gurbachan v. Satpal Singh, AIR 1990 SC 209].

g) Where the High Court acquitted the accused on the ground that he had no adequate motive to commit the offence, although, in the said case, there was strong direct evidence establishing the guilt of the accused, thereby making it unnecessary on the part of the prosecution to establish "motive.' [State of AP v. Bogam Chandraiah, AIR 1986 SC 1899]

31.2.2. Where acquittal would result is gross miscarriage of justice:

a) Where the findings of the High Court, disconnecting the accused persons with the crime, were based on a perfunctory consideration of evidence, [State of UP v. Pheru Singh, AIR 1989 SC 1205] or based on extenuating circumstances which were purely based in imagination and fantasy. [State of Uttar Pradesh v. Pussu 1983 AIR 867 (SC)]

b) Where the accused had been acquitted on ground of delay in conducting trial, which delay was attributable not to the tardiness or indifference of the prosecuting agencies, but to the conduct of the accused himself; or where accused had been acquitted on ground of delay in conducting trial relating to an offence which is not of a trivial nature. [State of Maharashtra v. ChampalalPunjaji Shah, AIR 1981 SC 1675] [Source : Durga Das Basu - "The Criminal Procedure Code, 1973" Sixth Edition Vol.II Chapter XXIX]"

12. Keeping in mind the aforesaid aspects that the note of caution has been mandating now the present judgment is to analysed.

13. Before proceeding further the depositions of the prosecution witnesses is to be first scanned.

14. As P.W. 1 S.I. Jaiveer Singh appeared in the witness box, according to him, he was posted in the concerned police station and he conducted the proceedings of panchayatnama. He has further deposed that he on the basis of the chik FIR had proceeded to the place of occurrence and he prepared the panchayatnama and one Sri Atarur Rehman S/o Havibul Rehman, Sahibe Alam S/o Sadik, Mohd. Nisar S/o Hazi Faiz Mohammad, Junaid Khan S/o Liyaqat Khan and Shameed S/o Waseem were appointed as panch.

15. As P.W. 2 the first informant Naseem deposed that the deceased was his younger brother and on the fateful day i.e. 03.03.2015 at 8-9 in the morning he along

with his deceased brother Azeem and partner Iqbal had proceeded from Amraudha to Jolhupur and after half an hour they reached to Jolhupur and purchased two cattle and at about 07:00-07:30 in the evening they proceeded from Jolhupur and came to Kalpi and reached to Eidgah at 9 in the night and after leaving Azeem and Iqbal he proceeded to Kalpi to purchase another cattle and when he came back after one hour he met Iqbal and on being asked about the whereabouts of his brother Azeem, Iqbal told him that Azeem had proceeded for answering the nature's call and after waiting for 15 minutes when his deceased brother did not came back, they dialled on his mobile number but the phone was though ringing but the same was not picked up and they proceeded to search the deceased brother and the they found near a neem tree the deceased brother's body lying there with injuries in the shape of three marks on the body and injuries on the head and the first informant screamed when he witnessed the body of his brother, he became unconscious and when he regained conscious after half an hour by that time other villagers had come. He accordingly, submitted a written complaint and FIR was lodged against the unknown persons and one Javed who is the resident of the same village came there he wrote the written complaint on the dictation of the first informant and the first informant was read over the written complaint and he signed the same.

16. P.W. 3 Atrur Rehman claims to be the witness of panchayatnama. He proved the panchayatnama.

17. P.W. 4 Mohd. Ishtiyaq has also proved the fact that consequent to the recovery of the dead body of the deceased in his presence the plain and blood stained earth was collected.

18. As P.W. 5 Mohd Iqbal appeared as a prosecution witness and according to his statement he on 10.03.2015 had gone to purchase the cattle to a place being Jolhupur crossing and along with him neither the first informant Naseem nor the deceased was with him and he also showed his ignorance about the occurrence and thus he turned hostile.

19. P.W. 6 Dr. Bhanu Pratap claims to have conducted postmortem on 04.03.2015 when he was posed as Medical Officer in District Hospital Orai according to him the deceased sustained five injuries being rupture in ventral aspect and in his leg there was ruptured blister and on the right side of the stomach there was also penetrating wound along with unblicus and up to visceral organ. The deceased is stated to have other wounds which were injury nos. 4 and 5. As per the opinion of P.W. 6 the cause of death was oozing out of blood and death took place ¾ days back and according to him he in his deposition has stated that the death might have taken place on 03.03.2015 at about 02:00 hours.

20. P.W. 7 I.O. Yogendra Pratap Singh has claims himself to be the Investigating Officer who conducted the investigation while preparing chik FIR, taking statements of the prosecution witnesses preparing the site plan etc.

21. P.W. 8 1465 Sanjeev Kumar claims himself to be the person who has proved the FIR.

22. P.W. 9 claims himself to the I.O. being Awadhesh Kumar Singh who conducted the investigations so left by P.W. 7 Yogendra Pratap Singh and he submitted the charge sheet.

23. Undisputedly, the genesis of the present case emanates from the incident which is stated to have taken place on 03.05.2015 when the first informant, deceased and Iqbal have been stated to have gone to purchase cattle and when they return back after purchasing two cattle they left the deceased and his partner Iqbal near Karbala an thereafter, he proceeded to purchase another cattle and then he returned back then he was apprised by Iqbal that his brother had gone to answer the nature's call and on being contacted through phone and waiting for some time the deceased did not come back then they traced the deceased and found that the deceased was lying in a dead condition near the neem tree. It has also come on record that the FIR has been lodged against unknown persons.

24. So far as the issue relatable to the marking of the accused herein for commission of the crime is concerned, the name of the accused did not find place in the FIR however, it has come on record that an allegation has been sought to be levelled upon the accused herein that there existed certain dispute between the accused herein and the deceased with relation to crops as the accused used to do agriculture activities near the agriculture field of the accused that is of Mushtaq and on the other hand the complainant fraction used to trade in cattle. According to prosecution oftenly in connection with trenching and trampling of the agriculture crops by the cattle so possessed by the complainant fraction losses were sought to be sustained which became the basis of altercations. According to prosecution on the fateful day on account of trampling of the crops the disputed occurred which resulted into the murder of the deceased.

25. Even otherwise, this Court finds that a categorical finding has been recorded by the learned trial court that no such allegation relatable to the commission of crime as a motive so alleged by the prosecution finds its presence in the FIR. More so before the trial also the first informant in his examination in chief had also not reflected the said fact regarding any grudge relating to the motive and the said fact stands admitted in the page no. 7 of the cross examination wherein the first informant had stated that he is not aware and not remembering as to whether the fact relating to the loss of crops and dispute with the accused was narrated or apprised to the Investigating Officer or not.

26. The learned trial court has taken pains to go into the said aspect of the matter while recording the finding that in the FIR the name of the accused did not find place however, during the course of investigation on 13.03.2015 the first informant informed the Investigating Officer in his mazeed statement for the very first time that the accused herein had disposed of his brother and on the basis of the said statement of the first informant on 18.03.2015 the name of the accused came to the surface and he was arrested. Apart from the same though bald and vague allegation have been sought to be made referable to the dispute and the rivalry as a motive but neither any date, time nor details of the incident have been mentioned. Nonetheless, there is nothing on record to suggest as to whether any complaint to the said effect was made before any authority or not.

27. Notably, from the statement of the first informant it is clear that on 03.03.2015 the deceased was with the first informant and Iqbal barring about one hour when he

had gone after leaving the deceased along with his partner to buy an additional cattle at Kalpi. Thus, merely making bald and vague allegations will not absolve the prosecution as motive is not only to be indicated but proved also beyond doubt.

28. So far as the issue relatable to the recovery of incriminating articles being the weapon alleged to be used for commission of crime and on the pointing out of the accused is concerned, the prosecution has come up with a stand that on 18.03.2015 the accused on his pointing out got recovered the weapon used for commission of crime and two mobile phones and he was also arrested and further the accused is being shown to have committed the said crime which stands proved from the report of the forensic laboratory.

29. Though it has also come on record that the recovery of the weapon used for commission of crime and two mobile phones have been shown to be recovered from the pointing out of the accused but there had been no independent witness to have corroborated the said fact. Ex. A-3 which happens to be the recovery memo shows that on the pointing out of the accused behind the Eidgah near Old Dome one Ballum, two mobiles have been shown to have been recovered however, no time has been shown of recovery. As per the Nakal Report No. 27, 16:25 hours have been shown on 18.03.2015 however, as per P.W. 7 I.O. Yogendra Pratap Singh, he in his cross examination has come up with the stand that the accused was arrested on 18.03.2015 at 14:20 pm and as per the case diary, the accused was put up in lock-up as mentioned in report no. 27 at 14:25 hours. Notably, P.W. 7 I.O. Yogendra Pratap Singh has stated that he had not prepared any fard and he is not aware as to how much is the distance between the place of arrest and the place of recovery and he has further stated that the place of recovery is an open land and there is no restriction of entry and the recovery had been made after 15 days.

30. As a matter of fact the learned trial court has further analysed the matter and according to it the recovery is at the difference of two hours and the distance is also not known to the Investigating Officer and the place is an open place which itself shows that the things do not match with the actual events as there cannot be a possibility that the recovery is a planted one particularly when there is no description given in the fard itself and there has been no investigation into the fact as to who is the owner of the mobiles in question.

31. Nonetheless, there was no independent witness to have corroborate to the said recovery event except the interested witness being the first informant. Moreover, Mohd. Naseem being the P.W. 2 the first informant has further stated certain facts which are contrary and in contradiction with the statement of P.W. 7 I.O. Yogendra Pratap Singh as according to him the date on which the dead body was recovered was the date of recovery of Barchi/Ballum and mobiles. Apart from this, it has further been deposed that in the Barchi which was recovered from dome had the blood marking and according to him the blood was fresh. Thus, according to the prosecution on the date of the arrest of the accused i.e. 18.03.2015 one Barchi/Ballum and two mobiles were recovered, however, from perusal of the statement of the P.W. 2 and P.W. 7 there are contradictions with regard to the issue of recovery of Barchi/Ballum on the date of

arrest. Moreover, the question about the blood being present in the Barchi/Ballum is concerned, the same cannot be fresh that to after a long period of time i.e. 15 days. Even otherwise, P.W. 7 Yogendra Pratap Singh in his deposition has himself admitted the fact that the ownership of the two mobile phones was not got investigated by him. To put it otherwise I.O. has further come with a stand that the ownership of mobile phone could have been investigated from the mobile shop or telecom company. To put nail to the coffin of conviction, letter 57 Ka and Ex. A-17 which happens to be the report of Forensic Laboratory itself shows that the recovered Ballum which is stated to have contained blood, could not be tested and thus, no report was given in that regard. Hence, so far as the recovery aspect is concerned in absence of any independent witness to have corroborated the recovery of linking of the incriminating article being the weapon used for committing murder and the mobile phones with the accused and cloud over the arrest and recovery of the accused itself makes the prosecution theory weak.

32. The present case at best can be stretched to be of circumstantial evidence as there is no eye witness who has seen commission of crime. It has come on record that P.W. 5 Iqbal S/o Abdul Razzaq could have been the star witness as according to him he was with the accused on 03.03.2015 when the first informant left the deceased with Iqbal and had gone to purchase additional cattle. P.W. 5 Iqbal could have been the intrested witness as he is a partner with the first informant. Reasonably, it can be presumed that motive was known to him as alleged by the prosecution regarding the fact that their cattle which used to trample the crops of the accused fraction. P.W.5 Iqbal had showed his ignorance regarding the fact that he was with the first informant and he met the accused. Meaning thereby, the events dated 03.03.2015 has been completely denied by P.W. 5 Iqbal as he turned hostile. Thus, once P.W. 5 Iqbal stood hostile then the very basis of erecting the prosecution case stood demolished. So far as the issue with regard to the extra judicial confession is concerned, the same as per the settled legal position is a weak evidence.

33. It is well settled that prosecution has to prove beyond doubt that every link in the chain of circumstances establishes the guilt of accused beyond reasonable doubt and all circumstances are consistently pointing out towards the guilt of accused.

34. Recently, in the case of **Criminal Appeal No. 378 of 2015 Chandrapal Vs. State of Chhattisgarh** decided on 27.05.2022 the Hon'ble Apex Court in paragraph no. 7 has observed as under:-

"7. At the outset, it may be stated that undisputedly the entire case of the prosecution rested on the circumstantial evidence, as there was no eye witness to the alleged incident. The law on the appreciation of circumstantial evidence is also well settled. The circumstances concerned "must or should be" established and not "may be" established, as held in Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra1. The accused "must be" and not merely "may be" guilty before a court can convict him. The conclusions of guilt arrived at must be sure conclusions and must not be based on vague conjectures. The entire chain of circumstances on which the conclusion of guilt is to be drawn, should be fully

established and should not leave any reasonable ground for the conclusion consistent with the innocence of the accused. The five golden principles enumerated in case of Sharad Birdhichand Sarda Vs. State of Maharashtra2 laid down in para 152 may be reproduced herein for ready reference:

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 1 (1973) 2 SCC 793 2 (1984) 4 SCC 116 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

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

35. P.W. 5 Iqbal has come up with a stand that the accused in his presence had admitted his guilt of commission of crime while making extra judicial confession. As observed earlier, P.W. 5 himself stood hostile and denied presence of the accused and occurring of the event on 03.05.2015 thus extra judicial confession stated to be made by the accused also looses its credibility.

36. The Hon'ble Apex Court in the case of **Mohd. Azad @ Samin vs. State of West Bengal, 2008 (15) SCC 449,** in paragraphs 21 and 22 observed as under:-

*"21. A similar view was also taken in **Jaswant Gir v. State of Punjab, 2005 (12) SCC 438 and Kusuma Ankama Rao's case, 2008 (13) SCC 257.***

22. "18. Confessions may be divided into two classes i.e. judicial and extra- judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are

generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the `Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short 'Evidence Act'). The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See R. v. Warickshall) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary

confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's Evidence, 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

37 . In the case o**f Sansar Chand vs. State of Rajasthan 2010 (10) SCC 604**, Hon'ble Apex Court in paragraph 29 observed as under:-

"29. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material vide Thimma vs. The State of Mysore - AIR 1971 SC 1871, Mulk Raj vs. The State of U.P. - AIR 1959 SC 902, Sivakumar vs. State by Inspector of Police - AIR 206 SC 563 (para 41 & 42), Shiva Karam Payaswami Tewar vs. State of Maharashtra - AIR 2009 SC 1692, Mohd. Azad vs. State of West Bengal - AIR 2009 SC 1307."

38. Further, in the case of ***Sahadevan and another vs. State of Tamilnadu 2012 (6) SCC 403***, Hon'ble Apex Court in paragraphs 14 to 16 observed as under:-

"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

15. Now, we may examine some judgments of this Court dealing with this aspect.

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

15.2. In Pakkirisamy v. State of T.N. [(1997) 8 SCC 158], the Court held that:

"8. .... It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession."

15.3. Again in Kavita v. State of T.N. [(1998) 6 SCC 108], the Court stated the dictum that:

"4. There is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to

confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The Court, further expressed the view that:

"19. .... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused....."

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

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

X

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

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

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

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

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

"53. It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must

invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

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

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

The Principles

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law."

39. Further, in the case of **Ram Lal vs. State of Himachal Pradesh 2019 (17) SCC 411**, Hon'ble Apex Court in paragraphs 13 to 15 observed as under:-

"13. Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. Considering the admissibility and evidentiary value of extra-judicial confession, after referring to various judgments, in Sahadevn and another vs. State of Tamilnadu (2012) 6 SCC 403, this court held as under:-

"15.1. In Balwinder Singh v. State of Punjab 1995 Supp (4) SCC 259 this Court stated the principle that:

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution.Where an extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."

15.4. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in State of Rajasthan v. Raja Ram (2003) 8 SCC 180 stated the principle that:

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made." The Court further expressed the view that:

"19. ... Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused...."

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

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimaa Raju v. State of Mysore (1970) 2 SCC 105, Mulk Raj v. State of U.P. AIR 1959 SC 902, Sivakumar v. State of Inspector of Police (2006) 1 SCC 714 (SCC paras 40 and 41 : AIR paras 41 and 42), Shiva Karam Pavaswami Tewari v. State of Maharashtra (2009) 11 SCC 262 and Mohd. Azad alias Shamin v. State of W.B. (2008) 15 SCC 449]"."

40. Moreover, it is also settled principle of law that suspicion however, strong it may be but it does not substitute place of prove. Hon'ble Apex Court i**n Special Leave Petition (Crl.) No. 1156 of 2021 (State of Odisha Vs. Banabihari Mohapatra and Anr.)** decided on **12.02.2021** in paragraph no. 38 has observed as under:-

"38. It is well settled by a plethora of judicial pronouncement of this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. This proposition has been reiterated in Sujit Biswas v. State of Assam reported in AIR 2013 SC 3817."

*41. A*nalysing the case from the four corners of law, this Court finds that the prosecution story proceeds on weak evidence as firstly FIR was lodged against unknown persons, secondly, motive though alleged could not be proved by the prosecution. Thirdly, the accused is shown to have arrested and recovery so sought to be made from him of the incriminating article but in absence of any independent witness and also the fact that the time of arrest and recovery also does not match and

even the forensic laboratory report does not support the prosecution version, fourthly, extra judicial confession so made looses its efficacy as P.W. 5 Iqbal turned hostile before whom the extra judicial confession stated to be made and last but not the least the fact that circumstantial evidences do not support the prosecution case as the complete chain to link the accused to commit crime stands missing. This Court further finds that the learned trial court has meticulously scanned the depositions of the prosecution witnesses and the evidences so adduced and has come to a correct conclusion that the prosecution has miserably failed to link the accused with respect to commission of crime. The view taken by the learned trial court is a possible and a plausible view as not other view is possible. Hence, this Court has no option but to concur the judgment of the learned trial court acquitting the accused herein.

42. Resultantly, no ground is made as to accord leave to appeal and accordingly, the same is rejected.

43. As the leave to file the present appeal stands rejected thus, the present appeal so instituted at the behest of the State-appellant u/s 378 (3) of the Cr.P.C. stands **dismissed.**

(2022) 10 ILRA 1138
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Government Appeal No. 2008 of 1987

The State of U.P. ...Appellant
Versus
Krishna Kumar Kulshreshtha & Ors. ...Respondents

Counsel for the Appellant:
A.G.A., Sri S.K. Kulshreshtha

Counsel for the Respondents:
Dr.D.K. Kulshreshtha, Sri P.K. Singh, Sri M.K.S. Chauhan

A. Criminal Law – Dowry Death - Indian Penal Code: Sections 302/34 & 201 – It is a settled principle that while exercising appellate powers, even if two views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court. Interference with acquittal can only be justified when it is based on a perverse view. (Para 12, 13, 14, 23)

It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. (Para 19)

B. Consideration to the presumption of innocence – If the appellate Court is reversing the trial Court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption stands reinforced, reaffirmed and strengthened by the trial Court. (Para 23)

C. It is a well settled principle of law that when the genesis and the manner of incident are doubtful, the accused cannot be convicted. (Para 35)

In the written report the informant did not mention that on the fateful day i.e. to say on 15.11.1982 the informant had visited the house of the accused persons before the death of his daughter. This fact was admitted by him the cross-examination. A genuine question arises that when on the fateful day the informant himself found his daughter in a St. of unsound health then why this fact was not disclosed by

him in the written report prepared by him. This indicates that the prosecution is trying to hide the genesis of the incident. (Para 35)

D. It is the duty of the accused to explain the incriminating circumstance proved against him while making a St.ment u/s 313 CrPC. Keeping silent and not furnishing any explanation for such circumstance in an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure St.ment duly proved is a very positive circumstance against him. (Para 39)

The accused persons in their St.ment u/s 313 CrPC not only not only explained the incriminating circumstances but also adduced oral and documentary evidence to prove the same. Specific defence has been taken by the accused persons that the death of the deceased was natural and she died due to sickness. They provided medical help to her and she had been under treatment of doctor. (Para 39)

E. The defence witnesses are entitled to equal respect and treatment as that of the prosecution – The evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution – a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses. (Para 39)

The trial Court after appreciating the oral and documentary evidence on record has not found the documents filed by the prosecution as reliable and genuine and in view of the trial Court the weight given to the oral and documentary evidence of the prosecution was not sufficient to prove the guilt of the accused in this case. (Para 41)

F. Preponderance of probability – It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability.

If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including *mens rea* of the accused he would be entitled to be acquitted. (Para 42)

The burden/onus in this case is not upon the accused persons/respondents but whatsoever has been St.d by them in their St.ment u/s 313 CrPC, oral and documentary evidence to support that version has been produced by them which has been supposed to be cogent and reliable by the trial Court, thus there is preponderance of probability in favour of the innocence of the accused persons/respondents. (Para 44)

G. It appears that there was a deliberate delay in lodging of the FIR which seems to be result of due consultation and after thought – The suspicious death of the daughter of the informant was a very serious matter for him but surprisingly neither he informed nor did he send his son to inform the police about it. (Para 45)

As a matter of fact, no person has seen the occurrence and on the basis of analysis of oral and documentary evidence on record, no incriminating circumstances to connect the respondents with the alleged offence is proved. Hence, the non-conviction of the respondents u/s 302/34 and 201 IPC is upheld. (Para 48)

Appeal dismissed. (E-4)

Precedent followed:

1. M.S. Narayana Menon @ Mani Vs St. of Ker. & anr., (2006) 6 SCC 39 (Para 12)

2. Chandrappa Vs St. of Karn., (2007) 4 SCC 415 (Para 13)

3. St. of Goa Vs Sanjay Thakran & anr., (2007) 3 CC 75 (Para 15)

4. St. of U. P. Vs Ram Veer Singh & ors., 2007 A.I.R. S.C.W. 5553 (Para 16)

5. Girja Prasad (Dead) by L.R.s Vs St. of M.P., 2007 A.I.R. S.C.W. 5589 (Para 16)

6. Luna Ram Vs Bhupat Singh & ors., (2009) SCC 749 (Para 17)

7. Mookkiah & anr. Vs St., Rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321 (Para 18)

8. St. of Karn. Vs Hemareddy, AIR 1981, SC 1417 (Para 19)

9. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66 (Para 20)

10. St. of Pun. Vs Madan Mohan Lal Verma, (2013) 14 SCC 153 (Para 21)

11. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219 (Para 22)

12. Shailendra Rajdev Pasvan Vs St. of Gujarat, (2020) 14 SCC 750 (Para 23)

13. Pankaj Vs St. of Raj., (2016) 16 Supreme Court Cases 192 (Para 35)

14. Neel Kumar @ Anil Kumar Vs St. of Har., (2012) 5 CC 766 (Para 39)

15. Munshi Prasad & ors. Vs St. of Bihar, (2002) 1 SCC 351 (Para 39)

16. Rishikesh Singh Vs St. of U.P., AIR 1970 Alld 51 (Full Bench) (Para 42)

17. V.D. Jhangan Vs St. of U. P., AIR 1966 SC 1762 (Para 43)

Present Government Appeal assails judgment and order dated 29.04.1987, passed by the Court of Special Judge (Economic Offences), Agra.

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. Accused persons Krishna Kumar Kulshreshtha, Sudhir Kumar Kulshreshtha and Akhilesh Kumar Kulshreshtha and Smt. Gayatri Devi Kulshreshtha were acquitted of the charges under Section 302/34 and 201 I.P.C. in Sessions Trial No. 488 of 1984 arising out of case crime no. 495 of 1985, P.S- Loha Mandi, District- Agra by the Court of Special Judge (Economic Offences), Agra by judgement and order dated 29.4.1987, feeling aggrieved of which this State appeal has been filed.

2. The prosecution story unfolded by the FIR in brief is that Smt. Beena Kumari Kulshreshtha @ Beena Kulshreshtha, daughter of the informant-Guru Dayal Prasad was married with accused Akhilesh Kumar Kulshreshtha on 9.5.1982 and as per his capacity the informant offered dowry to the in-laws of her daughter, however, the accused persons Akhilesh Kumar Kulshreshtha-husband, Krishna Kumar Kulshreshtha-father-in-law, Smt. Gayatri Devi-mother-in-law were dissatisfied with the dowry and Smt. Bina was subjected to cruelty and harassment for demand of dowry by the aforesaid accused persons and also by her brother-in-law Sudhir Kumar Kulshreshtha. The deceased used to make complaint of these incidents to her mother and brother. On 13.11.1982 Girish Chand Kulshreshtha, the nephew of the informant went to the house of the deceased on the occasion of Dipawali and he found her normal and healthy, however, she appeared to be upset. On 15.11.1982 at about 5.15 pm. the informant got the information of the death of his daughter and after reaching the accused persons' house he found her dead. The wife of the informant was shocked and became unconscious. The informant took away his wife to his house and next day morning gave a written report to S.O. Loha Mandi, Agra alleging therein that the in-laws of his daughter have killed her by poisoning.

3. On the basis of the written report Ex.Ka-7, the FIR Ex.Ka-8 was lodged and G.D. Ex.Ka-9 was also prepared.

4. The investigation was handed over to S.I. Rama Shankar Sharma, who performed the proceedings of the investigation, recorded the statement of the witnesses and prepared site plan Ex.Ka-10 and subsequently the investigation was conducted by Inspector Shiv Bahadur Singh and then by Deputy S.P. Raj Pal Singh Rana, who recorded the statement of the witnesses and submitted charge sheet Ex.Ka-11 to the Court.

5. The accused persons appeared before the Court. After the case being committed to the Court of Sessions they were charged under Section 302/34 and 201 I.P.C. They denied of the charges and claimed to be tried.

6. In order to prove its case, the prosecution relied upon the oral testimony of P.W.1 Guru Dayal Prasad-the informant, P.W2- Girish Chand Kulshreshtha, cousin of the deceased, P.W.3 Rakesh Kulshreshtha brother of the deceased, P.W.4- Bhagwan Das, Head Moharir, scribe of the FIR, P.W.5-Inspector Shiv Bahadur Singh second I.O of the case and P.W.6 Retired Deputy S.P. Raj Pal Singh Rana subsequent I.O.

7. To support the oral evidence, documentary evidence was also relied upon by the prosecution and in documentary evidence list Ex. Ka-1, letters Ex.Ka-2, Ex.Ka-3, Ex.Ka-4, Ex.Ka-5 and Ex.Ka-6, written report Ex.Ka-7, Chik FIR Ex.Ka-8, G.D. Ex.Ka 9 have been filed.

8. Learned trial Court after perusing the entire evidence on record and after hearing the oral submissions of the parties found that no case was made out against the accused persons and the prosecution has utterly failed to connect the accused with the guilt, and accordingly acquitted them of the charges under Section 302/34 and 201 I.P.C.

9. Learned A.G.A. has submitted that the learned trial Judge has not appreciated the evidence on record in proper and legal manner. The judgement has been passed in haste. The circumstances of the case were going against the accused persons and the entire allegations of demand of dowry and cruelty and harassment of the deceased were proved by the witnesses of fact. Learned trial Judge ignoring it passed the acquittal order. It has been prayed that the impugned judgement of acquittal be set aside and the appeal be allowed.

10. Per-contra, learned counsel for the respondents/accused has contended that there is no legal or factual error in the impugned judgement. There was no evidence at all against any of the accused on record and since the deceased was died in the presence of the informant and his wife there was no question for the death being unnatural or homicidal death. The trial Court has made no error in acquitting the respondents/ accused persons and hence the appeal is liable to be dismissed.

11. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non-guilty, would require to be discussed.

12. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have

been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

13. Further, in the case of "**CHANDRAPPA Vs. STATE OF KARNATAKA",** reported in **(2007) 4 SCC 415,** the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as,"substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

14. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

15. Even in the case of **"STATE OF GOA Vs. SANJAY THAKRAN & ANR.", reported in (2007) 3 S.C.C. 75,** the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

"16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

16. Similar principle has been laid down by the Apex Court in cases of **"STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553 and in "GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589.** Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

17. In the case of "**LUNA RAM VS. BHUPAT SINGH AND ORS.", reported in (2009) SCC 749, t**he Apex Court in para 10 and 11 has held as under:

"10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

18. It was also held by the Apex Court in the case of **"MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU**", **reported in AIR 2013 SC 321**, the Apex Court in para 4 has held as under:

"4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized

that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

19. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "**STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417**, wherein it is held as under:

"...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

20. The Hon'ble Apex Court in "**SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

21. Further, in the case of **"STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

"The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the

explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."

22. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219,** has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

.....It is relevant to note the observations of this Court in the case of **Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606**, which reads thus:

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

23. The Apex Court recently in **Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750,** has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced, reaffirmed and strengthened by the trial court and in Samsul Haque v. State of Assam, (2019) 18 SCC 161 held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

24. However, in our view it is desirable to have a glance upon the oral evidence adduced by the prosecution before appreciating the submissions of both the sides.

25. P.W.1 Gurudayal Prasad, who is the father of the deceased has proved the factum of marriage between the deceased and the accused Akhilesh Kumar Kulshreshtha, and also narrated that the in-laws/ accused persons were not satisfied with the dowry given by him and his daughter was subjected to cruelty for demand of dowry. He has also proved some letters written by accused persons and the deceased herself and also list of demand given by in-laws of his daughter at the time of gauna. He has further stated that when he was informed about death of his daughter, he went to the house of accused persons along with his wife. Her in-laws never informed about any sickness of his daughter and even his nephew Girish Chand Kulshreshtha, who met the deceased at her house found her in a healthy condition. His wife started weeping looking at the dead body of her daughter and said that the death has not natural and she has been murdered. The in-laws of the deceased killed his daughter for demand of dowry and did not even perform the autopsy of her dead body. Written report has been proved as Ex.Ka-7 by P.W.1 and he has also explained that due to treatment and care of his wife he could not move to the police station on the same day.

26. P.W.2- Girish Chand Kulshreshtha, who is the nephew of the informant has stated that on 13.11.1982 in the evening he had gone to meet Beena at her matrimonial house on the occasion of Dipawali. The accused persons met there and on his request the deceased was also called, who was looking mentally upset but not sick. Her mother-in-law told that she will never visit to her parental house, now.

27. P.W.3-Rakesh Kulshreshtha, the real brother of the deceased, has stated that his sister had complained to him regarding demand of scooter and fridge made by her in-laws. He had gone to the place of the accused persons on 27.10.1982 and 11.11.1982 and on the later occasion the mother-in-law of his sister scolded him and also complained of not giving anything on the occasion of Karwachauth. When he met Beena there she told him not to come over there and also said that if they chose to kill her, they will do so in one day. He found Beena in a sound state of health at that time.

28. P.W.4-Head Moharir Bhagwan Das has proved the Chik FIR and G.D. Of the case as Ex.Ka-8 and Ex.Ka-9 respectively prepared on the basis of the written report of the informant.

29. P.W.5-Shiv Bahadur Singh the second I.O. of the case has proved the

functioning of the investigation conducted by him and also by the first I.O. Ram Shankar Sharma and has also proved site plan Ex.Ka-10 prepared by the first I.O. Ram Shankar Sharma.

30. P.W.6-retired Deputy S.P. Raj Pal Singh Rana has been the last I.O. Of the case, who has also proved the remaining formalities of the investigation and the charge sheet as Ex.Ka-11.

31. After the closing of the prosecution evidence the statement of the accused persons were recorded under Section 313 Cr.P.C. and all the incriminating circumstances and evidences were put to them. They denied the alleged occurrence and also denied the genuineness of so called letters proved in the evidence and they expressly stated that the deceased died in the presence of the informant and his wife and at that time she was sick and due to illness was unable to move even. They have also stated that the whole story is false and fabricated only to grab money from the accused persons.

32. D.W.1 Amar Nath Lavania, D.W.2 M.L. Bansal have also been examined in defence.

33. The accused persons have also relied upon the documentary evidence, letter written by the informant Ex.Kha-1, letter by the accused Krishna Kumar Ex.Kha-2, medical prescription Ex.Kha-3 and Ex.Kha-4.

34. Heard learned counsels for the parties and perused the record.

35. Submissions of the learned A.G.A. takes us through the deposition of the witnesses of fact i.e. P.W.1, P.W.2 and P.W.3. The statement made by P.W.1 reveals that on the fateful day the informant along with his wife had visited the house of the accused persons where he met her daughter who appeared in the state of sickness, however, not serious. He has admitted this fact that at that time accused Sudhir Kumar Kulshreshtha had told him that she was suffering from lose motion and fever and treatment of some Hakeem was going on. It is pertinent to mention here that in the written report the informant did not mention this fact that on the fateful day that is to say on 15.11.1982 the informant had visited the house of the accused persons before the death of her daughter. This fact was admitted by him in his cross-examination. Learned counsel for the respondents has impressed upon this statement where also finds that the informant is trying to hide the correct facts of the case deliberately. A genuine question arises that when on the fateful day the informant himself found her daughter in a state of unsound health why this fact was not disclosed by him in the written report prepared by him. Thus it makes us to opine that the prosecution is trying to hide the genesis of the incident. In **Pankaj Vs. State of Rajasthan (2016) 16 Supreme Court Cases 192,** it has been held that "it is a well settled principle of law that when the genesis and the manner of incident is doubtful, the accused cannot be convicted." No doubt this principle of law applies to this case.

36. P.W.2 has also given contradictory statement in respect of the physical health of the deceased in the light of his statement under Section 161 Cr.P.C.

37. P.W.3 had visited the matrimonial house of the deceased four days before the occurrence and he had found her fit and

healthy. He has also stated that it appeared that the accused persons wanted to kill her and this fact was narrated by him to his father. It is pertinent to mention here that in the deposition of P.W.1 nothing is found to this effect that he was informed by his son that the accused persons wanted to kill the deceased. It is also a material contradiction which falsify the oral evidence adduced by the prosecution.

38. The trial Court has pointed out the material contradictions found in the depositions of the prosecution witness of fact.

39. In **Neel Kumar @ Anil Kumar Vs. State of Haryana (2012) 5 SCC 766** (at page 774), the Apex Court held "It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 CrPC. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him". The argument put forth by the learned counsel for the respondents is that the accused persons in their statement under Section 313 Cr.p.C. not only explained the incriminating circumstances but also adduced oral and documentary evidence to prove the same. It has also been submitted by the learned counsel for the respondents that specific defence has been taken by the accused persons that the death of the deceased was natural and she died due to sickness. They provided medical help to her and she had been under treatment of doctor. They have relied upon the statement of D.W.1 and D.W.2 and also the documentary evidence i.e. medical papers in this regard, which the trial Court has found to be trustworthy and genuine. D.W. 2 Dr. M.L. Bansal has treated the deceased for lose motion and vomiting and advised to consult any senior physician as she was in a state of serious dehydration and the accused persons also called a senior physician. D.W.2 has proved the aforesaid facts. The factum of illness of the deceased has also been proved by D.W.1, who is a tenant in the same house, where the respondents live. In **Munshi Prasad and Ors. Vs. State of Bihar (2002) 1 SCC 351,** the Hon'ble Apex Court held that "the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution -- a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses".

40. Learned A.G.A. has submitted that the fact of demand of dowry and cruelty and harassment towards the deceased by the accused persons is proved by the documentary evidence adduced by the prosecution and in this respect some letters have also been filed along with the list which are marked as Ex. Ka-1 to Ex.Ka-6.

41. The trial Court after appreciating the oral and documentary evidence on record has not found the aforesaid documents filed by the prosecution as reliable and genuine and in view of the trial Court the weight given to the oral and

documentary evidence of the prosecution was not sufficient to prove the guilt of the accused in this case.

42. Reliance has been placed on R**ishikesh Singh Vs. State of U.P. AIR 1970 ALLD 51 (Full Bench),** a leading case on the subject, by the learned counsel for the respondents wherein it has been held that "If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted."

43. In V.D.Jhangan vs State Of Uttar Pradesh AIR 1966 SC 1762, it was observed like this. "It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

44. Learned counsel for the respondents has vehemently argued that the burden/ onus in this case is not upon the accused persons/ respondents but whatsoever has been stated by them in their statement under Section 313 Cr.P.C., oral and documentary evidence to support that version has been produced by them which has been supposed to be cogent and reliable by the trial Court, thus there is a preponderance of probability in favour of the innocence of the accused persons/ respondents.

45. Learned counsel for the respondents takes us to the factum of the genuineness of the FIR. It has been argued that the FIR is a result of consultation and after thought. According to the version of the FIR, on 15.11.1982 when the informant visited the place of the accused persons, he was shocked to see the dead body of his daughter and his wife fell down and became unconscious. She got her home and as he remained busy in the treatment and care of his wife, he could not inform the police about the incident. The learned counsel for the respondents has vehemently argued that P.W.3 is the real son of the informant. The suspicious death of the daughter of the informant was a very serious matter for him but surprisingly he even did not sent his son P.W.3 Rakesh Kulshreshtha to inform the police about the suspicious death of the deceased.

46. In the facts and circumstances of the case, we find force in the contention of the learned counsel for the respondents and it appears that there was a deliberate delay in lodging of the FIR which seems to be result of due consultation and after thought.

47. We find ourselves in agreement with what has been submitted by the learned counsel for the respondents.

48. On the basis of the aforesaid discussion and relying upon the case laws cited above, we find that the learned trial Judge has committed no error in passing an acquittal order in favour of the accused persons/ respondents. As a matter of fact, no person has seen the occurrence and on the basis of the analysis of oral and documentary evidence on record, we find that no incriminating circumstances to connect the respondents with the alleged offence is proved. Hence, we concur with the finding given by the learned trial Court. Hence, the non-conviction of the

respondents under Section 302/34 and 201 I.P.C. is upheld.

49. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we concur with the learned trial Judge. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Court below. The bail and bail bonds are cancelled.

50. We are thankful to learned A.G.A. and the learned counsel for the respondents for ably assisting the Court.

(2022) 10 ILRA 1150
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Government Appeal No. 2574 of 1985

State of U.P. ...Appellant
Versus
Ganga Vishun & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Pavan Kumar Kushwaha

A. Criminal Law – Challenge to acquittal – It is settled legal position that injuries on the injured person is a guarantee of his being present on the place of occurrence but is not guarantee of their truthfulness – In the facts and circumstances of the case, it is not safe to convict the accused person on the basis of evidence produced by the prosecution. The prosecution has utterly failed to prove its case beyond all reasonable doubts and, therefore, has acquitted all the accused-persons. (Para 18, 19)

B. Scope of interference – It has been held by the Apex Court that **if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the Trial Court.** (Para 20, 21)

Appeal dismissed. (E-4)

Precedent followed:

1. St. of Karn. Vs Gopalkrishna, (2005) 9 SCC 291 (Para 20)

2. Dilawar Singh Vs St. of Har., (2015) 1 SCC 737 (Para 21)

Present Government Appeal assails judgment and order dated 07.06.1985, passed by Upper Munsif Magistrate VII, District Bareilly, U/S 323/324/34 IPC.

(Delivered by Hon'ble Gajendra Kumar, J.)

1. The State of U.P. has preferred this appeal under Section 378 Cr.P.C. assailing the correctness of the judgment and order dated 07.06.1985 passed by the learned Civil Judge, Sr. Division-VIIth, District-Bareilly in Criminal Case No.193 of 1985 (State Vs. Ganga Vishun and others) whereby, the learned court below has acquitted all the four accused-persons (respondents) of the charges under Sections 323/324/34 of Indian Penal Code.

2. The Appeal against respondent no.1 (Ganga Vishun) and respondent no.2 (Nathoo Lal) stands abated as they reported to have died, which is evident from the death certificate, filed by opposite party no.3, a copy of the same has been annexed as Annexure-SA-1 to the supplementary affidavit. Appeal against respondent no.3 (Hori Lal) has already been abated by a co-ordinate Bench of this Court vide order

dated 01.02.2016, therefore, the same will proceed against respondent no.4-Siya Ram only.

3. The prosecution story in brief is that, on the basis of written report dated 25.04.1981 (Ex.Ka-1), a chick FIR was registered at 22:10 p.m. against the respondents under Sections 324/323//504/506 IPC (Ex.Ka-6). In the said report, it is alleged by the informant-Roshal Lal s/o Jhunnu Lal (P.W.-1) that on the fateful day of 25.04.1981 at about 06:00 p.m., accused-persons were winnowing the wheat in the field of the informant, and when informant-Roshan Lal (P.W.-1) along with his brother Ram Kumar (P.W.-2) objected to do the same to the respondents, they denied and said in a very rudely manner that they will take it from this field itself, and after a few minutes, informant/complainant saw that accused-persons, namely, Ganga Vishu, Nathoo Lal and Siya Ram armed with "Ganta' and Hori Lal armed with "lathi-danda' committed maar-peet with the informant and his brother, as a result, they received serious injuries.

4. While framing charge, the trial judge framed charges against the accused-persons under Sections 323/324/34 IPC.

5. So as to hold accused persons guilty, prosecution has examined as many as four witnesses. Statements of accused persons were recorded under Section 313 Cr.P.C., in which they pleaded their innocence and false implication.

6. By the impugned judgment, the trial judge has acquitted the respondents of all the charges. Hence, the present appeal by the State, assailing the acquittal of the accused-persons.

7. Learned AGA for the State-appellant submits that the trial judge has erred in law in acquitting all the accused-persons (respondents). He submits that once, the informants (injured) have made allegations against the respondents, the court was obliged to convict the accused.

8. On the other hand, Sri Pavan Kumar Kushwaha, learned counsel for the surviving respondent no.4, submits that he was never involved in committing the aforesaid offence and false allegation has been levelled against him. As such, there is no illegality or perversity in the order, passed by the learned court below, hence no interference is called for by this Court.

9. I have heard learned AGA for the State-appellant, Sri Pavan Kumar Kushwaha, learned counsel appearing for the surviving accused-respondent no.4 and perused the material available on record.

10. As per the statement of Roshan Lal (P.W.-1), who has specifically stated in his written report dated 25.04..1981 (Ex.Ka-1) that Hori Lal was armed with *lathi-danda* and other accused-persons were armed with Ganta, but in his cross-examination, Roshan Lal (P.W.-1) has stated that Hori Lal was armed with Ganta and other accused-persons were armed with *lathi-danda* and committed *maar-peet* with the informants-injured, which creates doubt in the prosecution story.

11. Ram Kumar (P.W.-2), in his examination-in-chief, has also supported the prosecution story and as per his statement, the accused-persons committed maar-peet with the informants-injured till five minutes, if his statement is accepted to some extent, then informants-injured are sure to get serious injuries, but as per

medical report, all the injuries are simple in nature, which also creates doubts in the story of the prosecution.

12. Narayan Lal (P.W.3), in his statement, has stated that Tractor and Thressor were standing on the "Med'(मेड़), at that point of time, and because of the wind, straw (Bhusa) was going in the field of the informants-injured so it could not be said that the motive of the accused-persons were bad, because the direction of the wind could not be reversed as it moved according to the natural order.

13. In his statement, Jev Lal Gangwar (P.W.-4) has stated that, on the written report (Tahrir) (Ex.Ka-1), given by the informant-Roshan Lal, (P.W.-1), thumb impression taken by the ink-pad, which also creates doubt in the story of the prosecution version as there is no evidence available on record so as to prove that at that point of time ink-pad was present there.

14. Injury reports of accused persons namely, Roshal Lal and Ram Kumar reads as follows:-

Roshan Lal

1. Incise wound 8 c.m. x 3 c.m. x muscle deep in the middle of the wrist of the right hand.

2. Incise wound 8 c.m. x 1 c.m. x muscle on the elbow

Impression:- All the injuries are simple in nature and caused by sharp weapon.

Ram Kumar

1. Incise wound 2 c.m. x 0.3 c.m. x muscle deep behind the right elbow..

2. Abrasion contusion 7 c.m. x 2 c.m. below the left elbow.

Impression:- All the injuries are simple in nature and injury no.1 caused by sharp weapon.

15. Learned counsel for the State-appellant submits that as per injury reports, injured persons have received injuries by sharp weapon and this fact has also not been taken into consideration by the court below. Injuries on the persons of the injured/eye-witness guaranteed that story narrated by the witnesses is true and there is no material on record which can falsify the evidence.

16. On the other hand, learned counsel for the respondent submits that as per injury reports, injured persons have received injuries by sharp weapon which also creates doubt in the story of the prosecution as the aforesaid injuries are simple in nature and not on vital parts of the body. He further submits that from perusal of the injury reports, it is apparent that injury reports have not been proved by the doctor and their genuineness has been admitted and formal proof has been dispensed with by the accused persons which means that they have been admitted by the accused persons as they are, but so far as their contents are concerned they are required to be proved by the prosecution but the same has not been done by the prosecution.

17. From perusal of the record, it is evident that there is no denial of the fact that the defence admitted the genuineness of injury reports and formal proof thereof was dispensed with so the genuineness and

authenticity of the documents i.e. injury reports stand proved and shall be read as valid evidence under Section 294 Cr.P.C. It is settled preposition of law that genuineness of any documents filed by the parties if not disputed by the opposite party. It can be read as a substantial evidence.

18. In the above facts and circumstances of the case, the manner and mode in which the injuries were received by the injured persons has to be proved by the prosecution which has not been properly proved. In the facts and circumstances of this case, it can also not be improbablized that the injured persons received injury on their hands with gusts of wind while removing the winnowing machine. It is settled legal position that injuries on the injured person is a guarantee of his being present on the place of occurrence but is not guarantee of their truthfullness. In view of the above and in the facts and circumstances of the case, it is not safe to convict the accused person on the basis of evidence produced by the prosecution.

19. Considering all the aspects of the case, the trial court came to the conclusion that the prosecution has utterly failed to prove its case beyond all reasonable doubts and, therefore, has acquitted all the accused-persons. The view taken by the trial court is one of the possible view.

20. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Apex Court that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial court. In the case of **State of Karnataka Vs. Gopalkrishna** as reported in **(2005) 9 SCC 291,** the Hon'ble Apex Court, while dealing with an appeal against acquittal, observed as under:-

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

16. In **Sudershan Kumar v. State of Himachal** reported in **(2014) 15 SCC 666** the Hon'ble Supreme Court observed thus;-

"31.It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled Dhanapal v. State which is the judgment where most of the earlier decisions laying down the aforesaid

principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

"37. In ***Chandrappa v. State of Karnataka****, this Court held:* ***(SCC p. 432 para 42), (1)*** *An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

21. In **Dilawar Singh v. State of Haryana, (2015) 1 SCC 737**, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

37. In ***Chandrappa v. State of Karnataka,*** *the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under: (SCC p.432 para 42) "42....(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

22. Considering the above legal position and the factual aspects of the case, I am of the view that the trial Judge was justified in acquitting the accused-respondent.

23. The Appeal is, accordingly, **dismissed.**

(2022) 10 ILRA 1155
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2022

BEFORE

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

Second Appeal No. 417 of 2022

Chabila ...Appellant
Versus
Ramawater ...Respondents

Counsel for the Appellant:
Sri Mridul Kumar

Counsel for the Respondents:
Sri Jitendra Kumar Ravat

A. Civil Law – Suit for Specific Performance - Code of Civil Procedure, 1908 - Order XLI Rule 11; Specific Relief Act, 1963 - Sections 16, 18, 20, 21 & 20(2)(b) r/w Explanation II of the Act - A plea of non-est factum is different from fraud. In case of a plea of fraud, the case has to be established beyond reasonable doubt. Here, a plea of fraud was raised and an issue about it was framed at the defendant's instance. So far as a rustic villager is concerned, the burden of proof, in case of either plea of fraud or non-est factum, be reversed, but that

has not been done in this case. There is no pleading to the effect that the defendant is an illiterate and rustic villager, unacquainted with the ways of the world. This submission appears to have been inspired by the stand taken during arguments before the Trial Court, which the Trial Court has rightly rejected in the absence of requisite pleadings. (Para 13)

B. The suit agreement is a registered document, wherein, there is a presumption of correctness about the Registrar's endorsement. The presumption is rebuttable, but there is no evidence led to offset the strong presumption that attaches. The said finding has been affirmed by the Lower Appellate Court also. (Para 15)

C. Defendant's case of hardship - Mere fact that the defendant has made a bad bargain is no ground to refuse specific performance. It has been noticed that the defendant has a total of 30 bighas of agricultural land located in more than one village. It has been remarked that it is not the defendant's case that in the event specific performance being granted, he would become landless, or that his livelihood would be effaced. It has been opined that **if a decree of specific performance is passed, the defendant would not face that kind of hardship as envisaged under Section 20(2)(b), read with Explanation II of the Act of 1963.** It must be remarked that this position of the law is about the way it stood before its amendment vide The Specific Relief (Amendment) Act, 20183. (Para 16)

D. Though the plaintiff has to prove and establish a case that discretion ought to be exercised in his favour, but where the defendant does not come with clean hands and suppresses material facts, the discretion should not be exercised against specific performance. The defendant's case has been condemned by the Trial Court as false about his defences of fraud and the defendant being a moneylender, who had lent him money, but misused his papers. It is on all these premises that the learned Trial Judge has exercised discretion also to grant specific performance. The Appellate Court has gone through the evidence and affirmed all these findings. (Para 18)

The plaintiff's case is well established on the foot of a registered document, i.e., the suit agreement, which he has proved to the hilt on the strength of evidence that he had led, both oral and documentary. There is absolutely no flaw in the findings returned by the two Courts below concurrently, worth scrutiny under Section 100 of the Code. There is no substantial question of law involved in this appeal, which is concluded by well considered findings of fact.

Second appeal dismissed. (E-4)

Precedent followed:

1. Om Prakash Vs Pooran Chand & anr., 2012 (1) CAR 79 (All) (Para 17)

2. Zarina Siddiqui Vs A. Ramalingam @ A. Amarnathan, AIR 2015 SC 580 (Para 18)

Second appeal against the judgment and decree dated 07.03.2022 passed by Learned Additional District Court, Jalaun at Orai.

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

1. This is a defendant's second appeal, arising out of a suit for specific performance, which has been decreed by both the Courts below.

2. Heard Mr. Mridul Kumar, learned Counsel for the appellant in support of the motion under Order XLI Rule 11 of the Code of Civil Procedure, 19081 and Mr. Jitendra Kumar Ravat, learned Counsel, who appears on caveat, on behalf of the plaintiff-respondent.

3. The plaintiff-respondent, Ramawatar, who shall hereinafter be referred to as "the plantiff" instituted Original Suit No. 210 of 2002, Ramawatar

v. Chabila, before the Court of the Civil Judge (Junior Division), Jalaun at Orai claiming specific performance of a registered agreement to sell dated 13.11.1998, executed in the plaintiff's favour by Chabila, the sole defendant-appellant. The defendant-appellant aforesaid shall hereinafter be referred to as *"the defendant"*.

4. It is the plaintiff's case that the defendant is the recorded *bhumidhar*-in-possession of an agricultural land bearing *Khasra* No. 194 ad-measuring 1.165 hectares, situate in Mauja Dharguva, Pargana Orai, Jalaun. It was asserted by the plaintiff that the defendant was in need of money and decided to sell-off his land aforesaid to the plaintiff for a total sale consideration of ₹70,000/-. For the purpose, the defendant executed a registered agreement to sell in favour of the plaintiff on 13.11.1998. At the time of execution of the agreement, the plaintiff paid, out of the agreed consideration, a sum of ₹65,000/-. It was agreed between parties that the plaintiff shall pay the remainder of ₹5,000/- within a period of one year and thereupon, the defendant shall execute a registered sale deed in favour of the plaintiff, transferring the land subject matter of the suit agreement. The land aforesaid shall hereinafter be called as *"the suit property"*.

5. It is the plaintiff's case that the suit agreement was executed in the Sub-Registrar's Office and the earnest was also paid there. The plaintiff has always been ready and willing to perform his part of the contract. It is also the plaintiff's case that the defendant is bound under the suit agreement to receive the remainder of the sale consideration i.e. the sum of Rs. ₹5,000/- and execute a sale deed in his favour. It is the plaintiff's further case that he requested the defendant to execute the sale deed in his favour, but the defendant did no more than assure the plaintiff that he would abide by his covenant. In fact, he did not. The plaintiff, accordingly, caused a notice dated 01.03.2022 to be served upon the defendant, asking him to receive the remainder of the consideration and execute the requisite sale deed in his favour. The said notice was never replied by the defendant. The plaintiff then caused a notice to be sent to the defendant's correct address, asking the latter to remain present in the Sub-Registrar's Office on 17.10.2002, for the purpose of executing the covenanted sale deed upon receipt of the balance sale consideration, in terms of the suit agreement. He was present at the Sub-Registrar's Office on 17.10.2002, but the defendant did not turn up. Broadly on this cause of action, the suit was instituted.

6. The defendant put in his written statement, also carrying his counterclaim. He admitted his ownership of the suit property, but denied the plaintiff's case almost about everything else. Most of the defendant's case is carried in the additional pleas, where it is averred that he was ailing and needed a sum of ₹3,10,000/-. The defendant approached one Ram Prakash, an attesting witness of the suit agreement, requesting a loan. Ram Prakash is alleged to have assured the defendant that he would secure him a loan of ₹30,000/-, which would carry interest at the usual bank rate. It is pleaded that the defendant being in need of money, received a sum of ₹30,000/- from Ram Prakash at his home, in the presence of witnesses, on 13.01.1998. Ram Prakash said that the defendant would have to execute some papers to serve as security for the loan. It is averred that Ram Prakash never disclosed

what property he would have to encumber as security. He is said to have made the defendant thumb-mark blank stamp papers and also supply his photographs. Ram Prakash was alleged by the defendant to have assured the latter that he would take care of the paperwork. The defendant was assured that as soon as he repays the loan, the document would be returned to him. The defendant has averred that he did not know the plaintiff when the suit agreement was executed. The defendant repaid a sum of Rs. 30,000/- to Ram Prakash and asked him to give back the document, to which Ram Prakash is claimed to have responded, telling the defendant that the document was missing somewhere, and as soon as the same was found, it would be returned to the defendant. The defendant claims that he demanded of Ram Prakash to return the document, but Ram Prakash assured that he would not ask the defendant to repay the loan that he had already received. The defendant came to know later on that the plaintiff had brought a suit for specific performance on the basis of the suit agreement and secured an *ex-parte* decree behind his back. The defendant moved to set aside the *ex-parte* decree, which was allowed. It is the defendant's case that on a perusal of records, he came to know that Ram Prakash had, in fact, caused an agreement to sell to be scribed on those blank stamp papers. It is also the defendant's case the plaintiff is a moneylender and Ram Prakash would, on his behalf, disburse loans to persons in need. The plaintiff and the defendant never entered into any bargain relating to sale of the suit property that embodies the suit agreement. The defendant never received any notice from the plaintiff. It is the defendant's case that the suit property is very valuable and the defendant was never in need to sell his land. The suit property, at the relevant time, had a market value of at least ₹10 lacs. The defendant is dependent on the suit property for his livelihood. There is no question of selling the said property. If the defendant is made to part with the suit property, he would suffer great hardship. The defendant denied execution of the suit agreement and pleaded that it was the product of a fraud played upon him. In the counterclaim, it was prayed that a decree of declaration be passed, adjudging the suit agreement void. The defendant demanded that the suit be dismissed with special costs.

7. A replication was put in on behalf of the plaintiff, traversing the counterclaim and reiterating the plaint case.

8. On pleadings of parties, the following issues were framed :

1. Whether the defendant executed an agreement to sell in favour of the plaintiff on 13.11.1998 for Rs. 70,000/-? If yes, its effect?

2. Whether the agreement to sell dated 13.11.1998 was got executed by the plaintiff for the purpose of securing the loan? If yes, its effect?

3. Whether the disputed agreement is based on fraud?

4. Whether the suit of the plaintiff is barred by Sections 16, 18, 20 and 21 of the Specific Relief Act?

5. Whether the defendant is entitled through the counterclaim in paragraph 21 of written statement to get the disputed document declared void and illegal?

6. Whether the counterclaim of the defendant is time barred?

7. Whether insufficient court fee has been paid on the counterclaim?

8. To what relief, if any, is the plaintiff entitled?

9. The learned Trial Judge has set out a summary of the documentary evidence as well as the description of witnesses examined by both sides in support of their respective cases, and the same need not be listed here again. Of course, reference would be made to so much of the evidence as is necessary to dispose of this motion.

10. The Trial Court found on Issue No. 6 against the defendant, holding the counterclaim to be time-barred. Issues Nos. 5 and 7 followed the result of the answer to Issue No. 6, and were answered against the defendant. Issues Nos. 2 and 3 were taken up together and answered against the defendant. Issue No. 1 has been answered for the plaintiff. Issue No. 4 has been answered against the defendant. Issue No. 8, that relates to the exercise of discretion to grant specific performance of contract under Section 20 of the Specific Relief Act, 19632 has been answered in favour of the plaintiff. The suit has been decreed for the relief of specific performance, though with a direction for the costs to go easy.

11. Upon the defendant's appeal to the learned District Judge, the Additional District Judge, Court No. 1, Jalaun at Orai, has reviewed the entire evidence issue-wise, and affirmed the Trial Court, reiterating the Trial Court's decree in speaking terms. The Lower Appellate Court too, directed costs to go easy.

12. Aggrieved, the defendant has instituted the present appeal.

13. Mr. Mridul Kumar,, learned Counsel for the appellant, has argued before this Court that his client is a rustic villager and burden of proof ought to have been reversed, requiring the plaintiff to affirmatively prove that the defendant executed the suit agreement after understanding its contents. This Court must immediately clarify that a plea of *non-est factum* is different from fraud. Here, a plea of fraud was raised and an issue about it was framed at the defendant's instance. So far as a rustic villager is concerned, the burden of proof, in case of either plea of fraud or *non-est factum*, be reversed, but that has not been done in this case. The submission of the learned Counsel for the appellant that the burden of proof should have been reversed in this case, does not appear to be tenable, because for one, it is not in every case of an illiterate man - even a rustic, that the burden of proof has to be reversed, like a pardanasheen woman or a certain class of women, unacquainted with the ways of the world. In the case of a man, it has to be demonstrated that apart from being illiterate and rustic, he is absolutely unacquainted with worldly affairs. The said question does not remotely arise in this case, irrespective of the fact that fraud is pleaded or *non-est factum*, because there is no pleading to the effect that the defendant is an illiterate and rustic villager, unacquainted with the ways of the world. This submission appears to have been inspired by the stand taken during arguments before the Trial Court, which the Trial Court has rightly rejected in the absence of requisite pleadings.

14. On the other hand, the Trial Court has dealt with the issue of fraud with a remarkably fine understanding of the law and with an equally remarkable marshalling of evidence. The evidence has rightly been appreciated in its finest detail. The Trial Court has held that in case of a plea of fraud, the case has to be established beyond

reasonable doubt. He has referred to binding authority on the point. In appreciating the evidence, the learned Trial Judge has referred to the testimony of D.W.-2, about whom it has been very carefully remarked that he is a brother of one of the attesting witnesses, Shiv Narayan. This witness's testimony has been appreciated to remark that whereas according to his pleading in the written statement, the defendant was made to sign blank stamp papers, the witness under reference has said in his cross-examination that the papers which the defendant signed in his presence were plain and not stamp papers. It has also been noticed that the witness D.W.-2 has said that Ramawatar (the plaintiff) had not given any loan to Chabila (the defendant). This witness has gone on to say that Ramawatar is into the business of money lending. It is further stated that he has just heard about this fact. From these facts, the Trial Court has remarked that it shows that this witness's testimony about Ramawatar being into the business of money lending is hearsay and negatived the case on its basis. The evidence of D.W.-3 has also been noticed with the remark that he has not supported the case of the defendant at all in the cross-examination and turned hostile. The Trial Court has remarked that heavy burden lay upon the defendant to prove the plea of fraud and two of his witnesses have not at all supported that case. The finding of the Trial Court on Issues Nos. 2 and 3 is absolutely flawless. The Appellate Court has rightly affirmed the findings.

15. So far as Issue No. 1 goes, the Trial Court has held that the suit agreement is a registered document, wherein, there is a presumption of correctness about the Registrar's endorsement. The presumption is rebuttable, but there is no evidence led to offset the strong presumption that attaches. The said finding has been affirmed by the Lower Appellate Court also. In deciding Issue No. 3, the Trial Court has again held that there is a plea that the suit is barred by Sections 16, 18, 20 and 21 of the Act of 1963, but there is no pleading elucidating how the suit is barred under the said provisions.

16. The Trial Court has dealt with the defendant's case of hardship, thoroughly examining the evidence on record. It has been noticed that the defendant has a total of 30 *bighas* of agricultural land located in more than one village. It has been remarked that it is not the defendant's case that in the event specific performance being granted, he would become landless, or that his livelihood would be effaced. It has been opined that if a decree of specific performance is passed, the defendant would not face that kind of hardship as envisaged under Section 20(2)(b), read with Explanation II of the Act of 1963. It must be remarked that this position of the law is about the way it stood before its amendment vide The Specific Relief (Amendment) Act, 20183. The Trial Court Court has also opined that though according to prevalent circle rate, the price of the suit property for the purposes of stamp duty, would be a sum of ₹1.68 lacs, the sum of ₹70,000/- for which the bargain has been struck is apparently the result of circumstances that made the defendant choose to enter into that bargain. It is opined by the Trial Court that the mere fact that the defendant has made a bad bargain is no ground to refuse specific performance. This finding too has been affirmed by the Lower Appellate Court. In our opinion, there is no perversity about this finding or any illegality besetting it.

17. In deciding Issue No. 8, the Trial Court has gone into every possible detail of relevant evidence that ought to enter consideration before exercising discretion to grant specific performance. He has also considered the issue of directing a higher price to be paid in terms of the decisions of this Court in **Om Prakash v. Pooran Chand and another**. It has been opined that the bargain in this case has been settled, because the defendant was in need of money and he decided to do it at a lesser price.

18. There is another reason why the Trial Court has chosen to exercise discretion in favour of the plaintiff, and that is because the defendant apparently came up with a false case of fraud and the transaction being a loan, which he could not prove. In doing that, the Trial Court has relied on the principle laid down by the Supreme Court in **Zarina Siddiqui v. A. Ramalingam alias A. Amarnathan**, where it has been held that though the plaintiff has to prove and establish a case that discretion ought to be exercised in his favour, but where the defendant does not come with clean hands and suppresses material facts, the discretion should not be exercised against specific performance. The defendant's case has been condemned by the Trial Court as false about his defences of fraud and the defendant being a moneylender, who had lent him money, but misused his papers. It is on all these premises that the learned Trial Judge has exercised discretion also to grant specific performance. The Appellate Court has gone through the evidence and affirmed all these findings.

19. On a wholesome consideration of the matter, this Court must remark that there is not the slightest reason in the present case to interfere with the concurrent opinion of the two Courts below on any of the issues involved. To add to it is the fact that the case that the defendant pleaded was that he had taken a loan, which he had returned to the plaintiff's agent Ram Prakash and asked him to give back his papers, which the latter said were misplaced and did not return. This story to the face of it pleaded in defence is enough to tilt the balance of probability against the defendant. The reason, to supplement the reasoning of the Courts below, is that if indeed the defendant had taken a loan from the plaintiff through his agent, Ram Prakash, which he repaid to Ram Prakash, he would have certainly asked for a receipt. Once Ram Prakash had made him execute a registered document that the defendant believed to be a document to secure the loan, in the nature of things, repayment of the loan could not have been without a receipt.

20. In addition, it is also *ex-facie* a preposterous stand because the loan being a sum of ₹30,000/-, it is not possible that the sum would have been refunded without interest. There is nothing said apparently by the defendant about the interest that he repaid to Ram Prakash on the sum of ₹30,000/-. The entire story that the defendant had come up with is laced with falsehood and the Courts below have rightly disbelieved the defendant's case.

21. On the other hand, the plaintiff's case is well established on the foot of a registered document, that is to say, the suit agreement, which he has proved to the hilt on the strength of evidence that he had led, both oral and documentary. There is absolutely no flaw in the findings returned by the two Courts below concurrently, worth scrutiny under Section 100 of the

Code. There is no substantial question of law involved in this appeal, which is concluded by well considered findings of fact.

22. Before parting with the matter, this Court must place on record its profound appreciation for the very well-considered and exceptionally well-structured judgement written by the learned Trial Judge Mr. Palash Ganguly. It shows the finest marshalling of facts and evidence and understanding of the law, considering that the Trial Judge is a very junior Judicial Officer.

23. In this result, this appeal is **dismissed** under Order XLI Rule 11 of the Code.

24. There shall, however, be no order as to costs.

(2022) 10 ILRA 1162
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 29.09.2022

BEFORE

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

Matter under Art. 227 (Civil) No. 6339 of 2021

Har Narain Singh ...Petitioner
Versus
Ravi Shanker Nigam ...Respondent

Counsel for the Petitioner:
Sri Manoj Kumar Sharma

Counsel for the Respondent:
Ms. Shalini Goel, Mrs. Rama Goel Bansal

A. Civil Law – Tenancy – Eviction - The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) - Sections 20(2)(a) & 20(2)(c); Transfer of Property Act, 1882 - Section 106.

Requirement of notice – It is well settled that the Rent Control Acts do not completely supersede or supplant the provisions of the Transfer of Property Act governing the relationship of landlord and tenant. Since there is no provision for determination of tenancy in the Rent Control Act, one has necessarily to look to the provisions of the Transfer of Property Act. **The phrase 'after the determination of his tenancy' occurring in sub-section (2) of Section 20 refers to the determination of tenancy in accordance with law, i.e. in the provisions of the Transfer of Property Act. This brings in Section 106.** (Para 19)

The Revisional Court, therefore, went astray to look for the duration of notice required to terminate the tenancy in the provisions of Section 20(2)(a) of the Act. The said period is to be determined only with reference to the provisions of S. 106 of the T.P. Act. To that extent, the findings of the Revisional Court are wrong. (Para 20)

B. Statutory period of a valid notice - No doubt, the period of time required to determine a lease granted for a manufacturing purpose is six months by notice, but this statutory period is subject to a contract, local law or usage to the contrary. In the facts found here, the tenancy, in the opinion of this Court, was clearly one for month-to-month. It could be determined by a month's notice. The notice to quit, therefore, cannot be questioned on the said ground. (Para 21, 24)

Here, the Court finds that in the notice to quit dated 26.09.2014, there is a clear assertion that the tenant holds the demised premises on a monthly rent of Rs. 150/-. In the rent receipts also, there is consistent mention of rent at a monthly rate. From all these circumstances, it is evident that the lease always was one from month-to-month. It was not a lease from year-to-year that S.106 of the T.P. Act postulates. A contract to the contrary, notwithstanding the lease being for a manufacturing purpose, is clearly discernible. Therefore, the tenancy was

validly terminated by a 30 days' notice. (Para 21, 23)

C. Structural Alteration - In section 20(2)(c) the landlord is not required to prove "material alteration" but he has to show a "structural alteration" made, having the effect of disfigurement or diminishing the value or utility of rented building. The word "material alteration" does not find place in section 20(2) (c). (Para 35)

The issue of structural alteration is essentially a question of fact in the first instance and the Trial Court has not written a word worth the name in returning its finding on the issue, this Court is of opinion that for the determination of the said issue, the matter has to go back to the Trial Court. The other issues, that have been decided by this judgment, shall no longer be open to the parties or the Courts of Trial or Revision to examine. (Para 36)

Writ petition allowed. (E-4)

Precedent followed:

1. Dhanapal Chettiar Vs Yesodai Ammal, (1979) 4 SCC 214 (Para 19)

2. Jagdish Kumar Khanna Vs Shakuntala Devi & ors., 1980 ARC 535 (Para 19)

3. Smt. Ram Murti Devi Vs Vth A.D.J., Meerut & ors., 1982 SCC OnLine All 776 (Para 30)

4. Umesh Kumar Vs Arun Kumar & ors., 2012 SCC OnLine All 3987 (Para 35)

Present petition assails judgment and decree dated 14.01.2021, passed by the Additional District Judge, Jhansi as well as the judgment and decree dated 16.09.2019, passed by the Judge, Small Cause Court, Jhansi.

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

1. This is a tenant's petition under Article 227 of the Constitution, questioning the decree of eviction and recovery of arrears of rent, besides mesne profits, passed concurrently by the two Courts below.

2. S.C.C. Suit No. 3 of 2015 was instituted by Ravi Shanker Nigam, the plaintiff-respondent, seeking eviction of the defendant-petitioner, Har Narain Singh, from the shop detailed at the foot of the plaint, giving rise to the suit, besides a decree for recovery of rent in the sum of Rs.5035/- and damages for use and occupation in the sum of Rs.5050/-, aggregating to a figure of Rs.10085/-. In addition, the plaintiff has sought a decree for pendente lite and future damages for use and occupation at the rate of Rs.50/- per day, besides costs of the suit. The suit has been instituted by the plaintiff-respondent (for short, 'the landlord'), pleading a cause of action that he is the landlord of the demised shop, wherein the defendant-petitioner (for short, 'the tenant') is a tenant at a monthly rent of Rs.150/-. Needless to say that exemption from the provisions of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) (for short, 'the Act') has not been pleaded and it is common ground between parties that the Act applies. The suit has been instituted on the ground of actionable default under Section 20(2)(a) and structural alteration under Section 20(2)(c) of the Act.

3. It is the landlord's case that the tenant was in default of rent since 01.02.1996 and further that he had, without the permission in writing by the landlord, made construction as well as structural alteration in the demised shop, which tended to diminish its value, utility and disfigure it. The basis of pleading a case of structural alteration was the fact that

according to the landlord, the tenant, without his permission, had partitioned the demised shop into two and caused the tile worked roof to be removed and replaced by a different roof, supported by girders and covered by stone-slabs. In addition, was the landlord's case that the existing door of the shop had been removed and replaced by another. All these changes were said to constitute structural alteration, that tended to diminish the utility of the demised shop and disfigure it.

4. The landlord served the tenant a notice to quit dated 26.09.2014, asking him to deliver vacant possession of the demised shop, upon expiry of 30 days of receipt of the notice. The notice dated 28.09.2014 was answered by the tenant by a reply dated 18.10.2014 on incorrect facts, refusing to vacate the shop and denying his liability to pay arrears of rent, besides damages for use and occupation demanded. The notice to quit was one composite under Section 106 of the Transfer of Property Act, 1882 (for short, "the T.P. Act') and Section 20 of the Act. The suit was instituted by the landlord with the notice to quit being not complied with by the tenant. The suit was registered on the file of the Judge, Small Cause Court, Jhansi as S.C.C. Suit No. 3 of 2015.

5. The tenant put in a written statement and contested the suit. It was pleaded in the written statement that the demised shop was let out to the tenant's father between the years 1962-63 by the then landlord, Laxmi Shankar Nigam at a monthly rent of Rs.17.20. The tenant's father, prior to him, was the tenant in the demised shop. After his death, the tenant inherited the tenancy on the same terms and has held the demised shop in the same right, paying rent to Laxmi Shanker Nigam at the rate of Rs.17.20 per month. The last rent, that was paid to Laxmi Shanker Nigam, was in the month of December, 1995. It is the further case of the tenant that thereafter the tenant tendered rent by hand to Laxmi Shanker Nigam and then sent it at his correct postal address by money order on 01.01.1996, which he refused to accept. In consequence, the tenant instituted Misc. Case No. 110 of 1996, Har Narain Singh vs. Laxmi Shanker, under Section 30(1) of the Act before the Court of the Civil Judge (Jr. Div.), Jhansi with a prayer that he may be permitted to deposit rent in Court. Misc. Case No. 110 of 1996 was allowed vide order dated 03.12.1997 and the tenant has regularly deposited rent in Court with the last deposit made in the said Court on 31.12.2014.

6. It is then averred in the written statement that upon receipt of the notice to quit dated 26.09.2014 from the landlord and after answering it, in order to avoid controversy, the tenant remitted rent to the landlord from 01.02.1996 to 31.10.2014 at the rate of Rs.150/- per month by money order, which the landlord refused to accept. It is pleaded that the said facts are mentioned in the tenant's reply dated 18.10.2014, tendered in answer to the notice to quit. Later on, the tenant has deposited the entire rent due w.e.f. 01.02.1996 to 28.02.2015, together with interest and costs of the suit, in compliance with Section 20(4) of the Act, before the first date of hearing. The sum of money deposited in compliance with Section 20(4) of the Act is pleaded with full particulars in paragraph No. 27 of the plaint, indicating the five heads under which deposit of a total sum of Rs. 40,9345/0 has been made, calculating rent at the rate of Rs.150/- per month. On these facts, the case of actionable default under Section 20(2)(a) of

the Act was denied and further relief from eviction was claimed under Section 20(4).

7. So far as the case of structural alteration leading to the demised shop's utility being diminished or the shop being disfigured is concerned, it is pleaded that the tenant has not done any structural alteration to the shop and it stays in the position it was when let out. The pleadings of the landlord about the structural alteration prohibited under Section 20(2)(c) of the Act are denied by paraphrase. It is said that the pleaded structural changes do not mention the date, month and year, when they were made. This is by and enlarge the pleaded case of the tenant in answer to the case of structural alteration in the demised shop leading to diminishment of its utility and disfigurement.

8. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

(1) Whether the plaintiff is the landlord of the demised part of the property and is there a relationship of landlord and tenant between parties?

(2) Whether the notice served by the plaintiff is valid?

(3) Whether the defendant has done material alteration to the demised premises without the permission of the plaintiff?

(4) Whether the defendant has committed default in the payment of rent?

(5) Whether the defendant is entitled to the benefit of Section 20(4) of the Rent Control Act?

(6) Whether the plaintiff is entitled to any other relief?

9. The landlord led documentary evidence and examined himself in support of his case as PW-1. He tendered in lieu of his examination-in-chief in the dock, his evidence on affidavit. He was duly cross-examined. The defendant too filed voluminous documentary evidence and examined himself as DW-1, besides another witness, Ram Sewak as DW-2. Both of them tendered their testimony on affidavits and faced cross-examined in the witness-box. The details of the documentary evidence are listed in minute detail in the two judgments of the Courts below and no useful purpose would be served by recapitulating that list of documentary evidence. Needless to say that the relevant of it shall be referred to during the course of the judgment.

10. The suit was tried and decreed by the Judge, Small Cause Court, Jhansi vide judgment and decree dated 16.09.2019. The Judge, Small Cause Court accepted the landlord's case on both grounds, to wit, actionable default and structural alteration leading to disfigurement of the demised shop and diminishment of its utility. The tenant's case of relief from eviction under Section 20(4) of the Act was not accepted.

11. The tenant preferred a revision against the decree passed by the Trial Court to the District Judge of Jhansi under Section 25 of the Provincial Small Cause Courts Act, 1860. The revision aforesaid was registered on file of the learned District Judge as Small Cause Revision No. 26 of 2019. The said revision upon assignment came up for hearing before the Additional District Judge, Court No.3, Jhansi. The learned Additional District Judge dismissed

the revision and affirmed the decree passed by the Trial Court, but set aside the finding on Issue No. 5 alone, that is to say, the issue about entitlement of the tenant to relief from eviction under Section 20(4) of the Act.

12. Heard Mr. Manoj Kumar Sharma, learned Counsel for the tenant and Mrs. Rama Goel Bansal along with Ms. Shalini Goel, learned Counsel for the landlord.

13. It must be remarked here that there is no issue between parties that the landlord has inherited his right as the landlord from the original landlord, Laxmi Shanker Nigam being his nephew. It is also to be remarked that the Revisional Court after holding the tenant in actionable default under Section 20(2)(a) of the Act has extended the benefit of Section 20(4), but upheld the decree on the ground of structural alteration etc. under Section 20(2)(c) of the Act. The findings recorded by the Revisional Court relating to the benefit of Section 20(4) of the Act have not been assailed on behalf of the landlord. Therefore, the decree as now stands to be assailed is one of eviction, founded on the ground of structural alteration etc. under Section 20(2)(c) of the Act. It is for this reason that the Revisional Court has directed deposits made in whatever Court, to be adjusted against the decretal amount.

14. Mr. M.K. Sharma, learned Counsel for the tenant has been at pains to show that there is no actionable default on the tenant's part and if there be one at all, the tenant stands relieved of his liability from eviction under Section 20(4) of the Act. The said part of Mr. Sharma's submission is not required to be gone into, because the learned Counsel appearing for the landlord does not assail the finding by the Revisional Court extending the benefit of Section 20(4) of the Act. This stand of the landlord has already been noticed earlier, but a mention of the same has been made again in the context of Mr. Sharma's detailed submissions regarding actionable default and relief from eviction etc., made at the hearing.

15. The learned Counsel for the tenant has assailed the correctness of the findings returned by the two Courts below regarding the validity of the notice to quit, on which the suit is founded. It is his submission that the tenancy being for a manufacturing purpose, the lease shall be deemed to be one from year to year, terminable by six months' notice and not 30 days under Section 106 of the T.P. Act. It is emphasized that the lease here was for a Flour Mill (Aata Chakki), which is a manufacturing purpose, entitling the tenant to six months' notice. However, the notice to quit is one that terminates the lease at the end of 30 days. The notice is, therefore, invalid.

16. The learned Counsel for the landlord has supported the said finding and drawn the attention of the Court to the judgment of the Revisional Court in this regard. A perusal of the judgment of the Revisional Court shows that the Judge has discarded the tenant's submission regarding the mandatory duration of the notice under Section 106, T.P. Act, being six months in the case of a lease for a manufacturing purpose, relying on the provisions of Section 20(2)(a) of the Act. The relevant part of Section 20, including the provisions of sub-Section (2)(a) read:

"20. Bar of suit for eviction of tenant except on specified grounds- (1) Save as provided in sub-section (2), no suit

shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner:

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925), has issued a certificate that he is serving under special conditions within the meaning of Section 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words four months in this clause shall be deemed to have been substituted by the words one year;"

17. The Revisional Court has held that the provisions of the Act would prevail over the provisions of Section 106, T.P. Act, because the Act is a special statute, whereas the T.P. Act is a general law. The aforesaid exposition of the law by the Revisional Court cannot be accepted. The duration of notice to quit, envisaged under Section 106, T.P. Act, is altogether different from the period of notice, envisaged under Section 20(2)(a) of the Act. Section 106 of the T.P. Act governs the period of notice, necessary to determine a lease of immovable property, unless there be a contract or local law or usage to the contrary. Section 20(2)(a) of the Act, on the other hand, has a completely different scope and purpose. It has nothing to do with the period of notice to determine a lease regarding immovable property.

18. Section 20(2)(a) of the Act is to be understood in the context of sub-Section (1) of Section 20, which bars the right of a landlord to sue the tenant for eviction from a building, despite the determination of his tenancy, either by efflux of time or on the expiration of a notice to quit or in any other manner, except on the grounds envisaged under sub-Section (2) of Section 20. Thus, sub-Section (1) of Section 20 introduces a general embargo on the right of the landlord to evict his tenant from a building by serving him a notice to quit or on the expiration of lease by efflux of time. The various clauses of sub-Section (2) envisage grounds, on the fulfillment whereof, the embargo to sue would be lifted. Clause (a) of sub-Section (2) envisages the first of these grounds, where the bar on the landlord's right to sue his tenant for eviction would not be there. The terms of Clause (a) of sub-Section (2) provide that the tenant, who is in arrears of rent for not less than four months and has failed to pay rent to the landlord within one month from the date of a notice of demand, would entitle the landlord to bring a suit for eviction against

him. Thus, sub-Section (2)(a) of Section 20 affords the grounds on which the landlord can institute a suit for eviction against his tenant from a building, but by itself does not envisage a notice to quit determining the lease, which is governed by Section 106 of the T.P. Act. The period of 30 days envisaged under Section 20(2)(a) of the Act is not, in any manner, the period of time relating to a notice to the tenant to quit or one determining his tenancy. It is the period of time to be stipulated in a notice of demand of arrears of rent that are due for a period of four months or more, which if not paid within the period of 30 days, despite the demand notice, would entitle the landlord to sue for eviction. Since in many cases, a notice to quit under Section 106 of the T.P. Act requires a period of 30 days, at the end of which the lease would stand determined, it has been judicially approved as a valid notice, where the Act applies, that a combined notice to quit and demand for arrears of rent etc. under Section 106, T.P. Act read with Section 20(2)(a) of the Act may be served on the tenant, who is in actionable default.

19. In a different context, where the question was whether in the State of Uttar Pradesh, it was necessary for a landlord to serve a notice to quit under Section 106 of the T.P. Act, after the decision of the Supreme Court in **V. Dhanapal Chettiar v. Yesodai Ammal, (1979) 4 SCC 214,** holding that in proceedings governed by the Rent Control Act, a notice to quit under Section 106 of the T.P. Act is not necessary, this Court in **Jagdish Kumar Khanna v. Shakuntala Devi and others, 1980 ARC 535** remarked:

14. It is well settled that the Rent Control Acts do not completely supersede or supplant the provisions of the Transfer of Property Act governing the relationship of landlord and tenant. The Rent Control Act superimposes itself on the relevant and material provisions of the Transfer of Property Act. The provisions of the Rent Control Act override and prevail only in so far as they go. Since there is no provision for determination of tenancy in the Rent Control Act, one has necessarily to look to the provisions of the Transfer of Property Act. Section 111 of the Transfer of Property Act provides for determination of tenancy. Some of the methods provided therein are by efflux of time or on the expiration of notice to quit. This is provided by Section 106 of the Transfer of Property Act. The phrase "after the determination of his tenancy' occurring in sub-section (2) of Section 20 refers to the determination of tenancy in accordance with law, i.e. in the provisions of the Transfer of Property Act. This brings in Section 106.

20. The above exposition of the law, though made in a different context, is a universal principle governing the determination of tenancy in the State of Uttar Pradesh, so long and so far as the Act applies. The Revisional Court, therefore, went astray to look for the duration of notice required to terminate the tenancy in the provisions of Section 20(2)(a) of the Act. The said period is to be determined only with reference to the provisions of Section 106 of the T.P. Act. To that extent, the findings of the Revisional Court are wrong. This brings us face to face with Mr. Sharma's submission that the notice to quit is bad in law, because the lease here was one for establishing and running a flour mill (Aata Chakki), a manufacturing purpose, where the statutory period of a valid notice to quit is six months. The provisions of Section 106 of the T.P. Act read:

106. Duration of certain leases in absence of written contract or local usage.-

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month-to-month, terminable on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

21. No doubt, the period of time required to determine a lease granted for a manufacturing purpose is six months by notice, but this statutory period is subject to a contract, local law or usage to the contrary. Here, what the Court finds is that in the notice to quit dated 26.09.2014, there is a clear assertion that the tenant holds the demised premises on a monthly rent of Rs.150/-. In the reply notice, it is acknowledged by the tenant that his father was a tenant in the demised premises, let out by the late Laxmi Shanker Nigam on a monthly rent of Rs.17.20 and that rent up to December, 1995 has been paid. Elsewhere, also in the reply notice, the rent has been acknowledged at a monthly rate. Likewise, in Paragraph No. 1 of the plaint, it is averred to the following effect:

1- यह कि वादी दुकान नम्बर जिसकी सीमायें नीचे दी जा रही हैं स्थित अन्दर सैंयर गेट झांसी का मालिक व लैण्डलोर्ड है और उक्त दुकान मे प्रतिवादी 150/- प्रतिमाह की दर से बतौर किरायेदार आबाद है।

22. In Paragraph No. 22 of the written statement, it is averred on behalf of the tenant as follows:

22- यह कि तथ्य यह है कि प्रश्नगत दुकान प्रतिवादी के पिता ने सन 1962-1963 में उक्त दुकान के स्वामी व लैण्ड लोर्ड श्रीमती लक्ष्मी शंकर से रू0 17.20 पैसे माहवार की दर से किराये पर ली थी तहायात प्रतिवादी के पिता प्रश्नगत दुकान में बतौर किरायेदार आबाद रहे। बाद वफात प्रतिवादी के पिता प्रश्नगत दुकान में उन्हीं शरायतों पर उत्तर दाता प्रतिवादी श्री लक्ष्मी शंकर निगम की ओर से बतौर किरायदार वशरह रू0 17.20 पैसे माहवार आवाद हुआ व चला आता रहा व प्रतिवादी न उक्त श्री लक्ष्मी शंकर निगम को माह दिसम्बर सन 1995 तक का किराया अदा किया।

23. In the rent receipts also, that have been filed before the Trial Court vide a list of documents, annexed as Annexure No.7 to the writ petition, there is consistent mention of rent at a monthly rate. In the cross-examination of the defendant too, the

case is of the demised shop, being held on a monthly rent. From all these circumstances, it is evident that the lease always was one from month-to-month. It was not a lease from year-to-year that Section 106 of the T.P. Act postulates. A contract to the contrary, notwithstanding the lease being for a manufacturing purpose, is clearly discernible. Therefore, in the opinion of this Court, the tenancy was validly terminated by a 30 days' notice. The question involved here fell for consideration before this Court in **Smt. Ram Murti Devi v. Vth Additional District Judge, Meerut and others, 1982 SCC OnLine All 776**. Interestingly, the facts in Smt. Ram Murti Devi (supra) show that the demised premises, a garage, was let out to the tenant for the purpose of running a flour mill (Aata Chakki). It has been described in report as 'flour machine'. Amongst other things, the tenant questioned the validity of one month's notice to determine the tenancy on the ground that the lease was for a manufacturing purpose and required on the landlord's part a six month's notice to terminate the tenancy. Answering the said issue in **Smt. Ram Murti Devi,** it was held:

15. The revisional court also referred to and relied on a decision in the case of Binda Din v. Smt. Pran Dei reported in 1968 All LJ 721. I have examined this case and I find that the same fully supports the view taken by the courts below. In this case, it has been held that though a tenancy may be for manufacturing purposes, the parties may agree that the tenancy would be from month to month irrespective of the purpose of tenancy. It was further held that where there was an admission by the tenant that in regard to a manufacturing lease monthly rent was payable, it would be a stronger case for holding that the tenancy was of monthly duration. The learned Judge referred to the decision of the Supreme Court in the case of Ram Kumar v. Jagdish Chandra reported in AIR 1952 SC 23 and held that section 106 of the Transfer of Property Act embodied a rule of construction for finding out the duration of the lease and he observed that if there was no other evidence and circumstance, the lease would be deemed to be from year to year terminable at six months' notice where it is for manufacturing purpose. However, the learned Judge observed that if there was an indication that the tenancy was from month to month, the lease would be liable to be terminated on a month's notice even if it was for manufacturing purposes.

16. I am in respectful agreement with the view expressed in the aforesaid case. Learned Counsel however placed reliance on the decision of the Supreme Court in the case of Ram Kumar (supra) and contended that the decision of this court in the case of Binda Din reported in 1968 All LJ 721 requires reconsideration. He submitted that according to that decision, it is the purpose of the lease and not the mode of payment of rent which is decisive of the issues.

17. I cannot agree. The Supreme Court has not ruled that where the lease is for manufacturing purpose, there cannot be an enquiry whether there is any indication that the parties had agreed that the lease would be from month to month. Nor has the Supreme Court said that the mode of payment cannot afford any indication as to the duration of the lease agreed to between the parties. The Supreme Court in this connection observed thus at page 27 (column 1):

"It has no doubt been recognised: in several cases that the mode in which a rent is expressed to be payable affords a presumption that the tenancy is of a character corresponding thereto. Consequently, when the rent reserved is an annual rent, the presumption would arise that the tenancy was an annual tenancy unless there is something to rebut the presumption."

18. The decision of this Court in the case of Binda Din, 1968 All LJ 721 is in my opinion in accord with the law laid down by the Supreme Court.

19. Learned counsel for the petitioner vehemently contended that the mode of payment cannot be a ground for holding that the tenancy was a month to month tenancy. The submission has no force. In Ram Kumar's case (AIR 1952 SC 23) (supra) the Supreme Court has made observations (quoted above) which do lend support to the view that mode of payment, even if not conclusive of the controversy, can be considered for ascertaining whether notwithstanding the purpose of the lease there is no indication that there was a contract to contrary within the meaning of Section 106 of the Transfer of Property Act. In any case, in the present case, it is the cumulative effect of various facts and circumstances on the basis of which the courts below have held against the petitioner. The mode of payment was not the sole ground for holding against the petitioner. In my view, even if the mode of payment may not per se be decisive of the issue, it cannot, in my view, be said that the mode of payment is an altogether irrelevant circumstance. Far from being irrelevant, the mode of payment is, in my view, an important and relevant circumstance for ascertaining whether there is any contract to the contrary as to the duration of the lease.

24. In the facts found here, the tenancy, in the opinion of this Court, was clearly one for month-to-month. It could be determined by a month's notice. The notice to quit, therefore, cannot be questioned on the said ground.

25. Now, it is submitted by the learned Counsel for the tenant that the findings of both the Courts below on the issue of structural alteration without the written permission of the landlord, leading to the building housing the demised premises suffering a diminishment in its value or utility and its disfigurement, are patently flawed. It is argued that it was the landlord's burden to adduce expert evidence or take out a commission for local inspection to show what structural alterations have been done, and if done, how these diminished the value of the building housing the demised premises or affected its utility or disfigured it. It is submitted that the Courts below placed the burden on the tenant's shoulders to adduce evidence, negatively oriented to establish that there was no violation of Section 20(2) (c) of the Act.

26. A look at the Trial Court's findings on the issue does not require this Court to spare a second thought in accepting the tenant's criticism that the Trial Court has wrongly placed burden upon the tenant to prove the case of structural alteration. The short finding recorded by the Trial Court on the issue can be best appreciated by a reproduction thereof verbatim:

"इस तथ्य को सिद्ध करने का भार वादी पर था कि प्रश्नगत दुकान में प्रतिवादी ने मौलिक स्वरूप को परिवर्तित करा दिया गया है। प्रतिवादी की ओर से जो साक्ष्य प्रस्तुत की गयी

है। उसमें प्रतिवादी ने अपनी जिरह के पेज 7 पर यह कथन किया गया है कि प्रश्नगत दुकान जब किराये पर ली गयी थी उस समय कच्ची खपरैल थी, मैं नहीं बता सकता, दुकान जैसी थी, वैसी है। दुकान में आटा चक्की के साथ मेरा बेटा दर्जी का काम भी करता है। जिसकी दुकान सी०ए० टेलर्स के नाम से है। वर्ष 1998 से मेरा लड़का टेलरिंग का कार्य कर रहा है। वर्तमान में दुकान पर पत्थर की छत डली है, छत के समय दुकान में प्लास्टर का कार्य कराया था। जिसका खर्चा पिता जी ने दिया था। इस साक्षी ने आगे अपनी जिरह में यह भी कथन किया है कि प्रश्नगत दुकान के मालिक वादी हैं। मैं अपने लड़के को प्रश्नगत दुकान में दर्जी का काम करने के लिये कोई अनुमति नहीं ली थी। प्रतिवादी द्वारा बहस के दौरान यह तर्क प्रस्तुत किया गया है कि वादी द्वारा प्रश्नगत दुकान संरचनात्मक परिवर्तन के बावत न तो कोई अमीन आख्या या फोटोग्राफस प्रस्तुत किये हैं, न ही परिवर्तन व परिवर्धन नियत तिथि वादी द्वारा अपने वाद/ साक्ष्य में प्रस्तुत की है। इस संबंध में पत्रावली के परिशीलन से यह विदित हुआ कि उक्त वादी के कथनों के संबंध में प्रतिवादी द्वारा भी न तो अमीन आख्या मंगाई गयी न ही कोई फोटोग्राफ्स इस बावत प्रस्तुत किया गया। इस प्रकार वादी द्वारा इस तथ्य को सिद्ध करने में सफल रहे कि प्रतिवादी दवारा प्रश्नगत दुकान में निर्माण या संरचनात्मक परिवर्तन जिसमें उसका मूल्य या उसकी उपयोगिता घटने की संभावना हो, किया गया है। तदनुसार यह विनिश्चय बिन्दु सं०-3 वादी के पक्ष में निर्णीत किया जाता है।

(emphasis by Court)

27. A reading of the said finding clearly shows that the Trial Court has not at all looked into evidence led on behalf of the tenant to establish a case of structural alteration of the kind envisaged under Section 20(2)(c) of the Act. The Trial Court has virtually assumed the case to be proved, as alleged, and then held that for the reason that the tenant has not applied for a commission to carry out a local inspection or produced photographs, the conclusion ipso facto is that the tenant has made structural alteration to the demised shop as is likely to diminish its value or utility or disfigure it. The finding is absolutely based on no evidence, and proceeds as if there were a presumption about the prohibited structural alteration in support of the landlord's case. The finding to that extent is perverse also.

28. The Revisional Court has examined the matter in some detail. The findings recorded by the Revisional Court, with reference to the evidence DWs 1 and 2 on the question of structural alteration, are to the effect that both the DWs have acknowledged in their cross-examination that structural alterations have been done to the shop, where a plywood partition has been put in place, and apart from the flour mill installed, an additional tailor's shop had been established. In the relevant part of cross-examination of DW-1, it has been accepted that the demised shop had a kachcha tile-worked roof, but now the shop has a roof fixed with girders and stone slabs. It has been further said, when the roof was changed, he did not remember. The stone-slabbed roof was laid during the tenancy of the witness's father. Again, DW-2 has stated in his cross-examination that the shop has two doors: in one part, there is a flour mill and in the other, the tailors shop exists. The building in question, according to the witness, had no wall. The partition wall is made of plywood.

29. From all this evidence, the further finding recorded by the Revisional Court is that the testimony of DWs 1 and 2 shows

shows that the tenant has done structural alteration to the demised shop. It is next remarked that there is no permission produced for the said structural alteration. It is observed that on the other hand, the landlord says, that whatever structural alteration has been done by the tenant, it was without his permission. The said assertion is unrebutted on the tenant's part.

30. The finding on Issue No. 3 recorded by the Revisional Court concludes with the remarks that the Trial Court's finding on Issue No. 3 is liable to be affirmed to the extent that the tenant has, without the permission of the landlord, made structural alteration in the demised shop. The Revisional Court has then said that the further issue, whether the structural alteration made is one that is likely to diminish the value or utility of the shop or disfigure it, would be answered later on in the Revisional Court's judgment.

31. The Revisional Court while answering Issues Nos. 4 and 5, which quintessentially are about default and relief from eviction, has recorded findings on the point, whether the structural alteration is likely to diminish the value or utility of the demised shop or disfigure it. The relevant finding recorded is extracted below:

(iii) प्रश्नगत वाद इस अधिनियम की धारा २०(२) (ग) के अधीन भी योजित किया है। जैसा कि उपरोक्त प्रस्तरों में अभिनिर्धारित किया गया है प्रतिवादी द्वारा प्रश्नगत दुकान में वादी की इजाजत के बिना परिवर्तन व परिवर्धन किया है तथा दुकान को दो भागों में विभाजित भी कर लिया है जिसमें से एक पार्टीशन में प्रतिवादी के पुत्र द्वारा दर्जी का भी कार्य किया जा रहा है। अतः ऐसी स्थिति में इस न्यायालय के अभिमत में इस संरचनात्मक परिवर्तन से प्रश्नगत दुकान का मूल्य एवं उसकी उपयोगिता निश्चित रूप से घटती है। यद्यपि वादी द्वारा इस अधिनियम की धारा २०(२) (घ) के अधीन यह वाद योजित नहीं किया गया है, जबकि डी०डबलू०- १ एवं डी०डबलू०-२ के स्वयं की स्वीकारोक्ति है कि प्रश्नगत दुकान में मूल कार्य के अतिरिक्त दर्जी का भी कार्य सम्पादित किया जा रहा है। किन्तु उस स्थिति में भी जबकि दुकान को दो हिस्सों में बांट लिया गया है और एक हिस्से में दर्जी का कार्य सम्पादित किया जा रहा है, इस न्यायालय के अभिमत में ऐसा परिवर्तन प्रश्नगत दुकान के मूल्य एवं उपयोगिता को निश्चित रूप से घटाता है एवं उसे विरूपित भी करता है।

32. Surprisingly, there is no finding recorded by the Revisional Court about the effect of replacement of the existing tile-worked roof with a stone-slabbed roof, supported by girders on the value or the utility of the demised shop or about the fact if the changed roof has disfigured it. The finding recorded is about the twin use, to which the demised shop has been put after placing a plywood partition, where it has been held that the said double user of the shop brings about a structural alteration, which leads to value and utility of the shop being diminished. There are then some very mixed up remarks by the Revisional Court, where the reasoning seems to have gone haywire between the requirements of Sections 20(2)(c) and 20(2)(d) of the Act. It is observed by the Revisional Court that though the landlord's case is not one under Section 20(2)(d), DWs 1 and 2 have admitted the fact that in the demised shop, apart from its authorized user, it is being put to the additional use of a tailor's shop. This observation is followed by the remark that in a situation where the shop has been divided into two parts, one being where the tailoring work is done, in the Court's opinion the change certainly leads to a

diminishment of the value and utility of the demised shop.

33. This Court is afraid that the finding recorded by the Revisional Court, unlike the Trial Court, is flawed for confounding the requirements of Sections 20(2)(c) and 20(2)(d) of the Act. It is also flawed, because it has inferred a case of structural alteration by the putting up of a plywood partition. The plywood partition certainly does not bring about structural alteration. Dismantling the existing tile-worked roof and replacing it by one of stone-slabs with girder support, may. Therefore, the Revisional Court has observed in manifest illegality that partition of the demised shop into two part by a plywood partition, amounts to structural alteration. The other finding recorded is that by use of the demised shop as two, one for housing the flour mill and the other for the tailoring business, certainly leads to diminishing its value and utility, is also manifestly illegal. It is so because the diminishment in value or utility must come from the structural alteration made to the building and not from the use that it is put to. The plywood partition is not a structural alteration, as already said, and, therefore, cannot be linked to the diminishment in value or utility or even disfigurement. The use of a shop for two kinds of trades or business may or may not diminish the shop's utility, but that is not something, which is the consequence of a structural alteration. It may or may not be a case of inconsistent user, prohibited by Section 20(2) (d) of the Act, but that is not the ground on which the suit for eviction has been instituted. The Revisional Court appears to have been cognizant of this folly in the finding and has mentioned it in hesitant words. However, the Revisional Court has gone ahead to say that the plywood partition of the shop and its use for the twin business of the flour mill and the tailor's shop, lead to a diminishment of its value and utility. The said finding is completely beyond the purview of the requirements of Section 20(2) (c) of the Act. The reason is that the Revisional Court has not opined the way it did, because a plywood partition had been put up in the shop, dividing it into two, but the fact that the shop subdivided as it is by a plywood partition is being used for the purpose of two different trades/ business. There is nothing inferred as a diminishment in the value or the utility of the demised shop from any structural change made, but one from the nature of business added to the existing one. There is, therefore, nothing on the findings recorded by the Revisional Court to conclude that any of the structural changes made have led to a diminishment in the value or the utility of the demised shop or its disfigurement.

34. There is hardly any finding about the impact on the value or the utility of the demised shop, in consequence of the existing tile-worked roof being replaced by stone-slabbed roof supported by girders. Likewise, there is no finding whether the replacement of the existing doors on the shop have led to diminishing of its value or utility or disfiguring it. These are the relevant inquiries, which ought to have been made by the Courts below before returning a finding on the ground under Section 20(2) (c) of the Act.

35. On what parameters, the plea under Section 20(2) (c) of the Act has to be examined, has been spelt out by this Court in ***Umesh Kumar v. Arun Kumar and others, 2012 SCC OnLine All 3987. In Umesh Kumar*** *(supra)*, it has been held:

6. Section 20(2)(c) of Act, 1972 would be attracted incurring liability for ejectment of tenant from the let out building only when landlord is successful in proving the following:

(1) There is no permission obtained by tenant in writing from landlord;

(2) The tenant has made or permitted to make some construction or structural alteration in the building; and

(3) Construction/ structural alteration, as above, is such as is likely to diminish the value of property or utility or to disfigure it.

7. So far as consent part is concerned, the concurrent finding is that there is no such consent available with tenant. It is also not in dispute that certain construction/structural alterations have been made by tenant in the shop in question. Therefore, first two aspects as above are satisfied and this Court has to find out whether the inference drawn by Courts below about factor (3) above is just and valid or is so manifestly illegal or illogical or erroneous so as to justify this Court's intervention in writ jurisdiction.

8. This Court in Dr. Jai Gopal Gupta v. Bodh Mal [1969 ALJ 477.] held that in a suit filed for eviction on the ground of "material alteration", the Court has to first record a finding about the actual construction made by tenant and such finding will be a finding of fact. Having done so, the Court thereafter would have to form an opinion whether such constructions have "materially" altered the accommodation or is likely to cause substantial damage to its value. That was the requirement under statute, as it was up for consideration in Dr. Jai Gopal Gupta (supra) but the language of section 20(2)(c) has removed the word "material alteration" and it is now differently worded. Now the term is "construction" or "structural alteration". The two terms namely construction or structural alteration are much lighter requirement than the term material alteration. Now every construction or structural alteration, whether it can be said to be "material" or not would attract the mischief under section 20(2)(c) of Act, 1972 provided it further satisfy the their requirement namely diminish the value of the property or utility or to disfigure it.

9. Be that as it may, the subsequent opinion, which is to be formed by a Court, i.e., the effect of construction/structural alternation on accommodation about its value, utility etc. is a finding involving a mixed question of fact and law. This has to be determined on the application of correct principle of law. This has been said by Apex Court in Om Prakash v. Amar Singh [1987 (13) ALR 163 (SC).].

10. The findings regarding alteration/structural changes made by tenant in accommodation in question as recorded by Trial Court, therefore, would have to be taken final since it is finding of fact. The Revisional Court hereat has also not pointed out anywhere in the revisional judgment that the said finding of fact is based on no evidence or that it is perverse or there is otherwise any error or jurisdictional fact. To this extent no interference needs in this case.

13. The word "value" means intrinsic worth of a thing. In other words, utility of an object satisfying, directly or

indirectly, the needs or desires of a person. It can thus be said that to attract section 20(2)(c) it has to be established that the tenant has committed such acts of construction or structural alteration as are likely to diminish the quality, strength or value of building or rented land to such an extent that intrinsic worth or fitness of the building or rented land has considerably affected its use for some desirable practical purpose. The decrease or deterioration, in other words, the impairment of the worth and usefulness or the value and utility of the building or rented land has to be judged and determined from the point of view of landlord and not of tenant or any one else. This aspect has also been reiterated by Apex Court in Gurbachan Singh (supra) in para 12 of the judgment. In Gurbachan Singh (supra) also the tenant had removed full size door of one shop and merged the shop into open part of verandah. All these activities were held to be a constructional alteration impairing material value and utility of building. The Court observed:

"14..... then the rest of the construction, additions and alterations of the 5 shops and the verandah in front of the said shops of a permanent nature, will certainly amount to acts as have or likely to have impaired materially the value or utility of the building/premises let out to them..... In the present case the removal of the roof of the shops partition walls and the doors, laying of a root, merging of the verandah with the shops, closing the doors and opening new doors and windows and converting the premises altogether, giving totally a new and a different shape and complexion by such alteration would certainly be regarded as one involving material impairment of the premises affecting its Fitness for use for desirable practical purpose and intrinsic worth of the demised premises from the point of view of the appellant-landlords within the meaning of section 13(2)(iii) of the Act."

18. In Ram Chandra (supra) Hon'ble N.N. Sharma, J. considered the question, whether the nature of alteration was a "material alteration" or not but this Court has no hesitation in observing that in section 20(2)(c) the landlord is not required to prove "material alteration" but he has to show a "structural alteration" made, having the effect of disfigurement or diminishing the value or utility of rented building. The word "material alteration" does not find place in section 20(2)(c) and, therefore, various authorities relied in Ram Chandra (supra), in my view, also would have no application to the case in hand, governed by section 20(2)(c) of Act, 1972.

(emphasis by Court)

36. Considering that the issue of structural alteration is essentially a question of fact in the first instance and the Trial Court has not written a word worth the name in returning its finding on the issue, this Court is of opinion that for the determination of the said issue, the matter has to go back to the Trial Court. The other issues, that have been decided by this judgment, shall no longer be open to the parties or the Courts of Trial or Revision to examine. The findings of the Courts below on Issues Nos. 1, 2, 4 and 5 are all affirmed, subject, of course, to the remarks in this judgment. The Trial Court is, therefore, required to re-determine the suit on Issues Nos. 3 and 6 alone, regarding which the parties shall be free to suit their case on merits. The parties shall be at liberty to lead further evidence on the said issues, if they so desire. While determining the suit afresh, the Trial Court shall bear in mind the guidance in this judgment.

37. In the circumstances, this petition **succeeds** and is **allowed**. The impugned judgment and decree dated 14.01.2021 passed by the Additional District Judge, Court No.3, Jhansi in S.C.C. Revision No. 26 of 2019 as well as the judgment and decree dated 16.09.2019 passed by the Judge, Small Cause Court, Jhansi in S.C.C. Suit No. 3 of 2015 are set aside, except to the extent of findings upheld by this judgment. The Judge, Small Cause Court, Jhansi shall proceed to try and determine the suit afresh, after hearing the parties and their witnesses. Considering the fact that the suit is one of the year 2015 and occasion has arisen, where a remand has been made to the Trial Court, it is directed that the Trial Court shall proceed with the suit, fixing two dates of effective hearing every week and decide the suit within a period of **three months** of the date of receipt of a copy of this judgment.

38. Let a copy of this judgment be communicated to the Judge, Small Cause Court, Jhansi through the learned District Judge, Jhansi by the Registrar (Compliance).

(2022) 10 ILRA 1177
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

First Appeal No. 510 of 2022
Alongwith
First Appeal No. 485 of 2022

Ms. Nasrin Begum & Anr. ...Appellants
Versus
Prof. Mohd. Sajjad & Anr. ...Respondents

Counsel for the Appellants:
Sri Kavish Suhail, Sri Pradeep Kumar Chandra (Sr.Adv.)

Counsel for the Respondents:
Sri Tarun Pratap Singh, Sri Komal Mehrotra, Sri Syed Ahmad Faizan, Sri S.F.A. Naqvi (Sr. Advocate), Sri Atul Dayal (Sr. Advocate)

A. Family Law – Custody of child - Guardians and Wards Act, 1890 - Sections 8, 10, 17(3) & 25 - The principles of law in relation to the custody of a minor child, as to the paramount consideration of the welfare and interest of the child and the custody not being the rights of the parents under a statute is well settled. (Para 17)

Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society. (Para 18)

The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. (Para 19)

In the present case, the sister (appellant No. 1) had left her child with her brother and sister-in-law who are issueless would not deprive her from the custody of her minor child. The child has not been legally adopted. The answer to the question that was considered by the trial court to give custody of the child to the maternal uncle and aunt is guided by the wishes of the child who does not even know as to who her birth parents are. The family court was swayed away by the fact that the detachment of the child from her maternal uncle and aunt who have brought her up as her own child, would have perilous effect on the physiology of the child. Whereas the parents are fighting for the custody of the child since the child was in a tender age of five years. It was categorically stated by the appellants that they were not

allowed to meet their child and the respondents have refused to give back the child despite their best efforts to find out an amicable solution. The vehemence of the respondents in not allowing the child to meet her birth parents is evident from their resistance in even allowing the child to see her birth parents once in a year for 15 days. Several cases including criminal complaints were filed between the parties because of the dispute relating to the custody of the child. (Para 31)

Giving due consideration to the circumstances such as ordinary comfort, contentment, intellectual, moral and physical development, health, education and general maintenance of the child as also the favourable surroundings, it is in the best interest of the child whose welfare is our paramount consideration that she be in the custody of her birth parents. The reason being that:-

(i) The applicants are biological parents (both mother and father) of the child. The child as a human being has a right to know as to who are her parents and has a legal right to remain in the custody of her parents till she attains majority.

(ii) The appellants have other children, the child would grow with her siblings which is a positive environment being favourable surroundings for the welfare of the child.

(iii) Knowing her real identity as a human being is the first right of the child. She must know who her birth parents are. She must know who her siblings are. She must know who the persons are who are fostering her at present. The child cannot be allowed to live in a camouflage of her own being. Even an adopted child within the family sometime faces emotional turmoil when he is grown up and told about his/her real parents. The deprivation of the company or even knowledge about her birth parents may come as a shock to the child when she is grown up. The deprivation of the child of the company of her own siblings may prove to be a shock for her, later. (Para 32)

In any case, a child as a human being cannot be deprived of the company of her birth parents under a concealed identity of the respondents being her real parents. The mother who gave birth to the child cannot be deprived of the company of her daughter just for the fact that for sometime the child was given in the foster care of her maternal uncle and aunt. It is not about the right of the applicants (the parents) or the respondents (the maternal uncle and aunt) rather it is about the right of the child as a human being. A minor has a birth right to remain in the custody of her/his birth parents, who are the best persons on earth to know the welfare of the child. (Para 34)

B. Proceeding in appointing or declaring the guardian of a minor the Court shall be guided by not only the law to which the minor is subject, but the welfare of the minor as appears in the circumstances of the case and if the minor is old enough to form an intelligent preference, the court may consider that preference. (Para 22)

In the present case, the maternal uncle and aunts/foster parents of the child have not acted in a matured manner in the situation in which they fall. Their emotions on the one hand and the welfare of the child on the other are pitted against each other. The attitude and behavior of the foster parents in the whole scenario is also not understandable. Without there being any legal adoption but only under an arrangement within the family, the foster parents (the respondents) should have though fostered the child as their own but should have allowed the child to know as to who her birth parents are, to meet them, to spend time with them and then take an informed decision, an intelligent preference as to with whom she wanted to stay, to spend her childhood. (Para 34)

On overall consideration of the facts of the present case, in exercise of judicial discretion, giving paramount consideration to the welfare of the minor, we are of the considered opinion that for contentment, intellectual, moral and physical development of the child, the best interest of the child is to be in the custody of her birth parents. The wishes of the child who is not old enough to form an intelligent preference cannot prevail over the welfare of the child. (Para 35)

The First Appeal No. 510 of 2022 is hereby allowed. The First Appeal No. 485 of 2022 is disposed of. (E-4)

Precedent followed:

1. V. Ravi Chandran Vs U.O.I. & ors., 2010 (1) SCC 174 (Para 7)

2. Guru Nagpal Vs Sumedha, 2009 SCC 42

3. Vivek Singh Vs Romani Singh, 2017 (3) SCC 231 (Para 7)

4. Nil Ratan Kundu & ors. Vs Abhijit Kundu, 2008 (9) SCC 413 (Para 12)

5. Thrity Hoshie Dolikuka Vs Hoshiam Shavaksha Dolikuka, 1983 (1) SCR 49 (Para 16)

6. Rosy Jacob Vs Jacob A. Chakramakkal, 1973 (1) SCC 840 (Para 18)

7. Bimla Devi Vs Subhas Chandra Yadav Nirala, AIR 1992 Pat 76 (Para 19)

8. Kamla Devi Vs St. of H. P., AIR 1987 HP 34 (Para 20)

Present appeal assails the judgment and order dated 30.05.2022 passed by the Additional Principal Judge, Family Court, Court No. 3, Aligarh.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard Sri Pradeep Kumar Chandra learned Senior Advocate assisted by Sri Kavish Suhail learned Advocate, Sri Atul Dayal learned Senior Advocate assisted by Sri Komal Mehrotra and Sri S.F.A. Naqvi learned Senior Advocate assisted by Sri Syed Ahmad Faizan, learned Advocate for the parties in both the connected appeals.

2. These two connected appeals have been filed by both sides challenging the order dated 30.05.2022 passed by the Additional Principal Judge, Family Court, Court No.3, Aligarh in Misc. Petition No.73 of 2019 filed under Section 8, 10 & 25 of the Guardians and Wards Act' 1890 (in short as '1890' Act. The appellants in First Appeal No.510 of 2022 are applicants of the misc. case filed under the Act' 1890 praying for custody of the minor child. The appellant in connected First Appeal No.485 of 2022 are aggrieved by the aforesaid decision only to the extent of the findings on issue No.2 where the applicants have been provided visitation right/custody of the child for a period of 15 days in one year during summer vacation in the school of the minor child till she attains majority.

3. The applicants/appellants are natural guardians, biological parents of the child who was about five years of age on the date of the application seeking custody of the child. The respondents/appellants in the connected Appeal No.485 of 2022 are maternal uncle and aunt of the child, the respondent No.1 being real brother of the appellant No.1. As stated in the application filed by the appellants, the minor child was born on 16.12.2013 at Jeddah, Saudi Arabia and a birth certificate was issued by the concerned authority at Jeddah wherein names of the applicants/appellants as parents of the child have been mentioned. The respondents herein are issue-less. Initially one Mohd. Zaheer, brother of the respondent No.2 namely sister-in-law of the applicants, gave them his minor girl child for about three months and later took her away. The respondents went under depression on account of the said incident.

4. When the applicants came to India after birth of their girl child on 11.03.2014, the respondents expressed their desire to look after the minor child for sometime so

that they may overcome the crisis. It was then agreed that the minor would be in custody of the respondents and whenever the applicants come to Delhi they would be spending time with their daughter and the child would remain in touch with her parents through audio and video calls. On the request of the respondents, the passport and birth certificate of the minor child was handed over to the respondents so that they may not face any inconvenience in keeping the child with them. Believing her brother, the appellant No.1 namely Ms. Nasrin Begum had signed a written document wherein custody of the minor child was given for the time being to the respondents. The applicants/appellants then left for Saudia Arabia. It is stated that this arrangement was made by the appellants only as humanitarian consideration, to help brother and sister-in-law of the appellant No.1 to overcome the emotional crisis faced by them.

5. In the year 2015, during vacation when the applicants/appellant came to India, they felt change in the behaviour of the respondents. Again in the year 2017, during vacation, they came to India with the main object of meeting their daughter and when they reached at the house of the respondents, the respondents did not allow them (the appellants) to meet the child. Being family members, the applicants/appellants tried to persuade the respondents through elders in the family. The appellant No.1 in the meantime, gave birth to the fourth child on 07.05.2018. During this period and thereafter, the appellant No.1 talked to her brother namely the respondent No.1 to take her child back with her to Saudi Arabia and requested respondent No.1 to give back the passport of the minor child. The respondent gave passport and photographs of the minor child to the appellant No.1 and that with this conduct of the respondent, the appellants had no doubt that the respondent would have no objection to give away the child. The process of getting visa of the child was then initiated by the appellant No.1 and visa was issued from Saudi Arabia on 25.07.2018. When the applicants/appellants came to India and went to the house of the respondents to meet the child they were not allowed to enter inside nor were permitted to talk to the child. The appellant No.1 stayed in India for about 8 months before moving the application so that she may persuade the respondents to give back her daughter. However, the respondents misbehaved with the appellant No.1 and then the appellants were constrained to approach the family court seeking for custody of the minor child. The cause of action to institute the proceedings arose when the respondent had refused to handover the custody of the minor child to the appellants.

6. In the written statement filed by the respondent, it was admitted that the applicants/appellants are biological parents of the child. It is also admitted that the respondents are issue-less. But the application was objected with the assertion that the applicants/appellants had handed over the custody of the minor child to the respondent on 11.04.2014 willingly and now in view of the Section 25 of the Act' 1890, the appellants cannot seek the custody of the child. It is argued that an adoption deed was executed by the appellants to give the minor child in the custody of the respondents and the adoption deed was signed by the appellants out of their own sweet will, which is a notarized deed. When the child was given in the custody of the respondents, she was barely three and a half months. The respondents looked after the child as their

own and she had grown to a six and a half years old beautiful girl and they cannot think of separation from the child. The child is very close to the respondents and is studying in one of the best school at Aligarh. The respondents are taking good care of the child and it is in the welfare of the child to grow in the custody of the respondents. It was admitted that there was no provision for adoption in Muslim Personal Law but contention is that the said legal grounds has no bearing on the facts that the paramount consideration of the Court in selecting a proper guardian of the minor child should be the welfare and well being of the child, which is with the respondents. On the said pleading and the documentary and oral evidences filed by the parties, the issues framed by the family court were as follows:-

"बिन्दु संख्या 1 "क्या प्रार्थीगण प्रार्थनापत्र में वर्णित तथ्यों के आधार पर अवयस्क/नाबालिग जैनव गुफरान के बॉयोलोजिकल, नेचूरल पेरेन्टस होते हुये अभिरक्षा प्राप्त करने के अधिकारी है ?

बिन्दु संख्या-2:- "क्या प्रार्थी/वादी किसी अन्य अनुतोष को पाने का अधिकारी है?"

7. The issue No.1 has been decided against the appellants by the family court on the ground that taking paramount consideration of the welfare of the child in light of the decision of the Apex Court in **V.Ravi Chandran vs Union Of India & Ors1, Guru Nagpal Vs. Sumedha2, Vivek Singh Vs. Romani Singh3, i**t is in the best interest of the child to remain in the custody of the respondents. It was opined by the family court that the children cannot be treated as chattel/property and the act of the applicants/appellants in leaving their three months child in the custody of the respondents show that they were happy with the arrangement that the child would live with her maternal uncle and aunt. When the respondents looked after the child of a tender age of three months who has now grown into a six years old girl, as an afterthought on account of the dispute with her brother, the appellant No.1 had instituted the application seeking custody of the child. The Court had also interviewed the child and noted her statement that she would call maternal uncle and Aunt as "Abba" and "Ammi" and stated that she was being looked after well by them and she wants to stay with them only. It was also noted that even the appellant No.2 examined as PW-1, natural father of the child had stated that he did not want to take away the child against her wishes. It was noted that the wishes of the child to stay with the respondents cannot be ignored by the Court.

8. It is argued by the learned counsel for the appellants that the appellants were desperate to take away their child with them and made efforts so that the amicable solution can be found as both the parties are closely related to each other. The statement of the father that he did not want to take away the child forcibly as against the wishes of the respondents itself shows that the appellants made efforts to persuade the respondents to give away their child which all went in vain and hence they were constrained to file the instant application. Even before filing of the present application, Habeas Corpus petition had been filed before the High Court at Delhi which was dismissed on the ground of lack of territorial jurisdiction. It is argued by the learned counsel for the appellant that the judicial pronouncement about the welfare of the child relate to the dispute between husband and wife namely two biological

parents and not an outsider. The term guardianship denotes the guardianship of a minor. The Quran is a basic of the law relating to the concept of guardianship of a minor. Muslim Personal Law makes a difference between guardian of a person and guardian of the property in case of minor.

9. Guardianship of a person for minor for custody is given to mother who is de facto guardian of the child upto the age of seven years for a male child and in case of female child till the child attains the age of puberty as per the Hanafi law. In Shia law, the mother is a de facto guardian upto two years for the male child and seven years in case of female child. In any case, the legal guardian of a child can only be a person who is either a natural guardian or a guardian appointed by the Court. In absence of a legal guardian, the Court is entitled to appoint guardian for the betterment of the minor. Under Muslim Law the question of guardianship of a minor is very essential so as to deal with the right of the minor and his/her property, if any.

10. Be that as it may, it is argued that the family court had given a complete go-by to the legal principles of appointment of guardian under the Act' 1890 while deciding the application moved by the appellants who are natural/biological parents of the child. The occasion for moving application before the family court arose on account of the fact that the respondents had refused to give the child in the custody of her biological parents. It is argued that the notarized deed claimed as adoption deed has no sanctity of law and, moreover, the said arrangement was made by the appellant out of sheer love and affection for the issue-less brother and sister-in-law. Under the said arrangements between the parties, the appellants were free to meet their child and to spend time with her and to take her away without any permission or consent of the respondent. The appellants were also free to stay in touch with their child by calling her through audio and video mode frequently.

11. The respondents, however, did not honor their promise and later behaved strangely in denying entry of the parents (appellants) in their house to meet the child. The appellant No.1 had to stay for a long time in India to persuade the respondents to allow her to meet the child and on their denial, the appellants were constrained to move the family court. On account of the changed behavior and attitude to the respondents where they have not only denied access to the child but also detached the child from her own parents, this dispute came to the Court.

12. Sri Atul Dayal leaned counsel for the respondent, in rebuttal, has heavily relied upon the decision of the Apex Court in **Nil Ratan Kundu & others vs. Abhijit Kundu4** to submit that in the matter of custody of a minor child, as per legal position in India, the paramount consideration for the Court is the welfare of the child. The Court has to ascertain not only the welfare but also the wishes of the child by interviewing the child. He, therefore, urged that this Court may summon the child to know her wishes if it has any doubt about the findings returned by the family court where the categorical statement made by the child was noted that the respondents are her 'Abbu' and 'Ammi' and she wants to stay with them only. It was argued that any change in the arrangement as on date or detachment of the child from the respondents who are

looking after her as their own child since she was barely three and a half months old, would have an adverse effect on the mental well being of the child and may have the effect her physical health as well. It is, thus, argued that the family court had given due consideration to the circumstances of the case and based on the well settled principle of welfare of the minor child being paramount consideration, having duly ascertained the wishes of the child, has rightly rejected the application.

13. On the findings on issue No.1, about the visitation right given to the applicant/appellant the biological parents of the child, it was argued by the learned counsel for the respondents that the arrangements made by the family court while deciding issue No.2 of leaving the child in custody of the appellants was wholly uncalled for, in as much as, giving visitation right is a different consideration from that of giving custody of the minor child for 15 days to the parents who have never contributed in the upbringing of the child so far.

14. Having considered the submissions of the learned counsel for the parties and perused the record, we find that this is a peculiar case of the parents (both) being the applicants seeking custody of their minor child from their close relatives who have fostered the child for few years. As is evident from the record, there is no dispute about the fact that the minor girl child was left in the custody of the respondents when she was barely three and a half months old. The arguments of the appellants/biological parents are that they have given the child in the custody of the respondent being their close relatives i.e. brother and sister-in-law of appellant No.1, so that they may overcome depression which they were facing at the particular point of time. However, as per the arrangement between the parties, the child was to remain in the custody of the respondents but the appellants were free to meet her and to spend time with their child whenever they want. From the turn of events, it seems that the said arrangement did not work for long as the respondents had refused to allow the appellants (the parents) to meet their child. There was lot of resistance at the ends of the respondents which is also evident from the fact that the respondents are even not happy with the arrangement made by the family court to allow the parents to have the custody of their child for 15 days in one year. The respondents have resisted this arrangement on the premise that the appellants would take the child to Saudi Arabia forcibly and illegally. This apprehension was raised before the Court at the time when the interim application of the applicant/appellant was considered and allowed by this Court and the child was sent with appellant No.1 for 15 days during summer vacation as per order of the family court.

15. It is evident from the record that the child was denied access to her own parents. She has been deprived of her right to know her own parents and spend time with them. Though, there cannot be a doubt to the fact that the child was brought up by the respondents as their own daughter and she would call them as 'Abbu' and 'Ammi', but restraining a child to meet her parents, to our mind, is nothing but denial of her birth/natural right to know her own self. As the child is living with the respondents since when she was three and a half months old and barely got the chance to know her parents, interviewing her or knowing her wishes would have served no useful

purpose as the child would want to remain in the custody of the persons with whom she is residing at present and who she knows as her own parents. We may record that for this reason and for other reasons for the discussion made hereinafter, we did not accept the prayer made by the learned counsel for the respondent to summon the child to ascertain her wishes.

16. Further, this situation takes us to the observations made by the Apex Court in the case of **Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka5** wherein the Apex Court while declining to interview the minor child had noted that it was satisfied in the facts of that case that the minor child was not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. In the facts of that case, the parents of the child were litigating and the court while dealing with the said case had noted that any child who is placed in such an unfortunate position can hardly have the capacity to express an intelligent preference which may require the court's consideration to decide what should be the course to be adopted for the child's welfare. It was observed that mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. The relevant observations of the Apex Court in the said decision as noted in paragraph No.'81' of Nil Ratan Kundu (supra) are required to be noted hereinunder:-

"81. Considering the facts of the case, however, the Court refused to undertake that exercise and stated;

"In the facts and circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. We have earlier set out in extenso the various orders passed by the various learned Judges of the Bombay High Court after interviewing the minor and the learned Judges have recorded their impressions in their judgments and orders. The impressions as recorded by the learned Judges of the Bombay High Court, go to indicate that the minor has expressed different kinds of wishes at different times under different conditions. It also appears from the report of the Social Welfare Expert that these interviews cast a gloom on the sensitive mind of the tender girl and caused a lot of strain and depression on her. Torn between her love for both her parents and the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected. Though the girl is quite bright and intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age and is placed in a very delicate and embarrassing situation because of the unfortunate relationship and litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest and welfare. Mature thinking is indeed necessary in such a situation to decide as to what will enure to her benefit and welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare. The letters addressed by the daughter to

her mother from Panchgani and also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly and cannot form any firm desire. We feel that sending for the minor and interviewing her in the present case will not only not serve any useful purpose but will have the effect of creating further depression and demoralisation in her mind".

(emphasis supplied)"

17. The principles of law in relation to the custody of a minor child, as to the paramount consideration of the welfare and interest of the child and the custody not being the rights of the parents under a statute is well settled. However, the said position of law has been stated and reiterated in those cases where the parents have been litigating over the custody of the child after separation. In some of the cases, the grand parents have litigated with one of the parent of the child after death of another and the issue was examined from the angle of the welfare of the child in the facts and circumstances of the case.

18. In **Rosy Jacob Vs. Jacob A. Chakramakkal6**, the Apex Court has held that the object and purpose of the 1890' Act is not merely physical custody of the minor but due protection of the rights of minor's (words) health, maintenance and education. It was held that the power and duty of the Court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of-course to be given to the right of the natural guardian but if the custody of the father (in that case) cannot promote the welfare of the children, he may be refused such guardianship. It was observed by the Apex Court in the facts of that case, that merely because there is no defect in the personal care and attachment of the father for his child, which every normal parent has, the father would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. The Court also observed that children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society. It was observed that the Court as a guardian of the minor in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

19. In **Bimla Devi Vs. Subhas Chandra Yadav 'Nirala'7 t**he Court has held that paramount consideration should be welfare of minor and normal rule (the father is natural guardian and is, therefore, entitled to the custody of the child) may not be followed if he is alleged to have committed murder of his wife. In such case, appointment of grand-mother as guardian of minor girl cannot be said to be contrary to law. Construing the expression `welfare' under the Hindu Minority and Guardianship Act, 1956 liberally, it was observed by the Court therein that:-

"It is well settled that the word `welfare' used in this section must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being".

20. In **Kamla Devi Vs. State of Himachal Pradesh8 it** was observed by the Apex Court that the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its **parens patriae** jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other.

21. All the above noted decisions have been taken note of by the Apex Court in **Nil Ratan Kundu (supra),** the judgement relied upon by the learned counsel for the respondent, to decide the matter of custody of the child in a case where father had moved an application under the Guardian and Wards Act' 1890 seeking custody of his child. In that particular case, the mother of the child had died in unfortunate circumstances. The first information report was lodged against the father of the child that he had brutally assaulted his wife who had died out of the injuries inflicted by the husband. The appellants before the Apex court were grandparents of the child to whom the child was handed over after death of his mother while the father was in jail. The child was barely five years old at that point of time. After the father was enlarged on bail, he moved application for custody of the child. The family court as also High Court gave the custody of the child noticing that the present and future of the child would be better secured in the custody of his father and directed that the child be immediately removed from the custody of his maternal grandparents.

22. While upturning the said decision, it was noted by the Apex Court that both the trial as also the High Court had erred in not applying correct principle and proper test of welfare of minor as a paramount consideration. It was also noted that the trial court had fell in error in not ascertaining wishes of the child as to with whom he wanted to stay. It was noted by the Apex Court that even the statutory provisions in the form of Section 17(3) of the Act' 1890 provides that proceeding in appointing or declaring the guardian of a minor the Court shall be guided by not only the law to which the minor is subject, but the welfare of the minor as appears in the circumstances of the case and if the minor is old enough to form an intelligent preference, the court may consider that preference. It was noted in the facts of that case that the father was facing the charge of attributing death of mother of the child and a criminal case was pending in the Court. This indeed was a relevant factor for a court of law which must be addressed while deciding the custody of a minor in favour of the father.

23. In the facts and circumstances of the case, the Apex court did not agree to the observations of the High Court that the child was tutored by the maternal parents to make him hostile towards his father. The Court did not accept the submission of the counsels for the father therein that the trial court was not bound to interview the child and held that the observations in **Thrity**

Hoshie Dolikuka (supra) about the perilous effect of interviewing the child at the time of deciding the issue of custody, was in the peculiar facts and circumstances of the case, as the Court was satisfied that calling a minor girl and interviewing her several times had not served any useful purpose and rather had the effect of creating further depression and demoralization in her mind.

24. On overall consideration of the case, it was held therein that the trial court ought to have ascertained the wishes of the minor child as to with whom he wanted to stay.

25. The above decisions in **Nil Ratan Kundu (supra)** was heavily relied upon by the learned counsel for the respondent to argue with vehemence that the wishes of the minor child is one of the most relevant considerations to decide the issue of the custody of the child.

26. In light of the above, we may record that the present case presents peculiar facts and circumstances where the child has been deprived of her right to know as to who her biological parents are. She has been denied access to her parents by her maternal uncle and aunt who brought up her as her own child from the tender age of three and a half months. They have not only fostered the child but brought her as their own child. The maternal uncle and aunt of the child have no legal adoption and cannot be said to be legal guardian of the child and can only be said to be the foster parents. It is evident that they looked after the child very well but they are wrong in not allowing the child to meet her parents. They brought up the child as their own and changed her perception about her own parents. The child who is in the care and custody of the respondents from the tender age of three and a half months would not even know as to who her parents are.

27. In this admitted facts, in our considered opinion, no useful purpose would have been served in interviewing the child as in all probabilities she would reiterate what she had stated before the family court. The observations in the Apex Court in **Nil Ratan Kundu (supra)** that the Court was required to ascertain the wishes of the child as to with whom he wanted to stay, therefore, would not be of any help to the respondents to support their assertion that the wishes of the child has been duly ascertained by the family court in order to decide the issue of custody of the child and no interference should be made by the Court without further interviewing the child.

28. We may further record that we have no doubt about the statement of the minor girl noted by the family court that she wants to stay with the respondents, her maternal uncle and aunt, whom she calls 'Abbu' and 'Ammi'. The question, however, is about the welfare of the child. In a case where the welfare of the child is pitted against the wishes of the child, the wishes of the child has to yield in favour of the paramount consideration of welfare of the child who may wish otherwise. This is one of the issues which was considered by the Apex Court in Triti (supra) while refusing to interview the child again.

29. We may further note sub-section (3) of Section 17 of the Act' 1890 which provides that the court may consider the preference of the minor if the minor is old enough to form an intelligent preference

which may taken into consideration in deciding her welfare.

30. It was held by the Apex Court in **Nil Ratan Kundu (supra) t**hat it is not the `negative test' that the father is not `unfit' or disqualified to have custody of his son/daughter but the `positive test' that such custody would be in the welfare of the minor, which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian.

31. Coming to the instant case, simply the fact that the sister (appellant No.1) had left her child with her brother and sister-in-law who are issueless would not deprive her from the custody of her minor child. The child has not been legally adopted. The answer to the question that was considered by the trial court to give custody of the child to the maternal uncle and aunt is guided by the wishes of the child who does not even know as to who her birth parents are. The family court was swayed away by the fact that the detachment of the child from her maternal uncle and aunt who have brought her up as her own child, would have perilous effect on the physiology of the child. Whereas the parents are fighting for the custody of the child since the child was in a tender age of five years. It was categorically stated by the appellants that they were not allowed to meet their child and the respondents have refused to give back the child despite their best efforts to find out an amicable solution. The vehemence of the respondents in not allowing the child to meet her birth parents is evident from their resistance in even allowing the child to see her birth parents once in a year for 15 days. Several cases including criminal complaints were filed between the parties because of the dispute relating to the custody of the child.

32. In exercise of our jurisdiction as parens patriae, giving due consideration to the circumstances such as ordinary comfort, contentment, intellectual, moral and physical development, health, education and general maintenance of the child as also the favourable surroundings, as noted by the Apex Court in **Kamla Devi (supra)**, we are of the considered opinion that it is in the best interest of the child whose welfare is our paramount consideration that she be in the custody of her birth parents. The reason being that:-

(i) The applicants are biological parents (both mother and father) of the child. The child as a human being has a right to know as to who are her parents and has a legal right to remain in the custody of her parents till she attains majority.

(ii) The appellants have other children, the child would grow with her siblings which is a positive environment being favourable surroundings for the welfare of the child.

(iii) Knowing her real identity as a human being is the first right of the child. She must know who her birth parents are. She must know who her siblings are. She must know who the persons are who are fostering her at present. The child cannot be allowed to live in a camouflage of her own being. Even an adopted child within the family sometime faces emotional turmoil when he is grown up and told about his/her real parents. The deprivation of the company or even knowledge about her birth parents may come as a shock to the child when she is grown up. The deprivation of the child of the company of

her own siblings may prove to be a shock for her, later.

33. We are conscious of the fact that she might face some difficulty in the beginning to stay away from the respondents whom she know as her real parents, but we hope and trust that the parents appellants being well educated persons would succeed in creating a positive environment for the child so that she may adjust to the new environment with the proper care and support of her parents. Her siblings may also add to the said efforts of the parents.

34. In any case, a child as a human being cannot be deprived of the company of her birth parents under a concealed identity of the respondents being her real parents. The mother who gave birth to the child cannot be deprived of the company of her daughter just for the fact that for sometime the child was given in the foster care of her maternal uncle and aunt. It is not about the right of the applicants (the parents) or the respondents (the maternal uncle and aunt) rather it is about the right of the child as a human being. A minor has a birth right to remain in the custody of her/his birth parents, who are the best persons on earth to know the welfare of the child. The maternal uncle and aunts/foster parents of the child have not acted in a matured manner in the situation in which they fall. Their emotions on the one hand and the welfare of the child on the other are pitted against each other. The attitude and behaviour of the foster parents in the whole scenario is also not understandable. Had it been a case of legal adoption with the wishes of the parents of the child, the situation would be otherwise. Without there being any legal adoption but only under an arrangement within the family, in our considered opinion, the foster parents (the respondents) should have though fostered the child as their own but should have allowed the child to know as to who her birth parents are, to meet them, to spend time with them and then take an informed decision, an intelligent preference as to with whom she wanted to stay, to spend her childhood.

35. On overall consideration of the facts of the present case, in exercise of our judicial discretion, giving paramount consideration to the welfare of the minor, we are of the considered opinion that for contentment, intellectual, moral and physical development of the child, the best interest of the child is to be in the custody of her birth parents. The wishes of the child who is not old enough to form an intelligent preference cannot prevail over the welfare of the child.

36. We, therefore, provide that the child be handed over to the appellants/applicants by the respondents within a period of one month from the date of delivery of the judgement.

37. For handing over the custody of the child, both the parties shall appear before the Principal Judge, Family Court at Aligarh. The Principal Judge, Family Court shall record the process of the handing over and taking over the child by the respondents and the appellants; respectively, and transmit the said documents to this Court as compliance of this order.

38. We, however, provide that the appellants should allow the child to meet with her maternal uncle and aunt who have fostered her for about six years. The child should be allowed to spend time with her

maternal uncle and aunt whenever the parents visit India and during her school vacations, atleast once or twice in a year depending upon her visit to India.

39. The respondents namely the maternal uncle and aunt of the child may also go to Saudi Arabia, the place of residence of the child to meet her and spend time with her.

40. We hope and trust that with the passage of time when the emotions between the parties (sister and brother) are settled down, they both can contribute towards the upbringing of the child so that she may grow into a confident, self reliant human being. We can only advise the litigating respondents who are closely related to the child to contribute in the upbringing of the child not financially but emotionally and morally so that she may grow up without any negative effect on her life because of the current dispute between the parties.

41. With the above observations and directions, the judgement and order dated 30.05.2022 passed by the Additional Principal Judge, Family Court, Court No.3, Aligarh hereby set aside. The First Appeal No.510 of 2022 is hereby allowed. The First Appeal No.485 of 2022 is disposed of in view of the above observations and directions.

42. The compliance report shall be submitted by the Principal Judge, Family Court within a period of two months from today and shall be placed on the record by the office.

43. No order as to cost.

(2022) 10 ILRA 1190

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 334 of 2022

State of U.P. ...Appellant

Versus

Israr & Ors. ...Respondents

Counsel for the Appellant:
A.G.A., Sri Shiv Kumar Pal

Counsel for the Respondents:

A. Criminal Law – Acquittal - Indian Penal Code, 1860 - Section 364 - Code of Criminal Procedure, 1973 - Section 378 – Delay in lodging the FIR – Scope of Interference - The Hon'ble Apex Court in the line of the decisions right from the very inception has been consistently mandating that in the proceedings challenging the judgment of acquittal, appellate courts should be slow in interfering as double presumption of innocence is tagged with the accused and until and unless the order so passed by the trial Court is perverse or straight away points towards a wrong direction emanating complete miscarriage of justice and further misreading of the evidence and there are substantive and compelling grounds for setting aside the judgment of acquittal. The Courts should, normally and in routine manner, not interfere particularly when the view taken by the learned trial Court is plausible and possible view. Needless to point out, even in the appellate courts should be slow in interfering where another view is possible. (Para 8)

B. It is well settled that delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the

FIR and later substantiated by the evidence merely on the ground of delay. These are all matters of appreciation and much depends on the facts and circumstances of each case. (Para 28)

Keeping aside the aspect of the delay and its impact on the prosecution case, an additional aspect is to be noticed that barring the St.ment of PW-9 Asma, all the prosecution witnesses have turned hostile and denuded themselves from supporting the prosecution case. (Para 31)

C. Evidence Act: Section 65-B(4) - A certificate u/s 65-B(4) is necessary as in absence of the same, the call details cannot be said to be proved. The entire prosecution theory hinges upon phone call so sought to be made from the mobile phone of Israr to the deceased. Though at the time of submission of the charge sheet, reference has been made to the call details being CDR, however, the same was not proved before the learned Trial Court as neither any evidence was led, nor the same was made part and parcel of the same. (Para 43)

D. Motive – The motive which is being sought to be assigned for commission of alleged crime is relatable to the love marriage so sought to be solemnized as well as election rivalry also could not be proved by the prosecution as the past for commission of crime. (Para 46)

E. Last seen theory – In absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed. (Para 56)

In the present case, the story of last seen also gets demolished, as PW-2 Mohd. Naeem, PW-3 Rajab Ali and PW-4 Om Pal Singh have come up with the stand that though they claimed to be prosecution witnesses, but they have not seen the deceased with the accused. (Para 56)

F. No doubt, suspicion, however, grave it may be, but it does not chair the seat of proof, as an accused is presumed to be innocent unless proved guilty beyond reasonable doubt. (Para 57)

In a nutshell, the Court finds that the prosecution case proceeds upon weak evidences and the complete chain so as to indicate the accused to have committed the crime while completing the chain pointedly marking the case to have committed crime is also missing. (Para 60)

Appeal dismissed. (E-4)

Precedent followed:

1. Jafarudheen & ors. Vs St. of Kerala, 2022 LiveLaw (SC) 403 (Para 9)

2. Apren Joseph @ Current Kunjukunju & ors. Vs The St. of Kerala, (1973) 3 SCC 114 (Para 27)

3. Tara Singh & ors. Vs St. of Pun., 1991 Supp (1) SCC 536 (Para 28)

4. P. Rajagopal & ors. Vs St. of T. N., (2019) 5 CC 403 (Para 29)

5. Dilawar Singh Vs St. of Delhi, (2007) 12 SCC 641 (Para 30)

6. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal & ors., (2020) 7 SCC 1 (Para 44)

7. Ravindra Singh @ Kaku Vs St. of Pun., Criminal Appeal No. 1307 of 2019, decided on 04.05.2022 (Para 45)

8. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116 (Para 53)

9. Bodhraj Vs St. of J.&K., (2002) 8 SCC 45 (Para 54)

10. The St. of Odisha Vs Banabihari Mohapatra & anr., Special Leave Petition (Crl) No. 1156 of 2021, decided on 12.02.2021 (Para 55)

11. Chandra Pal Vs St. of Chhattisgarh, Criminal Appeal No. 378 of 2015, decided on 27.05.2022 (Para 56)

12. Nathiya Vs St. represented by Inspector of Police, Bagayam Police Station Vellore, (2016) 10 SCC 298 (Para 58)

Present appeal assails judgment and order dated 25.02.2022, passed by Additional District and Sessions Judge Sessions Judge/Fast Track Court, Amroha.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. This is an appeal under Section 378(3) of Code of Criminal Procedure (hereinafter referred to as "CrPC') filed against the judgment and order dated 25.2.2022 passed by Additional District & Sessions Judge/ Fast Track Court No.2, Jyotiba Phule Nagar (Amroha) in Session Trial/1700263/2014, State Vs. Israr and others arising out of Case Crime No. 278 of 2012, under Section 364 IPC, P.S. Amroha City, District Amroha, whereby accused-respondents have acquitted.

2. Briefly stated facts shorn off unnecessary details that the complainant Musharraf son of Ashraf, resident of village Nanak Nagli, P.S. Kaanth, Moradabad had submitted a written report on 31.8.2012 to S.P. Amroha with an allegation that he is the resident of village Nanak Nagli, P.S. Kaanth, Moradabad and his son Nusrat aged about 27 years is living for the past 9 years in Amroha in locality Qureshi in the house of one Shoeb as a tenant and his son had married twice as the name of the first wife is Asma and the second wife is Nazmeen. Nusrat being his son about 11 years ago had married Nazmeen daughter of Afsar Khan being in love with her and in the said connection, family members of Nazmeen were furiated and they bore enmity with his son. About 8 months ago the complainant son Nusrat was abducted and the accused being Kalam son of Qayyum resident of Sultanpur, Sujauddin, Akram, Rustam sons of Afsar Khan, Alauddin son of Akhtar Khan and Mushahid son of Sher Khan resident of village Nanak Nagli, P.S. Kaanth, Moradabad were instrumental in committing said offence and his son was recovered by the joint operation of police of Hasanpur and Gajraula.

3. As per the prosecution theory, on 29.8.2012 at 3:00 in the noon, the son of the complainant being Nusrat was accompanied with his both the wives and his children was present in the locality Qureshi, then the accused Israr made a call in the mobile phone of his son. The mobile number of Nusrat is stated to be 9917816875 and 9927874914. After receiving the said call which is stated to be made by Israr resident of village Kaserua, the complainant's son apprised his wives that he has been called by Israr resident of village Kaserua. It is further alleged that despite the fact that the complainant's son had proceeded on receiving the call of accused Israr, but when he did not return, then calls were made, however, it was noticed that both the mobile numbers were switched off and even after repeated search, his whereabouts were not traced and thus suspicion occurred that on account of love marriage so solemnized between his son and Nazmeen, the same became the ground of commission of the offence. Further allegation has been made that the complainant proceeded to the Police Station Amroha City, however, no action, whatsoever has been taken and thus he has submitted the written report that FIR be lodged.

4. Consequent to the submission of written report on 31.8.2012 at 19:15 hours, FIR was lodged in the concerned police station against the accused Kalam, Israr, Sujauddin, Akram, Rustam, Alauddin and Mushahid under Section 364 IPC. One Pramod Kumar Sharma was nominated as the Investigating Officer along with

Inspector K.P. Singh. It has also come on record that the Investigating Officer proceeded to conduct investigation while preparing the site-plan and when the dead body of the deceased was shown to be found near river Ganga, then inquest report was also prepared. Statements under Section 161 CrPC was also undertaken and charge sheet was submitted by the Investigating Officer against the accused Israr. Nanhe, Gayasuddin, Mushahid, Akram and Kalam under Section 364 IPC. It has further come on record that during investigation, Gayasuddin @ Pappu had died. The case was committed to the Sessions, charges were read over to the accused Israr, Nanhey, Mushahid, Akram and Kalam on 10.11.2016. The accused pleaded innocence and claimed to be tried. However, subsequently, accused Kalam died and thus now criminal proceeding was sought to be initiated against the accused, who are four in number.

5. Learned trial court by virtue of judgment and order under challenge has acquitted the accused.

6. Challenging the same, now the State is before this Court.

7. In order bring home the charges, the prosecution has examined the following witnesses:

PW-1. Musharraf,
PW-2. Mohd. Naeem
PW-3. Rajab Ali
PW-4. Ompal Singh
PW-5. Nazmeen
PW-6. S.I. Retired Pramod Kumar Sharma
PW-7. HC152 Vikas Sharma,
PW-8. Retd. Inspector K.P. Singh Bhati
PW-9. Asma

8. This Court is oblivious of the fact that present proceedings is emanating from the judgement and order of acquittal. To put it otherwise, the present appeal has been filed by the first informant whereby he seeks judicial intervention for reversing the judgement of acquittal into conviction. The Hon'ble Apex Court in the line of the decisions right from the very inception has been consistently mandating that in the proceedings challenging the judgement of acquittal, appellate courts should be slow in interfering as double presumption of innocence is tagged with the accused and until and unless the order so passed by the trial court is perverse or straight away points towards a wrong direction emanating complete miscarriage of justice and further misreading of the evidence and there are substantive and compelling grounds for setting aside the judgement of acquittal. The courts should, normally and in routine manner, not interfere particularly when the view taken by the learned trial Court is plausible and possible view. Needless to point out, even the appellate Courts should be slow in interfering where another view is possible.

9. The Hon'ble Apex Court in the case of ***Jafarudheen and others vs. State of Kerala, 2022 LiveLaw (SC) 403,*** has observed as under:-

"25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the

accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents: Mohan @Srinivas @Seena @Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder: -

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be

perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179]) "20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/ inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum- Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501], Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])"

It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh [Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436 : (2019) 2 SCC (Cri) 586], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

" 31. An identical question came to be considered before this Court in Umedbhai Jadavbhai [Umedbhai Jadavbhai v. State of Gujarat, (1978) 1 SCC 228 : 1978 SCC (Cri) 108]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225 : 1996 SCC (Cri) 972] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a wellconsidered judgment duly meeting all the contentions raised before it. But then will this noncompliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan [K. Ramakrishnan Unnithan v. State of Kerala, (1999) 3 SCC 309: 1999 SCC (Cri) 410] , after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was

not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley [Atley v. State of U.P., AIR 1955 SC 807 : 1955 Cri LJ 1653] , in para 5, this Court observed and held as under :

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal. If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [Surajpal Singh v. State, 1951 SCC 1207 : AIR 1952 SC 52]; Wilayat Khan v. State of U.P. [Wilayat Khan v. State of U.P., 1951 SCC 898 : AIR 1953 SC 122])

In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

31.4. In K. Gopal Reddy [K. Gopal Reddy v. State of A.P., (1979) 1 SCC 355 : 1979 SCC (Cri) 305], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere

in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder: -

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325 has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC 383: (2013) 1 SCC (Cri) 69] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is

categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

xxx xxx xxx

23. Further, in Hakeem Khan v. State of M.P., (2017) 5 SCC 719 : (2017) 2 SCC (Cri) 653 this court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under: (SCC pp. 722-23)

"9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office

of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

10. Bearing in mind the proposition of law so culled out by Hon'ble Apex Court, now the present case is to be addressed.

11. Heard Sri Kailash Prasad Pathak, the learned A.G.A.

12. Learned A.G.A, has argued that the judgment and order passed by the Trial Court acquitting the accused is superficial and besides being perverse inasmuch as there was ample evidence available on record so as to convict the accused as not only the prosecution witnesses had supported the prosecution theory, but there were other factors available not only showing motive, but clearly linking the accused with respect to commission of crime.

13. In nutshell, learned A.G.A, has argued that the judgment of acquittal has proceeded towards wrong direction, as learned Trial Court has misread the evidence, which pointedly marked the accused of commission of crime.

14. In order to delve into the issue in question, the testimony of the prosecution witnesses is to be at least noticed.

15. PW-1 Musharraf claims himself to be the first informant and according to him, he is father of the deceased being his son lives with his both the wives and children as the tenant in the house of Shoeb in locality Qureshi and his son Nusrat has apprised his wife Asma that he had received a call and that's why he proceeded and when he did not come back to his house, then the calls were made on the mobile phone of the deceased, then it was revealed that mobile phone was switched off. According to him, he knows the accused, as they are his relatives and resident of the same village and he had promptly gone to lodge FIR, but it was not lodged, but the same was lodged after two days.

16. As PW-2, Mohd. Naeem appeared in the witness box and according to him he does not know the deceased Nusrat nor he knows the accused and on the fateful day on 29.8.2012, he was in his house and he had not seen Nusrat being accompanied with the accused.

17. PW-3, Rajab Ali also entered into the witness box and according to him, he knows the accused Gayasuddin @ Pappu, Israr and Nanhey, as their agricultural farm is adjoining his agricultural farm. According to him, the accused are residents of village Kaserua. He has further deposed that on 30.8.2012, he had not seen the accused Gayasuddin @ Pappu, Israr, Nanhey along with any other person.

18. As PW-4 Ompal Singh appeared as prosecution witness. He has come up with the stand that on 30.8.2012, he had not seen deceased with the accused Gayasuddin @ Pappu, Nanhey, Israr, residents of Kaserua.

19. One Nazmeen appeared as PW-5. She claims to be the wife of the deceased and marriage to him 9 years ago being the second wife and the first wife of the deceased was Asma and she along with her and three children had stayed with the deceased husband in a rented room. According to her statement, her husband Nusrat without informing her had gone away. When he did not come back and she did not receive any phone call and she had not seen Israr and Gayasuddin @ Pappu.

20. As PW-6 S.I. Pramod Kumar Sharma appeared in the witness box and according to him on 2.11.2012, he was posted as Station Incharge, Kotwali City, Amroha and he has taken the investigation from the stage which was left by his predecessor Mrityunjai Singh consequent to his transfer. He in his statement has further deposed that Nusrat was of a criminal character and was a history-sheeter and against him, several criminal cases were going on. He has further deposed that he had not taken the possession of the vehicle which was used in the crime and he has also not sketched the place of occurrence from the highway while preparing the site-plan. He has further deposed that consequent to the investigation, so conducted by him, he did not find the dead body of the deceased, nor any incriminating articles were recovered.

21. PW-7 Head Constable 152 Vikas Sharma has deposed that on 31.8.2012, he was posted as Head Clerk and at 9:15 hours, he had lodged FIR and thus he sought to prove the FIR.

22. As PW-8, Retd. Inspector K.P. Singh Bhati claims himself to be the Investigating Officer so entrusted with the duty, consequent to the direction issued by I.G. Zone, Bareilly.

23. As PW-9, Asma appeared as a prosecution witness and according to her statement, she had been the Pradhan of village Nanak Nagli. She further stated that one Roshan Ara who happens to be the wife of Sujauddin also contested the Pradhan election and on account of the election rivalry, the crime has been committed. She has further deposed that Nusrat had two wives, one being PW-9 and when the deceased husband stayed in Amroha, then he married Nazmeen, who happens to be the real sister of Sujauddin and this was the rivalry, which bore in the mind of Sujauddin. She has further deposed that earlier also, the deceased became missing and he was abducted by the accused Israr, Pappu, Sujauddin, Akram, Alauddin and Kalam.

24. PW-9 has further deposed that on 29.8.2012 Israr had called her husband and he had told her that he is going on the basis of call of Israr, and thereafter, no phone whatsoever was received and her husband went missing.

25. Undisputedly, the incident relates to 29.8.2012, wherein as per the prosecution case, the deceased received a phone call from Israr and he proceeded to meet Israr and went missing and when phone call was made, then the mobile was found to be switched off. Admittedly, the FIR has been lodged on 31.8.2012 at 19:15 hours after a period of two days. An explanation has been sought to be offered by the prosecution that the delay occasioned on account of the fact that the deceased went missing and after waiting for a phone call, and when the same was not received and after making repeated

search when the whereabouts of the deceased was not traced, then the FIR was lodged.

26. The learned Trial Court has taken pains to examine the FIR in question, wherein it was found that the word "applicant' and certain other conspicuous words have been used, even in fact it is PW-1 Musharraf, who happens to be the witness, who claims to be the first informant, he in his cross examination has stated that he had got typed the FIR in the District Court Amroha and the person, who had typed the FIR did not read the same and he without reading the contents of the FIR he had put thumb impression over the same. He has further admitted that the contents of the FIR were narrated by the person, who was typing the same. Even in fact, PW-7 Head Constable 152 Vikas Sharma has himself deposed in his cross-examination that the PW-1 had not put any signature or thumb impression of PW-1 in the FIR and in the written report, there were various over-writings, which depicted that the same was tailored in such a manner so as to make a case. He has further deposed that the said written report had been scribed by some person of Mohalla Qureshi, Amroha. Not only the delay in lodging the FIR assumes significance, but the statement of PW's- 1 to 7 also creates a cloud regarding the fact that whether the said incident occurred or not, particularly when PW's 1 and 7 in their statement had admitted that the FIR was being written/ typed by somebody else and on their direction, the facts were narrated and without seeing the same and listening to the facts so mentioned therein signatures and thumb impressions were made by the PW-1/ Musharraf (first informant).

27. The Hon'ble Apex Court on the question of delay in lodging the FIR and its impact upon the prosecution theory has observed in the case of **(1973) 3 SCC 114 Apren Joseph Alias Current Kunjukunju and others Vs. The State of Kerala** wherein para 11 following was mandated:

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it under Section 154, Cr. P. C. As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such information report can only be made by an eye witness. First information report under Section 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue unreasonable delay in lodging the F. I. R., therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on

all the facts and circumstances of a given case.

28. In the case of **Tara Singh and others Vs. State of Punjab 1991 Supp (1) SCC 536**, the Hon'ble Apex Court in paragraph 4 has observed as under:-

4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case.

29. Yet, in the case of **P. Rajagopal and others Vs. State of Tamil Nadu (2019) 5 SCC 403**, the Hon'ble Apex Court in paragraph 12 has held as under:-

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely."

30. Further in the case of ***Dilawar Singh vs. State of Delhi*** reported in **(2007) 12 SCC 641** in paragraph 9, 10 and 11, the Hon'ble Apex Court has observed as under: -

"9. In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

10. In Thulia Kali v. The State of Tamil Nadu (AIR 1973 SC 501), it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

11. In Ram Jag and others v. The State of U.P. (AIR 1974 SC 606) the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution."

31. Keeping aside the aspect of the delay and its impact on the prosecution case, an additional aspect is to be noticed that barring the statement of PW-9 Asma, all the prosecution witnesses have turned hostile and denuded themselves from supporting the prosecution case.

32. So far as PW-1 is concerned, he though happens to be the father of the deceased, however, as discussed earlier, he has admitted in his deposition that he had got the FIR typed in the District Court and he without reading and listening to the contents of the FIR had put his thumb impression and the said fact stands corroborated with the statement of HCP152 Vikas Sharma. So far as PW-2 Mohd. Naeem is concerned, he though was presented as a prosecution witness, but he denies knowing Nusrat and the accused and on the fateful day on 29.8.2012, he was in his house and he did not see the conditions and he claims that he has not given any statement under Section 161 of CrPC.

33. Similarly, PW-3 Rajab Ali also turned hostile while coming up with the stands that he has not given any statement as stated by the prosecution under Section 161 CrPC and he has not seen the accused with the deceased on 30.8.2012, near brick-kiln.

34. PW-4 also became hostile and according to him, he has not seen the accused with the deceased on 30.8.2012 and he claims not to give any statement under Section 161 CrPC.

35. PW-5 Nazmeen also turned hostile being wife of the deceased while coming up with the stand that the accused on the fateful day had gone out of the house without apprising her and he did not return and she also denied the fact that any phone call came on the mobile of the deceased and according to her statement, her maternal family members were happy with her love marriage with the deceased.

36. PW-6, who happens to be S.I. Pramod Kumar Sharma had come up with the stand that the deceased was a history sheeter having criminal history and he has further admitted that in the site-plan, the place of occurrence and the highway has not been sketched and the dead body of the deceased was not recovered nor any incriminating articles were found.

37. PW-7 Head Constable 152 Vikas Sharma though has proved the lodging of

the FIR, but as discussed above, according to him, the written complaint was prepared by some persons of mohalla Qureshi and there were over-writings and cuttings.

38. PW-8, S.I. K.P. Singh Bhati had deposed that he is not aware as to which place, he had searched the deceased and according to him, there was no witness, who came in support of the prosecution theory and the deceased was a history sheeter and criminal cases were going on against him in Delhi, Haryana, Uttar Pradesh and Uttarakhand.

39. Thus PW's 1 to 8 have not supported the prosecution theory as sought to be suggested by PW-9. In fact, PW-9 seeks to support the prosecution theory. Though conviction can be made on the basis of the deposition of a solitary witness provided the same is reliable and constantly points towards the crime taking into account the other factors in that regard.

40. PW-9 claims herself to be the wife of the deceased. However, there are major contradictions in her testimony, which discredits her testimony, as on one hand in her examination, PW-9 has come up with the stand that Nazmeen is the real sister of Sujauddin. However, in her cross-examination, she comes up with a stand that Nazmeen is not a real sister of Sujauddin, but cousin sister, though father was the same, but she was born out of her second mother. So much so PW-9 Asma in her examination-in-chief has come up with the stand that she had gone to the house of Sujauddin, Ashraf, Rustam, Mushahid and Israr in order to find the whereabouts of her husband, however her husband could not be traced, but in her cross-examination, she had stated that she had not gone to the house of Sujauddin, Akram, Rustam, Kalam and Israr. Apart from the same, on 29.8.2012 according to her, the deceased husband received a phone call from Israr and he had apprised that he is going to Israr's place, but there is no recital about the fact as to at what time, the deceased husband received the phone call. In her cross-examination, on being specifically asked, she had stated that on the date of the occurrence, her deceased husband had gone outside the house in the morning without taking the breakfast.

41. Conversely, in the FIR, the time of leaving house in question has been shown to be 3:00 in the noon. The said fact stands corroborated with CD-1 at page 7 of the Case Diary. Additionally in the statement under Section 161 CrPC, PW-9 Asma has further stated that her husband left the house at 3:00 in the noon which itself shows that it is highly improbable that the person, who leaves the house at 3:00 in noon, would have either taken meals being breakfast or lunch. Thus there is clear contradiction in the statement of PW-9.

42. Inconsistency in the statement of PW-9 gets further highlighted from the fact that in her examination in chief, PW-9 had stated that her hsuband had apprised that he had received the phone call of Israr and Israr had called him however in her cross-examination, an improvement was sought to be made to the extent that Israr was sitting with Sujauddin, Akram, Rustam, Mushahid, Kalam and Alauddin and as all they were sitting together so they had called the deceased. Additionally in the cross-examination, a further improvement was made that Israr, Rustam, Akram, Sujauddin, Alauddin, Mushahid, Kalam and Gayasuddin @ Pappu were calling and that is why her husband had gone, as the said facts were apprised by the deceased.

PW-9 in her cross-examination, has further stated that in connection with certain settlement her husband was being called. Meaning thereby, that at every stage, improvements were sought to be made.

43. Another additional aspect also needs to be examined is with regard to the fact that the entire prosecution theory hinges upon phone call so sought to be made from the mobile phone of Israr to the deceased. Though at the time of submission of the charge sheet, reference has been made to the call details being CDR, however, the same was not proved before the learned Trial Court as neither any evidence was led, nor the same was made part and partial of the same.

44. Even in fact, the law in this regard is very clear that a certificate under Section 65-B (4) of the Evidence Act is necessary as in absence of the same, the call details cannot be said to be proved. The said aspect of the matter has already been taken note by the Hon'ble Apex Court in the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others,*** (2020) 7 SCC 1, which is observed in paragraphs no. 47, 51, 52 and 61 as under:-

"47. However, caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. This was well put by this Court in Presidential Poll, In re, (1974) 2 SCC 33, as follows: (SCC pp. 49-50, paras 14-15)

"14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in

the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims, 10th Edn. at pp. 162-63 and Craies on Statute Law, 6th Edn. at p. 268.)"

It is important to note that the provision in question in Presidential Poll, In re24 was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case.

.....

51. On an application of the aforesaid maxims to the present case, it a is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V.2, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/ persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

.....

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the

admissibility of evidence by way of electronic record, as correctly held in Anvar P.V.2, and incorrectly "clarified" a in Shafhi Mohammad³. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor40, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose."

45. Recently Hon'ble Apex Court in **Criminal Appeal No.1307 of 2019 Ravinder Singh @ Kaku Vs. State of Punjab** decided on 4.5.2022 had followed the judgement in the case of **Arjun Panditrao Khotkar (Supra)** and paragraph 21 has held as under:-

"21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, Oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law".

46. Nonetheless, the motive which is being sought to be assigned for commission of alleged crime is relatable to the love marriage so sought to be solemnized as well as election rivalry also could not be proved by the prosecution as the past for commission of crime. Moreover, so far as the allegations so sought to be leveled against the accused Sujauddin and others is concerned relatable to abduction of his husband on earlier occasion and the recovery at the instance of the joint operation of the police of Police Station Gajraula and Police Station Hasanpur is concerned, PW-8 Inspector K.P. Singh Bhati in his cross examination has stated that in the said case final report has been submitted.

47. Apart from the same, another factor, which also needs to be gone into is relatable to the fact as to who had seen the commission of the offence in the light of the last seen theory.

48. PW-2, Mohd. Naeem, PW-3 Rajab Ali and PW-4 Om Pal Singh in their statement have come up with the stand that they have not seen the deceased with the accused. Meaning thereby, the theory of last seen also stands exploded.

49. Moreover, it has come on record that the deceased was a history sheeter having a criminal background and he was found in fact instrumental in preparing forged papers. The said fact has been admitted by the father of the deceased PW-1 Musharraf and PW-5 Nazmeen, even PW-6 being I.O. Pramod Kumar Sharma has also deposed that the deceased was having criminal background and so much so PW-8 I.O. K.P. Singh Bhati has also come up with the said stand.

50. The said factors itself indicate towards a possibility that he was having enmity with others or he himself got him concealed in such a manner so as to avoid the onslaught, which might be inflicted upon him with relation to the criminal cases being lodged and pending against him in the State of Delhi, Uttar Pradesh, Uttarakhand etc.

51. Recovery aspect also needs to be noticed that PW-6 being the I.O. Pramod Kumar Sharma in his cross-examination has stated that he had not taken the vehicle in question in his possession and the body, which is sought to be shown to be recovered was not marked in the site plan vis-a-vis the location of the highway and further due to waves which were witnessed in the river, the same obstructed in tracing out the dead body of the deceased and further to put nail on the coffin of the conviction PW-8 being K.P. Singh Bhati in his cross-examination has shown his ignorance, as to which were the places, whereat the dead body of the deceased was sought to be searched. The said fact itself shows that there had been a defective investigation at the instance of the Investigating Officer.

52. Cumulatively analyzing, the present case from the four-corners of law, it is apparent that barring PW-9, none of the prosecution witnesses supported the prosecution theory and in view of vast contradictions and inconsistency in the statements of PW-9, same also discredits testimony of PW-9 also. In case, the prosecution theory is stretched as an elastic, then the same can be put as the case of circumstantial evidence. However, the prosecution is under obligation to prove the same in such a manner that it is only the accused, who have committed the crime beyond doubt and nobody else.

53. The Apex Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra reported in (1984) 4 SCC 116,*** has observed as under: -

"153. A *close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra (1973) 2 SCC 793, where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human

probability the act must have been done by the accused."

54. Moreover, without burdening the judgment, this Court also notices the judgment in the case of ***Bodhraj vs. State of J&K*** reported in ***(2002) 8 SCC 45,*** wherein in paragraph 9 and 10, the following was observed by the Hon'ble Apex Court: -

"9. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence. the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other persons. (See Hukam Singh v. State of Rajasthan, AIR (1977) SC 1063), Eradu and Ors. v. State of Hyderabad, AIR (1956) SC 316, Earabhadrappa v. State of Karnataka, AIR (1983) SC 446, State of U.P. v. Sukhbasi and Ors., AIR (1985) SC 1224, Balwinder Singh v. State of Punjab, AIR (1987) SC 350, Ashok Kumar Chatterjee v. State of MP AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab, AIR (1954) SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt."

55. Recently in the **Special Leave Petition (Crl) No. 1156 of 2021, The State of Odisha vs. Banabihari Mohapatra and Another** decided on 12.2.2021, the Hon'ble Apex Court in paragraphs 35, 36 and 37 has observed as under: -

"35. Before a case against an accused can be said to be fully established on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must fully be established and the facts so established should be consistent only with the hypothesis of guilt of the accused. There has to be a chain of evidence so complete, as not to leave any reasonable doubt for any 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.

36 In Shanti Devi v. State of Rajasthan reported in (2012) 12 SCC 158, this Court held that the principles for

conviction of the accused based on circumstantial evidence are:

"10.1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

10.2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

10.3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else. 10.4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

37. Keeping the above test in mind, we have no iota of doubt that the Trial Court rightly acquitted the Accused Respondents. There is a strong possibility that the accused, who was as per the opinion of the doctor who performed the autopsy, intoxicated with alcohol, might have accidentally touched a live electrical wire, may be while he was asleep. The impugned judgment of the High Court dismissing the appeal on the ground of delay does not call for interference under Article 136 of the Constitution of India."

56. The story of last seen also gets demolished as discussed above, as PW-2 Mohd. Naeem, PW-3 Rajab Ali and PW-4 Om Pal Singh have come up with the stand that though they claimed to be prosecution witnesses, but they have not seen the deceased with the accused. The Hon'ble Apex Court in **Criminal Appeal No. 378 of 2015, *Chandra Pal vs. State of Chhattisgarh*** decided on 27.5.2022 in paragraphs- 13, 14, 15, 16 and 17 has observed as under: -

"13. This takes the court to examine the theory of "Last seen together" propounded by the prosecution. As per the case of prosecution, PW-1 Dhansingh had seen the accused Chandrapal calling the deceased Kanhaiya and taking him inside his house on the fateful night. Apart from the fact that the said Dhansingh had not stated about the time or date when he had lastly seen Kanhaiya with Chandrapal, even assuming that he had seen Chandrapal calling Kanhaiya at his house when he was sitting at the premises of village panchayat, the said even had taken place ten days prior to the day when the dead bodies of the deceased were found. The time gap between the two incidents i.e., the day when Dhansingh saw Chandrapal calling Kanhaiya at his house and the day Kanhaiya's dead body was found being quite big, it is difficult to connect the present appellant with the alleged crime, more particularly when there is no other clinching and cogent evidence produced by the prosecution.

`14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

`15. In case of Bodhraj & Ors. Vs. State of Jammu and Kashmir (2002) 8 SCC 45, this court held in para 31 that:

`"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the

deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible...."

`16. In Jaswant Gir Vs. State of Punjab, (2005) 12 SCC 438, this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

`17. In Arjun Marik & Ors. Vs. State of Bihar 10, It was observed that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused, and therefore no conviction on that basis alone can be founded."

57. No doubt, suspicion, however, grave it may be, but it does not chair the seat of proof, as an accused is presumed to be innocent unless proved guilty beyond reasonable doubt.

58. In ***Nathiya Vs. State represented by Inspector of Police, Bagayam Police Station Vellore*** **(2016) 10 SCC 298**, the Hon'ble Apex Court in paragraph 25 has observed as under:-

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`"25. On an analysis of the overall fact situation, we are of the considered opinion that the chain of circumstantial evidence relied upon by the prosecution to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record do raise a needle of suspicion towards them, the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof."

59. The Hon'ble Apex Court in the case of T***he State of Odisha vs. Banabihari Mohapatra*** *(supra)* in paragraph 38 has held as under:-

"It is well settled by a plethora of judicial pronouncement of this Court that suspicion, however strong cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. This proposition has been reiterated in Sujit Biswas v. State of Assam reported in AIR 2013 SC 3817."

60. In nutshell, the Court finds that the prosecution case proceeds upon weak evidences and the complete chain so as to indicate the accused to have committed the crime while completing the chain pointedly marking the case to have committed crime is also missing.

61. This Court further finds that the view taken by the learned Trial Court is a possible view and there is no justification in adopting any other view. The considerations, which weighed the learned Trial Court while acquitting the accused itself are based on the ocular testimony and the evidence so adduced in support thereof and in absence of any perversity so committed by the learned Trial Court, this Court finds its inability to hold the judgment as perverse.

62. Hence, in any view of the matter applying the principles of law so culled out by the Hon'ble Apex Court in the facts of

the present case, we have no option but to concur with the view taken by the learned Sessions Judge.

63. We find that it is not a case worth granting leave to appeal. The application for granting leave to appeal is **rejected.**

64. Since the leave to file the appeal has not been granted, consequently, present government appeal also stands **dismissed**.

65. Records of the present case be sent back to the concerned court below.

(2022) 10 ILRA 1213
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Government Appeal No. 2450 of 1986

The State of U.P. ...Appellant
Versus
Durga Prasad & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri I.M. Khan, Sri A.B.L. Gaur, Sri Madhukar Maurya, Sri Rahul Mishra, Sri Sandeep Kumar

A. Criminal Law – Acquittal - Indian Penal Code, 1860 - Sections 147, 304, 149 & 323 - Code of Criminal Procedure, 1973 - Section 378 – Scope of Interference – The reasons for interfering in the judgment of acquittal should be compelling and substantive in order to prevent miscarriage of justice through the parties. This Court while exercising jurisdiction can only interfere and grant indulgence in the judgment and the order of acquittal when it is palpably perverse, there has been complete misreading of the evidences so sought to be adduced and it proceeds towards a wrong directions so as to indicate that the view taken by the learned Trial Court is a view which cannot be perceived by a prudent person. (Para 16)

B. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version. (Para 36)

In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the Court, and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution. This also, therefore, shows that the defence version may be true.

The IO has specifically deposed that he had not taken the bloodstained earth on the day he was assigned the investigation (i.e. 11.07.1982). He further could not justify in his St.ment as to why he did not take the St.ment of the injured (deceased). He has deposed that he had not gone to the field in order to determine the fact as to whether the crops were destroyed while grazing by the accused or not. This stand taken by the IO coupled with the fact that **there is a serious cloud over the incident which occurred in the agricultural field generating the commission of the alleged offence does not link the accused to have committed offence.** (Para 35)

C. Enmity is a two sided dagger and one of the basis of commission of crime being the motive but **the prosecution if, is taking aid of the device of motive, has to prove it beyond doubt so as to give the opportunity to the defence to despell the same.** (Para 39)

There was an enmity between the parties and election took place only three days before the incident and son (Vidyasagar) of the deceased

who defeated Pradhan had taken PW 1 Rajendra Prasad to lodge FIR at Police Station. This Court finds that though on one hand motive is being sought to be assigned as a basis for commission of the crime but non implication of the Pradhan itself creates a **suspicion and cloud over the prosecution theory pertaining to the offence which has rivalry of Pradhan as the basis of commission of crime.** (Para 37)

D. Merely because there has been delay in recording the St.ment of the prosecution witnesses by the IO does not *ipso facto* renders it to be fatal to the prosecution case but there has to be an explanation so as to suggest as to what was the reasons occasioned in delay in recording the St.ment of the prosecution witnesses.

In the present case, the IO had the due opportunity to get recorded the St.ments of the prosecution witness so as to eliminate the chances of any soliciting or tutoring but there was no reason assigned for delay in recording the St.ment of the prosecution witness. (Para 44)

E. Conflict between the prosecution case and medical evidence – If there is inconsistency or discrepancy between the medical evidence and the direct evidence or between medical evidence of two doctors, one of whom examined the injured person and the other conducted postmortem on the injured person after his death or as to the injuries, then in criminal cases, the accused is given the benefit of doubt, and let off. Where the direct testimony is found untrustworthy, conviction on the basis of medical evidence supported by other circumstantial evidence can be done, if that is trustworthy. (Para 48, 49)

The Hon'ble Apex Court has gone to the issue relating to the food which the deceased ate and condition whether the same was digested, undigested or semi-digested in order to determine the actual time of death and while considering the same, determined the veracity of the prosecution theory. (Para 48)

In the present case learned trial Court has concluded that by no stretch of imagination the semi digested food could be in stomach when the incident took place at 5:00 in the evening. (Para 50)

The prosecution could not prove the commission of the offences by the accused herein beyond doubt. This Court cannot substitute the views so taken by the learned Trial Court once the same is not actuated by perversity. (Para 52)

1) In the FIR there has been no specific role assigned to the accused herein particularly when the first informant being PW 1 Rajendra Prasad happened to be the son of the deceased and also an eye witness.
2) How could the narration of the facts while travelling in bullock cart before the journey yet to be commenced was recited in the written complaint.
3) Involvement of Durga Prasad in the commission of the crime who is St.d to be aged about 70-75 years chasing Rajendra Prasad and administering beating with a wooden stick despite presence of other accused.
4) Non-resistance of Rajendra Prasad (PW 1) for an hour while permitting accused Prem Narayan to graze the agricultural field and destroy the crops.
5) Delay in recording of the St.ments of the prosecution witness. (Para 51)

Appeal dismissed. (E-4)

<u>Precedent followed</u>:

1. Ravi Sharma Vs St. Government of N.C.T. of Delhi & anr., Criminal Appeal No. (S). 410-411/2015, decided on 11.07.2022 (Para 17)

2. Lakshmi Singh & ors. Vs St. of Bihar, (1976) 4 SCC 394 (Para 36)

3. Maruti Rama Naik Vs St. of Mah., (2003) 10 SCC 670 (Para 41)

4. Jagjit Singh @ Jagga Vs St. of Pun., (2005) 3 SCC 689 (Para 42)

5. V.K. Mishra & anr. Vs St. of Uttarakhand & anr., (2015) 9 SCC 588 (Para 43)

6. Shivaji Sahabrao Bobade & anr. Vs St. of Mah., (1973) 2 SCC 793 (Para 46)

7. Ram Narain Singh Vs St. of Pun., (1975) 4 SCC 497 (Para 47)

8. Sanjay Khanderao Wadane Vs St. of Mah., (2017) 11 SCC 842 (Para 49)

Present Government Appeal assails judgment and order dated 03.06.1986, passed by Additional Sessions Judge, Fatehpur.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Challenge in this appeal u/s 378 of code of Criminal Procedure 1973 (hereinafter referred to as Cr.P.C.) is made to the judgment and order dated 03.06.1986 passed by Additional Sessions Judge, Fatehpur in Sessions Trial No. 211/1983 (State Vs. Durga Prasad and Others) u/s 147, 304/149, 323/149 IPC, P.S. Ghazipur, District Fatehpur acquitting the accused herein.

2. This appeal was initially filed while arraying as many as seven accused-respondents. However, the accused-respondents nos. 1, 2 and 4 during the pendency of the present appeal expired. Accordingly, the present appeal stood abated against the accused-respondents nos. 1, 2 and 4.

3. Factual matrix of the case so interwoven in the present appeal centres around with an allegation that a written report/complaint was submitted on 10.07.1982 by the first informant being Rajendra Prasad S/o Chandra Bhushan Prasad R/o Village Kewai, P.S. Ghazipur, District Fatehpur before the Police Station Ghazipur, District Fatehpur with an allegation that the accused herein who were seven in number at the time of the filing of the appeal had committed offences at 12 in the noon on 10.07.1982 when the first informant being Rajendra Prasad along with his brother Virendra had gone along with the cattle in the agriculture field which was owned by them near the tube well in Kolanhar. Agriculture crop being paddy was cultivated and the same was in matured condition. However, at 05:00 in the evening on the fateful day i.e. 10.07.1982 the accused-respondent no. 5 Prem Narayan S/o Mishri Lal who was grazing his cattle trenched in the agricultural field along with cattle and trampled the paddy and the sugar cane crop so present therein causing destruction. Protest was sought to be made by the first informant Rajendra, however, the same was not liked by the accused Prem Narayan and he hurled abuses upon the first informant. From there the first informant along with his cattle straight away went to the house of the Prem Narayan raising protest. Prosecution further alleges that the said protest was not accepted however, rather to the contrary at that point of time Durga Prasad S/o Kali Charan, Mishri Lal S/o Durga Prasad committed the role of extortion while instigating the accused Dhunnu, Jagat Narayan and Prem Narayan and in turn they instigated the brother Ram Kumar and nephew Santosh Kumar S/o Mewa Lal. Thereafter, all the accused aided with wooden stick chased the first informant Rajendra Prasad and the first informant run away and when he reached near the main gate of the house of Jiya Lal then the accused gave a blow with the wooden stick upon the first informant and witnessing the same the elder brother of the first informant Bajrang Prasad and his father Chandra Bhushan came forward to rescue the first informant, however they were also administered blow with the aid of wooden stick pursuant whereto they fell down and

witnessing the said incident Ram Lal Tiwari S/o Devi Lal and Bishun Dayal S/o Bhikuyuwa and Lakhan S/o Devi Lal came to rescue however, on account of the onslaught of administering wooden stick, the father of the first informant Chandra Bhusan became unconscious and so much so the first informant Rajendra and his elder brother Bajrang Prasad also sustained injuries and thereafter they took their father Chandra Bhushan in a bullock cart to the police station for lodging of written complaint.

4. On the basis of the written complaint so submitted by the first informant Rajendera Prasad FIR was lodged on 10.07.1982 at 21:20 hours against the accused herein u/s 147/308/323 IPC. The injured was sent to District Hospital, Fatehpur. The first informant being Rajendra Prasad and his brother Bajrang and father Chandra Bhuhan were medically examined by Dr. V.K. Tripathi, Medical Officer who was on duty at 02:30 am and 02:40 am on 11.07.1982. According to the prosecution Chandra Bhushan who happened to be the father of the fist informant, who was in unconscious situation was admitted in the hospital where he succumbed to injuries at 03:45 am on 11.07.1982.

5. Prosecution alleges that after the death of Chandra Bhushan G.D. Ex. Ka-10 was entered and the Sub-Inspector was deputed for completing the formalities for inquest and accordingly, Panchayatnama was prepared. The dead body of the deceased was sent for postmortem which was put to scrutiny by Dr. U.S. Tiwari, who conducted the postmortem on 11.07.1982 at 05:50 in the evening. As Chandra Bhushan died so the penal section which found its presence in FIR so lodged by the first informant on 10.07.1982 at 21:20 hours was transformed into section 147/304/323 IPC.

6. ne S.I. Sri Ram Dayal Singh was nominated as the Investigating Officer who claims to have recorded the statement of prosecution witnesses. I.O. Sri Ram Dayal Singh after recording the statements of the prosecution witnesses and also completing the formalities which are to be conducted during the course of investigation submitted charge sheet u/s 147, 304, 149 and 323 IPC.

7. The case was committed to Sessions.

8. Charges were read over to the accused. Accused pleaded non-guilty and claimed to be tried.

9. The prosecution in order to bring home the charges the following prosecution witnesses were produced:-

1.	Rajendra Prasad	P.W.1
2.	Bajrang Prasad	P.W.2
3.	Ram Lal	P.W.3
4.	S.I. Ram Dayal Singh	P.W.4

10. The defence in order to substantiate its stand has submitted various documents being:-

1.	Copy of the affidavit of Bajrang Prasad filed in connection with bail application
2.	Order of S.D.M. dated 16.03.1982 in case u/s 107, 116 Cr.P.C.

3.	Chalani Report against Chandra Bhushan, Bajrang Prasad, Ram Gopal, Ram Lal
4.	Copy of Surety Bond
5.	Ex.Kha 7, Copy of order of corss case u/s 107 Cr.P.C.
6.	Ex. Kha 8, Copy of Chalani Report
7.	Ex. Kha 9, State of Mewa Lal
8.	Ex. Kha 10, Copy of the Order
9.	Ex. Kha 11, Mark Sheet of High School Examination

11. The learned trial court by virtue of judgment and the order under challenge has acquitted the accused herein.

12. Challenging the same, now the State of U.P. is before this Court in the proceedings purported to be u/s 378 of the Cr.P.C.

13. We have heard Sri Indra Pal Singh Rajpoot, learned A.G.A. for the State-appellant and Sri Madhukar Maurya, learned counsel for the surviving accused respondent nos. 3, 5, 6 and 7.

14. Sri Indra Pal Singh Rajpoot, learned A.G.A. in support of the appeal has made manifold submissions namely:-

(a). The learned trial court has committed manifest illegality in acquitting the accused herein while completely misreading the evidence available on record as the present case was a case wherein there was a prompt FIR, disclosing offences committed by the accused herein as they had been specifically marked in the FIR assigning roles.

(b). The prosecution witnesses has supported the occurrence of the incident that too by the accused and there was ample evidence available on record so as to pointedly mark the accused to have committed the crime.

(c). There was clear cut motive attributed upon the accused herein for commission of crime which itself was catalyst for doing the acts which not only injured the P.W. 1 and P.W. 2 but also took the life of their father Chandra Bhushan, the deceased.

(d). Merely because, there are minor contradictions in the statements of the prosecution witnesses the same could be a ground to acquit the accused herein once the other factors consistently proves that the accused had committed the crime.

15. Sri Madhukar Maurya, learned counsel for the surviving accused respondents has made the following submissions:-

(a). FIR in question is anti-timed and the accused have been falsely roped in in the present criminal case.

(b). No specific role has been assigned in the FIR but as an after thought different role has been assigned for commission of crime by the accused which is nothing but a case of improvement.

(c). There are material contradictions in the statement of the prosecution witnesses which itself demolishes the prosecution theory.

(d). There was no such motive which could be the basis for commission of the crime as alleged by the prosecution.

(e). Judgment and the order of acquittal is based upon correct appreciation

of the prosecution testimony and evidences so adduced which does not need any interference at the stage.

16. Before embarking upon the validity and the legality of the judgment and the order of acquittal passed by the learned trial court, this Court is to bear in mind the fact that this Court is occasioned to deal with the judgment and the order of acquittal in an appellate jurisdiction that to under section 378 of Cr.P.C. To put it otherwise, there are certain limitations which have to be noticed and kept in mind that while exercising appellate jurisdiction, as this Court while exercising appellate jurisdiction can only interfere and grant indulgence in the judgment and the order of acquittal when it is palpably perverse, there has been complete misreading of the evidences so sought to be adduced and it proceeds towards a wrong directions so as to indicate that the view taken by the learned trial court is a view which cannot be perceived by a prudent person. The reasons for interfering in the judgment of acquittal should be compelling and substantive in order to prevent miscarriage of justice through the parties.

17. The Hon'ble Apex Court in the recent judgment in the case of **Criminal Appeal No (S). 410-411/2015 (Ravi Sharma Vs. State (Government of N.C.T. of Delhi) & Anr.)** decided on **11.07.2022** in paragraph nos. 8 and 9 has held as under:-

"8. Before venturing into the merits of the case, we would like to reiterate the scope of Section 378 of the Code of Criminal Procedure (for short "Cr.P.C.') while deciding an appeal by the High Court, as the position of law is rather settled. We would like to quote the relevant portion of a recent judgment of this Court in Jafarudheen and Others v. State of Kerala (2022 SCC Online SC 495) as follows:

25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters.

9. This Court in the aforesaid judgment has noted the following decision while laying down the law:

Precedents:

- *Mohan alias Srinivas alias Seena alias Tailor Seena v. State of Karnataka, [2021 SCC OnLine SC 1233] as hereunder:*

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence.

Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity, nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark.

23. This court, time and again has laid down the law on the scope of inquiry by an Appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this court in Anwar Ali v. State of Himanchal Pradesh, (2020) 10 SCC 166:

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under: [Babu v. State of Kerala, [(2010) 9 SCC 189]:

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [(2001) 1 SCC 501], Aruvelu v. State, [(2009) 10 SCC 206] and Gamini Bala Koteswara Rao v. State of

A.P. [(2009) 10 SCC 636])." It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10], that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse, and the findings would not be interfered with.

14.3. In the recent decision of Vijay Mohan Singh v. State of Karnataka, [(2019) 5 SCC 436], this Court again had an occasion to consider the scope of Section 378 CrPC and the interference by the High Court [State of Karnataka v. Vijay Mohan Singh, 2013 SCC OnLine Kar 10732] in an appeal against acquittal. This Court considered a catena of decisions of this Court right from 1952 onwards. In para 31, it is observed and held as under:

"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai v. State of Gujarat, [(1978) 1 SCC 228]. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under:

"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case.'

31.1. In Sambasivan v. State of Kerala, [(1998) 5 SCC 412], the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on reappreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court. While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under:

"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Doshi case [Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225] viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently

illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case.'

31.2. In K. Ramakrishnan Unnithan v. State of Kerala, [(1999) 3 SCC 309], after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley v. State of U.P., [AIR 1955 SC 807], in para 5, this Court observed and held as under:

"5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 CrPC came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on

an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well- established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State [1951 SCC 1207]; Wilayat Khan v. State of U.P. [1951 SCC 898]. In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.'

31.4. In K. Gopal Reddy v. State of A.P., [(1979) 1 SCC 355], this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

N. Vijayakumar v. State of T.N., [(2021) 3 SCC 687] as hereunder:-- "20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in Chandrappa v. State of Karnataka, [(2007) 4 SCC 415] has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under: (SCC p. 432)

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own

conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

21. Further in the judgment in Murugesan v. State, [(2012) 10 SCC 383] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained. In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction.

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23. Further, in Hakeem Khan v. State of M.P., [(2017) 5 SCC 719] this Court has considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said judgment it is held that if the "possible view" of the trial court is not agreeable for the High Court, even then such "possible view" recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court. Para 9 of the judgment reads as under; (SCC pp.722-23) "9. Having heard the learned counsel for the parties, we are of the view that the trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Penal Code. The most important reason of the trial court, as has been stated above, was that, given the time of 6.30 p.m. to 7.00 p.m. of a winter evening, it would be dark, and, therefore, identification of seventeen persons would be extremely difficult. This

reason, coupled with the fact that the only independent witness turned hostile, and two other eyewitnesses who were independent were not examined, would certainly create a large hole in the prosecution story. Apart from this, the very fact that there were injuries on three of the accused party, two of them being deep injuries in the skull, would lead to the conclusion that nothing was premeditated and there was, in all probability, a scuffle that led to injuries on both sides. While the learned counsel for the respondent may be right in stating that the trial court went overboard in stating that the complainant party was the aggressor, but the trial court's ultimate conclusion leading to an acquittal is certainly a possible view on the facts of this case. This is coupled with the fact that the presence of the kingpin Sarpanch is itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place."

24. By applying the abovesaid principles and the evidence on record in the case on hand, we are of the considered view that having regard to material contradictions which we have already noticed above and also as referred to in the trial court judgment, it can be said that acquittal is a "possible view". By applying the ratio as laid down by this Court in the judgments which are stated supra, even assuming another view is possible, same is no ground to interfere with the judgment of acquittal and to convict the appellant for the offence alleged. From the evidence, it is clear that when the Inspecting Officer and other witnesses who are examined on behalf of the prosecution, went to the office of the appellant-accused, the appellant was not there in the office and office was open and people were moving out and in from the office of the appellant. It is also clear from the evidence of PWs 3, 5 and 11 that the currency and cellphone were taken out from the drawer of the table by the appellant at their instance. There is also no reason, when the tainted notes and the cellphone were given to the appellant at 5.45 p.m. no recordings were made and the appellant was not tested by PW 11 till 7.00 p.m."

18. In the light with the aforesaid proposition of law so culled out by the Hon'ble

19. The ocular testimony of the prosecution witnesses is to be analysed.

20. As P.W. 1, the first informant being Rajendra Prasad entered into the witness box, according to him he recognizes all the accused. He in his statement has deposed that he along with his younger brother Virendra had gone to his agriculture field to graze the cattle at 12 in the noon on 10.07.1982 which is near tube well where at the crop of paddy was existing and at that point of time accused Prem Narayan along with his cattle came into the agricultural field of the first informant and when the first informant raised his protest then he abused the first informant. Occasioning the said situation, the first informant came back from the field and straight away went to the house of the accused Mishri Lal and raised his complaint. He has further stated that behind him the accused Prem Narayan also came along with his cattle and when he was complaining about the same in the house of the Prem Narayan then the accused Durga Prasad indulged into extortion while telling his son and the other accused that the first informant be put to administration of beating. When the accused aided with wooden stick ran to inflict blow upon the

first informant and he came just near the gate of the house of Jiya Lal whereat the aforesaid accused assembled together and inflicted blow upon the first informant and witnessing the same his father Chandra Bhushan Prasad and brother Bajrang Prasad also came and at that point of time the accused administered beating upon them and Sri Durga Prasad also inflicted a blow with the wooden stick upon him. He further deposed that on account of blow of wooden stick so sought to be resorted to by the accused all three of them sustained injuries and Ram Lakhan and Vishnu Dayal witnessed the same. In nutshell P.W. 1 supported the prosecution version.

21. One Bajrang Prasad appeared as P.W. 2 and according to him on the fateful day i.e. 10.07.1982 his brother Rajendra and Virendra had gone to graze the cattle where at Prem Narayan hurled abuses and thereafter, he witnessed that his brother Rajendra was inflicted blow by wooden stick by the accused and when he and his father Chandra Bhushan requested not to do the said act then they were also administered beating. He claims to have sustained injuries.

22. P.W. 3 Ram Lal also appeared as a prosecution witness according to him he witnessed the incident which occurred on 10.07.1982. According to him Chandra Bhushan was administered beating by accused Mishri Lal, Dhunnu Lal and Bajrang was administered beating by Ram Kumar. He has also supported the prosecution version.

23 . S.I. Ram Dayal Singh appeared as P.W. 4 he claims to be the Investigating Officer who had taken statement and submitted charge sheet.

24. So far as the injuries is concerned, there are three injured namely P.W. 1 Rajendra Prasad, P.W. 2 Bajrang Prasad and the deceased Chandra Bhushan.

25. P.W. 1 Rajendra Prasad was medically examined on 11.07.1982 at 02:40 am and according to the doctor who has examined him and all the injuries were found to be simple instead of injury no. 1 which was kept on observation and x-ray was advised. Similarly, so far as the injury of Bajrang Prasad, P.W. 2 is concerned he was also put to medico legal examination on 11.07.1982 at 02:30 am wherein the injuries were cause by blunt object and the same was fresh as injury no. 1 was found to be simple, injury no. 2, 3 were advised for X-ray.

26. As regards Chandra Bhushan is concerned, he is stated to have sustained injuries pursuant where to he became unconscious but he succumbed to the injury and on 11.07.1982 at 05:50 hours, the postmortem was conducted wherein the cause of death was shock and haemorrhage due to injuries.

27. Undisputedly, the FIR has been lodged by the first informant Rajendra on 10.07.1982 at 21:20 hours against the accused herein claiming himself to be the witness of the incident which occurred in the agricultural field and also near the house of Mishri Lal and Jiya Lal. In the FIR though the accused have been marked while committing offence but no specific role what so ever has been assigned to them. In the FIR it has also been recited that after the receiving of the injuries at the hands of the accused herein the first informant being Rajendra along with his brother Bajrang and the deceased Chandra Bhushan proceeded in a bullock cart towards the police station and the FIR was got lodged. P.W. 1 in his cross-examination

has stated that he had got written complaint/report in his house and after writing the entire written complaint he proceeded from his own house and neither in the transit from the house till the police station he did not add anything and he on being specifically asked he had specifically deposed that he had written the written complaint in the house that he took his deceased father in bullock cart. He has further deposed in paragraph no. 18 that he has not written complaint in the police station that to after consulting. He further deposed that he along with Vidya Sagar S/o Ram Gopal had gone to the police station.

28. As a matter of fact it is quite paradoxical and amazing that even on the suggestion the P.W. 1 Rajendra Prasad who happens to be the first informant had stated that he was in his house and he wrote/got prepared the written complaint and he did not add or write anything in the written complaint in his transit that from the house till the police station then to how could a person imagine certain events which is yet to be occurred practically when he is in the house and he is writing something regarding going by bullock cart once he has not commenced his journey. The aforesaid fact itself shows that the prosecution theory is under cloud. The issue also assumes more significance particularly when no role had been assigned in the FIR regarding commission of crime by the accused who are seven in number however, subsequently improvement has been sought to be made at a later stage so as to assign specific role once the first informant is nobody but an eye witness who even in fact was present when the incident took place whereby he and his father and brother were subjected to blow by wooden stick by the accused herein.

29. More so, P.W. 2, Bajrang Prasad who happens to be the son of the deceased and real brother of Rajendra Prasad and also an eye witness of the incident in para 3 has further stated that the accused Mishri Lal and Dhunnu Lal had inflicted blow with wooden stick however, the injury report of Chandra Bhushan dated 11.07.1982 at 02:30 am itself shows that single injury was sustained by the deceased. Meaning thereby that the prosecution theory also stands exploded as there is no justification as to why one injury is being sought to be found when two accused with two wooden sticks had inflicted blow upon the deceased and he became unconscious and fell down. The said aspect also assumes significance once the FIR is completely silent about the specific role assigned in that regard.

30. So far as the involvement of the accused Durga Prasad in commission of the crime in question is concerned P.W. 1 Rajendra Prasad in his cross examination in paragraph no. 5 has himself stated that Durga Prasad at the time of the incident was 70-75 years and he was quite old and weak. Once the said fact has himself been spelt out by the P.W. 1 who happens to be an eye witness then in presence of his son and grand son there was no occasion for Durga Prasad to have inflicted injury by wooden stick himself as it is not expected that a person being 70-75 years would run and chase P.W. 1 Rajendra who is stated to have being chased by the accused from the house of the accused Mishri Lal near the gate of the house of Jiya Lal.

31. Similarly, this Court is to also analyse another aspect of the matter that P.W. 1 Rajendra and P.W. 2 Brijendra Prasad both are real bothers and thus, only person who is not of the family is P.W. 3 who happens to be Sri Ram Lal and according to him he was in his house when

he heard noises then he came near the door of Jiya Lal wherein he was occasioned to witness to said incident. However, according to his statement he was near his field irrigating the paddy crop and he came back after finishing the irrigation work at 04:00 or 04:30 in the evening and after fifteen minutes he heard certain noises. Remarkably, he had not disclose the said fact to the Investigating Officer that he had come from his house to the place of occurrence though he stands and supports the fact that he has come from tube well at 04:30 pm and he also did not inform the family members of the P.W. 1 regarding grazing of the field by the accused Prem Narayan.

32. So far as P.W. 3 is concerned, he happens to be an interested witness having its tilt towards the complainant fraction as he had been administered threatening by accused Mishri Lal a week ago that he should not appear as a witness in some case. The conduct of the P.W. 3 itself marks importance particularly when he has himself in his cross examination denied the fact he has filed an affidavit in the bail application but conversely, he had stated that he did not know as to how and under what circumstances he had signed the affidavit. The said fact also assumes significant once the affidavit is to be sworn before an oath commissioner. More so the entire testimony of the P.W. 3 does not inspire confidence particularly when he comes up with a stand that he heard the instigation of the accused and he immediately rushed as the same also does not finds its presence in the statement u/s 161 Cr.P.C.

33. More so, P.W. 2 Bajrang Prasad in his statement has deposed that the field of Ram Lal is not near the tube well or on the way of the village then how P.W. 3 Ram Lal could see the origin of the dispute.

34. It has also come on record as per the statement of P.W. 1 Rajendra Prasad that the accused Prem Narayan along with his cattle had entered into the agriculture field and destroyed paddy and other crops and he remained there for at about one hour. The first informant along with his brother were already present over there and Prem Narayan was shown to be all alone with the cattle then it becomes highly unbelievable that the first informant and his brother Virendra will allow the accused to graze the cattle and destroy the crops which is the source of livelihood. It is also not a case wherein the accused happened to be a very strong person having good built as P.W. 1 Rajendra Prasad has himself in his statement deposed that he did not put resistance as abuses were hurled and he was aged about 18-19/16-17 years. The said conduct of the P.W. 1 Rajendra Prasad itself does not inspire confidence as the accused was single as well as the first informant was with his brother in that regard.

35. Even P.W. 4 who happens to be the Investigating Officer being S.I. Ram Dayal has stated that in his deposition that he was assigned the Investigation on 11.07.1982 and he took the statement of Constable Prem Chandra on the said date and on 13.07.1982 he took the statement of Ram Lal, Bishun Dayal, Lakhan and on 21.07.1982 he had gone to the place of occurrence and took the statement of Bajrang Prasad and prepared the site plan and on 01.08.1982 he took the statement of P.W. 1, Rajendra Prasad for the purposes of identification of place of occurrence and he got information on 13.07.1982 regarding the death of Chandra Bhushan. He has

specifically deposed in paragraph no. 10 of his statement that he had not taken the blood stained earth on 11.07.1982. He further could not justify in his statement as to why he did not take the statement of the injured (deceased). P.W. 4 has further stated that he has not taken the samples of blood stained earth. Further in paragraph no. 11 of the statement of P.W. 4 it has been deposed that the I.O. had not gone to the field in order to determine the fact as to whether the crops were destroyed while grazing by the accused or not. The aforesaid stand taken by the Investigating Officer coupled with the fact that there is a serious cloud over the incident which occurred in the agricultural field generating the commission of the alleged offence does not link the accused to have committed offence.

36. Notably in the case of **Lakshmi Singh And Others Vs. State of Bihar (1976) 4 SCC 394** the Hon'ble Apex Court had the occasion to deal with the issue where at there was a failure to send blood stained earth for chemical examination and the Hon'ble Apex Court in paragraph no. 14 has observed as under:-

"14. To add to this another important circumstances is the omission on the part of the prosecution to send the bloodstained earth found at the place of occurrence for chemical examination which could have fixed the situs of the assault. In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the Court, and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution. This also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version."

37. Motive can be also one of the factors for commission of crime however, here in the present case the learned trial court has gone into the said aspect of the matter while recording the categorical finding that though the motive is stated to begun in the agriculture field but the fact that the Phool Chand Pradhan had defeated Ram Gopal is also to be taken note off though it had been denied by the accused herein that they had supported Phool Chand with whom the deceased had inimical terms. Though it has been proved from the documents filed by the defence that proceedings were under gone under section 107 Cr.P.C. between Phool Chand and Prahalad in which Ram Kumar and Mewa Lal stood as securities and Mewa Lal has also appeared as a witness against Chandra Bhushan for Ram Pratap and Phool Chand. Thus, there was an enmity between the parties and election took place only three days before the incident and the Vidyasagar the son of defeated Pradhan had taken P.W. 1 Rajendra Prasad to lodge FIR at Police Station.

38. Moreover, this Court finds that though on one hand motive is being sought to be assigned as a basis for commission of the crime but non implication of the Pradhan itself creates a suspicion and cloud over the prosecution theory as the basis of commission of crime was also the rivalry pertaining to the offence of Pradhan. The

said aspect also makes its relevance particularly when there is also cloud over the fact that as to whether on account of grazing of agricultural field of the complainant fraction the genesis of the dispute got generated as even P.W. 4 as per his statement had not visited the place of occurrence relating to grazing of the agricultural field that to at the end of the accused fraction.

39. Notably, enmity is a two sided dragger and one of the basis of commission of crime being the motive but the prosecution if, is taking aid of the device of motive, has to prove it beyond doubt so as to give the opportunity to the defence to despell the same.

40. Nonetheless, it has come in the statement of P.W. 1 Rajendra Prasad that he was admitted in hospital for 7-8 days and the statement of Rajendra Prasad was taken by the Investigating Officer after 20-21 days meaning thereby, by all probabilities a story was being sought to be cooked up for implicating the accused herein as it is not a case that the P.W. 1 Rajendra Prasad was seriously ill or in unconscious condition and also not in a position to give statement. P.W. 1 Rajendra Prasad further in his statement in paragraph no. 11 has stated that besides Ram Lal and Ram Lakhan there was no other person in the nearby houses who could witness the same, however, women folk were there who did not come out side.

41. The Hon'ble Apex Court in the case of **Maruti Rama Naik Vs. State of Maharashtra** reported in **(2003) 10 SCC 670** in paragraph no. 7 has observed as under:-

"We will now consider whether the evidence of PW-4 in any manner corroborates the evidence of PW-3 or for that matter the said evidence of PW-4 is acceptable at all. PW-4 has admitted that he is a close relative of deceased Krishna Mahada Naik. While he had noticed the incident of the attack on the deceased Krishna Mahada Naik, he has not spoken in any manner about the subsequent attack which includes the attack on PW-3. According to this witness, at the relevant time, he was going to the bus-stand to board a bus to reach his factory where he was working when he saw the assault on the deceased Krishna Mahada Naik by the assailants including the appellants. Having noticed the incident, he did not go to any one of his relatives' house to inform about the attack in question. He knew at that point of time that Krishna Mahada Naik was injured and still alive, still he did not make any effort whatsoever to get any help to shift the injured to a hospital. According to this witness, even after seeing Krishna Mahada Naik lying injured in a critical condition, he without informing anybody about the incident, went to the bus-stand, took a bus and went to his factory and even at that point of time, he had sufficient opportunity to inform the other people about the incident or for that matter, even the Police which he did not do. It is interesting to note from the evidence of this witness that even though he had an opportunity of approaching the police, he did go to them because he did not know whom he had to inform about the incident in the Police Station. The witness further states that he went to the factory, worked for a while, took leave from the factory and went back home. Even after reaching home, he did not bother to find out from anybody there about the fate of the victims nor did he inform anybody about he having witnessed the incident. It is only at about 6 p.m. when PW-21 recorded the statement

for the first time, he came out with the fact of having witnessed the incident. It is rather surprising as to how and in what manner, PW-21 came to know that PW-4 was a witness to the incident. The prosecution has also failed to explain the delay in recording the statement of this witness, therefore, bearing in mind the conduct of PW-4 in not informing anybody about his having witnessed the incident and the delay in recording his statement makes us hesitant to place any reliance on his evidence. The only other piece of evidence relied by the prosecution to support its case against these two appellants is that of recovery which even according to prosecution, was made from a place which was not in the exclusive possession of the appellants and the said place was easily accessible by other people and also the fact that recovery was made almost 9 days after the incident in question, in our opinion, this piece of evidence also would not at all be sufficient to base a conviction of these appellants without further acceptable corroboration. Therefore, we are of the opinion that these appeals must succeed. The conviction and sentence imposed on the appellants are set aside and the appeals are allowed."

42. Further in the case of **Jagjit Singh Alias Jagga Vs. State of Punjab** reported in **(2005) 3 SCC 689** the Hon'ble Supreme Court in paragraph no. 30 has observed as under:-

"30. This has to be viewed in the light of the fact that her statement was recorded by the Investigating Officer for the first time three days after the occurrence, and her statement was recorded by the Judicial Magistrate six days after the occurrence. The courts below have taken the view that delay in examining her has caused no prejudice to the defence. Counsel for the appellant, submitted that this period was utilized by the prosecution for tutoring the witness, and therefore the delay of three days in her examination under Section 161 Cr. P.C. is significant No explanation is forthcoming as to why she was not examined for three days when the Investigating Office knew that a statement of her's had been recorded by the doctor on 30th August, 1996. The Trial Court took the view that since she was under a shock she was not in a position to make a statement and, therefore, her statement was recorded later. This is clearly erroneous because the case of the prosecution is that she regained consciousness on 30th August, 1996 and, thereafter, she was fully conscious. The evidence of Dr. Bhupinder Singh, PW-7 who gave a certificate of her fitness to make a statement is also to the same effect. The reasoning of the Trial Court that the victim, PW-6, was under a great shock and was not in a position to make the statement, cannot be sustained. Neither the Trial Court nor the High Court cared to closely examine the evidence on record to find out whether there was any evidence on record to prove that the appellant was known to PW-6 or that PW-6 had any reason to know his name so as to be able to identify him by name. The explanation furnished by PW-6 five years after the occurrence, that she knew the appellant because he happened to be the son of Amar Singh at whose tune well her grandparents resided, is unacceptable particularly, in view of the fact that there is no evidence to establish that she had ever earlier seen the appellant and in none of the three statements made by her earlier the name of Amar Singh is mentioned. The delay in examining her in the course of investigation also creates a serious doubt in the absence of any

explanation for her late examination after three days, when admittedly she was the sole eye witness who was also injured in the course of the occurrence. We are, therefore, of the view that though she may have witnessed the occurrence, she did not know the appellant by name as she had no opportunity of knowing or seeing him earlier, and that she has involved the appellant at the instance of her father, who was the person who suggested the involvement of the appellant when her statement Ex.PW-6/A was being recorded."

43. Yet in the case of **V.K. Mishra And Another Vs. State of Uttrakhand And Another** reported in **(2015) 9 SCC 588** the Hon'ble Apex Court in paragraph no. 26 has observed as under:-

"26. It cannot be held as a rule of universal application that the testimony of a witness becomes unreliable merely because there is delay in examination of a particular witness. In Sunil Kumar & Anr. vs. State of Rajasthan, (2005) 9 SCC 283; it was held that the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a core of witness to falsely support the prosecution case."

44. Though, merely because there has been delay in recording the statement of the prosecution witnesses by the Investigating Officer does not ipso facto renders it to be fatal to the prosecution case but there has to be an explanation so as to suggest as to what was the reasons occasioned in delay in recording the statement of the prosecution witnesses. This Court finds that the present case at hand P.W. 4 had the due opportunity to get recorded the statements of the prosecution witness so as to eliminate the chances of any soliciting or tutoring but there was no reason assigned for delay in recording the statement of the prosecution witness.

45. The learned court had also taken pains so as to determine the fact as to what time the deceased died while taken clue from the postmortem report wherein the food so found from the body of the deceased was in semi digested condition. According to learned trial court as per the testimony of the prosecution witness the meal was taken in their house in day time at 12 in the noon and postmortem of the deceased was conducted at 05:50 in the evening and thus, by that time the normal meal which is taken by average villager gets digested thus the FIR in question was sought to be shown an anti time FIR while referring to the often relied books which relatable to medical jurisprudence in this regard.

46. The Hon'ble Apex Court in the case of **Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra** reported in **(1973) 2 SCC 793** in paragraph no. 11 has observed as under:-

"That Hariba died of violence on 26th September, 1966, is indubitable, but who did him to death is a moot point. The lethal attack is alleged to have been made on a cart-.track lying between the two villages, Bibi and Ghadgewali in the afternoon on a bazaar day in the former village when people must evidently have been moving about. The macabre story of an old man, Hariba, being killed on a road near village Bibi around 5-30 p.m. by two known persons, Shivaji and Lalasaheb was recounted by one Balakrishna (P.W. 2) before the Police Patial (P. W. 15) in less

than an hour of the incident (vide Ex. 8 and Ex. 36). Thus, the first information has been laid promptly, if we assume the hour of death to have been correctly stated there. Ext. 8 does mention briefly the material facts and the crucial witnesses in what may be treated as a hurriedly drawn up embryonic document. The contention of counsel for the respondents before us, which has received judicial reinforcement by acceptance by the Sessions Judge, is that this first information is an ersatz product of many minds manupulating to make it, and the apparently short, honest interval between the occurrence and the report, to the Patil is a make-believe, the death having occurred beyond doubt at about 2-00 p.m. and not at 5-30 p.m. as the prosecution disingenously pleads. Reliance is primarily placed for this pre-clocking of the occurrence on the postmortem certificate, doctor's evidence and the medical expertise contained in Modi's Medical Jurisprudence. Admittedly, 'semi-digested solid food particles' were observed in the deceased's stomach by P.W. 4 the medical officer, and the inference sought to be too neatly drawn therefrom is that the man must have come by his end (and that the digestive process must also have come to a halt with it) 2 to 3 hours after his last lunch, which, according to P.W. 2, was at 10.00 a.m. If he did die before 2.00 p.m., everything else in the prosecution evidence became suspect, argued the court. The assurance of this assertion, however, turns on the exact accuracy, in terms of the I.S.T., of the testimony of P.W. 5 who swore that himself and the deceased had taken food on the fateful day at about 10.00 or 10.30 a.m. before setting out for Bibi. The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about 'time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed. 10.30 a.m. could well have been an hour or more one way or the other and too much play on such slippery facts goes against realism so essential in a testimonial appraisal. More importantly, the court must not abandon a scientific attitude to medical science if it is not to be guilty or judicial superstition To quote Modi's Medical Jurisprudence that food would be completely digested in four to five hours or to swear by the doctor to deduce that death must have occurred within 3 hours of the eating and, therefrom, to argue that the presence of undigested food in the dead body spells the sure inference that death must have occurred before 2.00 p.m. is to mis-read the science on the subject of digestive processes. Modi's Medical Jurisprudence, extracts from which have been given by both the courts, makes out that a mixed diet of animal and vegetable foods. normally taken by Europeans, takes 4 to 5 hours for complete digestion while a vegetable diet, containing mostly farinaceous food usually consumed by Indians, does not leave the stomach completely within 6 to 7 hours after its ingestion. Indeed, the learned author cautiously adds that the stomachic contents cannot determine with precision the time of death "inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma". He also states "it must also be remembered that the process of digestion in normal healthy persons may continue for a time after death". The learned judges reminded themselves of the imponderables pointed out by Modi which makes the 'digestive' testimony inconclusive and, therefore, insufficient to contradict positive evidence, if any, about the time of death To

impute exactitude to a medical statement oblivious to the variables noticed by experts and changes in dietary habits is to be unfair to the science. We are not prepared to run the judicial risk of staking the whole verdict on nebulous medical observations. Given so according to P.W. 5 deceased took tea some time after 12-30 p.m. when they started for Bibi. At that time the possibility of his having had something to eat is not ruled out. If so, the medical evidence as to the time of death will not be inconsistent with the postmortem findings.

47. In the case of **Ram Narain Singh Vs. State of Punjab** reported in **(1975) 4 SCC 497** the Hon'ble Apex Court in paragraph no. 9 has observed as under:-

"9. This brings us to the other aspects of the case, namely, whether or not the prosecution had tried to change the time and place of occurrence, as contended by the learned counsel for the appellants. There is no direct evidence to show that the occurrence took place at 8-00 P.M. but there are certain strong circumstances which lead to the irresistible inference and an inescapable conclusion that the occurrence must have taken place at about P.M. In the first place, the informant himself has categorically stated in his evidence that he had left for the police station at 8-00 P.M. although the occurrence had taken place at 6-30 P.M. He has not given any explanation why he waited in the village for hours if he eventually decided to go to the police station alone without taking any escort. This clearly shows that the occurrence must have taken place at about 8- 00 P.M. and the time has been shifted to 6-30 P.M. Only with a view to make it appear that the occurrence took place in the house where the accused could be properly identified. Another important circumstance which supports this inference is that according to the evidence of Surjit Singh who stated at P. 41 of the High Court Paper Book that they had taken their food at village Phaphre Bhaike about an hour before the occurrence. Here he is completely belied by the medical evidence of Dr. Walia which shows that undigested food was found in the stomach of the deceased and according to him the deceased must have taken his food only five minutes before his death or at the most within half an hour of his death. Doctor's evidence therefore clearly shows that he must have taken his food at 8-00 P.M. which is also the usual time when the villagers take their food. Another important circumstance which shows that the occurrence must have taken place at 8-00 P.M. is the evidence of P.W. 15 Baggar Singh that after hearing about the occurrence he came out of his house after about four hours of the alleged firing and went to the spot about 1 1/2 hours before the police arrived. the witness states that the police arrived at the spot about 1 1/2 hours after he had gone to the spot. According to the evidence of the A.S.I. he had proceeded to the village Hassanpur at about 2-30 A.M. On October 3, 1972. This means that the witness must have reached the spot at about 1-00 A.M. This would put the occurrence at about 9-00 P.M. On October 2, 1972 as the witness stirred out of his house four hour after the occurrence. This version also belies the version of the two eye witnesses that the occurrence took place in their house at about 6-30 P.M."

48. The Hon'ble Apex Court in the case of **Shivaji Sahabrao Bobade (Supra)** and **Ram Narain Singh (Supra)** had the occasion to consider the contingency relating to the conflict between the prosecution case and medical evidence etc.

in order to determine the issue relating to the time of the death of the deceased. The Hon'ble Apex Court had even gong to the issue relating to the food which the deceased ate and condition whether the same was digested, undigested or semi-digested in order to determine the actual time of the death and while considering the same, the Apex court determined the veracity of the prosecution theory.

49. Yet in the case of S**anjay Khanderao Wadane Vs. State of Maharashtra** reported in **(2017) 11 SCC 842** the Hon'ble Apex Court has further analysed the inconsistency or discrepancy between medical evidence and direct evidence while holding in paragraph nos. 13 and 16 as under:-

"13. A medical witness who performs a post-mortem examination is a witness of fact though he also gives an opinion on certain aspects of the case. The value of a medical witness is not merely a check upon the testimony of eyewitnesses; it is also independent testimony because it may establish certain facts quite apart from the other oral evidence. From the evidence on record, inferences are drawn as to the truth or otherwise of the prosecution case in criminal matters and truth or otherwise of a claim in civil matters. In this process, the medical evidence plays a very crucial role. If there is inconsistency or discrepancy between the medical evidence and the direct evidence or between medical evidence of two doctors, one of whom examined the injured person and the other conducted post mortem on the injured person after his death or as to the injuries, then in criminal cases, the accused is given the benefit of doubt, and let off. Where the direct testimony is found untrustworthy, conviction on the basis of medical evidence supported by other circumstantial evidence can be done, if that is trustworthy.

16. 9) The presence or absence of food at the time of post-mortem in relation to the time of death is based on various factors and circumstances such as the type and nature of the food consumed, the time of taking the meal, the age of the person concerned and power and capacity of the person to digest the food. In the present case, though PW-8 has stated that he had "Bhel' with the deceased just before the incident, there is no evidence about the exact time when the meals were taken or the quantity of "Bhel' consumed by the deceased. Judging the time of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased. Even in Modi's Jurisprudence, it has been recorded as under:

"... The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of the occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of."

50. Applying the principle of law so culled out in the case of **Shivaji Sahabrao**

Bobade (Supra), Ram Narain Sing (Supra) and Sanjay Khanderao Wadane (Supra) in the present facts of the case this Court finds that as per the deposition of P.W. 1 Rajendra Prasad, the first informant he had deposed in paragraph no. 12 that in his house the meals are taken at about 12 in the noon and in the night by 10/11. He has specifically also deposed that in between neither any breakfast not snacks are being consumed. According to his deposition the deceased after being hit by the wooden stick became unconscious. Thus, according to the story so sought to be set up therein a normal agriculturist who lives in a village takes meal comprising of pan cakes of wheat (bread) which is in common parlance known as Chapaties along with lenten (Dal) and thus, the learned trial court came to the opinion that the said food get digested within 2/3 hours. The learned trial court has further gone to the extent that the rice gets digested within 3 to 4 hours and then came to the conclusion that by no stretch of imagination the semi digested food could be in stomach when the incident tool place at 05:00 in the evening.

51. Though, this Court would have skipped and ignored the said aspect however, while placing it as an additional factor, however, this Court from the ocular testimony of the prosecution witnesses does not finds the prosecution case to be proved beyond any reasonable doubt as in the FIR there has been no specific role assigned to the accused herein particularly when the first informant being P.W. 1 Rajendra Prasad happens to be the son of the deceased and also an eye witness. Apart from the same, in view of the categorical statement of the accused, first informant being P.W. 1 Rajendra Prasad that he had written a written complaint for lodging of the FIR in his house and he had specifically spelled out in his deposition that he had neither added or subtracted anything in the written complaint either during the transit from his house to the police station or in the police station then how could the narration of the facts while travelling in bullock cart before the journey yet to be commenced was recited in the written complaint. Additionally, the involvement Durga Prasad in the commission of the crime who is stated by the prosecution to be aged about 70-75 years chasing the P.W. 1 Rajendra Prasad and administering beating with a wooden stick despite presence of the other accused, non resistance of P.W. 1 for an hour while permitting accused Prem Narayan to graze the agricultural field and destroy the crops and further amongst other factor being last but not the least that delay in recording of the statements of the prosecution witness itself shows that the entire prosecution story is erected upon the allegations of which remains not only doubtful but they proceeds upon weak evidence.

52. We have bestowed anxious consideration over the prosecution case and the documents available on record as well as the ocular testimony and we find that learned trial court had not committed any manifest illegality in acquitting the accused as the view taken by the learned trial court is a possible and plausible view. Nonetheless, this Court further finds that the Trial Court has appreciated the evidences and has given cogent reasons in arriving to the conclusion that the prosecution could not prove the commission of the offences by the accused herein beyond doubt. Nevertheless, this Court cannot substitute the views so taken by the learned trial court once the same is not actuated by perversity.

53. Accordingly, this Court has no option but to concur with the judgment of the learned trial court.

54. Resultantly, no ground is made as to accord leave to appeal and accordingly, the same is rejected.

55. As the leave to file the present appeal stands rejected thus, the present government appeal so instituted at the behest of the State-appellant u/s 378 (3) of the Cr.P.C. stands **dismissed.**

56. Record of the present case be sent back to the concerned court below.
