APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.07.2016

BEFORE

THE HON'BLE MRS. RANJANA PANDYA, J.

Criminal Appeal No.- 473 Of 1996

Ram Raj & Ors. **...Appellants**
Versus
State **...Respondent**

Counsel for Appellants:
K.M.Rakesh, Manish Bajpai

Counsel for Respondent:
Govt. Advocate, Narendra Shukla, Shyam Mohan

Held

FIR Prompt and Reliable – The FIR was lodged within 1 hour and 15 minutes of the incident despite three injured persons and a 3 km distance to the police station. It was held to be prompt and free from embellishment.
Contradictions in Prosecution Case –
The FIR attributed the act of firing primarily to Parikshit Raj.
PW-1 (informant) later attempted to improve the version by stating that all accused fired.
PW-2 (injured witness Shri Ram Dixit) stated that only Parikshit Raj fired the first two shots and did not clearly support firing by Ram Raj and Tirth Raj.
These inconsistencies weakened the prosecution case regarding common intention under Section 34 IPC.
Conviction of Tirth Raj (and Ram Raj) Unsustainable –
There was no reliable evidence of overt act or participation in firing by Tirth Raj. Conviction under Section 307 read with Section 34 IPC was set aside.
Nature of Injuries –
Most injuries were simple firearm pellet injuries.
No injury was declared grievous or sufficient in the ordinary course of nature to cause death.
Only one injury (on the skull of Ram Shri) was on a vital part, but the doctor could not opine it to be fatal to life.
None of the injured were admitted to hospital.
Ingredients of Section 307 IPC Not Established –
Although actual fatal injury is not essential for Section 307 IPC, intention to cause death must be clearly proved. In the present case, evidence did not conclusively establish intention or knowledge necessary for attempt to murder.
Alteration of Conviction –
Conviction of Parikshit Raj under Section 307 IPC was altered to Section 324 IPC (voluntarily causing hurt by dangerous weapon).
Sentence Modified –
Parikshit Raj sentenced to ₹40,000 fine + four months' simple imprisonment (already undergone).
₹10,000 each to be paid as compensation to injured persons.

Default sentence of four months if fine not deposited.
Conviction of Tirth Raj set aside.
Appeal partly allowed.

CASE LAW CITED

State of Maharashtra v. Balram Bama Patil
Kundan Singh v. State of Punjab
Merambhai Punjabhai Khachar v. State of Gujarat

(Delivered by Hon'ble Mrs. Ranjana Pandya, J.)

1. Challenge in this appeal is to the judgment and order dated 10.10.1996 passed by learned Sessions Judge, Unnao in ST No. 555 of 1992 (State Vs. Ram Ran and others) under Section 307 IPC, Police Station Bihar, District Unnao, whereby the appellants Parikshit Raj and Tirth Raj were found guilty. Parikshit Raj was sentenced to five years' rigorous imprisonment under Section 307 IPC whereas accused Ram Raj and Teerath Raj was sentenced to five years' rigorous imprisonment under Section 307 IPC read with Section 34 IPC.

2. Filtering out unnecessary details, brief facts of the case are that an FIR was lodged by informant Kamala Kant Bajpai stating that all the three accused reside in village Akampur, Police Station Bihar, District Unnao. Informant Kamlakant Bajpai also reside in the same village. Accused Parikshat Raj is the real nephew of accused Ram Raj. Accused Tirth Raj and Ram Raj are real cousin brothers. According to the prosecution case there was a dispute regarding a Nali in between the informant and the accused persons. The accused persons wanted to make the Nali through the Sahan of the informant which was protested by the informant. On 6.12.1990 at about 5:30 P.M. informant Kamlakant Bajpai was sitting in front of his house on Chabutra with a Chhappar (Thatched structure) overhead. Informant's mother i.e. Smt. Ram Shree and informant's younger brother namely Vidyakant and neighbour Shri Ram Dixit were also sitting with him and were talking with each other. In the meantime, all three accused persons, named above, came there. Accused Parikshat Raj had a DBBL gun with him while accused Ram Raj and Tirthraj were armed with half guns. Accused Parikshit Raj laughed at Vidyakant and remarked that he was a imposter BABA and has been thrown out of the house and takes meals outside. Vidyakant forbade them that they should not utter false words. Thereupon, accused Tirth Raj exhorted that they should be killed and he was willing to spend Rs.50,000/-. Accused Parikshit Raj, thereafter, fired from his DBBL gun which hit Vidyakant and he fell down. Thereafter, Smt. Ram Shree and Sri Ram Dixit moved towards Vidyakant and then all the three accused persons fired from their fire-arms due to which Smt. Ram Shri, Shri Ram Dixit and Vidyakant sustained fire-arm injuries. Thereafter, villagers - Chandra Nath Tiwari, Vipin Kumar Dixit, Maiku Lal and many others came challenging and then the accused persons went away towards their houses.

3. After departure of the accused persons, informant Kamlakant Bajpai, carried the three injured in two bullock carts to the police station. Written report Ext. Ka-1 was got prepared by the informant outside the boundary of the police station by Ram Ji Pandey. Written report Ext. Ka-1

was given at the police station, Bihar. Head Moharrir Ashok Kumar Singh prepared chik FIR Ext. Ka-5 on the basis of written report. The case was registered in the G.D. at Sl. No. 22 at 6:45 PM on 6.12.1990. Original general diary has been weeded out and an endorsement to that effect from the Record Keeper is Ext. Ka-6. Carbon Copy of the G.D. entry is Ext. Ka-7. Chitthi Mazroobis Ext. Ka-8 to 10 in respect of injured Vidyakant, Shri Ram Dixit and Smt. Ram Sri respectively were prepared by Constable Clerk Virendra Kumar Singh and all the three injured were sent for medical examination.

4. Dr. U.S. Bagga was Medical Officer - Incharge of PHC Sumerpur. Injured were examined medically by him in between 8:15 PM and 10:10 PM on 6.12.1990. On the person of Vidyakant following injuries were found:-

1. A lacerated gun shot wound of entry of 0.3 cm diameter x 0.6 cm on the middle of the upper lip, direction from right to left, margins inverted, no blackening.

2. A lacerated gun shot wound of entry of 0.2 cm. in diameter x 0.4 cm on the left half of the abdomen and 10 cm above the umbilicus, direction from right to left upwards, clothes over the wound was torn, no blackening.

3. A lacerated gun shot wound of entry of 0.3 cm diameter x 0.4 cm on the front surface of the left thigh, 10 cm below the anterior-superior iliac spine, margins inverted, direction from right to left, no blackening.

4. Three lacerated gunshot wounds of entry in an area of 8 cm. x 4 cm; 0.2 cm x 0.3 cm 0.4 cm on the front to medial aspect of the right thigh, upper wound of entry 22.5 cm below and medial to the right anterior superior iliac spine, margins inverted, direction from right to left, upwards, no blackening.

5. A lacerated gunshot wound of entry of 0.2 cm diameter x 0.4 cm on the medial aspect, direction from right to left upwards, no blackening.

6. A lacerated gunshot wound of entry of 0.3 cm. diameter x 0.4 cm. on the front surface of the right leg, direction from right to left, margins inverted, 7 cms. below and lateral to injury No. 5.

All the injuries were kept under observation till X-ray and were caused by fire-arm. Injury report is Ext. Ka-2.

5. On the person of Sri Ram Dixit following injuries were noticed :-

1. A lacerated gunshot wound of entry of 3.0 cm. diameter x 0.6 cm. on the anterior aspect of the right arm upper part, 6 cm. below the top of the right shoulder, direction from right to left upwards, margins inverted, cloth opposite the wound tor, no blackening.

2. A lacerated gunshot wound of entry of 0.3 cm. diameter x 0.4 cm. on the outer aspect of right arm, 03.00 cm. below and backwards to the injury No. 1, cloth torn, no blackening.

3. A lacerated gunshot wound of entry of 0.3 cm. diameter x 0.4 cm. on the outer aspect of right arm, 16 cm. below the injury No. 2, direction right to left, margins inverted, no blackening.

4. A lacerated gunshot wound of entry of 0.3 cm. diameter x 2.5 cm. on the back surface of the right arm, direction from right to left, margins inverted, 6 cm. below and backwards to the injury No. 3, no blackening.

5. A lacerated gunshot wound of entry of 0.3 cm. diameter x 1.5 cm. on the back surface of the right forearm, 15 cm. below the right elbow joint, margins inverted, direction from right to left.

6. A lacerated gunshot wound of entry of 0.3 cm. diameter x 2.5 cm. on the right half of the chest, direction right to left upwards, margins inverted, 8 cm. above and outer to the right nipple, no blackening.

7. A lacerated gunshot wound of entry of 0.3 cm. x 0.4 cm. on the left half of the back, margins inverted, cloth over the wound torn, 5.5. cm. inner to injury No. 6.

8. A lacerated gunshot wound of entry of 0.3 cm. diameter x 0.4 cm. on the left half of the back, 22 cm. below injury No. 8, direction right to left downwards, margins inverted, cloth over the wound torn.

9. A lacerated gunshot wound of entry 0.3 cm. diameter x 0.4 cm. on the medial back surface of the left forearm, direction from right to left, margins inverted, 7.5 cm. below and medial to the elbow joint left, no blackening.

10. A gunshot wound of entry 0.3 cm. diameter x 0.5 cm. on the medial back surface of left fore-arm.

11. Two gunshot wounds of entry of 0.3 cm. diameter x 0.2 cm. on the right proximal phalanx of the left thumb, palmer surface, upper part, distance between two wounds is 0.5 cm. direction front to back.

12. A gunshot wound of entry of 0.3 cm. dia. x 1.0 cm. direction from front to back, margins inverted, no blackening, on the palmer surface of the left hand over the root of the middle finger left hand.

All the injuries were kept under observation till X-ray and were caused by fire-arm. Injury report is Ext. Ka-3.

6. On the person of Smt. Ram Sri following injury was noticed:-

A gunshot wound of entry of 0.3 cm. dia. x 2 cm. direction from right to left upwards, margins inverted, no blackening, on the right half of the skull, 12 cm. above right mastoid tip, no blackening.

Injury was kept under observation till X-ray and was caused by fire-arm. Injury report is Ext. Ka-4. In the opinion of the doctor injuries of the three injured could have been caused at about 5:30 P.M on 6.12.1990 by fire-arm. The doctor has stated that injury of Smt. Ram Sri is on the vital part of the body.

7. All the three injured were referred for X-ray examination by the doctor. Dr. Satya Prakash was the Radiologist of District Hospital, Unnao on 8.12.1990. He took X-ray of the injuries of the injured persons. He prepared X-ray plate Ext. 1 of the injuries of Vidya Kant. He has found radio opaque shadow of metallic density of pellet size present-one on the face, one on right leg, two in right thigh and one in left thigh. X-ray report in this regard is Ext. Ka-13. X-ray plate Ext. II is in respect of X-ray of Sri Ram Dixit and the doctor found radio opaque shadows of metallic density of pellet size present-one in right fore-arm, two in right upper arm and one on the back. X-ray report is Ext. Ka-14. X-ray plate Ext. III is in respect of the injured Smt. Ram Sri and one radio opaque shadow of metallic density of pellet size was found in right half of the skull. Her X-ray report is Ext. Ka-15.

8. Sri I.N. Sharma - Investigating Officer was present at the police station when the FIR Ext. Ka-5 was lodged and chik FIR bears his signature. The Investigating Officer interrogated informant Kamlakant Bajpai and his mother Smt. Ram Sri at the police Station itself. Interrogation of Vidyakant and Sri Ram Dixit could not be done as they had many injuries. On 7.12.1990 on the pointing out of the informant site-plan Ext. Ka-11 was prepared of the place of occurrence. After completing necessary formalities of investigation, charge-sheet Ext. Ka-12 was submitted against the accused persons.

9. The prosecution has examined Kamlakant Bajpai as PW-1, Sri Ram Dixit as PW-2, Dr. U.S. Bagga as PW-3, Head Moharrir Ashok Kumar Singh as PW-4 and Sri Indra Narain Sharma - Investigating Officer as PW-5 and Dr. Satya Prakash as PW-6. A reference to the statements of these witnesses has been made above and it needs no repetition.

10. Statements of accused persons were recorded under Section 313 Cr.P.C., wherein they denied the allegations levelled against them. Accused Teerath Raj stated that he was a government servant and resided at Unnaon. There was no dispute of Nali between the parties and they have been falsely implicated. However, no defence evidence was adduced by the accused persons.

11. The learned lower Court after examining the evidence on record, passed the sentence as indicated in para - 1 of the judgment.

12. Feeling aggrieved, the accused appellants have come up in appeal.

13. I have heard learned counsel for the appellants, learned AGA appearing for State and perused the lower Court record.

14. The accused appellant Ram Raj died during the pendency of appeal. Hence, the appeal filed by Ram Ram was abated.

15. The learned counsel for appellants has submitted that there was delay in lodging the first information report. All the injured persons was not produced. There is no evidence on record to convict the accused persons under Section 307 IPC. The judgment of learned Trial Court is based on surmises and conjectures and the appeal is liable to be allowed.

16. Per contra, the learned AGA appearing for the State while supporting the conviction of the accused appellants has submitted that the conviction is based on legally admissible evidence available on record. The judgment is well reasoned and the appeal lacks merit, which is liable to be dismissed.

17. As far as first information report is concerned, a perusal of the chik report Ext. Ka-5 reveals that occurrence took place on 06.12.1990 at 5:30 PM. Report was lodged on the same day at 6:45 PM. It is to be borne in mind that there are three injured persons in this case. The distance of police station from the place of occurrence is three kilometers. Lodging of the First Information Report depends on many circumstances like number of injured, nature of injuries, distance of police station from the place of occurrence. Thus, three persons having suffered gunshot wounds and distance of police station being three kilometers, the lodging of first information report after one hour and fifteen minutes would be considered a prompt FIR which rules out any chance of embellishment or false implication.

18. The learned counsel for the appellants while assailing the impugned judgment and order of conviction has submitted that as per the FIR Ext. Ka-1 although presence of all three accused namely Parikshat Raj, Ram Raj and Tirth Raj is shown in the first information report the role of abusing and exhortation is attributed to all the three accused, but role of firing was assigned to Parikshat Raj only, who is said to have fired with his DBBL gun due to which Vidya Kant, Ram Shri and Shri Ram were injured.

19. Thus, as per the first information report it is a case of single fire shot by Parikshat Raj. I have not lost sight of the fact that the first information report is not an encyclopedia of the complete prosecution case, but when the first information report is lodged by an eye witness the broad aspects of the matter are expected to find place in the first information report. In this background, the evidence of witnesses have to be seen. PW-1 Kamlakant Bajpai, informant, claims himself to be an eye-witness.

20. The learned counsel for appellants has also submitted that the FIR is short of motive and since no motive has been assigned to the appellants, hence the whole prosecution case becomes doubtful.

21. It is also a relevant aspect of the matter that in criminal cases of direct evidence motive looses its value. PW-1 Kamlakant Bajpai has stated that accused Parikshit was armed with a DBBL gun, Ram Raj and Tirth Raj were armed with small guns. All the three accused exhorted and Parikshit fired a short at the injured with his gun, it hit Vidyakant who fell down. When his mother Ram Shri and Shri Ram ran towards Vidya Kant, then all the three accused appellants made indiscreet firing at them, due to which Ram Shri, Shri Ram and Vidya Kant sustained injuries.

22. Thus, according to PW-1, Parikshit Raj fired two shots and Ram Raj and Tirth Raj each fired a shot.

23. PW-2 is the injured witness namely Shri Ram Dixit who has stated that all the three accused came on the spot. All the three laughed at Vidyakant and passed some comments. Appellant Parikshit was holding a DBBL gun; whereas other accused were holding small guns, at which Tirth Raj exhorted and Parikshat Raj opened fire which hit Vidya Kant. As soon as this witness and Ram Shri proceeded towards Vidya Kant, Parikshat Raj again fired a shot, which hit this witness and Ram Shri. After that two or three other shots were fired. However, this witness does not say that Tirth Raj or Ram Raj fired any shot. Hence, the FIR version, version of PW-1 namely Kamlakant and version of PW-2 Shri Ram Dixit are not in consonance with each other as regards the firing of shots is concerned. PW-1 Kamlakant has admitted that Shri Ram is cousin of his father. Although the testimony of an interested witness cannot be thrown out on this score alone but it has to be scrutinized very carefully. Thus, it can safely be concluded that there was no overt act on the part of Tirth Raj and Ram Raj as per F.I.R. Although PW-1 in his cross-examination has mended his statement and has stated that initially Parikshat Raj fired two shots, later on, other two accused fired shots. But, when he was asked why this fact was not mentioned in the FIR, he could not state any valid reason for not doing so. Thus, the conviction of Tirth Raj and Ram Raj under Section 307 read with Section 34 IPC is bad in the eyes of law in as much as even the injured PW-2 Shri Ram Dixit has stated that the first shot was fired by Parikshat Raj which hit Vidya Kant and second shot was fired by Parikshat Raj which hit Ram Shri and this witness. If Ram Raj and Tirth Raj would have also fired any shot, there was no reason why the injured witness Shri Ram would not have seen Ram Raj and Tirth Raj firing. Thus, it is clear that conviction of Ram Raj and Tirth Raj under Section 307 read with Section 34 IPC cannot be sustained and has to be set aside.

24. Learned counsel for the appellants while castigating the impugned judgment has submitted that the learned Trial Court has not given any plausible reason to record the conviction of appellant Parikshat Raj under Section 307 IPC. He has further submitted that as per the prosecution evidence so far as the injuries sustained by the injured are concerned, it has not been proved that any of the injuries sustained by any of the injured was fatal to life.

25. Even as per the supplementary report no bony injury was seen. Only radio opaque shadow of metallic density was seen in the supplementary report of all the three injured. Although, PW-1 Kamlakant Bajpai has stated that he remained in hospital along with the injured for the whole night. On the next date, he met the Investigating Officer who recorded his statement.

26. PW-1 Kamlakant Bajpai has stated that in the place of incident there was no blood stains; whereas injured Shri Ram PW-2 has stated that the place of incident was blood stained and there were totally 4 to 5 shots. According to this witness there were pellets on the spot but Investigating Officer did not find any blood or pellets on the spot. Shri Ram PW-2 also states that the Investigating Officer met him at the police station on the date of occurrence; whereas he has stated that he remained in hospital throughout the night. PW-2, Shri Ram Dixit, has also asserted in his statement that Durga Prasad, the father of informant, injured Kamlakant and husband of Ram Shri was present, but nobody else except this witness has asserted the presence of Durga Prasad at the place of occurrence.

27. To justify a conviction under Section 307 IPC, it is not essential that bodily injuries capable of causing death should have been inflicted. Although the nature of injuries actually caused may often give considerable assistance. Coming to the finding as to the intention of accused, such intention may also be deduced from other circumstances and may even in some cases be ascertained without any reference at all to the actual wounds. This section makes a distinction between an act of accused and its result, if any. Such an act may not be attended by any result. So far as the present assault is concerned, still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this Section. An Attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof has been laid down by the Hon'ble Apex Court in **State of Maharashtra vs. Balram Bama Patil, AIR 1983 SC 305.**

28. It is true that merely because the injuries are simple in nature, it cannot be said that the offence made out would not all be covered under Section 307 I.P.C. It would all depend upon the facts of a given case. Intention has to be seen in every case.

29. A perusal of the injuries of Vidya Kant, Shri Ram and Ram Shri reveals that none of the injuries sustained by injured were on the vital part except one injury sustained by injured Ram Shri, which was on her skull.

30. In **AIR 1982 SC 2013, Kundan Singh vs. State of Punjab**, the Hon'ble Apex Court has observed as under:-

"We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that P.W. 6 and P.W. 7 were in the courtyard of

their house when the appellant fired gun shots and he could not, therefore, have intended to injure them, the conviction of the appellant under Section 307, I.P.C. was not justified. We think that the conviction of the appellant could be maintained only under Section 324 of the I.P.C. since P.W. 6 and P.W. 7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under Section 324 of the I.P.C. for causing simple injuries to P.W. 6 and P.W. 7 and since the appellant has already suffered imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already undergone by him and that he may be set at liberty forthwith."

31. I would also like to place the law laid down by the Apex Court in **AIR 1996 SC 3236, Merambhai Punjabhai Khachar and others vs. State of Gujarat**, wherein an attempt to commit murder by fire arm and a pellet hit the victim, however, the Apex Court held that Section 307 I.P.C. cannot be held to have been satisfied and the conviction was altered to Section 324 I.P.C."

32. A perusal of the statement of Dr. U.S. Bagga, PW-3, reveals that in the injury reports marked as Ext. Ka-3, Ka-4 and Ka-8 none of the injuries have been mentioned to be grievous or fatal to life, although all the injuries were kept under observation. Dr. U.S. Bagga, PW-3, was cross-examined on this point. He state that although the injury of injured Ram Shri was on the vital part but he could not opine whether the said injury was fatal to life or not. He has also stated that none of the injured were admitted in the hospital. Although the medical reports have been assailed by the accused appellants on the ground that Ram Prakash is a relative of the informant and was an employee at PHC Sumerpur where the injured persons were examined. But on the basis of this fact, it cannot be inferred that the injury reports were got manipulated in connivance with Ram Prakash because if the informant would have tried to manipulate the injury reports, they could easily have procured a report showing that the injuries were fatal for life and were grievous in nature.

33. From the aforesaid discussion, I am of the view that conviction of the appellant Parikshat Raj under Section 307 IPC cannot be sustained and he is liable to be punished for the offence under Section 324 IPC.

34. The learned counsel for the appellants has stated that the appellant Parikshat Raj has already remained in jail for more than 130 days and he has been retired from service on medical grounds. He also submits that the occurrence took place in the year 1990 i.e. about 26 years back and all along 26 years the appellants have been living under fear of being convicted, hence, a lenient view may be taken in the matter.

35. Looking to the facts of the case as well as submissions made by the learned counsel for the appellants, it is a case where a lenient view may be taken in the matter. Thus, the conviction of appellant Tirth Raj under Section 307 read with Section 34 IPC is not sustainable in the eyes of law and is hereby set aside. So far as the conviction of appellant Parikshat Raj under Section 307 IPC and sentence awarded to him is concerned, is also set aside for the reason that he has not caused any fatal injury to any of the injured, as discussed above. But appellant Parikshat Raj is found guilty for the offence punishable under Section 324 IPC and is sentenced to a fine of Rs.40,000/-

and four months' simple imprisonment, which he has already undergone. The fine shall be deposited within two months from the date of judgement. Out of the fine so deposited Rs.10,000/- each shall be paid to injured Vidya Kant, Ram Shri and Shri Ram. In case any of them is not alive, it shall be paid to his legal representatives. If fine is not deposited within stipulated time, appellant Parikshat Raj shall undergo simple imprisonment for a period of four months.

36. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. However, provisions of Section 437Cr.P.C shall be complied with.

37. The appeal is **allowed partly**.

38. **Let a a copy of this judgment be transmitted immediately to the concerned Trial Court immediately and send back the lower Court record to ensure compliance.**

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 23423 Of 2015

Moni @ Monit **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
K.K. Srivastava, R.K. Srivastava

Counsel for Opposite Party:
Govt. Advocate

Held

The applicant is **not entitled to bail** in Case Crime No. 479 of 2014 under Section 302 IPC.
Considering:
The **nature and gravity of the offence** (murder of a 7-year-old child allegedly for human sacrifice),
The **circumstantial evidence collected during investigation**,
The **recovery of the weapon of offence pursuant to disclosure statement**,
The **medical evidence showing extreme brutality**,
no case for grant of bail is made out.
Observations made in the order are confined strictly to disposal of the bail application and shall not affect the merits of the trial.

Trial court is expected to expedite the trial and adopt coercive measures if necessary to secure attendance of witnesses.

CASE LAW CITED:
None

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Counter affidavit on behalf of the State filed today is taken on record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 479 of 2014, u/s 302 I.P.C., Police Station- Titavi, District- Muzaffar Nagar.

3. Heard learned counsel for the applicant and learned A.G.A.

4. Perused the record.

5. Submission of counsel for the applicant is that this is a case of circumstantial evidence and the link of the evidence is not complete to conclusively connect the applicant with the commission of crime. Further submission is that the applicant is not having any criminal history and the applicant was also not nominated in the F.I.R. No other submission has been raised on behalf of the applicant.

6. Learned A.G.A. has opposed the prayer for bail and has submitted that this is a case in which a small child of 7 years had been mercilessly killed for the purpose of doing human sacrifice in relation to some witchcraft. Further submission is that the evidence has been collected by the investigating officer to the effect that the co-accused Ranveer was indulged in the superstitious process of witchcraft and used to do such things with the claim to make the infertility of a woman perish and to help and facilitate them by the process of witchcraft to conceive child. It was with the same intention that they used to remain in search of the first child of somebody for sacrificing him because of the belief that it shall beget success in the desired object of this process. Learned A.G.A. has drawn the attention of the Court to the statements of Subhash and Gopal Singh, who have deposed to have seen the co-accused Ravindra and the applicant going along with the deceased child Kulvans towards some deity situated in a field where eventually his murdered body was found. Learned A.G.A. has also drawn the attention of the Court to the statements of the witnesses namely, Ramesh and Sukka, who have deposed to have overheard the applicant and the co-accused talking about the suitability of the deceased for the purposes of sacrifice. It was also emphasized that after arrest of the applicant and the co-accused, they were examined by the police and they had confessed their crime and had disclosed about the complicity in the crime and on the basis of their disclosure statement, the search for the weapon of offence was made and the incriminating weapon of offence 'dati-pitthi' was also discovered containing stains of blood on the same. Submission is that aforesaid circumstance of the case conclusively connects the applicant with the commission of crime. It was also emphasized by learned A.G.A. that the post mortem report of the deceased-child

would also indicate the multiple nature of the injuries on his body displaying the extreme brutality or cruelty committed upon him. It was also pointed out that the nature of injuries found on the body of the deceased would also indicate that his fingers and another parts were badly mutilated and chopped off. Contention is that the sacrifice of an innocent child speaks about the depravity of the accused persons, who have indulged into the aforesaid savage murder and that too which seems to have been perpetuated because of some weird orthodox superstitious values having no rational basis or vindication. Submission is that the brutality displayed in the commission of crime is extreme and looking to the gravity of the offence, no liberal view in the matter is called for.

7. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail.

8. Therefore, the prayer for bail of the applicant is rejected.

9. However, in case the trial of the case has already started, it is expected that the trial court shall make every sincere endeavour to expedite the proceedings of the trial and conclude the same at the earliest. It goes without saying that if the witnesses are not presenting themselves before the court, the court must adopt all necessary measures available under law including the coercive measures to procure their attendance in the court in order to expedite the conclusion of the trial at the earliest.

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 24097 Of 2016

Deshraj **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
Sudhir Bharti

Counsel for Opposite Party:
G.A.

Held

The Court considered:
The **delay of about 1½ months** in lodging the FIR (incident dated 01.05.2015; application to SSP dated 15.06.2015).
The presence of the first informant during inquest proceedings without raising allegations at that stage.
The applicant's custody since **31.01.2016**.
Absence of criminal antecedents.
Unlikelihood of early conclusion of trial.
No convincing material indicating possibility of tampering with evidence.
Allegations under Sections **498A and 306 IPC** were noted, but at the stage of bail, the Court found no sufficient ground to continue detention.
The Court observed that:
The delay in FIR is a relevant factor at bail stage.
Evidence collected did not prima facie conclusively establish instigation leading to suicide.
The applicant assured cooperation with trial.
Considering the overall facts and circumstances, the applicant was found entitled to bail.
Bail was granted subject to conditions:
No tampering with prosecution evidence.
Mandatory personal appearance on each date unless exempted by court.
Breach of conditions would entail cancellation of bail.
Observations in the order were confined strictly to bail and shall not affect the merits of the trial.

CASE LAW CITED
None

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. Perused the record.

3. Submission of counsel for the applicant is that the incident is said to have taken place on 01.5.2015 and the parents of the deceased were duly informed by applicant and they had also arrived at the place of occurrence. Counsel has drawn the attention of the Court to inquest proceedings which indicate that the first informant himself was one of the witnesses of the inquest proceedings. Apart from him, the other co-villagers of the first informant were also the witnesses of inquest. Emphasis has been laid by the counsel on the fact that despite the presence of the first informant during inquest proceedings no complaint was made against the applicant and the F.I.R. was lodged on an application given to S.S.P. which is dated 15.6.2015. Submission is that this inordinate delay in moving an application to lodge the F.I.R. has not been adequately explained by the prosecution. Further submission is that ten years had already passed after marriage and all the allegations with regard to demand of dowry and ill-treating the deceased are fake and false. It is further submitted that if there was any truth in the allegations of committing cruelty upon the deceased then there is absolutely no reason as to why the first informant would take so much time in lodging the F.I.R. against the applicant. Contention is that this inordinate and unexplained delay

is a circumstance which speaks in volumes about the fake nature of the allegations. Further contention is that actually despite the period of ten years that passed after marriage the deceased had not conceived and used to feel frustrated for the same reason and in fact had committed suicide because of the same background. It is further submitted that the evidence collected by the Investigating Officer also falls short of showing or proving that the commission of suicide was the direct result of any instigation on the part of the applicant. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required. It has also been submitted that the applicant is languishing in jail since 31.01.2016 and in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. It is also pointed out that the applicant is not having criminal antecedents.

4. Learned A.G.A. has opposed the prayer for bail.

5. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

6. Let the applicant-Deshraj, involved in S.T. No.90 of 2016 arising out of Case Crime No.1507 of 2015, u/s 498A, 306 I.P.C., P.S.-Rauja, District-Shahjahanpur be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 28788 Of 2015

Chanara @ Chandrawati ...Applicant
Versus
State Of U.P. ...Opposite Party

Counsel for Applicant:
R.P.S. Chauhan,Birendra Kaushik,Ram Pravesh Yadav

Counsel for Opposite Party:
Govt. Advocate

Held

The deceased died due to **ante-mortem hanging**, as per post-mortem report, indicating suicide.
No external injuries were found except the ligature mark, suggesting absence of physical violence prior to death.
The applicant (mother-in-law) was living separately, while the deceased resided with her husband separately.
Allegations in the FIR regarding murder were prima facie contradicted by medical evidence confirming suicide.
No tangible material was shown to establish abetment or instigation by the applicant under **Section 306 IPC**.
The applicant is an elderly woman and has been in custody since **21.05.2015** (more than one year at the time of consideration).
There is no likelihood of early conclusion of trial and no material suggesting that the applicant would tamper with evidence.
Considering:
Nature of allegations
Medical evidence
Period of detention
Absence of criminal antecedents
Unlikelihood of tampering

The Court found it a fit case for grant of bail.
Bail granted subject to conditions:

No tampering with prosecution evidence.
Mandatory personal appearance on each date unless exempted.
Breach of conditions may lead to cancellation of bail.

Observations are confined to the bail stage and shall not affect the merits of trial.

CASE LAW CITED:
None

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This second bail application has been filed seeking the release of the applicant on bail in Case Crime No. 216 of 2015, u/s 306 I.P.C., P.S.- Barasathi, District- Jaunpur. The first bail application was rejected by Hon'ble Aditya Nath Mittal, J. on 17.7.2015 as not pressed.

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

3. Perused the record.

4. Submission of the counsel for the applicant is that post mortem report of the deceased indicates that the deceased has died as a result of ante mortem hanging and obviously she has died as result of commission of suicide. Further submission is that there is no other mark of injury found on the person of the deceased except the ligature mark, which could indicate that any kind of violence or cruelty had been committed upon her before her death. It was also submitted that according to the F.I.R. version itself, the deceased lived along with her husband Dinesh Kumar separately. Submission is that the the applicant is the mother-in-law of the deceased and had nothing to do with the domestic quarrels of the deceased. It has also been submitted that the allegations of committing the murder of the deceased as has been made in the F.I.R. stands completely falsified by the findings of the post portem report which confirms the commission of suicide. Submission is that though the allegation made against the applicant is that the applicant was feeling jealous with the deceased and her husband and that is why the deceased was killed but it may be seen that the deceased had got marriage with her husband some 12 years back and had four children and lived separately and there was no occasion for the applicant, who herself is an old lady, to be jealous with her own son. Submission is that there is no tangible evidence to connect the applicant with the commission of crime and the facts and circumstances collected by the investigating officer are far short of proving any abetment or instigation done by the applicant which could have resulted in the commission of suicide by the deceased. Much emphasis was laid by the counsel on the period of detention and it has been pointed out that the applicant has spent more than a year in jail and she is languishing behind the bars since 21.5.201 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that she is ready to cooperate with the process of law and shall faithfully make herself available before the court whenever required.

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

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of

detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Chanara @ Chandrawati, involved in Case Crime No. 216 of 2015, u/s 306 I.P.C., P.S.- Barasathi, District- Jaunpur, be released on bail on her executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 29435 Of 2015

Nazir **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
Ravi Prakash Singh

Counsel for Opposite Party:
Govt. Advocate

Held

The applicant **Nazir** is entitled to be released on bail in Case Crime No. 91 of 2015 (S.T. No. 44 of 2015) under . Sections 452/376 IPC and Sections 3/4 POCSO Act, P.S. Bachhrayun, District Amroha/J.P. Nagar.
The Court granted bail after considering the following factors:
Medical examination assessed the victim's age as **19–20 years**, indicating majority.
No external injuries found on the victim's body.
No fresh injury to hymen; hymen found old torn and healed.
Medical evidence does not support allegation of force or violence.
Alleged delay in lodging FIR (incident dated 02.02.2015; FIR lodged on 04.05.2015).
Love letters (Annexure SA-1) suggesting consensual relationship.
Applicant in custody since 06.05.2015 (more than one year).
No likelihood of early conclusion of trial.
No convincing material indicating possibility of tampering with evidence.
Bail granted subject to conditions:
No tampering with prosecution evidence.
Personal appearance on each date unless exempted by the trial court.
Bail liable to cancellation upon breach of conditions.
Observations made are limited strictly to the bail stage and shall not influence the merits of the trial.

CASE LAW CITED

None

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Counter affidavit on behalf of the State filed today is taken on record.

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

3. Perused the record.

4. Submission of the counsel for the applicant is that according to the medical examination, the age of the girl was found between 19 to 20 years and actually she is fully grown up major girl. Further submission is that actually the applicant was carrying a love affair with the victim girl and in that connection the victim used to write love letters to him also. Counsel has drawn the attention of the Court to the love letters annexed as annexure no. SA-1 along with the supplementary affidavit indicating the cordial loving relationship between the two and in which the boy and the girl displayed their infatuation towards each other. It was also submitted that the incident is said to have taken place on 2.2.2015 in the midnight while the F.I.R. of the case was lodged on 4.5.2015 by the mother of the victim. Submission is that actually when the mother of the victim came to know about their relationship, she lodged the F.I.R. as she did not agree with the same. Counsel has drawn the attention of the Court to medical examination of the girl which does not indicate any kind of violence or any kind of injury on the private part or any other part of her body. The medical examination also does not indicate any fresh injury on hymen of the victim. To the contrary, the hymen was found old torn and healed. Further submission is that the absence of any corroboration from the medical evidence and the delayed reporting of the matter coupled with the exchange of

love letters are the circumstances enough to indicate that at the most, it is a case of consensual sex. It was also submitted that the family of the applicant and the family of the uncle of the victim were having civil litigations and the uncle of the victim, who is having inimical relationship with the applicant and his family, has added fuel to the fire and has got the first information report lodged against the applicant through the victim's mother. Contention is that the victim has given adverse statement against the applicant under the pressure of her mother and uncle. Much emphasis was laid by the counsel on the period of detention and it has been pointed out that the applicant has spent more than a year in jail and he is languishing behind the bars since 6.5.2015 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required.

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

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Nazir, involved in Case Crime No. 91 of 2015, S.T. No. 44 of 2015, u/s 452/376 I.P.C. and under Sections 3/4 POCSO Act, P.S.- Bachhrayun, District- Amroha/J.P. Nagar, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 2256 Of 2013

Mohit Mishra **...Appellant**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for Appellant:
Dinesh Kumar

Counsel for Respondents:
Govt. Advocate, T.K. Mishra

Held

The revision challenging the order dated 12.07.2013 passed by the Principal Magistrate, Juvenile Justice Board, Gautam Budh Nagar rejecting the plea of juvenility of Mohit Mishra is dismissed.
The Court held that:
The revisionist failed to produce matriculation certificate, birth certificate from the first attended school, or birth certificate issued by municipal authority/panchayat as required under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007.
The school leaving certificates relied upon by the revisionist are not sufficient or relevant for determining juvenility under Rule 12.
The medical age certificate dated 27.02.2013 issued by the Chief Medical Officer, Gautam Budh Nagar clearly opined that the revisionist was above 19 years of age.
In absence of statutory documentary proof of age, medical opinion becomes relevant and determinative.
No illegality, perversity, or infirmity was found in the order of the Juvenile Justice Board.
Consequently, the plea that the revisionist was 16 years and 5 months old on the date of incident (15.12.2012) was rejected.
The revision being without merit was dismissed and interim order, if any, was vacated.

CASE LAW CITED

Mohd. Azad Alam Vs. State of U.P., 2010 (1) JIC 303 (All)

Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000
Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Dinesh Kumar, learned counsel for the revisionist, Sri Yogesh Tiwari holding brief of Sri T.K. Mishra, learned counsel for the opposite party no. 2 and learned A.G.A. for the opposite party no. 1.

2. This criminal revision has been preferred by the revisionist for setting aside the judgment and order dated 12.07.2013 passed by the learned Principal Magistrate, Juvenile Justice Board, Gautam Budh Nagar in Misc. Case No. 39 of 2013 (State Vs. Mohit Mishra) arising out of Case Crime No. 499 of 2012 (State Vs. Mohit Mishra), under Sections 363, 366, 376, 368 I.P.C., Police Station Jewar, District Gautam Budh Nagar, whereby the application filed on behalf of the revisionist for declaring him juvenile has been rejected.

3. It is submitted by learned counsel for the revisionist that the revisionist was 16 years and 5 months old on the date of the alleged incident dated 15.12.2012. It is further submitted that the learned Principal Magistrate Juvenile Justice Board, Gautam Budh Nagar without making any enquiry with regard to the determination of age of the revisionist passed the impugned order. It is next submitted that the learned Principal Magistrate has overlooked the Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 and passed the impugned order, which is liable to be quashed.

4. On specific query made by the Court, learned counsel for the revisionist informed that neither the revisionist has passed matriculation nor any birth certificate is available with him. Moreover, he has relied upon the school leaving certificates filed as Annexure nos. 3, 4 and 4-A to the affidavit filed in support of revision, in which the date of birth of the revisionist Mohit Mishra has been mentioned as 15.7.1996. On the basis of these school leaving certificates, the learned Juvenile Justice Board has laid emphasis that these documents are not relevant to establish the juvenility of the revisionist.

5. In the age certificate dated 27.02.2013 of the revisionist issued by the Chief Medical Officer, Gautam Budh Nagar, annexed as Annexure-6 to the affidavit filed in support of revision, it has been opined that Mohit Mishra is above 19 years of age.

6. In the counter affidavit filed by the opposite party no. 2 Roop Singh, an order dated 21.12.2012 passed by this Court in Writ-C No. 67530 of 2012-Smt. Somwati and another Vs. State of U.P. and others has been annexed as Annexure-1 in which it has been observed that "both the petitioners have claimed to be adults".

7. Learned counsel for the opposite party no. 2 has produced a photostat copy of the bail order dated 11.7.2014 passed by this Court in Criminal Misc. Bail Application No. 8087 of 2014 by which the bail was granted to the revisionist.

8. Learned counsel for the revisionist has also relied upon a decision of this Court in the case of ***Mohd. Azad Alam Vs. State of U.P., 2010 (1) JIC 303 (All)***.

9. The facts of the present case are different from the facts mentioned in the above cited case.

10. Rule 12 of The Juvenile Justice (Care and Protection of Children), Rules, 2007 does not mention to consider the school leaving certificate to decide the juvenility. For this purpose, matriculation or equivalent certificates, thereafter the date of birth certificate from the school (other than a play school) first attended and thereafter birth certificate given by a corporation or a municipal authority or a panchayat shall be obtained for seeking evidence by the Juvenile Justice Board and in absence of all the above documents, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.

11. In the present case, the age certificate dated 27.02.2013 of the revisionist issued by the Chief Medical Officer, Gautam Budh Nagar is relevant, which has clearly declared the age of the revisionist Mohit Mishra as above 19 years of age.

12. In the circumstances, there is no illegality, perversity or infirmity in the impugned order. The revision sans merits and is liable to be dismissed.

13. The revision is accordingly dismissed. The interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.07.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Habeas Corpus Writ Petition No.- 22578 Of 2016

Smt. Manju Yadav Thru' Its Husband Yogendra Yadav ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioner:
Anil Kumar Pandey

Counsel for Respondents:
Government Advocate

Held

Writ of habeas corpus not maintainable where custody of a minor girl has been given to her parents by a competent Magistrate under lawful authority and such order is not patently illegal or without jurisdiction.
Distinction drawn between Nari Niketan detention and parental custody.

Earlier Division Bench judgments dealing with illegal detention in Nari Niketan are not applicable where custody is restored to lawful guardians.

Article 21 not violated.

Personal liberty under Article 21 is subject to procedure established by law. When a Magistrate, after determining minority, restores custody to lawful guardians, such action is in accordance with law.

Minor's consent irrelevant in kidnapping from lawful guardianship.

Under Section 361 IPC, taking a minor girl (below 18 years) from lawful guardianship constitutes an offence irrespective of her consent.

Restoration to lawful guardians not illegal detention.

Once a minor girl is recovered and handed over to her parents (lawful guardians), custody cannot be termed illegal confinement.

Alternative remedy relevant in present context.

Though habeas corpus is not barred by alternative remedy, where a judicial order exists and is not patently illegal, the appropriate remedy lies in revision/appeal, not writ jurisdiction.

Magistrate's order not patently illegal.

If the Magistrate has exercised jurisdiction lawfully and custody has been awarded to parents, writ court should not re-agitate the issue.

Petition dismissed.

CASE LAW CITED

1. Kalyani Chaudhary v. State of U.P.
1978 Cri LJ 1003

2. Smt. Mala (Corpus) v. State of U.P.
2015 (9) ADJ 737 (DB)

3. Pushpa Devi @ Rajwanti Devi v. State of U.P.
(1995) 1 JIC 189

4. Smt. Raj Kumari v. Superintendent, Women Protection Home, Meerut
1997 (2) AWC 720

5. Smt. Preeti Nishad v. State of U.P.
Habeas Corpus No. 146 of 2015

6. Sonu Paswan v. State of U.P.
2013 (31) LCD 1107

7. Sanno Devi v. State of U.P.
Habeas Corpus No. 309 of 2015

8. Delhi High Court decisions (Ravi Kumar v. State; Phoola Devi v. State)

(Delivered by Hon'ble Abhai Kumar, J.)

1. This petition has been filed to issue a writ, order or direction in the nature of habeas corpus for producing the corpus - Smt. Manju Yadav before this Court who is said to be legally wedded wife of the petitioner- Yogendra Yadav.

2. The brief point that is under consideration for this order is regarding the maintainability of writ of habeas corpus when an order of competent court/magistrate court is in existence for giving the minor girl in the custody of father after she was recovered during the investigation upon an FIR lodged under Sections 363 and 366 IPC.

3. The argument of learned counsel for the petitioner is two fold. Firstly, that Article 21 of the Constitution guarantees liberty of a citizen irrespective of her age, and a girl who has married and has gone out of her free will with the accused, cannot be detained against her wishes whether she is minor or major. Secondly, it is contended that availability of alternative remedy is no bar in maintainability of writ of habeas corpus and it is also stated by the learned counsel that even if the order of magistrate court is in existence regarding the custody of the girl, even then writ of habeas corpus is maintainable.

4. This Court is also of the considered view that Article 21 of the Constitution of India, provides guarantee against life of personal liberty except according to procedure established by law.

5. A person what to say about girl cannot be detained against one's wishes unless it is provided by law. This point was considered by a division bench of this Court in the case of ***Kalyani Chaudhary Vs. State of U.P., 1978 Cr.L.J. 1003***, wherein it was provided that in pursuance of Suppression of Immoral Traffic in Women and Girls Act, 1956, a girl cannot be sent to Nari Niketan, unless it is permitted to detain her in such a Home. Hon'ble Judges, observed as follows:

"4. A reading of the provision of the Suppression of Immoral Traffic in Women and Girls Act clearly shows that a person can be kept in a Protective Home only when she is being dealt with under the Act. No person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic in Women and Girls Act, or under some other law permitting her detention in such a Home. It is admitted that the case does not fall under this Act, no other law has been referred to."

6. This is abundantly clear that personal liberty of a person cannot be curtailed by any order, unless it is passed in accordance with law. So the contention of the learned counsel for the petitioner that right under Article 21 has been guaranteed is curtailed by the order of the magistrate court is to be seen in the perspective whether any such right to the magistrate is being provided by law or not.

7. Learned counsel fortified his assertions on the basis of observations made by this court in the cases of ***Smt. Mala (corpus) and another Vs. State of U.P. and others, 2015 (9) ADJ 737 (DB); Pushpa Devi alias Rajwanti Devi Vs. State of U.P., (1995) 1 JIC 189 and Sanno Devi Vs. State of U.P. and others, Hapeas Corpus No. 309 of 2015.***

8. In the case of Smt. Mala (supra), division bench of this court has elaborately discussed the detention of a girl in Nari Niketan by the order of a magistrate court/competent court and came

to the conclusion that judicial magistrate did not have any right to snatch the custody of the detenue from her husband and place her in a Protective Home. Division Bench also observed the contential issue whether a minor can be sent to Nari Niketan against her wish, and observed that it is no longer res-integra and stands conclusively settled by a catena of decisions of this Court. The case of Smt. Kalayani (supra) was referred by the bench and quoted the following portion as follows:

"No person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women and Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home."

9. Further the case of Pushpa Devi (supra) was also discussed by the division bench and observations made in Pushpa Devi's case is reproduced below:

"In any event, the question of age is not very material in the petitions of the nature of habeas corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of the minor against her will, unless there is some other reason for it."

10. The division bench further discussed the law laid down in the case of ***Smt. Raj Kumari Vs. Superintendent, Women Protection, Meerut and others House, 1997 (2) AWC 720***. In Smt. Raj Kumari's case, the detenue was sent to Protective Home and in that circumstances it was found unwarranted that the order of the magistrate directing for her detention till the party concerned gets a declaration by the Civil Court or the competent Court of law regarding her age. Division Bench further discussed other proposition made by another division bench of this Court in ***Habeas Corpus No. 146 of 2015, Smt. Preeti Nishad through her Husband Mahendra Kumar Vs. State of U.P.*** and quoted the observation made by the division bench in Smt. Preeti Nishad (supra):

""The main objection of Sri S. N. Tilhari, learned A.G.A. that the petitioner should be asked to file revision at this stage will be defeating the spirit of Article 21 of the Constitution of India. The petitioner is neither an accused nor an offender of law. She is simply a citizen of this country who has done no wrong. She is major. The C.M.O. concerned has given her age to be around 20 years. This is based on medical examination and x-ray report. So far the certificate submitted by the father is concerned, it appears to be fabricated. Detenue has clearly mentioned that she has never studied in the school from where the age certificate has been obtained. It is not a matriculation certificate. It is a lower class certificate issued recently after the controversy arose. It cannot be trusted compared to the C.M.O. report and her own version before the Court."

11. After discussing ratio laid down by various benches of this Court, division bench observed as follows:

"We now proceed to examine the third objection raised by learned A.G. A. before this Court that the detenue being a minor cannot be set at liberty and allowed to go with her husband merely on account of her having solemnized marriage with him. The detenue-petitioner

no. 1 as per her date of birth recorded in her Transfer certificate, is at present aged about sixteen years two months. There is nothing on record showing that the mother or the father of the corpus had made any application claiming her custody before the learned Magistrate. There is also no dispute that the petitioner no. 1 has solemnized marriage with petitioner no. 2, Gautam Chauhan, and they were living as husband and wife till the petitioner no. 1 was snatched away from her husband's custody and sent to Nari Niketan. A Division Bench of this Court in the case of Sonu Paswan Versus State of U. P. and another reported in 2013 (31) LCD 1107 has held that "a child marriage will be voidable at the instance of the minor. Otherwise, the marriage is not void ipso facto. In this view also the Magistrate does not have any right to snatch the custody of the detenue from the husband and place her in a protective home."

12. Learned counsel for the petitioner further made his thrust on the basis of law propounded in the case of Sanno Devi (supra). Division Bench of this court in that case while discussing the point giving the custody by a magistrate court after taking the statement under Section 164 Cr.P.C. of the victim thereby quashed the order of the magistrate court dated 7.1.2015 passed by Additional Chief Judicial Magistrate IIIrd, Hardoi and certain observations made by the division bench of this court are reproduced below:-

"29- While considering a petition filed for issuance of a writ in the nature of Habeas Corpus, the writ court is not required to go into the complexities of law, once it is made evident to the Court that personal liberty of a citizen has been curtailed. A writ court cannot contemplate any limitation on its power to deliver substantial justice. Equity justifies bending the Rules, where fair play is not violated , with a view to promote substantial justice.

35- When the facts are cumulatively considered, we find that liberty of the petitioner is being curtailed without any legal cause. Order Annexure No.-1 has been passed by the Magistrate without giving due importance to the personal liberty of the petitioner. The desire of the petitioner has been ignored without any legally tenable reason. The age determined through Medical/ossification test has been overlooked for the wrong reasons.

13. The ratio laid down by the division bench as well as in the above referred decisions per-se not applicable for the purpose of order under consideration. The only consideration that is required to be dealt with is regarding the maintainability of the writ of habeas corpus during existence of an order of a competent court whereby minor girl was given in the custody of her father.

14. All the judgments referred above are conspicuously silent regarding the order when custody of the girl was given to the parents. All the judgments dealt with the position where the girl was sent to Nari Niketan against her wishes and this Court is totally inconsonance with the observations made by the above referred division bench as well as bench of this court that a girl either minor or major cannot be sent to Nari Niketan against her wishes but what will happen if a minor girl has been given in the custody of her parents is not being discussed elaborately.

15. The observation of the division bench in the above referred cases that even a minor girl cannot be sent to Nari Niketan or otherwise is not elaborate enough to include the order regarding giving the minor girl to the parents. This Court is not inclined to discuss the order of the magistrate court in detail whether magistrate court reached to the conclusion regarding the minority of the girl is correct or not and whether magistrate court gave the custody to the parents without observing the specific provisions made in this regard.

16. No doubt there was an order in existence for giving the girl to the parents may be against her wishes and by the order of the magistrate court girl is said to be minor.

17. This Court is also of the view that was taken by the learned counsel for the petitioner that the alternative relief cannot abrogate the right of a person to seek remedy in the writ jurisdiction. When alternative remedy has already been exhausted then can a prayer under writ jurisdiction is maintainable where the order of the magistrate is not perse illegal or devoid of merit. Where by the order magistrate directs the girl to be sent to Nari Niketan is patently illegal order and in no circumstances that order is maintainable. In the circumstances, in the above referred writ petitions relief was given by the court.

18. Whether order giving a minor girl in the custody of parents can be said to be illegal order, certainly not.

19. Reference of Section 361 IPC is necessary and punishment for that is provided under Section 363 IPC. Section 361 is reproduced below:-

"**361. Kidnapping from lawful guardianship**.--Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception --This section does not extend to the act of any person who in good faith believes himself to be the father of an ille-gitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose"

20. When a minor girl under the age of 18 years is taken away from the lawful guardianship then that offence is punishable under Section 363 IPC. It is inherent right provided to lawful guardian to have the custody of a minor girl under the age of 18 years and whenever this right of lawful guardianship is infringed then he is having right to lodge an FIR.

21. After recovery of the girl, if she is again restored to the lawful guardianship then that order cannot be said to be illegal. When a magistrate finds that the girl is minor and has been taken away from the custody of the lawful guardianship, even if she is a consenting party, offence is made out and in the circumstances directing the girl into custody of lawful guardianship, cannot be an order that can be said to be patently illegal.

22. It is stubbornly contended by the learned counsel for the petitioner that the division bench decisions referred above clearly hold that even a minor girl who has married to the abductor cannot be sent back, and it is her right to remain with the person of her choice and whom she has married and have spent time with him after marriage or even without marriage.

23. At this juncture, I would like to draw the attention towards the observation made by the division bench of Delhi High Court wherein marriage of minors was discussed elaborately and the court has observed as follows in paras 16 and 18:

"16. In our judgment in Ravi Kumar v. The State and Anr. and Phoola Devi v. The State and Ors. (supra), we followed the existing legal position as noted in the preceding paras as the marriages solemnized in contravention of the age prescribed under section 5(iii) of the Hindu Marriage Act i.e 21 years for male and 18 years for female were neither void nor voidable under sections 11 and 12 of the Hindu Marriage Act. Such under age marriages were only punishable under Section 18 of the Hindu Marriage Act with imprisonment of 15 days and a fine of Rs. 1000/- as also under the provisions of Child Marriage Restraint Act.

18. `Run Away Marriages' are manifestation of a generational change due to variety of factors, including increased interaction between the sexes, with young boys and girls attaining maturity rapidly. It is a complex problem with inter play of social, economic, religious, caste, educational factors, including sex education and vulnerability and backwardness of the weaker sex having its impact. The Child Marriage Restraint Act, 1929 as well as relevant provisions of the Hindu Marriage Act are social legislations aimed at protection and development of the vulnerable sex and have to be interpreted and worked accordingly. The consequences of considering such marriages as void or voidable need to be evaluated since the State as well as the social reformists who have not been successful to change the mindset of the people tuned to early marriages. By an estimate, prevalence of child marriages in the major States of West Bengal, Rajasthan, Bihar and Madhya Pradesh varies from 56 to 59%. Moreover, it is also to be noted that any adverse fall out of any law that makes such underage marriages as void or voidable would be borne by none other than the women and their progeny.

It is for the Parliament to consider whether the present provisions of the Hindu Marriage Act and the Child Marriage Restraint Act have proved insufficient or failed to discourage child marriages and to take such remedial steps, as are required in their wisdom."

24. Prior to amendment that was done by the Criminal Law Amendment Act 2013 (13 of 2013) in the Indian Penal Code, consent of the girl was 16 years and by the amendment that age has

been increased to 18 years. From this very fact, it can be inferred that consenting age of 16 years was not found appropriate and it was thought that age of 16 years is not mature enough to give her consent for sexual relationship. The bar is being increased 18 years and certainly this was being increased to make the law very stringent towards the child marriage or consenting marriage against the provisions of Hindu Marriage Act as referred above.

25. We are being of progressive society, liberties should be accorded to every citizen to think independently and seeking his/her welfare on his/her own but by that we cannot accord the permission to do an illegal act and thereby creating imbalance in the society.

26. If a power has been provided to a magistrate and magistrate has exercised his power with due diligence and after consideration of the matter before it, if order is not patently illegal then same cannot be again reagitated by way of a writ petition. Moreso, when further remedy is available to the petitioner that is by way of a revision to the revisional court and further to the High Court. This court is of the view that when an order by magistrate has been passed that order is not patently illegal then same cannot be allowed to be challenged again by way of writ of habeas corpus because that will make the order of the court futile and of no consequence.

27. Summing-up if an order of a competent court/magistrate court is in existence and custody has been awarded to the parents and that order in itself is not beyond the jurisdiction of the magistrate court then same should not be interfered. In the present case custody of the minor girl has been given by the court as per law, hence Article 21 of the Constitution is not violated in any manner. As the girl is being given in the custody of her parents by order of a competent court, in the circumstances that custody cannot be held to be illegal and it cannot be said that the girl is in illegal detention of her parents. In the result, writ petition fails and is liable to be dismissed.

28. The writ petition is dismissed with the aforesaid observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Misc. Bench No.- 16136 Of 2016

Chotey Lal Yadav & Anr. **...Petitioners**
Versus
Union Of India & Ors. **...Respondents**

Counsel for Petitioner:
Sanjay Kumar Srivastava

Counsel for Respondents:
C.S.C., A.S.G., Dwijendra Mishra

Held

Delegation under Section 4(2) of the Multi-State Co-operative Societies Act, 2002 is by the Central Government, and once such delegation is made (vide notification dated 24.02.2003), the Registrar, Co-operative Societies, U.P. derives statutory authority to exercise powers under Section 84, including appointment of an Arbitrator.
The Central Registrar cannot, prima facie, override or nullify such delegation merely by issuing directions under Clause 2 of the notification dated 24.02.2003.
The power to delegate (or withdraw delegation) under Section 4(2) vests exclusively in the Central Government, not in the Central Registrar.
Clause 2 of the notification (requiring compliance with directions of Central Registrar) does not prima facie include the power to annul the delegated authority itself.
The Court required the Central Government to clarify under what authority the Central Registrar restrained the State Registrar from exercising delegated powers.
Interim direction issued restraining further arbitral interference until clarification.

CASE LAW CITED

None

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. Heard Sri Sanjay Kumar Srivastava, learned Counsel for the petitioner and Dr. L. P. Misra for the respondent Nos.5 and 6.

2. The issue raised in this petition by the petitioners regarding an election dispute is that the respondent No.2 has passed an order assuming the powers of an Arbitrator, which he could not do in view of the notification dated 24.2.2003, whereby the Registrar of Co-operative Societies of U.P. stood notified as the Arbitrator by the Central Government in exercise of powers under Section 4 (2) of the Multi-State Co-operative Societies Act, 2002. Sri Srivastava submits that the decision taken is erroneous on a total misinterpretation of the provisions that are applicable, hence the impugned order deserves to be quashed.

3. It is then submitted that the directions issued by this Court on 23.5.2016 did not confer the power of arbitration on the Central Registrar and since the Registrar, Co-operative Societies, U.P., had already been notified, there was no occasion for the Central Registrar to have withdrawn the file for adjudication of the dispute before him. It is therefore urged that the exercise of powers by the Central Registrar amounts to transgressing on the powers of the Central Government to notify any other officer as envisaged under Section 4 (2) of the 2002 Act. He has also referred to certain mala fides and he contends that in the absence of any defect in the authority to arbitrate in

the matter by the respondent No.3, the withdrawal of the said dispute by the respondent No.2 is an erroneous exercise of power.

4. Refuting the aforesaid submissions, Dr. L. P. Misra submits that the Central Registrar enjoys the power to arbitrate by virtue of the notification dated 24.2.2003 and in addition thereto, the Central Registrar also has the statutory authority to appoint an Arbitrator under Sub-Section (4) of Section 84 of the 2002 Act. Dr. Misra submits that the power of the Central Registrar to arbitrate himself is in addition to the Officer notified under Section 4 (2) of the 2002 Act. He therefore submits that the Central Registrar was well within his authority to have passed the impugned order and no de-notification is required for the said purpose as the Registrar, Co-operative Societies, U.P. is not the exclusive authority to enter upon arbitration in a dispute as involved in the present case.

5. We have considered the rival submissions and what we find is that this Court on the issue having been raised by the respondent No.6 in Writ Petition No.11428 (MB) of 2016, a direction was issued to the Central Registrar to decide the matter vide judgment dated 23.5.2016. The said judgment is extracted hereunder:-

"Heard Dr. L.P. Misra, learned counsel for the petitioner and also perused the supplementary affidavit filed today that is taken on record. Sri Sandeep Dixit has put in appearance for respondent no. 5 and Sri Brijendra Vikram Singh on behalf of first and second respondent. Learned Additional Chief Standing Counsel Sri Abdul Moin has appeared on behalf of the respondent no. 3.

It is not necessary to issue notice to the fourth respondent as he is only a formal party.

The stand taken by Sri Sandeep Dixit for the respondent no. 5 also appears to be that of the respondents no. 6, 7 and 8.

This petition has been filed for quashing the very appointment of the respondent no. 4 by the respondent no. 3 as an Arbitrator on the complaint of the respondents no. 5 to 8.

The contention of Dr. L.P. Misra on the legal plane is to the effect that the fourth respondent cannot assume the jurisdiction of an Arbitrator inasmuch as the Director, Cooperative, Ministry of Agriculture and Farmers Welfare, Government of India has already issued a letter on 19.5.2016 in the capacity of Central Registrar, Cooperative Societies commanding the Registrar, Cooperative Societies, U.P. to annul the order of appointment of the respondent no. 5 as an Arbitrator in an election dispute between the parties.

The said contention is being raised on the ground that the Central Registrar has the power to issue such directions keeping in view the provisions of Section 4 of the Multi State Cooperative Societies Act, 2002 read with the notification dated 24.2.2003.

Section 4 of the Act aforesaid is extracted hereinunder:

"4. Central Registrar.-(1) The Central Government may appoint a person to be the Central Registrar of Co-operative Societies and may appoint such other persons as it may think fit to assist the Central Registrar.

(2) The Central Government may, by notification, direct that any power exercisable by the Central Registrar under this Act (other than the power of registration of a multi-State co-operative society) shall, in relation to such society, and such matters a may be specified in the notification, be exercisable also by any other officer of the Central Government or of a State Government as may be authorised by the Central Government subject to such conditions as may be specified therein:

Provided that no officer of a State Government shall be empowered to exercise such power in relation to a national co-operative society."

The notification dated 24.2.2003 is also extracted hereinunder:

THE GAZETTE OF INDIA EXTRAORDINARY
MINISTRY OF AGRICULTURE
(Department of Agriculture and Co-operation)
NOTIFICATION
New Delhi, the 24th February, 2003

S.O.216(E) - In exercise of the powers conferred by Sub-section(2) of Section 4 of the Multi-State Co-operative Societies Act, 2002 (39 of 2002), the Central Government hereby directs that the powers exercisable by the Central Registrar under Section 84 of the Act shall also be exercisable by Registrar of Co-operative Societies of the States/UTs in respect of the societies located in their respective jurisdiction, subject to the following guidelines and conditions, that :-

1. Such powers in relation to a National Co-operative Society shall not be exercisable by these officers.

2. The officers shall comply with the directions (other than court cases) as may be given by the Central Registrar, appointed under Sub-section (1) of Section 4 of this Act, from time to time.

3. Appointment of arbitrators by the State Registrar of co-operative societies shall be subject to following guidelines:

(a) In case of disputes relating to organizational and legal mattes, arbitrators should either be a practicing Advocate or retired member of Judicial/Civil Services or officers at

least of the level of Deputy Registrar and above of co-operative department retired not more than two years prior to the date of appointment.

(b) In case of disputes relating to financial and banking matters including recovery disputes, person having financial and accounting background like Chartered Accountants/ICWAs/retired bank officers (retired not earlier than two years) may also be considered for appointment in addition to the persons listed in clause 3(a).

4. The list of approved arbitrators shall be submitted to the Central Registrar within 15 days of approval. The updated list of all the approved arbitrators should be sent to the Central Registrar on quarterly basis.

Dr. L.P. Misra, on the strength of the aforesaid provisions contends that once a direction has been issued on 19.5.2016, then the Arbitrator cannot now proceed keeping in view the past transactions referred to therein.

The said argument has been opposed by the learned counsel for the respondent no. 5 Sri Sandeep Dixit and by the learned Standing Counsel for the respondent no. 3 on the ground that the authorisation which flows from the notification dated 24.2.2003 has already been executed with the issuance of an office memorandum dated 4.5.2016 whereby the respondent no. 4 Naveen Kumar Garg has been appointed as the Arbitrator. This authorisation, according to the respondents, is complete in all respects and, therefore, the said respondent no. 4 has rightly assumed the functioning of an Arbitrator between the parties.

Having considered the aforesaid submissions, we find that the controlling power with the Central Registrar, Cooperative Societies emanates from Section 4 (1) read with Clause 2 of the notification dated 24.2.2003 that have already been extracted hereinabove.

In such a situation, the Central Registrar does not appear to have noticed any appointment of the Arbitrator by the Registrar, Cooperative Societies, U.P., which the respondents allege to have already been done on 4.5.2016. The letter dated 19.5.2016, therefore, is being disputed by the respondents on the ground that once the Arbitrator had already been appointed and an approved list had already been forwarded under the notification dated 24.2.2003, there was no occasion for issuance of the order dated 19.5.2016. The question, therefore, which falls for consideration is as to whether there is a valid appointment of an arbitrator in terms of Section 4 (1) read with the notification dated 24.2.2003 or not, and whether the respondent no. 4 has the authority to proceed accordingly.

Keeping in view the powers that are conferred on the Central Registrar as mentioned hereinabove, we are of the opinion that the final word in the matter has to be pronounced by the Central Registrar himself. Consequently, it will not be appropriate for the Arbitrator to proceed with the Arbitration so long as the Central Registrar does not pass an order

keeping in view the contentions which have been raised by the respondents as a whole including the letter dated 4.5.2016.

We dispose of this writ petition with a direction that the respondent no. 2 shall take into account all the aforesaid facts and then proceed to pass an appropriate order in accordance with law within two weeks from today. Till such orders are passed by the Central Registrar, the respondent no. 4 shall not proceed with the dispute sent for arbitration before him between the parties.

Disposed of with the said directions."

6. A perusal of the provisions of Section 4(2) reveals that the Central Government has the power to delegate the powers of the Central Registrar to any other officer of the Central Government or the State Government to be exercised by such officer also. This clearly means that the officer so notified by the Central Government can "also exercise such powers that are conferred on the Central Registrar under the Multi-State Co-operative Societies Act, 2002, other than the power of registration of multi-State co-operative society".

7. The Central Government issued a notification on 24.2.2003 authorizing the Registrar of the Co-operative Societies of the States / Union Territories that were provided for under section 84 and clause 2 of the said notification prescribes that the officers so notified shall comply with the directions, other than Court cases, as may be given by the Central Registrar. The power exercisable under section 84 is as follows :

"84.Reference of disputes.-(1) Notwithstanding anything contained in any other law for the time being in force, if any dispute [other than a dispute regarding disciplinary action taken by a multi-State co-operative society against its paid employee or an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 (14 of 1947)] touching the constitution, management or business of a multi-State co-operative society arises-

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past member and persons claiming through a member, past member or deceased member and the multi- State co-operative society, its board or any officer, agent or employee of the multi-State co- operative society or liquidator, past or present, or

(c) between the multi-State co-operative society or its board and any past board, any officer, agent or employee or any past officer, past agent or past employee, heirs or legal representatives of any deceaed officer, deceased agent or deceased employee of the multi-State co-operative society, or

(d) between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State co-operative society and liquidator of another multi-State co-operative society or between the liquidator of one multi- State co-operative society and the liquidator of another multi-State co-operative society,

such dispute shall be referred to arbitration.

(2) For the purposes of sub-section (1), the following shall be deemed to be disputes touching the constitution, management or business of a multi-State co-operative society, namely:-

(a) a claim by the multi-State co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;

(b) a claim by a surety against the principal debtor where the multi-State co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not;

(c) any dispute arising in connection with the election of any officer of a multi-State co- operative society.

(3) If any question arises whether a dispute referred to arbitration under this section is or is not a dispute touching the constitution, management or business of a multi-State co-operative society, the decision thereon of the arbitrator shall be final and shall not be called in question in any court.

(4) Where a dispute has been referred to arbitration under sub-section (1), the same shall be settled or decided by ***the arbitrator to be appointed by the Central Registrar.***

(5) Save as otherwise provided under this Act, the provisions of the Arbitration and Conciliation act, 1996 (26 of 1996) shall apply to all arbitration under this Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration and Conciliation Act, 1996."

8. The aforesaid section has been introduced for reference and resolution of disputes. Upon a reference of a dispute the Arbitrator is to enter upon the same and according to sub-section (4) the said arbitral power has been conferred on the Arbitrator to be appointed by the Central Registrar. Thus, the Central Registrar has been authorized under sub-section (4) of section 84 to appoint the Arbitrator.

9. The aforesaid power stood delegated to the Registrar of co-operative societies of the respective State. This delegation of the notification dated 24.2.2003 does not appear to have been withdrawn by the Central Government.

10. In the instant case the Central Registrar issued an order on 11.4.2016 extracted herein under:

"Most Immediate.
By Speed Post
No. R-11017/82/2015-L&M
Government of India
Ministry of Agriculture and Cooperation
Department of Agriculture, Cooperation and Farmers' Welfare
*(**Office of Central Registrar** of Cooperative Societies)*

Krishi Bhawan, New Delhi
Dated 11th April, 2016

To,
The Registrar of Cooperative Societies & Commissioner,
Government of Uttar Pradesh,
14, Vidhan Sabha Marg,
Lucknow-226027, Uttar Pradesh,

Sub: Conduct of election to the Committee of Management of Uttar Pradesh Upbhokta Sahakari Sangh Ltd., Upbhokta Bhavan, Balakadar Road, Lucknow-Appointment of Arbitrator for adjudication of dispute u/s 84 of the MSCS Act, 2002-reg.

Sir,

I am directed to refer to the above mentioned subject and to say that Chairman, Uttar Pradesh Upbhokta Sahakari Sangh Ltd., Lucknow vide letter dated 5.4.2016 addressed to the Central Registrar (copy enclosed) has objected to adjudication of dispute for arbitration by the Registrar of Cooperative Societies, Government of Uttar Pradesh filed against the conduct of election of the above society.

2. For natural of justice, it has been decided with the approval of competent authority that if any dispute is filed for conduct of election to the BoD of the above society before the Registrar of Cooperative Societies for arbitration, the same be sent to Central Registrar to take further action for appointment of an arbitrator.

3. This issues with the approval of Central Registrar of Cooperative Societies.

Yours faithfully

sd/-

*Encl.: **As above*** *(P. Sampath)*
Director(Cooperation)
23886268

Copy to:

i) Shri Prakash Dwivedi, Chairman, Uttar Pradesh Upbhokta Sahakari Sangh (UPSS) Ltd. Upbhokta Bhawan, Bulakadar Road, Lucknow, Uttar Pradesh.

ii) Shri Alok Dixit, Managing Director, Uttar Pradesh Upbhokta Sahakari Sangh (UPSS) Ltd. Upbhokta Bhawan, Bulakadar Road, Lucknow, Uttar Pradesh."

11. On 4.5.2016 the Registrar Cooperative Societies, U.P. in exercise of the powers under the Notification dated 24.2.2003 proceeded to appoint Sri Naveen Garg as the Arbitrator in the dispute relating to the society with which the petitioners are concerned. Thus, the power was being exercised by the Registrar, Cooperative Societies of U.P. delegated under the Notification dated 24.2.3003 whereby the said authority could appoint an Arbitrator under section 84 (4) of the 2002 Act.

12. On 19.5.2016 the Central Registrar passed the following order :

"Immediate.
By Speed Post

No. R-11017/82/2015-L&M
Government of India
Ministry of Agriculture and Cooperation
Department of Agriculture, Cooperation and Farmers' Welfare
*(**Office of Central Registrar** of Cooperative Societies)*

Krishi Bhawan, New Delhi
Dated 19th May, 2016

To,
The Commissioner for Cooperation and
Registrar if Cooperative Societies,
Government of Uttar Pradesh,
14, Vidhan Sabha Marg,
Lucknow-2260001, (UP)

Sub: Election to the Committee of Management of Uttar Pradesh Upbhokta Sahakari Sangh Ltd. Upbhokta Bhavan, Balakadar Road, Lucknow-Appointment of Arbitrator for adjudication of dispute u/s 84 of the MSCS Act, 2002 reg.

Sir,

I am directed to refer to this Department's letter of even number dated 11.04.2016 on the above mentioned subject and to say that in the above said letter of this Department it has been directed that if any dispute is filed for conduct of election to the BoD of the above society under section 84 of the MSCS Act, 2002, before your authority, the same be sent to this Department for taking further action by the Central Registrar to refer the same for adjudication for appointment of an Arbitrator in this case.

2. Since the Chairman of the society objected for appointment of Arbitrator by your authority, for natural of justice, the above decision was taken by the competent authority. Whereas, Shri Praksah Dwivedi, Chairman of the above society has brought to the notice of this Department vide his letter dated 13th May 2016 that Shri Navin Kumar Garg was appointed as an Arbitrator in the above case and the Arbitrator called for hearing on 23rd May 2016.

3. Since directions have already been given in the above case, it is requested that the dispute filed in this regard be sent to this Department for taking further action and the order for appointment of Arbitrator appointed by yourself be cancelled immediately in the interest of natural of justice.

4. This issues with the approval of Central Registrar of Cooperative Societies (CRCS)

Yours faithfully
sd/-
*Encl.: **As above*** *(P. Sampath)*
Director(Co-operation)
23886268

Copy to:

1) Shri Prakash Dwivedi, Chairman, Uttar Pradesh Upbhokta Sahakari Sangh (UPSS) Ltd. Upbhokta Bhawan, Bulakadar Road, Lucknow, Uttar Pradesh.

2) Shri Navin Kumar Garg, Arbitrator, C/o Registrar of Cooperative Societies, Government of Uttar Pradesh, 14, Vidhan Sabha Marg, Lucknow-226001 (UP)."

13. The aforesaid orders were taken shelter of by the respondents no. 5 and 6 and Writ Petition No. 11428(MB) 2016 was filed contending that the Registrar, Cooperative Societies, U.P. could not proceed in the matter. The said writ petition was disposed of by a Division Bench on 23.5.2016, the judgment whereof has already been extracted herein above.

14. Consequently the Arbitrator appointed by the Registrar, Cooperative Societies, U.P. did not proceed with the decision of the dispute in the aforesaid background.

15. The Central Registrar after the directions of the Division Bench aforesaid has now passed an order on 8.6.2016 holding that since the power has been delegated to the Registrar, Cooperative Societies U.P. that are also exercisable in terms of section 4(2) of the 2002 Act and the Notification dated 24.2.2003, the same does not amount to denuding the powers of the Central Registrar but retains overriding powers over the delegated powers of the Registrar, Cooperative Societies, U.P. The Central Registrar also held that in view of the letter dated 11.4.2016 the Registrar, Cooperative Societies, U.P. should not have proceeded to appoint an Arbitrator. Consequently a direction has been issued, presumably in exercise of powers under clause 2 of the notification dated 24.2.2003 to the Registrar, Cooperative Societies, U.P. to annul the appointment of Arbitrator dated 4.5.2016.

16. The petitioners have come up questioning the correctness of the order dated 8.6.2016 passed by the Central Registrar contending that the Notification dated 24.2.2003 is intact and the Registrar, Cooperative Societies U.P. was empowered to appoint an Arbitrator. Any order of restraint dated 11.4.2016 amounts to overriding the notification dated 24.2.2003 issued by the Central Government which is impermissible in law and, therefore, the order dated 19.5.2016 as well as the order dated 8.6.2016 passed by the Central Registrar are without jurisdiction as he does not exercise any such overriding powers.

17. The question is as to whether once the Central Government has issued a notification delegating the powers of Registrar, Cooperative Societies, U.P. to concurrently exercise powers of appointment of an Arbitrator under section 84(4) of the 2002 Act, then can the Central Registrar under the exercise of powers under section 84(4) read with the clause 2 of the notification dated 24.2.2003 assume overriding powers over such delegation by the Central Government so as to annul the action of the Registrar, Cooperative Societies, U.P. to appoint an Arbitrator.

18. Prima-facie, what we find is that once the power had been delegated on the Registrar, Cooperative Societies, U.P. to appoint an Arbitrator then this power flows from the authority of the notification dated 24.2.2003 issued by the Central Government. This delegation of power is not by the Central Registrar but by the Central Government. The respondents contend that by virtue of clause 2 of the notification dated 24.2.2003 the Registrar, Cooperative Societies, U.P. is bound by any direction issued by the Central Registrar including the direction not to appoint an Arbitrator in any such dispute. This in our prima-facie opinion may amount to as assumption of the powers of the Central Government in the hands of the Central Registrar, which power of notification to delegate is exclusively with the Central Government, and not with the Central Registrar.

19. Having considered the submissions raised, we find that the Central Registrar will have to explain as to under what authority can he restrain the exercise of authority by the Registrar, Cooperative Societies, U.P. of appointing an Arbitrator which has been directly delegated u/s 4(2) of the 2002 Act by the Central Government under the garb of a direction under clause (2) of the same notification. The power to issue a direction in our opinion may not include the power to dissolve the very delegation of power by the Central Government or the Registrar, Cooperative Societies, U.P. which is exclusively within its control under section 4(2) of the 2002 Act.

20. We, therefore, provide three weeks time to the respondent no. 1 to file a counter affidavit as the said respondent is the authority of the Central Government and can explain the aforesaid position of delegation.

21. The learned Standing Counsel has accepted notice for the respondent no. 3 who may also file a counter affidavit.

22. Issue notice to respondent no. 2 returnable at an early date. Steps within a week.

23. The matter shall come up immediately after three weeks. The Central Registrar as well as the respondent no. 3 shall not issue any further directions to the respondent no. 4 to restrain him or to arbitrate the dispute or appoint any other Arbitrator.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Misc. Bench No.- 16209 Of 2016

Mohd. Ismail **...Petitioner**

Versus

U.P. Sunni Central Waqf Board Thru. Its C.E.O. & Ors. **...Respondents**

Counsel for Petitioner:
Mohd Shadab Khan

Counsel for Respondents:
Mohd. Tariq Sayeed, Q.H.Rizvi, Syed Aftab Ahmad

Held

Under **Section 64(3) of the Waqf Act, 1995**, a decision requiring 2/3rd majority must be both **heard and decided** by the requisite majority.

Where the total strength of the Board is 11 members, **2/3rd majority comes to 8 members**.
In the present case:

Hearing was conducted by **only 6 members**.

Decision was signed by 8 members.

Since the hearing itself was not conducted by the statutorily required 2/3rd majority, the decision-making process was legally defective.

Consequently, the impugned order dated 31.5.2016 and the consequential Office Memorandum dated 18.6.2016 were held **unsustainable in law**.

The writ petition was allowed and the orders were quashed with liberty to the Board to pass a fresh order in accordance with law after giving opportunity of hearing.

CASE LAW CITED

Qamar Noor v. U.P. Sunni Central Waqf Board & Ors., Writ-C No. 14655 of 2016 (decided on 19.04.2016)
Mirza Tauseef Beg & Anr. v. U.P. Sunni Central Waqf Board & Ors., Writ Petition No. 14308 (MB) of 2016 (decided on 20.06.2016)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.
&
Hon'ble Dr. Vijay Laxmi, J.)

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel assisted by Mohd. Shadab Khan, Sri Syed Afatab Ahmad, learned Counsel for the respondent No.3 and Sri Q.H. Rizvi, learned counsel for the respondent Nos.1 and 2.

2. The petitioner questions the legality of the order dated 31.5.2016 as well as consequential Office Memorandum dated 18.6.2016 on several grounds but the primary ground of challenge raised is that 2/3rd majority out of 11 comes to '8' and the hearing was undertaken only by 6 members whereas the decision has been signed by 8 members. The argument is that the hearing and the decision both ought to have been rendered by a majority of 2/3rd as stipulated under Section 64 (3) of the Waqf Act, 1995.

3. This issue has already been dealt with in two Division Bench judgements of this Court ? one in the case of ***Qamar Noor v. U.P. Sunni Central Waqf Board and others, Writ-C No. 14655 of 2016*** decided on 19.4.2016 and followed by this Court in a Division Bench decision in the case of ***Mirza Tauseef Beg and another v. U.P. Sunni Central Waqf Board and others, Writ Petition No.14308 (MB) of 2016 decided on 20.6.2016.*** The said decisions have been placed before us by the learned counsel for the petitioner.

4. Learned Counsel for the respondents could not contradict the legal proposition so settled in the aforesaid decisions and consequently, on this short ground alone, the impugned order becomes unsustainable.

5. We allow the writ petition and quash the impugned order dated 31.5.2016 as well as the Office Memorandum dated 18.6.2016 with liberty to the Board to pass a fresh order, in accordance with law, after giving opportunity of hearing to the parties concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 1468 Of 2005

M/S Kartikey Ispat Pvt. Ltd. ...Applicant

Versus

The Commissioner Of Trade Tax U.P. Lucknow ...Opposite Party

Counsel for Applicant:
Ashok Kumar

Counsel for Opposite Party:
S.C.

Held

The Tribunal recorded a categorical finding that the Assessing Authority was unjustified in estimating undisclosed turnover for four months when the material related only to two months.
The Tribunal also found that there was no material indicating intention to evade tax beyond the survey date (27 July 2001).
However, despite holding the estimation for four months unsustainable, the Tribunal arbitrarily reduced the escaped turnover to ₹12,50,000 (purchases) and ₹11,50,000 (sales) **without disclosing any basis or reasoning**.
An assessment made to the "best of judgment" must:
Be based on relevant material,
Have reasonable nexus with available evidence,
Not be arbitrary, capricious, or based on mere conjecture.
Since the Tribunal failed to indicate the material or reasoning forming the basis of its modified estimate, its order was legally unsustainable.
The revision was allowed.
The Tribunal's order was set aside and the matter remanded for fresh decision in accordance with law.

CASE LAW CITED

State of Kerala v. C. Velukutty
CIT v. Laxminarain Badridas
1937 5 ITR 170 (Privy Council)
Jagadish Prasad Pannalal v. Member, Board of Revenue, West Bengal
1951 2 STC 27 (Calcutta High Court)
Doma Sahu Kishun Lal Sao v. State of Bihar
1951 2 STC 37 (Patna High Court)
State of Orissa v. Maharaja Shri B.P. Singh Deo

(Delivered by Hon'ble Yashwant Varma, J.)

1. This revision is directed against an order of the Tribunal dated 23 February 2005 which has proceeded to modify an order of assessment made against the revisionist in the course of proceedings taken and relating to the assessment year 2001-02.

2. The case of the revisionist was that it was engaged in the manufacture and sale of iron steel sheets and was duly exempted under section 4-A of the U.P. Trade Tax Act 1948. The assessing authority pursuant to a survey of the premises of the revisionist found as many as eight documents which did not appear to have been accounted for in the books. During the course of assessment, assessing authority proceeded to accept the explanation of the revisionist in respect of the material so gathered except in relation to Exhibit-4. As is described in the order of assessment, Exhibit-4 is stated to evidence a sale of 72 tons during the period 1 June 2001 to 19 July 2001. This sale valued at Rs. 4,58,327/- was found by the assessing authority to have not been accounted for. The assessing authority accordingly preceded to take the basis of the sales and purchases alleged to have been effected in this two month period and which had admittedly not been accounted for as a ground for rejection of the books of accounts. Taking these very undisclosed sales as the basis, the assessing authority proceeded to employ the same figures for the months of April, May, June and July. It accordingly proceeded to undertake a best judgment assessment and estimated the purchase for these four months to be Rs. 23,00,000 and the sale in these four months to be Rs. 25,00,000. Not finding success before the first appellate authority, the revisionist preferred a second appeal before the Tribunal which has proceeded to reduce the value of undisclosed purchases to Rs. 12,50,000/- and sales to Rs. 11,50,000/-.

3. What this Court however, finds is that the Tribunal has recorded a categorical finding that the act of the assessing authority in proceeding to estimate undisclosed turnover of sales and purchases for four months to be wholly unjustifiable. It records that admittedly the undisclosed purchase and sales were restricted to a period of two months. It therefore, held that the assessing authority was unjustified in enhancing the turnover of purchases and sale for a period of four months. It further took note of the fact that the assessing authority had not found any material which may have tended to indicate an intention to evade tax in any period after the date when the survey was undertaken namely on 27 July 2001. On this score also, the Tribunal found that the order of the assessing authority and its estimation of escaped purchases and sales was unsustainable. Having arrived at this conclusion, the Tribunal however, proceeded to reduce the escaped turnover of purchases and sales to Rs. 12,50,000/- and Rs. 11,50,000/- The order of the Tribunal is totally silent on the basis of which this was arrived at. The principles applicable to an assessment taken to the best of judgment are no longer res integra. One may in this connection only note what the Supreme Court held in **State of Kerala v. C. Velukutty1**,

9. What is the scope of Section 12(2)(b) of the Act? The expression "to the best of his judgment" in the said clause is presumably borrowed from Section 23(4) of the Income Tax Act. The said expression in the Income Tax Act was subject of judicial scrutiny. The Privy Council

in CIT v. Laxminarain Badridas [1937 5 ITR 170, 180] has considered those words. Therein it observed:

"He (the assessing authority) must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, Their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess work in the matter, it must be honest guess work. In that sense, too, the assessment must be to some extent arbitrary."

The Privy Council, while recognizing that an assessment made by an officer to the best of his judgment involved some guess work, emphasised that he must exercise his judgment after taking into consideration the relevant material. The view expressed by the Privy Council in the context of the Income Tax Act was followed when a similar question arose under the Sales Tax Act. A Division Bench of the Calcutta High Court in **Jagadish Prosal Pannalal v. Member, Board of Revenue, West Bengal** [1951 2 STC 27] confirmed the assessment made by the Sales Tax authorities, as in making the best judgment assessment the said authorities considered all the available materials and applied their mind and tried their best to come to a correct conclusion. So too, a Division Bench of the Patna High Court in **Doma Sahu Kishun Lal Sao v. State of Bihar** [1951 2 STC 37] refused to interfere with the best judgment assessment of a Sales Tax Officer as he took every relevant material into consideration, namely, the situation of the shop, the rush of the customers and the stock in the shop and also the estimate made by the Assistant Commissioners in the previous quarters.

10. Under Section 12(2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a Judge, but on settled and invariable principles of justice. Though there is an element of guess work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of Section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material.

4. The principles laid down find resonance in **State of Orissa v. Maharaja Shri B.P. Singh Deo2**,

"4. Apart from coming to the conclusion that the materials placed before him by the assessee were not reliable, the Assistant Collector has given no reason for enhancing the assessment. His order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does

not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet-will and pleasure of the concerned authorities. The scope of that power has been explained over and over again by this Court."

5. In the light of the law so laid down, it is clear that the order of the Tribunal is rendered unsustainable.

6. Accordingly, this revision shall stand **allowed**. The order of the Tribunal is hereby set aside and the matter is remanded to it for decision afresh and in light of the observations made hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 1568 Of 2006

M/S Jay Tech. Printing Systems (Pvt.) Limited ...Applicant
Versus
Commissioner, U.P. Trade Tax, Lucknow ...Opposite Party

Counsel for Applicant:
Krishna Agarwal, Pawan Shree Agarwal

Counsel for Opposite Party:
S.C.

Held

The power of seizure under **Section 13-A(1-A)** and the power of penalty under **Section 13-A(4)** of the U.P. Trade Tax Act operate in **distinct and separate spheres**.
For seizure under Section 13-A(1-A), two contingencies must exist:
(a) Goods are not traceable to a bona fide dealer; or
(b) There is a doubt that goods have not been properly accounted for.
However, for imposition of penalty under Section 13-A(4), the authority must record a clear satisfaction that:
The goods were **omitted from being shown in the accounts, registers, or other documents** maintained by the dealer.
Mere doubt is insufficient for penalty; a **positive finding of non-accounting** is mandatory.
In the present case:
The goods were traceable to bona fide registered dealers.

The first appellate authority had recorded a categorical finding that the goods were duly accounted for in the books.
Neither the Assessing Authority nor the Tribunal recorded any finding that the goods were not accounted for.
The Tribunal misdirected itself by considering:
Alleged inconsistencies regarding gate passes.
The manner in which raw material entered the State.
These considerations were **irrelevant** for proceedings under Section 13-A(4).
The statutory enquiry was thus vitiated by reliance on extraneous factors and failure to address the core requirement of Section 13-A(4).
Consequently, the penalty order and the Tribunal's order were unsustainable in law.
The revision was allowed, and the orders dated 14 February 2001 (Assessing Authority) and 18 September 2006 (Tribunal) were set aside.

CASE LAW CITED

None

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard the learned counsel for the revisionist and the learned standing counsel.

2. This revision emanates from proceedings taken against the assessee for levy of penalty under the provisions of Section 13-A (4) of the U.P. Trade Tax Act 1948. The assessee is said to be engaged in the business of printing of lottery tickets and case making on job work basis. Two consignments being sent by it outside the State of U.P under the cover of gate pass Nos. 167 and 64 were seized on 28 July 1998. At the time of seizure, the officers found that there was certain overwriting over the gate passes. The revisionist was put to notice and in its reply submitted that certain goods which had been received by it for the purposes of completion of job work contracts were being returned under the gate passes in question. The details of the dealer and the description of goods being returned were also declared. The assessing authority however did not accept the explanation furnished by the assessee and accordingly proceeded to impose penalty in terms of sub section (4) Section 13-A. Aggrieved thereby, the assessee took the matter before the first appellate authority, which held that both the revisionist and entities to whom the goods were dispatched were bona fide registered dealers. It further recorded a categorical finding that the goods which were being dispatched had been duly accounted for in the books of accounts. The first appellate authority therefore took the view that no cause existed for imposition of penalty. The Department took the order of the first appellate authority in appeal. The order impugned herein is the judgment of the Tribunal on the said appeal.

3. As a reading of the order of the Tribunal would indicate what has apparently weighed with it was a failure on the part of the revisionist to furnish details of how the material had actually been imported by it into the State of U.P. It has noticed what in its view was a shifting and vacillating stand of the revisionist inasmuch as while before the assessing authority its assertion was of the goods having been imported into the State under the cover of gate pass Nos. 4 and 13, before the first appellate authority the case set up by the revisionist was that the raw material had

been received under gate pass Nos. 3 and 4. On this basis, the Tribunal came to the conclusion that the explanation so proffered was not liable to be countenanced and consequently upheld the order of the assessing authority imposing penalty.

4. For the purpose of sustaining a seizure under Section 13 (1-A), this Court finds that it must be established that the goods found in a vehicle building or place are not traceable to any bona fide dealer. The second contingency in which a seizure could take place is upon the authority doubting the goods having been properly accounted for in the accounts, register and other documents. The two contingencies are: -

(a) The goods not being traceable to a bona fide dealer;

(b) A doubt that such goods have not been properly accounted for.

5. Insofar as imposition of penalty is concerned, the same is an order which comes to be passed after the dealer has been put to notice, an explanation obtained from him and upon the authority being **satisfied** that the goods were omitted from being shown in the accounts, registers and other documents maintained by the dealer. The width, expanse and content of sub sections (1-A) and (4) of Section 13-A operate therefore in different spheres. While the power under sub section (1-A) is exercised *pro tem* and at a time when the officer harbors a doubt about the goods being traceable to a bona fide dealer or not being duly accounted for, imposition of penalty under sub section (4) comes to be imposed only upon the authority being **satisfied** that the goods were omitted from being shown in the accounts, registers and other documents maintained by a dealer. The traceability of the goods to a bona fide dealer stands deleted from sub section (4). The doubt on account of which a seizure is effected under sub section (1-A) stands replaced with the satisfaction of the authority that the goods had not been accounted for in the books, registers and other documents of the dealer.

6. Significantly neither the assessing authority nor for that matter the Tribunal return or record any finding as to whether the goods which were seized had not been accounted for in the books of accounts which were maintained by the assessee. As noted above, both the assessing authority as well as the Tribunal have primarily proceeded to consider a failure on the part of the assessee to establish how the raw material had entered into the State to be fatal to its case. The Tribunal as well as the assessing authority have also referred to inconsistencies in the pleas taken by the assessee in respect of the bills and gate passes under which the raw material is said to have entered into the State.

7. On both scores this Court finds that the assessing authority as well as the Tribunal have permitted the introduction of considerations that were wholly irrelevant to the exercise of power under section 13A. The goods were shown to belong to a bona fide dealer. They were shown to have been duly entered in the books of accounts. How the raw material from which the goods were manufactured entered into the State was a wholly irrelevant consideration and clearly tainted the statutory enquiry beyond repair.

8. Having embarked upon this exercise, in the opinion of this Court, both the assessing authority as well as the Tribunal completely misdirected the enquiry, which was liable to be undertaken under sub-section (4). It is on account of this approach that no findings have been entered by the Tribunal as to whether the goods had been duly accounted for by the assessee. The Tribunal, this Court notes, does not refer to any evidence nor records any reason to dispel what the first appellate authority recorded in his order namely that the goods had been duly recorded in the books of accounts of the assessee.

9. For all the aforesaid reasons, the order of the assessing authority dated 14 February 2001 as also that of the Tribunal dated 18 September 2006 cannot be sustained.

10. The revision is accordingly **allowed**. The orders dated 14 February 2001 and 18 September 2006 passed by the assessing authority and the Tribunal respectively are hereby set aside.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2016

BEFORE

THE HON'BLE VINOD KUMAR MISRA, J.

Second Appeal No.- 524 Of 2016

Ved Prakash **...Appellant**
Versus
Kanhaiya Lal **...Respondent**

Counsel for Appellant:
Sudhanshu Pandey

Counsel for Respondent:
Sanjay Kumar Mishra

Held

The unregistered tenancy/lease agreement dated 29.04.2001 created rights in immovable property (shops), and therefore required compulsory registration under **Section 17 of the Registration Act, 1908**.
In view of **Section 49 of the Registration Act**, an unregistered document required to be registered cannot be received in evidence to prove the terms affecting immovable property.
Both the trial court and the first appellate court erred in relying upon the unregistered agreement and interpreting its terms for granting relief.
Admission of execution of the document by parties does not cure the defect of non-registration when the document is compulsorily registrable.
The first appellate court committed illegality in decreeing the suit based on clauses of an inadmissible document.

The substantial question of law was answered in favour of the appellant:
The unregistered tenancy/lease deed was inadmissible in evidence, and the appellate court's judgment relying upon it was erroneous and perverse.

CASE LAW CITED

M/s. K.B. Saha & Sons Pvt. Ltd. v. Development Consultant Ltd.
2008 (72) ALR 638 (SC)
Official Liquidator of M.E. Moola Sons Ltd. v. Perin R. Burjorjee
1932 Law Suit (P.C.) 45 (Privy Council)

(Delivered by Hon'ble Vinod Kumar Misra, J.)

1. Appellant-Ved Prakash has preferred the Second Appeal against the judgement and decree dated 28.1.2016 passed by learned Additional District Judge (Special Judge Ante Corruption Act), Court No. 5, Gorakhpur in Civil Appeal No. 32 of 2013, Kanhaiya Lal Vs. Ved Prakash by which the learned Appellate Court has set asisde the judgement and decree dated 13.8.2013 passed by learned Additional Civil Judge, Senior Division, Court No. 12, Gorakhpur in Original Suit No. 945 of 2001 and decreed the suit filed by plaintiff-respondent.

2. Following substantial question of law was framed in the present appeal:-

"Whether basis of Original Suit, namely, the unregistered tenancy/lease deed dated 29.4.2001, was inadmissible in evidence and the judgement of the first appellate court relying on it is erroneous and perverse, if so, its effect?"

3. I have heard learned counsel for the appellant and respondent, at length.

4. So far as the factual matrix of the case is concerned, it is admitted from the both of the sides that Achhey Lal, Bachha Lal and Kanhaiya Lal were tenants of respondent's three shops. As the shops were in dilapidated condition, it was agreed between landlord-Ved Prakash, Kanhaiya Lal and other two tenants, namely, Achhey Lal and Bachha Lal that they will vacate the dilapidated shops and landlord will construct there new shops and after construction, its possession will be handed over to the tenants on the same place at where their earlier shops were situated. For the cost of construction Rs. 30,000/- each was to be provided by the each of the tenants to the landlord. In this regard, an agreement was executed between the landlord and tenants on 29.4.2001 and all the terms and conditions were stipulated in the above agreement. It was also agreed in the agreement that construction will be completed by 30th June, 2001. On 27.8.2001, appellant-defendant, Ved Prakash issued notice to tenants, Achhey Lal, Bacha Lal and Kanhaiya Lal, in which, he informed the tenants that they have failed to provide him Rs. One lakh fifty thousand each for the completion of the construction of the shops. So landlord has taken money from other person and has given the shop to the other person.

5. Plaintiff-Kanhaiya Lal filed Original Suit No. 945 of 2001 against the defendant-Ved Prakash in the Court of Civil Judge (Senior Division), Gorakhpur for giving the possession of the shop in question to the plaintiff as per memorandum of tenancy dated 29.4.2001. In the above suit, defendant filed its written statement and contested the case. Learned trial court vide judgement dated 13.8.2008 dismissed the suit. Plaintiff assailed the judgement of the trial court by preferring the Appeal No. 32 of 2013 before the learned District Judge, Gorakhpur. Appeal was transferred to the learned Additional District Judge, Court No.-5, Gorakhpur. Learned first appellate court vide judgement dated 28.1.2016 has allowed the appeal and set asided the judgement of the learned trial court dated 13.8.2013 and decreed the suit. Appellate Court judgement has been challenged before this Court in the form of Second Appeal in which substantial question of law has been framed as indicated above.

6. In fact, neither the trial court nor the first appellate court has adverted to this issue whether the agreement dated 29.4.2001 being the unregistered document can be read in evidence. Both the courts below have taken into consideration the above agreement and have given their finding upon interpreting its terms. Basically, an agreement by which rights are created in immovable property is required to be registered under Section 17 of the Registration Act and in case, it is not registered then it cannot be read in evidence as per Section 49 of the Indian Registration Act.

7. Learned counsel for the respondent submitted that it was admitted from both the sides that an agreement with terms and conditions mentioned in it, was executed between the parties, so it is admitted to both the sides. So question of its not registered and not admissible in evidence, does not arise. This argument of learned counsel for the respondent is not worth credence.

8. Learned counsel for the respondent has also relied upon **1932 Law Suit (P.C.) 45, Privy Council (From Rangoon) (F.B.) Official Liquidator of M E Moola Sons Ltd Vs. Perin R Burjorjee.** In the cited case law, unregistered agreement was not affecting any immovable property. In the present case unregistered agreement is affecting the immovable property i.e. shops. So learned counsel for the respondent will not get any benefit with the above case law of the Privy Council.

9. Learned counsel for the appellant has cited case law reported in **2008 (72)ALR 638 SC, M/s. K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd.** It has been held in the above case law that document if inadmissible in evidence for want of registration, none of its terms can be admitted in evidence. To use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

10. So both the courts below have fallen in error in relying on the agreement dated 29.4.2001 and deciding the case on its basis. Agreement is unregistered. So plaintiff cannot base its case upon this unregistered agreement. Consequently, appellate court committed illegality in decreeing the suit on the basis of the misinterpretation of the clauses of agreement which could not be read in evidence at all.

11. In the light of the above, this Court answers the substantial question of law in this way that unregistered tenancy/lease deed dated 29.4.2001 which was basis of the original suit was inadmissible in evidence and the judgement of the first appellate court relying on it, is erroneous and perverse and is liable to be set asided.

12. Appeal is, accordingly, allowed. However, plaintiff will get back his Rs. 30,000/-with 6% of interest from the date of suit till payment is made from defendant on the basis of theory of undue enrichment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2016

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No.- 7027 Of 1996

Mohd. Ajaz **...Petitioner**
Versus
Managing Director & Ors. **...Respondents**

Counsel for Petitioner:
Ghaus Beg, Vishal Chaudhary

Counsel for Respondents:
S.K.Kaliya

Held

The petitioner was appointed purely on **contract basis for a fixed term** with clear stipulations that:
The appointment would automatically terminate on expiry of the contractual period.
No notice was required upon termination.
No claim for regularisation or extension could be made.
The petitioner's contractual appointment expired on **31.05.1996 by efflux of time**.
Merely because the petitioner was allowed to continue for some time beyond the contractual period on daily wage basis, **no legal right accrued in his favour** to claim continuation or renewal.
In service jurisprudence, concepts such as **holding over or adverse possession of post do not apply**.
A writ of mandamus cannot be issued to compel renewal of a contractual appointment or to continue a temporary employee whose term has expired.
The alleged oral termination is legally immaterial because the appointment had already come to an end automatically under the terms of the contract.
Additionally, more than 20 years had elapsed since termination; therefore, no equitable relief could be granted.
The writ petition was dismissed.

CASE LAW CITED:

Director, Institute of Management Development U.P. v. Pushpa Srivastava
M.S. Patil v. Gulbarga University
State of Orissa v. Mamata Mohanty
Secretary, State of Karnataka v. Uma Devi

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

1. The petitioner by means of the present writ petition under Article 226 of the Constitution of India, has challenged the alleged oral termination of his service by the respondents. The petitioner has further prayed for a direction to the respondents to allow him to continue on the post of driver-cum-peon and to pay him salary regularly.

2. The Small Industries Development Bank of India (for short "the Bank') is a development financial institution in India headquartered in Lucknow and having its offices all over the country. It was established in April 1990 through an Act of the Indian Parliament.

3. The petitioner was first appointed in the Bank on 27.06.1995 on daily wage basis as a driver-cum-peon in a temporary vacancy by the Manager of the Bank at Lucknow, the respondent no. 3. Thereafter, by an order dated 13.10.1995, the petitioner was appointed on the said post on a consolidated fixed salary of Rs. 3000/- per month on contract basis for a period of three months. The petitioner joined his duties accepting the term of his appointment letter. By an order dated 03.01.1996, the appointment of the petitioner was extended for a further period of three months on the same terms and conditions and by letter dated 12.04.1996, the appointment of the petitioner was further extended up to 31.05.1996. Although the appointment came to an end on 31.05.1996, by efflux of time, the petitioner was allowed to continue beyond the prescribed period on daily wage basis. It is alleged that on 4.10.1996, the petitioner was orally informed by the respondent no. 3 that his services were no longer required and accordingly, the petitioner was not permitted to work thereafter.

4. Sri Ghaus Beg, learned counsel for the petitioner has submitted that the work and conduct of the petitioner was satisfactory and there was no complaint against the petitioner and as such there was no reason why the services of the petitioner were not extended. The counsel contended that decision of the respondents in not renewing the contract of the petitioner was arbitrary and unjustified.

5. Per contra, Shri S.K. Kalia, Senior Advocate, has submitted that the engagement of the petitioner was purely on contract basis for a specific period on the terms and conditions mentioned in the said letter and after the term of the service of the petitioner came to an end the petitioner has no right to continue on the post in question. The averments made on behalf of the petitioner that his work and conduct was satisfactory has also been denied.

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

7. The only question that arises for consideration in the instant case that is "as to whether the petitioner can claim as a matter of right to continue on the post in question in spite of the fact that his term of appointment has come to an end by efflux of time' is no more res integra.

8. Relevant portion of the appointment order dated 13.10.1995 reads as under:-

" आपको निम्नलिखित निबंधनों और शर्तों पर ड्राइवर–सह–चपरासी का पद प्रस्तावित करने का निर्णय किया गया है–

1. आपको रू0 3000/– प्रतिमाह का नियत वेतन दिया जाएगा।

2. आपकी नियुक्ति, आपकी नियुक्ति तिथि अर्थात् अक्टूबर 04, 1995 से जनवरी 03, 1996 तक संविदा आधार पर होगी।

3. बैंक मे आपको नियोजन, उक्त अवधि की समाप्ति, अर्थात् जनवरी 03, 1996 को कार्यकाल की समाप्ति पर स्वतः समाप्त हो जाएगा। यह नोट किया जाए कि बैंक पर इस बात की कोई जिम्मेदारी नहीं होगी कि इस संबंध में वह सेवा समाप्ति संबंधी कोई औपचारिक सूचना जारी करे अथवा नोटिस दे। सेवा संविदा की समाप्ति पर कोई क्षतिपूर्ति देय नहीं होगी।

8. किसी भी परिस्थिति में, इस नियोजन संविदा के फलस्वरूप बैंक में नियमित नियोजन अथवा सेवा संविदा की अवधि में वृद्धि के संबंध में आपका कोई दावा नहीं बनता है।

9. बैंक को जब भी आवश्यकता होगी, तब आप बैंक में नियुक्ति के संदर्भ में प्रासंगिक प्रत्येक सूचना बैंक में प्रस्तुत करेंगे।"

(emphasis supplied)

9. It is well settled where the appointment is contractual, and such appointment comes to an end by efflux of time, the incumbent has no right to continue on the post in question. *{see Director, Institute of Management Development U.P. v. Pushpa Srivastava (Smt.), (1992) 4 SCC 33}*.

10. It is equally settled that merely because the incumbent is allowed to continue beyond the contractual period, it does not confer any right upon him to continue. In *M.S. Patil (Dr.) v. Gulbarga University, (2010) 10 SCC 63*, the Apex Court has held that the concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. Relying upon M.S. Patil (supra) in *State of Orissa and another v. Mamata Mohanty, (2011) 3 SCC 436*, the Apex Court has held that the concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, the continuance of a person wrongly appointed on post does not create any right in his favour.

11. Further a Constitution Bench of the Apex Court in Secretary, State of Karnataka and others v. Uma Devi and others, (2006) 4 SCC 1, has observed as under :-

"43. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme."

and then

"45. ... It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

(emphasis supplied)

12. Admittedly, the petitioner was appointed on contract basis on a consolidated salary for a fixed term and the same was extended from time to time on the same terms and conditions. By efflux of time the appointment of the petitioner came to an end on 31.05.1996. In view of the settled legal position the petitioner has no right to have his contract renewed and to continue on the post in question. No mandamus can be issued to the respondents to continue the petitioner in service.

13. Moreover, the services of the petitioner were terminated way back in the year 1996 and since then he is out of job. More than 20 years have passed. Even otherwise, at this distance of time no relief, whatsoever, can be granted to the petitioner.

14. For the foregoing reasons the writ petition is devoid of merit and is accordingly dismissed.

15. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2016

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No.- 16642 Of 2016

Hari Pal Singh **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Prafulla Tiwari, Lalta Prasad Misra

Counsel for Respondents:
C.S.C., Ashutosh Shahi, Brijesh Yadav 'Vijay', R.K.S. Suryavanshi, Ramesh Pandey

Held

Transfer after requisition but before advertisement is legally permissible.
The Court held that once a vacancy on the post of Principal has been notified to the U.P. Secondary Education Services Selection Board under Section 10 of the U.P. Secondary Education Services Selection Board Act, 1982, the Management may still fill the vacancy by transfer **provided that the Selection Board has not yet issued advertisement**.
Selection process commences with advertisement.

The process of direct recruitment begins only when the Selection Board publishes an advertisement inviting applications. Mere determination or notification of vacancy to the Board does not amount to commencement of the selection process.

Discretion of Management preserved.

The Committee of Management of a recognized aided Intermediate Institution retains discretion under Section 16 of the Board Act, 1982 to choose the mode of appointment (transfer or direct recruitment), but:
Such discretion must be exercised **before advertisement is issued** by the Selection Board.
After advertisement, the Management loses the discretion to resort to transfer.

Full Bench decision in Prashant Kumar Katiyar harmonized.

The Court held that the Full Bench judgment in *Prashant Kumar Katiyar* does not prohibit transfer after requisition; it only prohibits interference once the selection process has begun (i.e., after advertisement).
Since in the present case no advertisement had been issued by the Selection Board, the process of considering transfer of respondent no. 11 was **not illegal**.
However, authorities were directed to ensure that the transfer process strictly complies with Regulations 55 to 61 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act, 1921.
The writ petition was dismissed.

CASE LAW CITED

1. Prashant Kumar Katiyar vs. State of U.P. & others (2013 (1) ESC 221) – Full Bench
2. Asha Singh vs. State of U.P. & others (2007 (3) UPLBEC 2497)
3. Smt. Amita Sinha vs. State of U.P. & others (2008 (4) ESC 2799) – Division Bench
4. N.T. Devin Kutti &others vs.Karnataka Public Service Commission(1990) 3 SCC 157 – Supreme Court
5. Ved Prakash vs. Hari Krishna Singh (Special Appeal No. 30 of 2011)
6. U.P. Secondary Education Services Selection Board vs. State of U.P. (2011 (2) ADJ 892)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Dr. L.P. Misra, learned counsel for the petitioner, learned Standing Counsel for the State-respondents and Shri Ramesh Pandey, learned counsel representing the respondent no.11, who is on caveat.

2. The dispute engaging attention of this Court in the instant case relates to appointment on the post of Principal in Lucknow Montessori Inter College, Purana Qila, Lucknow-respondent no.10 (herein after referred to as 'LMIC'). The claim of respondent no.11 for appointment as Principal in the said institution on the basis of transfer is being resisted by the petitioner, who, at present, is officiating as Principal in the said institution.

3. LMIC is an Institution recognized by the Board of High School and Intermediate Education, Uttar Pradesh, Allahabad under the relevant provisions of Uttar Pradesh Intermediate Education Act, 1921 (herein after referred as 'the Act 1921 '). Similarly, Lala Ram Kumar Inter College, Patranga, Faizabad (hereinafter referred to as 'LRK Inter College') is also an Intermediate Institution recognized under the Act, 1921.

4. Both these Institutions are Government aided Institutions imparting education up to Intermediate level and students studying therein are subjected to take their examinations conducted by the Board of High School and Intermediate Examination, Allahabad.

5. Jurisdiction of this Court under Article 226 of the Constitution of India has been sought to be invoked by the petitioner assailing the validity of the letter/order dated 11.07.2016 of the Joint Director of Education, VI Region, Lucknow directing the District Inspector of Schools, Lucknow (herein after referred to as 'the DIOS') to take further action in the matter of transfer of respondent no.11, who is working as Principal of LRK Inter College, Patranga, Faizabad, to LMIC, Lucknow. The petitioner has also prayed that the resolution dated 18.06.2016 of the Committee of Management of LMIC, Lucknow resolving that No Objection Certificate be issued to respondent no.11 for his appointment as Principal in LMIC by way of transfer, be also quashed. No Objection Certificate issued to respondent no.11 by the Committee of Management of LMIC dated 21.06.2016 has also been challenged by the petitioner in this petition.

6. The basic premise on which Dr. L.P. Misra, learned counsel appearing for the petitioner, has proceeded to advance his arguments assailing the validity of the entire process initiated by the Committee of Management of LMIC, Lucknow to appoint respondent no.11 on the post of Principal in the Institution by way of transfer is that the said process of appointment is legally not available to the Management once the requisition for filling up the post in question by direct recruitment has been sent to the Uttar Pradesh Secondary Education Services Selection Board (herein after referred to as 'the Selection Board) under Section 10 of Uttar Pradesh Secondary Education [Services Selection Board] Act, 1982 (herein after referred to as 'the Board Act') read with Rule 11 of Uttar Pradesh Secondary Education Services Selection Board, Rules, 1998 (herein after referred to as 'the Rules, 1998').

7. Further contention of learned counsel for the petitioner is that in the instant case the process of transferring the respondent no.11 to LMIC, Lucknow as Principal from LRK Inter College, Patranga, Faizabad is in absolute contravention of the provisions contained in Regulations 55 to 61 of Chapter III of the Regulations framed under Section 16-G(2)(c) of Act, 1921.

8. Shri Ramesh Pandey, learned counsel representing the respondent no.11 has vehemently opposed the very maintainability of the writ petition by submitting that since no final decision in the matter of transfer of respondent no.11 has yet been taken by the authorities, as such the writ petition is premature. He addressed the Court on merit as well and has argued that in the facts and circumstances of the present case, the action of the Committee of Management of LMIC, Lucknow which is under challenge herein, does not suffer from any illegality or irregularity and hence, the writ petition deserves to be dismissed, even on merits.

9. Certain facts are to be noticed before dealing with the rival submissions made by the learned counsel appearing for the respective parties. Previous regular Principal of LMIC, Lucknow, Shri Amar Bahadur Singh was to attain the age of superannuation on 19.07.2012 as his date of birth is 20.07.1950. He was, however, allowed to continue till the end of academic session in which he

attained the age of superannuation i.e. till 30.06.2015. Shri Amar Bahadur Singh being National/State teacher awardee was granted extension for a further period of three years, hence, he claimed his continuance till the end of academic session second time. However, the State Government passed an order dated 30.09.2015 retiring Shri Amar Bahadur Singh on 30.06.2013. The said order dated 30.09.2015 became subject matter of challenge before this Court in Writ Petition No.6246 (S/S) of 2015, filed by Shri Amar Bahadur Singh, which was dismissed on 03.11.2015 by Hon'ble Single Judge of this Court. Special Appeal bearing No.560 of 2015 was filed by Shri Amar Bahadur Singh challenging the order dated 03.11.2015 passed by Hon'ble Single Judge. The Division Bench while disposing of the said Special Appeal did not interfere with the judgement and order dated 03.11.2015, passed by Hon'ble Single Judge, however, it was provided that no recovery shall be made from Shri Amar Bahadur Singh pursuant to the judgement and order dated 03.11.2015 holding further therein that Shri Amar Bahadur Singh was not entitled to continue any further or receive salary, nor shall he receive any consequential benefits arising out of continuance beyond his entitlement. In compliance of the said order dated 30.11.2015, the services of Shri Amar Bahadur Singh as Principal of LMIC were discontinued and officiating charge of the post of the Principal was given to the petitioner, being the senior most Lecturer in the Institution, by the Committee of Management, vide order dated 01.12.2015. Pursuant thereof the petitioner submitted his joining on the post of Principal on 01.12.2015 itself and his signatures as Principal have also been attested by the DIOS, Lucknow. Since then, the petitioner has been officiating as Principal in LMIC, Lucknow.

10. It appears that on 03.04.2016 an application was preferred by respondent no.11 to the Management of LMIC, Lucknow seeking his transfer on the post of Principal from LRK Inter College, Faizabad as on account of retirement of the erstwhile Principal there had occurred a vacancy on the post of Principal in LMIC, Lucknow on 30.11.2015. It has been stated that the Committee of Management, LMIC, Lucknow in its resolution dated 06.05.2016 took a decision to fill up the post and constituted a Committee comprising of three members to consider the applications received in that regard from the Principals working in other Institutions. On 07.05.2016, the DIOS, Lucknow wrote a letter to the Management of LMIC, Lucknow stating therein that though the post of Principal had fallen vacant in the year 2015, however, requisition for filling up the post had not been made available to be forwarded to the Selection Board. Through the said letter, the Management of LMIC, Lucknow was directed to ensure that the requisition be sent for filling up the post of Principal and other posts by direct recruitment within three days, failing which, it was also observed by the DIOS, Lucknow in his letter that under the Rules, requisition shall be sent to the Selection Board by his office directly for which the Management of the Institution shall be responsible.

11. The petitioner on 23.05.2016 wrote a letter to the DIOS that the post of Principal had fallen vacant on substantive basis w.e.f. 31.07.2014 on which he has been officiating since 01.12.2015 under the orders of the Management and further that the petitioner has come to know that the Management intends to make appointment by way of transfer of some other candidate whereas he being the senior most teacher is entitled to be considered for promotion on ah-hoc basis to the post of Principal. The petitioner through the said letter dated 23.05.2016 prayed that the

process initiated for appointment by way of transfer be cancelled and petitioner be granted promotion on ah-hoc basis. It appears that thereafter on receiving certain complaint on 23.05.2016, sent by the petitioner, the DIOS sent requisition for filling up the post of Principal by direct recruitment to the Selection Board by means of his letter dated 25.05.2016 under purported exercise of his jurisdiction vested in him under the Board Rules.

12. It is noticeable, at this juncture, that the DIOS in his earlier letter dated 07.05.2016 had required the Management of LMIC, Lucknow to sent the requisition to the Selection Board for appointment by way of direct recruitment not only on the post of Principal but also on the post of Lecturers/Teachers in L.T. Grade, however, the requisition by means of the letter dated 25.05.2016 was sent only for the post of Principal for selection by way of direct recruitment.

13. Some correspondence between the Management of LMIC and the DIOS, Lucknow appears to have taken place and the DIOS by means of his letter dated 08.06.2016, written to the Management of the Institution, has stated that since by his office requisition for appointment on the post of Principal by direct recruitment has been sent to the Selection Board on 25.05.2016, as such there is no requirement of filling up the said post by way of transfer. By the said letter dated 08.06.2016 the Management has also been required to submit proposal of ad-hoc promotion of the petitioner on the post of Principal. In the said letter, the DIOS has also stated that any process adopted for transfer against the post which has already been requisitioned to the Selection Board for being filled in by way of direct recruitment is unlawful. The DIOS, thus, expresses his disagreement with any such process.

14. The Management of LMIC, Lucknow proceeded ahead with the process relating to making appointment on the post of Principal in the Institution by way of transfer and accordingly, the impugned order/letter dated 11.07.2016 has been issued by the Joint Director of Education, VI Region, Lucknow directing the DIOS to take further action in the matter of transfer of respondent no.11 on the basis of documents received from the office of Joint Director of Education, Faizabad Region, Faizabad, vide his letter dated 06.07.2016. It is this order/direction dated 11.07.2016 which has been assailed by the petitioner in this petition.

15. On the basis of pleadings available on record and the arguments advanced in furtherance thereof by the learned counsel representing the parties, the following issues have emerged in this case for consideration and determination by this Court:-

(a) as to whether after notification of the vacancy on the post of Principal in a recognized Intermediate Institution under Section 10 of the Selection Board Act, 1982 is made either by the Management of the Institution or in failure whereof on the part of the Management, by the DIOS to the Selection Board, any process of making appointment on or filling up the said vacancy by way of transfer is legally permissible.

(b) as to whether the Management of an Intermediate Institution is vested with any discretion to decide and choose one of the modes enumerated in Section 16 of the Board Act, 1982 for making appointment against the vacancy on the post of Principal of an Institution.

(c) as to whether in the instant case, the provisions contained in Regulations 55 to 61 of Chapter-III of the Regulations framed under U.P. Intermediate Education Act, 1921 have been followed while processing the application made by the respondent no.11 seeking his transfer on the post of Principal in LMIC, Lucknow.

16. Taking up issue (c) first, this Court is of the considered opinion that since the process of transfer of respondent no.11 to LMIC, Lucknow as Principal is still not complete and in fact is in the mid way, as such any finding by the Court on the process adopted will be pre-judging the issue. In this view, no finding on this issue is warranted at this stage by the Court.

17. As regards issue (a), lengthy arguments have been advanced by learned counsel appearing for the respective parties, based on several provisions of U.P. Intermediate Education Act, 1921, Regulations framed thereunder, the Board Act, 1982 and the Board Rules, 1998.

18. Learned counsel for the petitioner has heavily relied upon a Full Bench decision of this Court in the case of ***Prashant Kumar Katiyar vs. State of U.P. And others***, reported in ***[2013 (1) ESC 221]***.

19. On the other hand, learned counsel representing the respondent no.11 has relied upon the judgement of this Court in the case of ***Asha Singh vs. State of U.P. And others***, reported in ***[(2007)3 UPLBEC 2497]*** which stands affirmed by a Division Bench judgement of this Court in the case of ***Smt. Amita Sinha vs. State of U.P. and others***, reported in ***[(2008) (4) ESC 2799]***.

20. The Full Bench decision in the case of ***Prashant Kumar Katiyar (supra)*** considered the claim of appointment of dependent of a teacher, who had died while in service, vis-a-vis the claim of a candidate who was selected by the Selection Board but was not appointed on account of the vacancy having been filled up by the other mode of direct recruitment as contemplated in the third proviso appended to Section 16(1) of the Selection Board Act, 1982. The Full Bench has delivered its judgement after examining the correctness of two Division Bench judgements rendered by this Court in the case of ***Ved Prakash vs. Hari Krishna Singh and others, Special Appeal No.30 of 2011*** decided on 19.01.2011 and that of the judgement in the case of ***U.P. Secondary Education Services Selection Board, Allahabad vs. State of U.P. and others***, reported in ***[2011 (2) ADJ 892]***. The Full Bench, after discussing various provisions of the Selection Board Act, 1982 and 1998 Rules, specially those of section 10, section 16, section 11 of the Board Act, 1982 and Rule 10, Rule 11 and Rule 12 of the Board Rules, 1998, has held that the entire exercise with regard to determination of vacancy has to be performed mandatorily by the Management and the DIOS, to enable the Selection Board to advertise the vacancy as notified in terms of the provisions contained in section 10 (2) of the Board Act read with Rule 12(1). Para 36 of the said judgement is quoted below:-

"36. It is this entire exercise with regard to determination that has to be performed mandatorily by the management and the District Inspector of Schools, to enable the Board to advertise the vacancy as notified which shall be done through wide publicity as provided for under Section 10(2) of the 1982 Act read with Rule 12(1) as quoted hereinabove."

21. The Full Bench crystallized the controversy which was considered by it in para 37 of the said judgement, which is extracted herein below:

"37. The controversy raised in this reference is vis-a-vis the impact of the action taken by the management and the District Inspector of Schools for determination of the vacancies and the consequential advertisement made by the Board and any attempt to alter the same by adopting the exceptional modes of appointment."

22. The Full Bench after discussing the entire matter has held in para 38 of the judgement that the Management or the District Inspector of Schools has not been empowered under the law to reverse the determination of vacancy and it can only add to it, subject to the contingency as contemplated under rule 11(3). The Court further observed that this does not take away the power to correct any arithmetical or calculative errors. Para 38 of the said judgement is relevant here which is quoted below:-

"38. In our opinion if the management has determined the vacancy or the District Inspector of Schools has done it as per Rule 11(4) then in that event the alteration of such determination and intimation is controlled only to the extent as provided by sub-rule (3) of Rule 11 which authorises the management and the Inspector to notify any fresh vacancy that may have occurred after such notification. The management or the District Inspector of Schools therefore has not been empowered under the rules to reverse the determination and it can only add to it, subject to the contingency as contemplated under sub-rule (3) of Rule 11. This however does not take away the power to correct any arithmetical or calculative errors that may have crept into such determination.

23. In the case of ***Prashant Kumar Katiyar (supra)*** the Full Bench of this Court further proceeded to observe that no power has been conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and the Rules. It has further been held that requisition to fill up the vacancies having been once sent to the Selection Board, becomes unalterable for the reason that the Selection Board proceeds with the advertisement by publishing the vacancy against which appointments are to be made inviting applications from the candidates giving their preference of the institutions to be indicated by them. This Court in this case has, thus, concluded that at this stage, to upset the procedure after advertisement by giving any further leverage would amount to disturbing the entire process of selection and if such a concession is given, the Management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation. The relevant portion of the said judgement extracted from para 39 of the said judgement is as under:-

"At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the Management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation."

24. Discussing the case of transfer, Hon'ble Full Bench in para 43 in the aforesaid case of ***Prashant Kumar Katiyar (supra)*** has held that such an exercise, if any, has to be concluded prior to determination and intimation of the vacancy to the Board and further that the Management or a teacher cannot be permitted to make a request for allowing such transfer after determination of the vacancies and initiation of the process by the Board. While drawing the said conclusion, the reason given by this Court in the Full Bench judgement is that the authority of the Selection Board to proceed with the selection should not be disturbed by such intervening claims relating to transfer.

25. Para 43 of the said judgement where Full Bench of this Court discusses the issue relating to transfer is as under:-

"43. Taking up the case of transfer, which can be done unilaterally and even bilaterally by exchange of teachers, has to be done on resolutions passed by the two institutions that are to allow such appointment by way of transfer. If there is an application of any such teacher seeking appointment by way of transfer the same has to be forwarded to the competent authority as per the regulations meant for such appointment under Chapter-III of the U.P. Intermediate Education Act, 1921 read with proviso to Section 16 of the 1982 Act. This exercise, if any, therefore, has to be concluded prior to the determination and intimation of the vacancy to the Board as per the calendar fixed under the rules. The management or a teacher cannot be permitted to make a request for allowing such transfer after the determination of the vacancies and the initiation of the process by the Board. The choice to fill up a vacancy by way of transfer therefore has to be exercised reasonably and its determination has to be finalized prior to the sending of the intimation and not thereafter. This will prevent any confusion or future complication in the process of selection that has to be undertaken by the Board. The authority of the Board to proceed with the selection therefore should not be disturbed by such intervening claims relating to transfer."

26. As observed above, learned counsel for appearing for the petitioner has placed very heavy reliance on this judgement to impress upon the Court that the exercise relating to transfer or appointment by way of transfer has to be concluded prior to determination and intimation of vacancy to the Selection Board and since in this case the vacancy has already been notified by the District Inspector of Schools on 25.05.2016 to the Selection Board hence, ongoing process of transfer of respondent no.11 is completely without jurisdiction and is legally not permissible.

27. Based on the aforesaid judgement rendered by Hon'ble Full Bench of this Court in the case of ***Prashant Kumar Katiyar (supra)***, the arguments advanced by the learned counsel for the petitioner on the first sight appear to be impressive, however, on a deeper probe the said argument merits rejection for the reasons which are to follow.

28. The reasoning given by Hon'ble Full Bench in the case of ***Prashant Kumar Katiyar (supra)*** is that in case after notification of the vacancy to the Selection Board any process of making appointment by way of transfer is initiated, the same would disturb the process of selection and further that upsetting the procedure initiated by the Selection Board for filling up the vacancy by way of direct recruitment would give leverage to the Management which may indulge into motivated manipulations. What is noticeable, at this juncture, is that the Full Bench has observed that once the requisition is sent to the Selection Board, further process of advertising the vacancies and that of selection ensues. The concern expressed by Hon'ble Full Bench, in my considered opinion, is that the process of selection initiated by the Selection Board should not be upset or disturbed, which is based on certain legal principles. Process of selection starts on publication of advertisement inviting applications for filling up the vacancies and that is how Hon'ble Full Bench in para 39 has used the phrase "at this stage, to upset the procedure after advertisement". Since the selection process starts on making the advertisement, as such, in my opinion, there is no bar to fill up the vacancy by way of transfer once the vacancy has been notified to the Selection Board, but the said liberty is available to the Management of an Institution only before the process of selection commences, that is to say, before an advertisement is made by the Selection Board inviting applications to fill up the vacancy by direct recruitment.

29. In para 43 of the judgement in the case of ***Prashant Kumar Katiyar (supra)***, Hon'ble Full Bench of this Court has observed that the Management or a teacher cannot be permitted to make a request for transfer "after determination of the vacancies and initiation of the process by the Board". Initiation of selection process by the Board commences on advertising the vacancies and not merely on determination of vacancies and its notification to the Selection Board either by the Management of the Institution or by the DIOS. The Full Bench in para 43 of the judgement in the case of ***Prashant Kumar Katiyar (supra)*** has taken note of the legal proposition that the authority of the selection Board to proceed with the selection should not be disturbed by an intervening claim relating to transfer. What is of significance is to prevent any disturbance in the selection process initiated by the Selection Board which, in my considered opinion, commences with the publication of the advertisement inviting applications for filling up the vacancies.

30. The aforesaid view is also supported by the judgement of this Court in the case of ***Asha Singh (supra)***. This Court in the said case of ***Asha Singh*** after analysing the various provisions of law has held that the process by direct recruitment starts with the issuance of advertisement by the Selection Board and thus, it would be appropriate to restrict the exercise of discretion by the Management qua the mode of appointment (that is, by transfer or by direct recruitment) for filling up the vacancy up to that stage only. The said view expressed by this Court in ***Asha Singh (supra)*** is based on a judgement of Hon'ble Supreme Court in the case of ***N.T. Devin Kutti and others vs. Karnataka Public Service Commission and others, [(1990) 3 SCC 157]***, wherein it has been clarified that the process of selection starts with the advertisement.

31. Paragraphs 17, 18, 19 and 21 of the judgement in the case of Asha Singh are relevant to be quoted which are as under:-

*17. The Hon'ble Supreme Court of India in the case of **N.T. Devin Kutti and others vs. Karnataka Public Service Commission and others, [(1990) 3 SCC 157]**, has clarified that the process of selection starts with the advertisement, and the selection of candidates is to be made in accordance with the existing Rules and Government Orders applicable on that date. The rights of the candidates crystallises on the date of publication of the advertisement (Reference paragraph-11). The process of selection ends with the appointment.*

18. In view of the aforesaid judgement of Hon'ble Supreme Court of India, it is held that the process of direct recruitment starts with the issuance of the advertisement, by the U.P. Secondary Education Services Selection Board, Allahabad. It would be logical to restrict the exercise of its discretion by the Committee of Management qua the mode of appointment (i.e., by transfer or by direct recruitment) for filling up the vacancy upto that stage only.

19. This Court may record that once the vacancy is advertised, the Committee of Management must loose its discretion to fill the same vacancy by transfer inasmuch as the process of direct recruitment has been started. Once the advertisement is made by the U.P. Secondary Education Services Selection Board, Allahabad the Committee of Management cannot resort to the mechanics of transfer for the purposes of filling up of the same vacancy, which had already been advertised.

21.This Court, therefore, holds that once the vacancy has been advertised on a requisition made by the Committee of Management by the U.P. Secondary Education Services Selection Board, Allahabad, the Committee of Management looses its discretion to resort to mode of appointment by way of transfer and than it is only by direct recruitment on the recommendation of the U.P. Secondary Education Services Selection Board, Allahabad that any appointment against the vacancy advertised can be made.

32. The issue relating to harmonizing the processes of appointment contemplated in the provisos appended to Section 16 to the Board Act, 1982 has been considered by a Division Bench of this Court in the case of ***Smt. Amita Sinha (supra)***. The judgement rendered by the Division Bench in the case of ***Smt. Amita Sinha (supra)*** was in special appeal filed against the judgement of Hon'ble Single Judge in the case of ***Asha Singh (supra)***. In para 10 of the judgement in the case of ***Smt. Amita Sinha (supra)*** the Division Bench has formed an opinion that the mode of appointment by transfer will apply only in case the process to fill up the vacancy has not been initiated by the Commission (now Board). It has further been held therein that the process begins with advertisement of vacancy and that to take a different view would be to create a clash in the operation of the two sets of provisions. The relevant portion occurring in para 10 of the judgement in the case of ***Smt. Amita Sinha (supra)*** is as under:-

"We are of the view that the only way to harmonize the two modes is to interpret the statute in a manner that the mode of appointment by transfer is confined to apply only in case where process to fill up the vacancy has not been initiated by the Commission. That process begins

with the advertisement of vacancies. To take a different view would be to create a clash in the operation of the two sets of provisions."

33. Yet at another place i.e. in para 12 the Division Bench in the case of ***Smt. Amita Sinha (supra)*** has observed that an order of appointment by transfer cannot be made after the commission has issued the advertisement.

34. Submission of learned counsel for the petitioner that after the judgement of Full Bench of this Court in the case of ***Prashant Kumar Katiyar (supra)***, the judgements rendered in the case of ***Asha Singh (supra)*** and ***Smt. Amita Sinha (supra)*** are no more good law, also needs to be considered at this stage. From a closer scrutiny of the aforesaid judgement of the Full Bench in the case of ***Prashant Kumar Katiyar (supra)*** and also that of the judgements in the case of ***Asha Singh (supra)*** and ***Smt. Amita Sinha (supra)*** what emerges is that there is no conflict in the ratio laid down by the aforesaid judgements. What has been emphasized in all the three judgements is that the two processes of appointment, namely, through transfer and through direct recruitment, are to be harmonized in such a fashion that the process once initiated by the Board for selection for appointment by direct recruitment does not get hampered or aborted in the mid way. As already observed above, the process of selection begins with the publication of advertisement and hence I am unable to agree with the submission made by the learned counsel for the petitioner in this regard.

35. In the light of the aforesaid discussion, finding of the Court in respect of issue (a) as formulated above is that any process adopted for making appointment through transfer against a vacancy notified to the Board for being filled in by way of direct recruitment is legally permissible only before the advertisement is issued by the Selection Board pursuant to the requisition sent to it.

36. The next issue to be determined here is in relation to the discretion of the Management of an intermediate institution to decide and choose one of the modes/processes enumerated in Section 16 of the Board Act, 1982 for making appointment against a vacancy. In this regard, under the scheme of U.P. Intermediate Education Act the powers, duties and functions of the Committee of Management of a recognized aided institution becomes inevitable to be examined. The powers, functions and duties of the Committee of Management as defined in Regulation 13 of Chapter-I of the Regulations framed under Intermediate Education Act includes the powers of appointment. The provisions of Regulation 13 of Chapter-I of the Regulations framed under Intermediate Education Act is extracted below:-

13. Power, Duties and Functions of the Committee of Management.*-Powers, duties and functions of the Committee of Management shall include the following:*

(i) Appointment, confirmation, promotion, permission to cross efficiency bar suspension and punishment (including, removal and dismissal) of Headmaster, Principal, teacher, matron, clerk or librarian in accordance with the provisions of the Act and the regulations.

(ii) To decide appeals against entries made, in character rolls of employees by the Head/Manager of the institution.

(iii) Grant of all leave admissible to the employees of the institution except where such power vests in the Headmaster or Principal.

(iv) Control and management of all moneys, securities property and endowments of the institution, excluding the Boys Funds and taking of necessary measures for their safe custody, investment, repairs, maintenance and legal protection.

(v) Ensuring proper utilization of maintenance and development grants and reimbursements received from Government.

(vi) Receiving all incomes (excepting stipends, scholarships and Boys' Funds) subscriptions, donations, gifts, dividends, interest, grants, etc. for the institution and meeting financial obligations arising out of its duties and functions."

37. One of the basic functions vested in the Committee of Management of an institution is appointment and disciplinary action against the teaching and non-teaching staff including Principal. The Selection Board Act, 1982 has been enacted only for the purposes of providing an independent selection mechanism under which the Selection Board has been constituted which, on the basis of selection held by it, makes recommendations for appointment against teaching posts in the recognized institutions. Ultimately, the power to appoint vests in the Committee of Management. Ordinarily though the recommendation made by the Selection Board is binding on the Committee of Management but in appropriate cases such recommendation can be resisted by the Committee of Management for valid reasons. Right to discharge duties to a teacher or Principal does not accrue merely on his selection to a post but the said right accrues only on his appointment. Function of appointment of a teacher or Principal is a very vital function which, under the statutory scheme contained in Regulation 13 of Chapter-I of Regulations framed under the U.P. Intermediate Education Act, has been entrusted to the Committee of Management. In this view, if it is held that the Committee of Management does not have any discretion to decide and choose one of the processes enumerated in Section 16 of the Board, 1982 for appointment, the same would result in diluting the statutory functions and powers of the Committee of Management to make appointments.

38. This Court in the case of ***Asha Singh (supra)*** has held that it is the domain of the appointing authority to adopt any mode of appointment. This Court in the said case has clearly held that the Committee of Management has a discretion to fill up the vacancy by way of transfer, however, as observed above, such discretion is to be exercised within a particular time frame that is up to a particular stage.

39. Paras 14 and 15 of the judgement in the case of ***Asha Singh (supra)*** are relevant in this regard, which are quoted below:-

"14. It is no doubt true that it is with the domain of the Appointing Authority to adopt to any of the modes of appointment in respect of the vacancy in question in accordance with the statutory provisions applicable.

15. It may be recorded that against the vacancy, which is required to be filled by direct recruitment, the Committee of Management has a discretion to fill up the vacancy by way of transfer. Such is the language of Section-16. The issue, however, is as to whether such discretion is to be exercised by the Committee of Management within a particular time frame/ upto a particular stage, or at any point of time till actual appointment is made against the vacancy."

40. Thus, the Court concludes that the Committee of Management of a recognized institution possesses the discretion to decide and choose one of the modes/processes enumerated in Section 16 of the Board Act, 1982 for making appointment against the vacancy on the post of Principal of a recognized institution, however, the said discretion is available only before advertisement is published by the Selection Board for making appointment by way of direct recruitment against the vacancy notified to it.

41. In view of the discussions made and reasons given herein above, the writ petition fails and is resultantly **dismissed**.

42. However, while dismissing the writ petition, it is ordered that the authorities concerned shall, before passing the order for appointment by way of transfer, scrutinize the process adopted for the said purpose strictly in accordance with law, specially keeping in view the provisions contained in Regulations 55 to 61 of Chapter-I of the Regulations framed under Section 16-G (2)(c) of U.P. Intermediate Education Act, 1921

43. There will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2016

BEFORE

THE HON'BLE MANOJ MISRA, J.

Writ A No.- 30156 Of 2016
&
Connected With Other Cases

Manish Kumar Singh & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioners:

Rahul Srivastava

Counsel for Respondents:
C.S.C., Mrigraj Singh

Held

The State Government had jurisdiction to fix the cut-off date (16.06.2016) for possession of minimum educational/training qualification in exercise of its executive power under Article 162 of the Constitution, particularly since the U.P. Basic Education (Teachers) Service Rules, 1981 are silent on such fixation.
The 1981 Rules do not confer exclusive authority upon the District Basic Education Officer to fix the cut-off date; nor do they prohibit the State from issuing such executive directions.
Rule 6 of the 1981 Rules, which prescribes a cut-off date for age qualification, does not mandate that the same cut-off date must apply for educational/training qualification.
Fixation of 16.06.2016 as the cut-off date is not arbitrary merely because certain candidates (BTC-2013 batch) fell on the wrong side of the cut-off date.
The cut-off date correlates with the date on which the State Government granted permission to initiate recruitment and cannot be termed capricious, whimsical, or wide off the reasonable mark.
Hardship caused to a particular batch does not render a cut-off date unconstitutional unless it is shown to be arbitrary or discriminatory.
The cut-off date does not create a class within a class; BTC-2013 candidates constitute a subsequent batch and are not similarly situated to earlier batches.
No violation of Articles 14 or 16 of the Constitution was established.
The writ petitions were dismissed.

CASE LAW CITED

Krushna Chandra Sahu (Dr) v. State of Orissa
Bhupinderpal Singh v. State of Punjab
U.P. Public Service Commission v. Alpana
State of Bihar v. Ramjee Prasad
Ramrao v. All India Backward Class Bank Employees Welfare Assn.
University Grants Commission v. Sadhana Chaudhary
Union of India v. Parameswaran Match Works
Sushma Sharma (Dr) v. State of Rajasthan

(Delivered by Hon'ble Manoj Misra, J.)

1. These writ petitions have been filed by candidates who have undertaken the BTC-2013 Training Course and have given their final semester examinations but before their result of the final semester could be declared, the State Government by Notification dated 16.06.2016 granted permission for recruitment of 16448 Assistant Teachers in Primary Schools under the U.P. Basic Education Board with a rider that a candidate to be eligible to apply for appointment must hold minimum educational as well as training qualification by or before 16.06.2016. Aggrieved by the cut-off date so fixed these petitions have been filed assailing the same with additional prayers that their final semester examination results be declared and that they may be permitted to apply for the post. Considering that all these petitions raise common questions of law and on facts there are no

issues, with the consent of learned counsel for the parties these petitions were heard together and are being decided by a common judgment.

2. In these writ petitions I have heard Sri R.K. Ojha, Sri G.K. Singh, learned senior counsels, Sri Rahul Srivastava, Sri Sreeprakash Singh, Sri Ganesh Mani Tripathi, Ms. Afshan Shafaut and Sri Yogendra Kumar for the petitioners; learned Standing Counsel for the State; Sri B. P. Singh and Sri A.K. Yadav for the Basic Education Board, U.P. and the Basic Shiksha Adhikari of the districts concerned; and Sri Ashok Khare, learned Senior Counsel assisted by Ashish Tripathi for the intervening respondents in Writ A No.30156 of 2016, which has been treated and heard as the leading case.

3. The record reflects that by government notification dated 29.07.2015, the Govt. of U.P. identified and approved creation of 19,948 posts of Assistant Teacher in Basic Schools run and established by U.P. Basic Education Board across various districts within the State with a declaration that posts would be filled in stages, dependent on the need to fill up the posts, subject to availability of budgetary support. Thereafter by government notification dated 14.12.2015 out of those 19,948 posts of Assistant Teacher, 3,500 posts were converted into that of Assistant Teacher (Urdu Language) with a declaration that the earlier government notification dated 29.07.2015 be treated as amended to that extent. Subsequently, by government notification dated 05.01.2016, a decision was taken to fill up those 3,500 posts of Assistant Teacher (Urdu Language) and guidelines were laid therein in respect of the recruitment process. Pursuant to that advertisements were published calling for applications from eligible candidates for those 3500 posts in various districts. The advertisements so published provided that a candidate must possess the requisite essential educational and training qualification by the last date fixed for online application registration. In respect of remaining 16,448 posts of Assistant Teacher that were identified and creation of which was approved by notification dated 29.07.2015, a government notification dated 16.06.2016 was issued thereby granting permission for recruitment on the said posts with a specific direction that only those candidates would be eligible for participation in the recruitment process, who possess the minimum educational/training qualification on the date of issuance of the government notification. It was observed in the notification that the Lucknow Bench of this Court in Writ Petition (S/S) No. 326 of 2016 (Mahendra Pratap Singh and seven others v. State of U.P. and Others) had directed that in future selections, the date on which the eligibility is to be determined should be specifically fixed and not left to unforeseen circumstances as had arisen in that case. Pursuant to the said government notification, advertisements were issued by the Basic Shiksha Adhikari in various districts within the State of Uttar Pradesh calling for applications from eligible candidates against those 16,448 posts of Assistant Teacher by specifically providing in the advertisement that a candidate must possess minimum educational qualification/training qualification by 16.06.2016 as was directed by the Government Notification dated 16.06.2016. It is this cut-off date which has been assailed in these writ petitions.

4. The case of the petitioners is that they are all undergoing training course of BTC -2013 and that they have all given their examination by the month of May, 2016 but their results have not been declared prior to 16.06.2016, which is the cut-off date, even though, in ordinary course, their

results ought to have been declared by the said date, therefore, this cut-off date seriously affects their right to be considered for appointment. It is their case that, subsequently, their results have been declared before the last date fixed for submission of the application form but because of the cut off date they could not apply. It is their case that if there had been no such cut off date for holding educational/ training qualification then by law the last date for submission of application form would have been the date for determining eligibility and in that scenario they would have all been eligible to apply. Accordingly, it is their prayer that the cut off date 16.06.2016 be struck down and all those who hold eligibility qualification by last date fixed for submission of application be allowed to apply.

5. During the course of arguments in Writ A No. 30156 of 2016 i.e. the leading petition, on 06.07.2016 an order was passed by this Court requiring the petitioners to file a supplementary-affidavit bringing on record such material so as to demonstrate that result of BTC course of any subsequent year, within the State of U.P., was declared prior to the result of BTC course of any previous year. This exercise was undertaken to ascertain as to whether result of BTC-2014 course was declared ahead of BTC-2013 course or not. Pursuant to the said direction, during the course of hearing, the learned counsel for the parties stated that as per their instructions result of any subsequent BTC course has not been declared ahead of BTC-2013 course.

6. Learned counsel appearing on behalf of the petitioners have assailed the cut-off date 16.06.2016 on the following grounds:

(a) That the recruitment on the posts of Assistant Teacher in Basic Schools, run by Basic Education Board, U.P., is governed by U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "1981 Rules"), which have been made in exercise of power under sub-section (1) of Section 19 of the U.P. Basic Education Act, 1972 (hereinafter referred to as "1972 Act"). Rule 4 of 1981 Rules provides that there shall be separate cadres of service for each local area. "Local area" is defined in Rule 2(1)(i) as an area over which a local body exercises jurisdiction. Rule 14 of 1981 Rules provides for determination of vacancies and preparation of list of candidates for appointment. Sub-rule (1) of Rule 14 provides that in respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9, and notify the vacancies in at least two newspapers having adequate circulation in the State as well as in the concerned district thereby inviting applications from candidates possessing prescribed training qualification from the district concerned and who have passed the Teacher Eligibility Test conducted by Government of U.P. or the Government of India. It has been submitted that "Appointing Authority" has been defined in Rule 2 (1) (b) of the Rules as the District Basic Education Officer provided that Additional District Basic Education Officer (Women) shall be deemed to be the appointing authority in relation to women teachers in a district where such officer is posted. Rule 2 (1) (f) defines "District Basic Education Officer" as an officer appointed by the State Government as such for a particular district. Rule 3 provides that the 1981

Rules shall apply to all teachers of local bodies transferred to the Board under Section 9 of the Act, 1971 and all teachers employed for the Basic and Nursery Schools established by the Board.

By placing reliance on the aforesaid provisions of the Rules, 1981, it has been contended on behalf of the petitioners that the post of an Assistant Teacher contemplated by the 1981 Rules is a post in reference to a particular local area whose appointing authority is the District Basic Education Officer of the district concerned, who has not only to determine the vacancies but also to notify the same by publication in newspapers having adequate circulation in the State as well as in the district concerned inviting applications from candidates possessing prescribed training qualifications from the district concerned and who have passed the Teacher Eligibility Test, conducted by Government of U.P. or the Government of India. It has been submitted that since it is the District Basic Education Officer who has to determine the vacancies and thereafter notify the vacancies calling for applications from candidates possessing prescribed educational /training qualification from the district concerned, it is the District Basic Education Officer alone, who can fix a cut-off date for possession of minimum educational / training qualification by an applicant whereas the State Government would have no jurisdiction to fix any such cut off date. It has been submitted that in the instant case, the cut-off date has not been fixed by the District Basic Education Officer by independently exercising his own mind but has been fixed under the direction of the State Government therefore the cut-off date so fixed is vitiated by non application of mind and deserves to be struck down and as the 1981 Rules do not provide for any cut off date for holding minimum educational/ training qualification, the last date for submission of the application would be deemed to be the cut off date by which a candidate must possess the educational /training qualification.

(b) That 16,448 posts of Assistant Teacher for which recruitment process has been initiated by notification dated 16.06.2016, were identified and determined by the State Government by notification dated 29th July, 2015 as part and parcel of 19,948 posts of Assistant Teacher out of which 3500 posts were converted into posts of Assistant Teacher (Urdu Language) for which the recruitment process was initiated separately by Government Notification dated 05th January, 2016 wherein the cut-off date for holding the minimum educational qualification/training qualification was the last date for submission of application. It has been submitted that the State cannot adopt two different criteria for fixing cut-off date for eligibility to apply in respect of posts that were initially identified and determined by a common notification.

(c) That the cut-off date has been fixed only to exclude a large section of candidates who though had undertaken the BTC-2013 course examination in the month of May, 2016 but their results were not declared by June, 2016 even though, in ordinary course, their results should have been declared much earlier. It has been submitted that the objective of an employer should be to ensure that, as far as possible, maximum number of candidates apply for appointment so that the selection is broad based and meritorious persons are appointed. But by adopting an arbitrary cut off date a large section of candidates who were undertaking BTC 2013 course have been excluded from consideration, therefore the entire selection would be limited to those candidates who had

undertaken the BTC course of 2012 or before thereby affecting the quality of teachers ultimately appointed.

(d) That the cut off date so fixed suffers from the vice of malice in law inasmuch as the State was throughout aware that BTC 2013 course batch of candidates had already given their examination and their results would be declared shortly, therefore, fixation of a cut-off date in the month of June, 2016 just before the declaration of their results was made maliciously to exclude their consideration and such exclusion was made only to benefit those who had secured training in the preceding years but were not successful in finding their names in the select list in respect of earlier recruitment.

(e) That Rule 6 of 1981 Rules provides for a criteria on the basis of which a cut-off date in respect of eligibility could be fixed. According to Rule 6, a candidate, for recruitment to any post referred to in clause (a) of Rule 5 or sub-clauses (iii) and (iv) of clause (b) of Rule 5 or proviso to Clause (b) of Rule 5, must have attained the age of Twenty one years and must not have attained the age of more than thirty-five years on the first day of July following the year in which the vacancy is notified. This discloses the legislative policy that the cut-off date for possessing minimum educational/training qualification must be in sync with the cut-off date fixed for age qualification. Accordingly, the cut-off date for holding minimum educational/ training qualification, which is even prior to the date of the advertisement, is nothing but arbitrary and is not in accordance with Rule 6 of 1981 Rules.

7. Per contra, the learned counsel for the respondents have submitted as follows:

(a) That 1972 Act is an Act to provide for the establishment of a Board of Basic Education and for matters connected therewith. Section 3 of the 1972 Act provides for constitution of the Board with effect from such date as the State Government may, by notification in the Gazette, appoint. Section 4 provides for functions of the Board and states that subject to the provisions of the said Act, it shall be the function of the Board to organise, co-ordinate and control the imparting of basic education and teachers' training therefor in the State, to raise its standards and to correlate it with the system of education as a whole in the State. Section 13 of 1972 Act provides for the control by the State Government. It provides that the Board shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of the 1972 Act. Sub-section (3) of section 13 of 1972 Act provides that the Board or any local body shall furnish to the State Government such reports, and other information, as the State Government may from time to time require for the purposes of the Act. Section 19 of 1972 Act provides for rule making power and vests the power in the State Government. Section 19 (1) of the 1972 Act provides that the State Government may, by notification, make rules for carrying out the purposes of the Act. Sub-section (2) of Section 19 provides that in particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the matters enumerated there under. Clause (a) of sub-section (2) of Section 19 empowers State Government to make rules to provide for the recruitment, and the conditions of service of persons appointed to the posts of officers, teachers and other employees. In exercise of its power under

Section 19 of 1971 Act, 1981 Rules have been notified. Rule 4 of 1981 Rules provides that there shall be separate cadres of service under the rules for each local area. The strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government provided that the appointing authority may leave unfilled or the Board may hold in abeyance any post or class of posts without thereby entitling any person to compensation. Provided further that the Board may, with the previous approval of the State Government, create from time to time such number of temporary posts as it may deem fit.

Relying on the aforesaid provisions, on behalf of the respondents, it was contended that strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre is subject to the approval of the State Government and the State Government, by virtue of section 13 of the 1972 Act is empowered to issue directions from time to time for the efficient administration of the 1972 Act, which the Board is under an obligation to carry out. Likewise, the Board has power under Section 4 of the 1972, Act to organise, co-ordinate and control the imparting of basic education and teachers' training therefor in the State and to take all such steps as may be necessary or convenient for, or may be incidental to the exercise of any power, or the discharge of any function or duty conferred or imposed on it by the 1972, Act. Section 6 of Act, 1972 empowers the Board to appoint such person, officers, teachers and other employees as it may, with the previous approval of the State Government, think fit for the purpose of enabling it to efficiently discharge its function. Section 19 (2)(a) provides that the State Government may make rule in respect of the recruitment, and conditions of service of persons appointed to the posts of officers, teachers and other employees under Section 6 of the Act, 1972. It has been submitted that keeping in mind the aforesaid provisions and the scheme of the 1972 Act and the 1981 Rules, it can be safely concluded that in absence of there being a provision to the contrary in the 1972 Act or the 1981 Rules, the State was well within its executive power, as conferred on it by Article 162 of the Constitution of India, to fix a cut-off date in respect of possession of minimum educational/training qualification by a candidate to be eligible for participating in the recruitment process.

(b) That the cut-off date, which has been fixed, is the date on which the recruitment process for 16,448 posts was permitted by State Government vide notification dated 16.06.2016, therefore, keeping in mind the direction given by the Lucknow Bench of this Court mandating fixing of a cut off date for possession of eligibility qualifications to avoid confusion, fixing of cut off date by the State Government in exercise of its executive power to ensure uniformity across the state cannot be said to be arbitrary. It has been submitted that the cut-off date, so fixed, is not wide off the mark or out of the Hat so as to be termed arbitrary inasmuch as it co-relates with the date on which the recruitment process was permitted and since neither the 1972 Act nor the 1981 Rules provides for a specific cut-off date in respect of holding of minimum educational /training qualification, the State was well within its jurisdiction to fix a cut-off date as has been fixed and the Board has rightly accepted the same and it has been uniformly applied by the appointing authorities across the State of Uttar Pradesh. It has been submitted that merely because certain class of persons fall on the wrong side of the cut-off date it would not be a ground to challenge the cut-off date.

(c) That the cut off date so fixed is neither in violation of Rule 6 nor Rule 14 or for that matter any of the provisions of the 1981 Rules and, therefore, there are no fetters on the power of either the State Government or the Board or the Basic Shiksha Adhikari concerned to fix a cut off date as has been done. Further, having same cut off date for attaining minimum eligibility, as is for the age, provided by Rule 6 of 1981 Rules, may create an anomalous situation, inasmuch as, if it is so, it could be possible that at the end of recruitment process a selected candidate though may be eligible in terms of age but may not be in possession of minimum educational/training qualification. Therefore, fixing a cut off date for holding eligibility qualifications on the same parameter as is for the age qualification would not be justified and, therefore, Rule 6 cannot be used as a guiding factor to determine the cut off date for holding educational/ training qualifications. It has been submitted that likewise Rule 14 of the 1981 Rules do not provide any guidance for fixing a cut off date in respect of possession of minimum educational/ training qualification. It only provides for notification of the vacancies by the appointing authority in newspapers calling for applications from candidates possessing prescribed educational/training qualification to participate in the recruitment process. But it nowhere restricts the right of the appointing authority to fix a cut-off date for holding minimum educational/training qualification. It has thus been submitted that the impugned cut-off date is not against the provisions of 1981 Rules.

(d) That no one has vested right that he should be considered for appointment. The right of consideration commences from the advertisement and is subject to the various conditions of the advertisement. It cannot be said that the right of consideration flowing from advertisement is distinct and serverable from various conditions of eligibility prescribed in the advertisement. A candidate would have a right of consideration in accordance with the advertisement, if he fulfills various qualifications and eligibility prescribed thereunder and not otherwise. It is not open to a candidate to suggest that he is entitled for the benefit of the advertisement because he falls within the age parameter and therefore the other part which fixes a cut off date for possession of minimum educational/training qualification should be ignored. As the cut off date has been fixed by a Government Notification, which the State Government is empowered to issue not only by the statutory scheme governing basic education but also by Article 162 of the Constitution of India, particularly, in absence of any rule or statutory provision to the contrary, therefore, the cut off date, which is in sync with the date on which the recruitment process was permitted by Government Notification dated 16th June, 2016, cannot be said to suffer from the vice of arbitrariness nor it can be said that it is based on no intelligible criteria, particularly, when no batch of BTC course conducted by the Board subsequent to BTC -2013 has been declared pass before the cut off date. It has been submitted that the BTC -2013 batch cannot be equated with BTC-2012 batch or batches of preceding year therefore the cut off date does not create a class within a class so as to make the cut off date unreasonable or arbitrary. Likewise it cannot be alleged that fixation of such cut off date amounted to malice in law. It has been submitted that the cut off date cannot be assailed merely because it restricts the zone of consideration because whenever a cut off date is fixed, there are always persons who fall on the other side of the cut off but that by itself is not a ground on which a cut off date can be successfully challenged.

ISSUES FOR DETERMINATION

8. Having considered the rival submissions and having perused the record, it would be useful to cull out the issues, which arise for determination in these proceedings. In the opinion of the Court following issues arise for determination:-

(i) Whether the State Government had jurisdiction to fix a cut off date for possession of minimum educational/training qualification in respect of appointment on 16448 posts of Assistant Teacher in Primary Schools run by the U.P. Basic Education Board?

(ii) Whether the cut off date, as fixed, is in violation of the provisions of U.P. Basic Education (Teachers) Service Rules, 1981?

(iii) Whether the cut off date is arbitrary and discriminates persons similarly situated on no intelligible criteria?

RELEVANT PROVISIONS OF 1972 ACT and 1981 RULES

9. Before proceeding to decide the aforesaid issues, it would be useful to examine the relevant provisions of the 1972 Act and the 1981 Rules.

10. The 1972 Act is an Act to provide for the establishment of a Board of Basic Education and for matters connected therewith. Section 2 (1) (b) defines basic education as education up to eighth class imparted in schools other than high schools or intermediate colleges. "Board" is defined in section 2(c) as the Uttar Pradesh Board of Basic Education constituted under Section 3. Section 3 provides that from such date as the State Government may, by notification in the Gazette, appoint, there shall be established a Board to be known as the Uttar Pradesh Board of Basic Education. Section 4 provides for the functions of the Board. Sub-section (1) of section 4 provides that it shall be the function of the Board to organise, co-ordinate and control the imparting of basic education and teachers' training therefor in the State, to raise its standards and to correlate it with the system of education as a whole in the State. Sub-section (2) of Section 4 provides that without prejudice to the generality of the provisions of sub-section (1) the Board shall be empowered to do various acts enumerated thereunder.

11. Section 6 of the 1972 Act provides as follows:

*"**6. Officers and other employees of the Board.**--(1) For the purpose of enabling it efficiently to discharge its functions under this Act the Board may appoint such number of officers, teachers and other employees as it may, with the previous approval of the State Government, think fit."*

12. Section 13 of 1972 Act provides for control by the State Government by providing as follows:-

*"**13. Control by the State Government :** (1) The Board shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.*

(2) If in, or in connection with, the exercise of any of its powers and discharge of any of the functions by the Board under this Act, any dispute arises between the Board and the State Government, or between the Board and any local body, the decision of the State Government on such dispute shall be final and binding on the Board or the local body, as the case may be.

(3) The Board or any local body shall furnish to the State Government such reports, returns and other information, as the State Government may from time to time require for the purposes of this Act."

13. Section 19 of the 1972 Act provides for the rule making power of the State Government. The same is reproduced herein below:-

*"**19. Power to make Rules.**- (1) The State Government may, by notification, make rules for carrying out the purposes of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely-

(a) the recruitment, and the conditions of service of persons appointed to the posts of officers, teachers and other employees under Section 6;

(b) the tenure of service, remuneration and other terms and conditions of service of officers, teachers and other employees transferred to the Board under Section 9;

(c) the recruitment, and the conditions of service of the persons appointed, to the posts of teachers and other employees of basic schools recognized by the Board.

(d) any other matter for which insufficient provision exists in the Act and provision in the rules is considered by the State Government to be necessary.

(e) any other matter which is to be or may be prescribed."

14. In exercise of power under Section 19 (1) of the 1972 Act the Governor has framed 1981 Rules. Rule 4 of Rules, 1981 provides as follows:-

*"**4. Strength of the service.**- (1) There shall be separate cadres of service under these rules for each local area.*

(2) The strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government.

Provided that the appointing authority may leave unfilled or the Board may hold in abeyance any post or class of posts without thereby entitling any person to compensation.

Provided further that the Board may, with the previous approval of the State Government, create from time to time such number of temporary posts as it may deem fit."

15. Rule 5 of 1981 Rules provides for the sources of recruitment to the various categories of posts mentioned thereunder. Part IV of the 1981 Rules provides for the qualification.

16. Rule 6 of the 1981 Rules provide for the qualification in respect of age of a candidate, which is being reproduced herein below:-

*"**6. Age.**- A candidate for recruitment to any post referred to in Clause (a) or sub-clauses (iii) and (iv) of clause (b) of Rule 5 or proviso to Clause (b) of Rule 5, must have attained the age of Twenty one years and must not have attained the age of more than thirty-five years on the first day of July following the year in which the vacancy is notified:*

Provided that the upper age limit shall in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes, Backward Classes be Greater by five years or as provided by the Government from time to time:

Provided further that the upper age limit shall in the case of a candidate, who is ex-serviceman, be greater by three years or as provided by the Government from time to time:

Provided also that the upper age limit shall be greater by fifteen years in the case of a handicapped candidate:

Provided also that where after successful completion of a course of training prescribed for teachers of Basic Schools, a candidate could not get appointment due to non-availability of vacancy in the district, the period he has remained unappointed shall not be counted for the calculation of his age if he has not attained the age of more than fifty years on the date of appointment:

Provided also that no upper age limit shall apply in case of B.Ed./ Lt./ B.P.Ed./ C.P.Ed. Or D.P.Ed. Trained candidates who have completed special B.T.C. Training Courses in the year 1999:

Provided also that in case of candidates having proficiency in Urdu and having completed two years B.T.C. Urdu special B.T.C. training course or completed special B.T.C.

training course the upper age limit shall be such as may be determined from time to time by the Government.

Provided also that the upper age limit in case of Mualim-e-Urdu degree holders who had obtained such degree before August 11, 1997 shall be not exceeding the age of superannuation:

Provided also that for the selection of candidates as Trainee Teachers, the upper age limit shall be such as may be determined from time to time by the Government."

17. Rule 8 of 1981 Rules provides for the essential qualifications for a candidate to be eligible for appointment to a post. It does not fix any date for holding of such qualification but does specify that for appointment such qualifications are essential.

18. Rule 14 of 1981 Rules provides for determination of vacancies and preparation of list. The same is being reproduced herein below:-

*"**14. Determination of vacancies and preparation of list.**-(1) (a) Determination of vacancies and preparation of list, in respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under Clause (a) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under Rule 9 and notify the vacancies in at least two leading daily news papers having adequate circulation in the State as well as in concerned district inviting applications from candidates possessing prescribed training qualification from the district concerned and teacher eligibility test passed, conducted by the Government or by the Government of India.*

(1) (b) The Government may from time to time decide to appoint candidates, who are graduates along with B.Ed./ B.Ed. (Special Education)/ D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India, as trainee teachers. These candidates after appointment will have to undergo six months special training programme in elementary education recognised by National Council of Teacher Education (NCTE). The appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes. Backward Classes, and other categories under Rule 9 and advertisement would be issued in at least two leading daily news papers having adequate circulation in the State as well as in concerned district inviting applications from candidates who are graduates along with B.Ed./ B.Ed. (Special Education)/ D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India.

(1) (c) The trainee teachers, after obtaining the certificate of successful completion of six months special training in elementary education shall be appointed as assistant teachers in

Junior basic schools against substantive post in regular pay-scale. The appointing authority will be duty bound to appoint the trainee teachers as assistant teachers within one month of issue of certificate of successful completion of said training.

(2) The appointing authority shall scrutinize the applications received in pursuance of the advertisement under Clause (a) or (b) of sub-rule (1) of Rule 14 and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3) (a) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (a) of sub-rule (1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix-I:

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall-be placed higher.

(b) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (b) of sub-rule 1) of Rule 14 shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix-II:

Provided that if two or more candidates obtain equal marks, the candidates senior in age shall be placed higher.

(c) The names of candidates in the list prepared in accordance with Clause (c) of sub-rule (1) of Rule 14 for appointment as assistant teacher shall be same as the list prepared under Clause (b) of sub-rule (3) of Rule 14 unless the candidate under the said list is unable to successfully complete the six months special training course in elementary education in his first attempt. If the candidate successfully completes the six months special training in his second and final attempt, the candidate's name shall be placed under the names of all those candidates who have completed the said six months special training in their first attempt.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).

(5) The list prepared under sub-rule (2) and arranged in accordance with clause (a) and (b) of sub-rule (3) of Rule 14 shall be forwarded- by the appointing, authority to the selection committee."

ISSUE No.1

19. On the issue whether the State Government under the Scheme of the 1972 Act and the 1981 Rules or otherwise has power to determine/fix the cut off date in respect of possession of minimum educational/training qualification by a candidate, the contention on behalf of the

petitioners is that under the 1981 Rules, the appointing authority in relation to a teacher of a Basic School is the District Basic Education Officer. Rule 4 provides that there shall be separate cadre of service for each local area. Local area is defined by Rule 2 (i) as an area over which a local body exercises jurisdiction. Rule 14 (1) provides for determination of vacancies by the appointing authority and for notification of the vacancies by the appointing authority in two newspapers inviting applications from the candidates possessing prescribed qualification from the district concerned with Teacher Eligibility Test pass. According to the petitioners' counsel in the aforesaid scheme the State Government is nowhere in the picture inasmuch as it neither determines the vacancies nor it issues advertisement inviting applications from candidates, therefore, although the rule may be silent in respect of the cut off date for possession of minimum educational/training qualification but such cut off date can only be fixed by the appointing authority upon application of his own mind and not on the dictates of the State Government which has no authority whatsoever to fix a cut off date in that regard. It has been suggested that since the cut off date has not been fixed as per law, the general legal principle would apply which is that in absence of any cut off date, the minimum educational/training qualification must be possessed by an applicant by the last date of submission of an application form.

20. Per contra, on behalf of the respondents it has been submitted that section 4 of the 1972 Act provides that the Board has to organise, co-ordinate and control the imparting of basic education and teachers' training therefor in the State and to take all such steps as may be necessary and convenient for, or may be incidental to, the exercise of any power, or the discharge of any function or duty conferred or imposed on it by the Act. Section 13 of the Act provides that the Board shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of the Act. Sub-section (3) of section 13 of 1972 Act provides that the Board or any local body shall furnish to the State Government such reports, returns and other information, as the State Government may from time to time require for the purposes of the Act. Section 19 confers rule making power on the State Government in respect of recruitment and service conditions of teachers or employees of the Board. Rule 4 of 1981 Rules provides that the strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government. It has been submitted that since the strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre are to be determined by the Board from time to time with the previous approval of the State Government, therefore, the determination of vacancies by the appointing authority as contemplated by sub-rule (1) of Rule 14 of 1981 Rules is subject to the approval of the State Government. Accordingly, though Rule 14 empowers the appointing authority to determine number of vacancies but that power is subject to the determination made by the Board with the previous approval of the State Government as would be clear from Rule 4 (2) of the 1981 Rules. It has been submitted that incorporation of the proviso to sub-rule (2) of Rule 4 to the effect that the appointing authority may leave unfilled or the Board may hold in abeyance any post or any class of posts would suggest that the cadre and strength of the service has to be determined by the Board with the previous approval of the State Government whereas the appointing authority has power to notify the posts on which appointment is proposed. Therefore, the determination as contemplated by Rule 14 (1) is in respect

of the posts which the appointing authority proposes to fill up by recruitment whereas in so far as determination of the strength of the cadre of the teaching staff is concerned, that is done by the Board with the previous approval of the State Government. It has been submitted that since the Rules, 1981 are silent in respect of fixation of a cut off date for possession of minimum educational/training qualification for eligibility to apply under the advertisement, the State Government being the ultimate repository of executive power, having power to make rules, and the subject falling within the legislative competence of the State, is fully empowered by Article 162 of the Constitution of India to fix a cut off date in respect of possession of minimum educational/training qualification while granting permission to recruit teachers.

21. Having noticed the rival submissions, it is clear from the Scheme of the Act, 1972 that the State Government exercises control over the Board and is empowered to issue directions to the Board from time to time for the efficient administration of the Act. The Board or any local body has to furnish to the State Government such reports, returns and other information, as the State Government from time to time require for the purposes of the Act. Section 19 empowers the State Government to make rules to carry out the purposes of the Act and in exercise of those powers, the State Government can make Rules in respect of recruitment and the conditions of service of the persons appointed to the posts of teachers and other employees of Basic Schools. Rule 4 of the 1981 Rules clearly provides that the strength of the cadre of the teaching staff pertaining to a local area and the number of posts in the cadre is to be determined by the Board from time to time with the previous approval of the State Government which signifies that without the approval of the State Government, there can be no fruitful determination of vacancy. The aforesaid scheme reflects that the State Government receives information from the Board in respect of each local area and thereafter on the basis of such information received from time to time, approves the determination of vacancies. There is substance in the submission made on behalf of the respondents that determination of vacancies by an appointing authority as contemplated by Rule 14 of 1981 Rules is subject to determination of vacancy by the Board with the previous approval of the State Government as contemplated by Rule 4(2) of the 1981 Rules.

The determination of vacancies by the appointing authority as contemplated by Rule 14 is not in respect of determining the cadre strength, which is under Rule 4 by the Board with the approval of the State Government, but it is in respect of those posts on which appointment is proposed because the First Proviso to sub-rule (2) of Rule 4 leaves it open to the appointing authority to leave a post or posts unfilled. As the 1981 Rules are silent in respect of the cut off date for possession of minimum educational/training qualification by a candidate, who seeks to apply pursuant to an advertisement, a cut off date can be fixed by providing for it in the advertisement.

22. From the record of these petitions, it is clear that the cut off date 16.06.2016 was fixed by the State Government vide notification dated 16.06.2016 in exercise of its constitutional power, under Article 162, keeping in mind the decision of Lucknow Bench of this Court in Writ Petition (S/S) No. 326 of 2016 dated 18.04.2016, in which it was observed that in future selections, the date in which the eligibility is to be determined should be specifically fixed and not left to unforeseen circumstances as had arisen in that case.

Article 162 of the Constitution of India provides that the executive power of the State extends to those matters with respect to which the Legislature of the State has power to make laws. Such executive instructions would have force of law unless they are contrary to any statutory provision or rule. In ***Krushna Chandra Sahu (Dr) v. State of Orissa, (1995) 6 SCC 1 (para 31)***, the apex court observed as follows: *"Now, power to make rules regulating the conditions of service of persons appointed on Government posts is available to the Governor of the State under the proviso to Article 309 and it was in exercise of this power that the present rules were made. If the statutory rules, in a given case, have not been made, either by Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Government under Article 162) to issue executive instructions. However, if the rules have been made but they are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions."*

Admittedly, the State Legislature has power to legislate on the subject of Basic Education and the State Government has power to frame rules in exercise of its power conferred upon it by Section 19 of the 1972 Act. Nothing has been shown that the 1972 Act or the 1981 Rules expressly or by necessary implication conferred power to fix cut off date on any particular authority only thereby prohibiting exercise of such power by the State. Since the 1981 Rules are silent in respect of a cut off date for possession of minimum educational/training qualification, the State, therefore, is entitled to fix a cut off date in exercise of its executive power conferred upon it by Article 162 of the Constitution. Accordingly, this Court is of the view that the State Government was well within its power to fix a cut off date in respect of possession of minimum educational/training qualification by a candidate who participated in the recruitment process. The issue no. 1, as framed above, is decided against the petitioners.

ISSUE No.2

23. On the issue as to whether the cut off date 16.06.2016 violates any of the provisions of 1981 Rules, the contention on behalf of the petitioners had been that Rule 6 of 1981 Rules provided a cut off date in respect of age qualification of a candidate by providing that a candidate must have attained the age of Twenty one years and must not have attained the age of more than thirty-five years on the first day of July following the year in which the vacancy is notified, which provides guidance to the appointing authority that by the first day of July of the following year in which the vacancy is notified, the candidate should be possessed of all essential qualifications including minimum educational/training qualification and, therefore, fixation of a cut off date even before the date of advertisement is in violation of Rule 6 of the Rules, 1981.

In response to the above submission, on behalf of the respondents, it has been submitted that Rule 6 fixes a cut off date in respect of age and not in respect of possession of minimum educational/training qualification and therefore there is no prohibition under the Rules to fix a different cut off date for possession of minimum educational/training qualification.

24. Having noticed the submissions of the learned counsel for the parties on issue no.2 as also on perusal of the provisions of 1972 Act and the 1981 Rules, this Court finds that Rule 6 does not prohibit a separate cut off date for possessing educational/ training qualification by a candidate for being eligible to participate in a recruitment process than what is fixed for age qualification. Even otherwise, it would be logical to ensure that a candidate before applying possesses the requisite educational / training qualification because it is quite possible that a recruitment process may culminate before the first day of July of the following year in which the vacancy is notified therefore if, by that time, a candidate is not possessed of requisite educational/ training qualification the whole exercise of considering his candidature would be in vain and would only result in confusion. Therefore, Rule 6 of 1981 Rules cannot be considered as a determining factor while fixing a cut off date for possessing minimum educational/ training qualification. This court is thus of the considered view that there is nothing in 1981 Rules which may suggest that the cut off date 16.06.2016 is violative of 1981 Rules. The issue no.2 is also decided against the petitioners.

ISSUE No.3

25. Before deciding the issue whether the cut off date 16.06.2016 is arbitrary and discriminates persons similarly situated on no intelligible criteria or not, it would be useful to first examine the purpose for which a cut off date is fixed for determining eligibility of a candidate qua a recruitment process. The purpose of fixing a cut off date is to avoid uncertainty and to ensure that the employer is not flooded with applications of ineligible candidates. A cut off date for the purpose of determining the eligibility of candidates must therefore be fixed and in absence of any Rule or any specific date fixed in the advertisement, the last date for filling up of applications is to be treated as the cut off date for possessing eligibility qualification. In ***Bhupinderpal Singh and others v. State of Punjab and others : (2000) 5 SCC 262*** , the Hon'ble Apex Court had deprecated the practice prevalent in the State of Punjab to determine the eligibility with reference to the date of interview. In paragraph 14 of its judgment, as per the report, the Apex Court had observed as follows:-

*"**14.** In view of several decisions of this Court relied on by the High Court and referred to herein above, it was expected of the State Government notifying the vacancies to have clearly laid down and stated the cut off date by reference to which the applicants were required to satisfy their eligibility. This was not done. It was pointed out on behalf of the several appellants/petitioners before this Court that the practice prevalent in Punjab has been to determine the eligibility by reference to the date of interview and there are innumerable cases wherein such candidates have been seeking employment as were not eligible on the date of making the applications or the last date appointed for receipt of the applications but were in the process of acquiring eligibility qualifications and did acquire the same by the time they were called for and appeared at the interview. Several such persons have been appointed but no one has challenged their appointments and they have continued to be in public employment. Such a loose practice, though prevalent, cannot be allowed to be continued and must be treated to have been put to an end. The reason is apparent. The applications made by such candidates as were not qualified but were in the process of acquiring eligibility qualifications would be difficult to be scrutinised and*

subjected to the process of approval or elimination and would only result in creating confusion and uncertainty. Many would be such applicants who would be called to face interview but shall have to be returned blank if they failed to acquire requisite eligibility qualifications by the time of interview. In our opinion the authorities of the State should be tied down to the principles governing the cut off date for testing the eligibility qualifications on the principles deducible from decided cases of this Court and stated herein above which have now to be treated as the settled service jurisprudence."

26. At this stage, it would be useful to notice a judgment of a Division Bench of this court which was reversed by the apex court. In Alpana Vs. U.P. Public Service Commission and Another, (Writ No.18918 of 1991) decided on 17.03.1993, a Division Bench of this Court while considering the question of eligibility of candidate, who had not acquired the requisite qualification by the cut off date but had given examination for the same and was awaiting result, had observed that the declaration of result relates back to the date of the examination therefore the candidate would be deemed eligible on the cut off date. Upturning the decision of this court, the apex court in ***U.P. Public Service Commission, U.P. v. Alpana, (1994) 2 SCC 723***, observed: *We find it difficult to give recognition to such an approach of the High Court as that would open up a flood of litigation. Many candidates superior to the respondent in merit may not have applied as the result of the examination was not declared before the last date for receipt of applications. If once such an approach is recognised there would be several applications received from such candidates not eligible to apply and that would not only increase avoidable work of the selecting authorities but would also increase the pressure on such authorities to withhold interviews till the results are declared, thereby causing avoidable administrative difficulties. This would also leave vacancies unfilled for long spells of time. We, therefore, find it difficult to uphold the view of the High Court impugned in this appeal.*

27. Now, it would be useful to notice the law as laid down by apex court in several judicial pronouncements in respect of the scope of judicial review when a challenge is made to a cut off date. In ***State of Bihar v. Ramjee Prasad, (1990) 3 SCC 368***, while negativing a challenge to the cut off date fixed for possessing the requisite experience, the apex court observed as follows:

*"**8.** In the present case as pointed out earlier the past practice was to fix the last date for receipt of applications a month or one and a half months after the date of actual publication of the advertisement. Following the past practice the State Government fixed the last date for receipt of applications as January 31, 1988. Those who had completed the required experience of three years by that date were, therefore, eligible to apply for the posts in question. The respondents and some of the intervenors who were not completing the required experience by that date, therefore, challenged the fixation of the last date as arbitrary and violative of Article 14 of the Constitution. It is obvious that in fixing the last date as January 31, 1988 the State Government had only followed the past practice and if the High Court's attention had been invited to this fact it would perhaps have refused to interfere since its interference is based on the erroneous belief that the past practice was to fix June 30 of the relevant year as the last date for receipt of applications. Except for leaning on a past practice the High Court has not assigned any*

reasons for its choice of the date. ***As pointed out by this Court the choice of date cannot be dubbed as arbitrary even if no particular reason is forthcoming for the same unless it is shown to be capricious or whimsical or wide off the reasonable mark. The choice of the date for advertising the posts had to depend on several factors, e.g. the number of vacancies in different disciplines, the need to fill up the posts, the availability of candidates, etc. It is not the case of anyone that experienced candidates were not available in sufficient numbers on the cut-off date. Merely because the respondents and some others would qualify for appointment if the last date for receipt of applications is shifted from January 31, 1988 to June 30, 1988 is no reason for dubbing the earlier date as arbitrary or irrational.*** *We are, therefore, of the opinion that the High Court was clearly in error in striking down the government's action of fixing the last date for receipt of applications as January 31, 1988 as arbitrary."*

(Emphasis Supplied)"

In ***Ramrao v. All India Backward Class Bank Employees Welfare Assn., (2004) 2 SCC 76***, the apex court while considering a challenge to fixation of a particular cut off date observed as follows:

"Cut-off date"

29. *It is now well settled that for the purpose of effecting promotion, the employer is required to fix a date for the purpose of effecting promotion and, thus, unless a cut-off date so fixed is held to be arbitrary or unreasonable, the same cannot be set aside as offending Article 14 of the Constitution of India. In the instant case, the cut-off date so fixed having regard to the directions contained by the National Industrial Tribunal which had been given a retrospective effect cannot be said to be arbitrary, irrational, whimsical or capricious.*

30. *The learned counsel could not point out as to how the said date can be said to be arbitrary and, thus, violative of Article 14 of the Constitution of India.*

31. *It is not in dispute that a cut-off date can be provided in terms of the provisions of the statute or executive order. In University Grants Commission v. Sadhana Chaudhary it has been observed:*

"21. ... It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide off the reasonable mark. (See: Union of India v. Parameswaran Match Works, and Sushma Sharma (Dr) v. State of Rajasthan)"

32. *If a cut-off date can be fixed, indisputably those who fall within the purview thereof would form a separate class. Such a classification has a reasonable nexus with the object which the decision of the Bank to promote its employees seeks to achieve. Such classifications would neither fall within the category of creating a class within a class or an artificial classification so as to offend Article 14 of the Constitution of India.*

33. *Whenever such a cut-off date is fixed, a question may arise as to why a person would suffer only because he comes within the wrong side of the cut-off date, but, the fact that some persons or a section of society would face hardship, by itself cannot be a ground for holding that the cut-off date so fixed is ultra vires Article 14 of the Constitution."*

28. From the law noticed above a cut off date cannot be challenged merely because one comes within the wrong side of the cut off date. Whenever a cut off date is fixed some persons or a section of society would face hardship but that, by itself, cannot be a ground for holding the cut off date so fixed to be ultra vires Article 14 of the Constitution. A choice of date cannot be dubbed as arbitrary even if no particular reason is forthcoming for the same unless it is shown to be capricious or whimsical or wide off the reasonable mark. The choice of the date for advertising the posts had to depend on several factors, e.g. the number of vacancies in different disciplines, the need to fill up the posts, the availability of candidates, etc.

29. In these batch of writ petitions, what has been sought to be argued is that the State was through out aware that BTC training batch of the year 2013 had given their examinations in the month of May, 2016 and their results were not declared, therefore, the cut off date ought not to have been fixed in such a manner that they be excluded from consideration only because their results could not be declared by the date, so fixed. The argument on behalf of the petitioners is that by fixation of such cut off date, a large section of trained candidates has been excluded from consideration because under the circumstances only the BTC batch of the year 2011-12 would be brought within the zone of consideration and, therefore, the selection would not be broad based and would affect the quality of teachers appointed.

30. The above submission cannot be accepted for two reasons. Firstly, because BTC -2013 batch is of a subsequent year than the BTC 2011 and 2012 batches, therefore it is not a case where the cut off date creates a class within a class as has been suggested on behalf of the petitioners by placing reliance on several judgments which relate to fixation of cut off dates in respect of eligibility to pensionary benefits payable to already retired employees which constitute a single class. Secondly, it has not been demonstrated by the petitioners that sufficient number of qualified and trained candidates are not available for the posts. Accordingly, the challenge that the cut off date does not satisfy the test of intelligible differentia, cannot be accepted. Under the circumstances, the bald assertion that the cut off date has been maliciously fixed to cater to earlier batches has no legs to stand. Further, it cannot be said that the cut off date is wide off the mark. It is well within a month of the last date for submission of the application form and it correlates with the date on which permission was accorded by the State Government to fill up the vacancies that had been admittedly identified in the year 2015 as part of 19,948 vacancies.

31. At this stage, another submission made on behalf of the petitioners needs to be noticed which is that the 16448 posts of Assistant Teachers were not created by Government Order dated 16.06.2016 but were identified and approved by a Government Order dated 29th July, 2015 whereby 19,948 posts of Assistant Teacher in the Basic Schools were determined. It has been submitted that out of those 19,948, 3,500 posts were converted into that of Assistant Teacher (Urdu Language) by Government Order dated 14th December, 2015 and in respect of those 3,500 posts, the recruitment process was initiated on 05th January, 2016 in which the cut off date for possession of minimum educational/training qualification was the last date for submission of the application. It has, therefore, been submitted, on behalf of the petitioners, that there cannot be two different criteria for fixation of cut off date of eligibility in respect of vacancies that were identified and determined by a common notification.

32. The above submission on behalf of the petitioners cannot be countenanced because though 19,948 posts were identified and determined by Government Notification dated 29th July, 2015 but decision to fill up those vacancies was not taken and thereafter 3,500 posts of Assistant Teacher (Urdu Language) were segregated for which a recruitment process was initiated separately. From a bare reading of notification dated 29th July, 2015 it is clear that though the Government had identified and determined the vacancies but had declared that the vacancies would be filled in stages, as per need and budgetary support. Therefore, once 3500 posts were converted into posts of Assistant Teacher (Urdu Language) they constituted a separate class and recruitment on the said posts was also separately initiated by notification dated 5th January, 2016 whereas in respect of the posts concerning the present petitions by notification dated 16th June, 2016, a decision was taken by the State Government to fill up the posts.

33. There is another aspect to the matter which is that the fourth proviso to Rule 6 of 1981 Rules seeks to take care of the candidates who could not get appointed within the prescribed age limit because of non-availability of vacancy in the district after successful completion of a course of training prescribed for teachers of Basic Schools. The said proviso provides that where after successful completion of a course of training prescribed for teachers of Basic Schools, a candidate does not get appointed due to non-availability of vacancy in the district, the period he has remained unappointed shall not be counted for the calculation of his age provided he has not attained the age of more than fifty years on the date of appointment. The above provision reflects the legislative intent to ensure consideration of all trained candidates subject to a limit. Therefore, even if the cut off date fixed by the Government leans in favour of the earlier batches of BTC course that by itself would not be a ground to hold the cut off date as arbitrary keeping in mind the legislative intent behind the 1981 Rules as also that they form a separate class.

34. In view of the discussion made above, this Court is of the view that the cut off date 16.06.2016 suffers neither from the vice of arbitrariness nor it can be said that it discriminates similarly situated persons on no intelligible criteria. The issue no.3 is also decided against the petitioners.

35. In view of the conclusions drawn above, these writ petitions must fail and are accordingly **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2016

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Writ A No.- 45376 Of 2012

State Of U.P. & Ors. ...Petitioners
Versus
Munshi Lal Baghel & Ors. ...Respondents

Counsel for Petitioners:
Ms. Meenakshi Singh & Sri R.B. Pradhan

Counsel for Respondents:
S.C.

Held

Seniority of Seenchpal (Patrol) is determined **Division-wise**, not on the basis of initial appointment in another Division.
Baghel was initially appointed in **Moradabad Division on 1 April 1981**, but he was transferred to **Aligarh Division on his own request** by order dated 31 July 1987.
The transfer order specifically stipulated that:
On transfer, he would be treated as **junior-most Seenchpal in the Aligarh Division**.
He joined without protest and accepted the condition.
The Circular dated 22 July 1967 issued by the Chief Engineer governing transfer of Patrols clearly provides that:
A transferred employee shall be placed **below the junior-most permanent or temporary employee in the transferee Division**.
Since seniority lists are prepared Division-wise and no common cadre seniority exists, Baghel could not claim seniority in Aligarh Division from his initial appointment date (1 April 1981).
The Tribunal erred in directing that his seniority be counted from 1 April 1981 and in placing him above Rakesh Chandra Srivastava.
The order of the Tribunal dated 29 October 2010 was illegal and unsustainable.
The writ petition was allowed and the claim petition filed by Baghel stood dismissed.

CASE LAW CITED

None

(Delivered by Hon'ble Dilip Gupta, J.

&
Hon'ble Prabhat Chandra Tripathi, J.)

1. The State of Uttar Pradesh and its officers have filed this petition to assail the order dated 29 October 2010 passed by State Public Services Tribunal, Lucknow1 in Claim Petition No. 1511 of 2007 that was instituted by Munshi Lal Baghel2 who has been impleaded as respondent no.1 in this petition.

2. The said claim petition was filed by Baghel, who was working on the post of Seenchpal, for a direction upon the opposite parties in the claim petition to place him in the final seniority list dated 7 March 2007 at the correct position between serial Nos. 10 and 11 and to grant him promotion on the post of 'Seench Paryavekshak' from the date persons at serial Nos. 10 and 11 were promoted with all consequential benefits.

3. The Tribunal by order dated 29 October 2010 allowed the claim petition and directed the opposite parties to re-fix the seniority of the applicant above the name of Rakesh Chandra Srivastava (who was placed at serial No.11) and, if he was found fit, then to consider his case for promotion on the post of 'Seench Paryavekshak' from the date promotion was granted to Rakesh Chandra Srivastava and, if promoted, to grant all the consequential benefits.

4. On 18 September 2012, while entertaining the writ petition, the Court had stayed the operation of order dated 29 October 2010 passed by the Tribunal and also issued notice to respondent nos. 1, 3 and 4. Sri Ranjeet Saxena, has put in appearance on behalf of respondent No.1. Office has reported that steps were taken to serve notice on respondent Nos. 3 and 4 by registered post on 24 September 2012 but neither acknowledgement due nor unserved notices have been received in the office. In such circumstances, notices on respondent Nos. 3 and 4 shall be deemed to have been served. No one has, however, put in appearance on behalf of respondent Nos. 3 and 4.

5. It transpires from the records that Baghel was initially posted as a Seenchpal on 1 April 1981 under the Executive Engineer, Feeder Channel Division-I, Moradabad. He, however, made a request for transfer to the Aligarh Division and by an order dated 31 July 1987, his request for transfer was accepted and he was transferred to Aligarh Division. He, consequently, joined at Narora, Lower Ganga Canal, Aligarh on 24 August 1987 pursuant to the aforesaid order dated 31 July 1987. This order dated 31 July 1987 clearly mentions that on transfer, Baghel shall be treated to be junior to all the employees of the Division. A seniority list of the Aligarh Division was prepared in which Baghel was placed below Rakesh Chandra Srivastava.

6. This is what prompted Baghel to file a claim petition before the Tribunal and it was sought to be contended before the Tribunal that his seniority should be counted from 1 April 1981 when he was initially appointed as Seenchpal in the Moradabad Division and not from the date when he joined at Aligarh Division on 24 August 1987 pursuant to the request made by him for transfer. This plea has found favour of the Tribunal and it has, accordingly, directed for refixation

of his seniority above that of Rakesh Chandra Srivastava, who had been appointed in the Aligarh Division on 16 June 1981.

7. Ms. Meenakshi Singh, learned Standing Counsel appearing for the petitioners has contended that the Tribunal erred in holding that the seniority of Baghel in the Aligarh Division, where he had joined his duty on 24 August 1987 pursuant to the transfer sought by him, should be counted from 1 April 1981. In support of her contention, learned Standing Counsel has placed reliance not only on the transfer order dated 31 July 1987 but also on the Circular dated 22 July 1967 issued by the office of the Chief Engineer relating to the transfer of Amins, Patrols, Tube-well Operators. Learned Standing Counsel has also submitted that seniority is determined Division-wise and, therefore, the Tribunal erred in law in giving seniority to Baghel from 1 April 1981.

8. Sri Ranjeet Saxena, learned counsel appearing for respondent no.1-Baghel has, however, contended that the order passed by the Tribunal does not call for any interference by this Court under Article 226 of the Constitution. His submission is that the Tribunal committed no illegality in holding that seniority of Baghel should be counted from 1 April 1981, which is the date on which he was initially posted in Moradabad Division and that the Circular issued by the Chief Engineer in the Irrigation Department would be of no relevance. He further contended that the Irrigation Department Patrols Service Rules, 1953 have not been followed by the Department. It is also his contention that Baghel had never made a request for his transfer.

9. We have considered the submissions advanced by the learned counsel for the parties.

10. It is not in dispute that Baghel was appointed as Seenchpal in Moradabad Division on 1 April 1981. It is also not in dispute that he was transferred to Narora Khand, Lower Ganga Canal, Aligarh Division, by order dated 31 July 1987. A perusal of the order dated 31 July 1987 clearly shows that on transfer to the Aligarh Division Baghel would be the junior-most Seenchpal. Baghel joined at Aligarh fully conscious of the condition mentioned in the transfer order and did not raise any objection.

11. The Circular dated 22 July 1967 issued by Chief Engineer, relates to the transfers of Amins, Patrols and Tube-Well Operators in the Divisional Cadre. It is not in dispute that Seenchpal is a Patrol. Transfers of patrol are governed by the Circular. This Circular provides that a patrol or tube-well operator shall be placed below the junior-most permanent or temporary patrol or tube-well operator working in the Division where they are transferred. This fact was also absolutely made clear in the transfer order.

12. The Tribunal has recorded a finding that Baghel had made a request for his transfer and the condition contained in the transfer order dated 31 July 1987 also supports this view. It is, therefore, not possible to accept the contention of learned counsel for Baghel that he had not made any request for transfer.

13. The Tribunal has given its decision regarding seniority of Baghel by treating the date of joining of Baghel at the Moradabad Division on 1 April 1981 for the purpose of seniority in the Aligarh Division. The seniority list, on which reliance has been placed by Baghel, is Division-wise and there is nothing on the record to indicate that a common seniority list is prepared. The Circular dated 22 July 1967 also supports this view. In the transfer order of Baghel, it was also clearly stated that on transfer, Baghel would be treated as junior-most Patrol in the Division. The Tribunal could not have, therefore, directed for placement of Baghel in the seniority list above Rakesh Chandra Srivastava by treating his appointment as 1 April 1981 in the Aligarh Division. When the seniority is determined Division-wise, the U.P. Government Servants Seniority Rules, 1991 and the Irrigation Department Patrols Service Rules, 1953 would not enure any benefit to Baghel. It is, therefore, apparent that the Tribunal committed an illegality in holding that the seniority of Baghel should be counted from 1 April 1981 in the Aligarh Division and he should be placed above Rakesh Chandra Srivastava who is at Serial No.11.

14. The order dated 29 October 2010 passed by the Tribunal, therefore, cannot be sustained. It is, accordingly, set aside. The writ petition is, accordingly, allowed and the claim petition filed by Baghel before the Tribunal stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 52336 Of 2015

Chintamani Upadhyaya **...Petitioner**
Versus
State Of U.P & Ors. **...Respondents**

Counsel for Petitioner:
Rahul Jain

Counsel for Respondents:
C.S.C., Sri R.C. Dwivedi
Held

The impugned order dated 20.08.2015 approving the transfer of the sixth respondent is **vitiated for violation of principles of natural justice**.
The petitioner was denied a fair opportunity of hearing because:
(i) His absence on the final date was for bona fide reasons and not deliberate;
(ii) Copies of documents submitted by the sixth respondent were not supplied to him despite a written request dated 14.08.2015;
(iii) The authority failed to consider the detailed objections submitted by the petitioner.

Supply of material relied upon is a mandatory facet of audi alteram partem. Failure to furnish documents before hearing amounts to a grave procedural illegality.
Even if the petitioner was absent on the last date, the authority was duty-bound to consider his written objections. Non-consideration itself vitiates the order.
The argument that hearing before the High Court cures violation of natural justice was rejected. An order passed in violation of natural justice is a nullity.
The impugned order dated 20.08.2015 was set aside and the matter remitted to the competent authority for fresh decision after affording opportunity to all concerned parties.
The sixth respondent may continue in the institution, but his continuance shall abide by the fresh decision.

CASE LAW CITED

Ramadhar Shastri Adarsh Shastri v. Deputy Director of Education
Committee of Management Vaidik Higher Secondary Schools v. District Inspector of Schools
Committee of Management, Devatrya Adarsh Inter College v. Deputy Director of Education
Mohinder Singh Gill v. Chief Election Commissioner
A.R. Antulay v. R.S. Nayak
Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa
Indira Nehru Gandhi v. Raj Narain
S.L. Kapoor v. Jagmohan
Ramadhar Shastri Adarsh Shastri v. Deputy Director of Education
Committee of Management Vaidik Higher Secondary Schools v. District Inspector of Schools
Committee of Management, Devatrya Adarsh Inter College v. Deputy Director of Education
Mohinder Singh Gill v. Chief Election Commissioner
Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa
Indira Nehru Gandhi v. Raj Narain
S.L. Kapoor v. Jagmohan

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner is an officiating Principal of a recognized institution, namely, Shyam Krishna Inter College. He has instituted this writ proceedings for issuing a writ of certiorari to quash the order dated 20th August, 2015 passed by the second respondent, whereby petitioner's representation has been rejected against the transfer of the sixth respondent and the order dated 24th August, 2015.

2. A brief reference to the factual aspects would suffice.

3. Shyam Krishna Inter College, Thawaipar, Gorakhpur (for short, the "Institution") is a recognized intermediate college. It receives financial aid from the State Government. The provisions of U.P. Intermediate Education Act, 1921 (U.P. Act No. II of 1921), the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971), and the U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982) are applicable to the Institution.

4. It is stated that a vacancy arose in the office of Principal of the Institution on 30th June, 2015. The petitioner being the senior most lecturer in the Institution was appointed as an officiating

Principal. The District Inspector of Schools is stated to have approved his appointment. He is functioning as officiating Principal since 13th July, 2015.

5. The Committee of Management has sent a requisition to the U.P. Secondary Education Services Selection Board1 for the selection of a permanent Principal. It appears that in the meantime the sixth respondent who was selected by the Board in the year 2010 as a Principal in Sri Ganga Bux Kannodia Gandhi Inter College, Kaptanganj, Kushinagar, who later transferred to Neta Subhash Krishi Sainik Inter College, Vinod Nagar, Maulaganj, Maharajganj, moved an application on 26th September, 2014 for his transfer to Shyam Krishna Inter College, Thawaipar, Gorakhpur.

6. It is stated that the application of the sixth respondent for his transfer to Shyam Krishna Inter College, Thawaipar, Gorakhpur2 was not considered in terms of Regulation-55 under Chapter-III of the Regulations framed under the U.P. Act No. II of 1921 and he was illegally transferred to the Institution where the Petitioner is working as Officiating Principal. The petitioner had preferred a writ petition3 prior to the sixth respondent's application was considered. This Court did not entertain his petition on the ground that it was a premature petition. His writ petition was dismissed as such, leaving it open to the petitioner to move this Court at appropriate stage.

7. It is stated that the petitioner submitted a representation dated 08th June, 2015 along with annexures and certified copy of the order of this Court dated 25th May, 2015. The second respondent fixed 16.7.2015 for hearing of the matter. However, prior to the said date the petitioner sent an application on 14.7.2015 requesting to fix some other date as his wife was not well. The second respondent fixed 27.7.2015 for hearing the matter and an information was sent to the petitioner vide letter dated 20.7.2015. The petitioner could not appear on 27.7.2015 on the ground that the letter intimating him the date 27.7.2015 was received by him on 27.7.2015 itself. The second respondent fixed 14.8.2015. On the said date the petitioner attended the office of the second respondent but no hearing took place and he was informed that the Director has gone to Lucknow. On the same day the petitioner submitted an application in his office, which was duly said to be received by the concerned clerk, demanding copies of the documents submitted by the sixth respondent. The said application is on the record as annexure-14 to the writ petition. When the petitioner came back to Gorakhpur, he was informed that the next date is fixed as 18.8.2015 i.e. only four days after the previous date. The petitioner got his reservation for Allahabad. In support of the said statement, he has brought on record railway reservation tickets from Gorakhpur to Allahabad and Allahabad to Gorakhpur, but the petitioner could not appear on the said date as he suddenly fell ill and got admitted in the hospital on 17.8.2015 and remained under medical treatment from 17.8.2015 to 19.8.2015. Thus, for the said reason he could not travel to Allahabad to attend the hearing. On 18.8.2015 the second respondent proceeded to hear the matter ex parte and passed the impugned order dated 20.8.2015.

8. It is also stated that on 14th August, 2015 the petitioner had moved an application that copies of the documents submitted by the sixth respondent in the office of the second respondent, may be supplied to him also.

9. I have heard learned counsel for the petitioner Sri Rahul Jain, learned Standing Counsel, and Sri R.K. Ojha, learned Senior Advocate assisted by Sri R.C. Dwivedi, learned counsel for the sixth respondent.

10. It is contended on behalf of the petitioner that the impugned order has been passed in utter disregard to the principles of natural justice. It is stated that sixth respondent had fixed total four dates, the petitioner had attended his office on previous dates but on 20.8.2015 the second respondent in his absence passed the order impugned without hearing him. He further submitted that the papers submitted by the sixth respondent were not supplied to him.

11. The next submission of learned counsel for the petitioner is that the sixth respondent is on probation and in fact he was placed under suspension by the Management of Sri Ganga Bux Kannodia Gandhi Inter College, Kushinagar (for short, the 'institution at Kushinagar') on 02nd September, 2010. The suspension order was approved by the District Inspector of Schools4 on 27th October, 2010. The said order was not challenged by the sixth respondent. He further submits that after the disciplinary proceedings the Committee of Management of the said institution found that the sixth respondent was guilty of misdemeanor. The charges in respect of financial misconduct stand proved. The Committee of Management of the said institution accepted the enquiry report and resolved to dismiss the sixth respondent.

12. It is further submitted that the resolution of the Committee of Management was forwarded by the DIOS on 28th April, 2011 to the Board. When the said proposal for approval of dismissal of the sixth respondent was pending consideration before the Board, an application was moved by the Committee of Management of the institution at Kushinagar to send back the papers with regard to dismissal of the sixth respondent on the ground that the Committee of Management has resolved to withdraw the departmental proceedings.

13. The disciplinary committee of the Board vide resolution dated 27th November, 2012 has returned all the papers to the committee of management of the concerned institution. It is stated that after the disciplinary proceedings were withdrawn, the sixth respondent has been transferred to the present Institution. It has been further urged by the learned counsel for the petitioner that under the amended regulation a three-member committee was constituted to consider the matter of transfer. In the meeting, in which the committee has taken the decision, one of the members of the committee, namely, the Secretary of the Board was not present hence two members have taken decision with regard to transfer of the sixth respondent.

14. Learned Senior Advocate appearing for the sixth respondent Sri R.K.Ojha submits that the sixth respondent is a regular Principal, therefore, in terms of Regulation-55 of Chapter-III of the Regulations framed under the U.P. Act No. II of 1921 he can be transferred even if he is on probation. He further submits that the Committee constituted in terms of Regulation-55 of Chapter-III had considered the matter of the petitioner and out of three members, two members were present, therefore, the decision taken by the committee with regard to approval of transfer of the

sixth respondent, was legal and there was no illegality, if a third member was not present in the meeting.

15. Lastly, Sri Ojha submits that even if there is a violation of principles of natural justice, the petitioner has been heard by this Court, therefore, now the said illegality stands cured. He also urged that the committee of management of the institution concerned is the appointing authority; therefore, it was well within its jurisdiction to withdraw the entire disciplinary proceedings. Accordingly the Committee of Management of the institution at Kushinagar made a request to the Board to return the papers. The Board has rightly acceded to the request of the Committee of Management of the said institution hence there is no illegality.

16. Learned Standing Counsel has adopted the submissions of Sri R.K. Ojha, learned Senior Advocate.

17. I have considered the rival submissions and perused the record.

18. It is a common ground that the petitioner is an officiating Principal. His appointment was approved by the DIOS. He had preferred a writ petition earlier when the transfer proceedings of the sixth respondent were pending. His writ petition was disposed as pre-mature with liberty to approach this Court at appropriate stage. After dismissal of his writ petition, he moved a representation before the second respondent that he may be heard when the matter of the sixth respondent is considered for transfer. On the three dates, mentioned above, the hearing could not take place. On 14th August, 2015 when the petitioner attended the office of the second respondent he was informed that the officer concerned is out of station. He submitted an application on 14th August, 2015 which is on the record. In his application he made a prayer that the copy of the documents submitted by the sixth respondent be supplied to him. It has not been denied that the no order was passed on his application, neither document was supplied to him.

19. Indisputably, the office of the second respondent did not supply copy of the documents submitted by the sixth respondent in spite of the fact that on 14.8.2016 the petitioner has demanded the said documents by submitting an application on the said date. This Court in the case of **Ramadhar Shastri Adarsh Shastri and another v. Deputy Director of Education, IV Region, Allahabad and others5** has considered the effect of non-supply of documents. The Court has observed that reversal of such a process results in grave error of procedure which vitiates the order. The Court held as under:

"2. ...Filing of documents should have preceded the hearing. The Deputy Director in reversing the process committed grave error of procedure which vitiated his order."

20. A similar view has been taken by a Division Bench of this Court in the case of **Committee of Management Vaidik Higher Secondary Schools v. District Inspector of Schools6**. In the said case, the Court held that one of the facets of principles of natural justice is that all the materials, on which the decision is based, should be apprised to the effected party and

he must be given opportunity to adduce evidence or material in his favour. If an action is taken against a person on the basis of certain material or evidence without bringing the same to the notice of such person is violative of procedural safeguard. The said decision has been followed by this Court in the case of **Committee of Management, Devatrya Adarsh Inter College, Bulandshahr and another v. Deputy Director of Education and others7**.

21. I have also seen the objections filed by the petitioner before the second respondent, which is on the record as annexure-11 to the writ petition. The second respondent while passing the order of transfer of the sixth respondent has not adverted to various points raised by the petitioner in his objections.

22. Even if the petitioner was not present on the date when the matter was heard by the second respondent, he ought to have considered various objections raised by the petitioner. Not considering those objections, itself, vitiates the impugned order as one of the facets of natural justice is that the point raised by a person against whom the order is passed, be considered even if the personal hearing is not necessary.

23. In view of the facts mentioned above, I find that the impugned order stands vitiated and it is in violation of principles of natural justice on the following grounds:

(i) the petitioner was prevented from sufficient ground to appear before the second respondent. There is no material on record that he deliberately adopted dilatory tactics, on the contrary, it appears that his absence was for bonafide reasons;

(ii) the material relied upon by the second respondent in his order, was not supplied to the petitioner;

(iii) the second respondent has not adverted to the detailed objections filed by the petitioner.

24. Coming to the submissions made by learned Senior Advocate that there are exceptions on natural justice and since this Court has heard the petitioner, as such there is no need to remit the matter to the authority concerned as the principles of natural justice have now been complied with, I am unable to subscribe the submissions made by learned Senior Counsel.

25. The natural justice is a requirement of fair play in action in a civilized justice system and good governance. One of its purpose is prevention of miscarriage of justice. Over the times the thin line between the administrative and quasi-judicial authorities has stand obliterated by a catena of decisions of the Supreme Court. The principles of natural justice have now an important place in modern administrative law. The issuance of natural justice is "fair play in action". In the words of Justice Krishna Iyer in the case of **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others8** it is not a bull in china shop nor it is a bee in one's bonnet.

It's essence is good conscience in a given situation; nothing more - but nothing less. Relevant part of the said judgement reads thus:

"48. ...It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more ---but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation."

26. The Supreme Court has quoted with approval the judgement of **A.R. Antulay v. R.S. Nayak and another9** in the case of **Rajasthan State Road Transport Corporation and another v. Bal Mukund Bairwa (2)10**, relevant part of which reads as under:

"35. Any order passed in violation of the principles of natural justice save and except certain contingencies of cases, would be a nullity. In A.R. Antulay (supra), this Court held: (SCC p. 660, para 55)

"55. ...No prejudice need be proved for enforcing the fundamental rights. Violation of a fundamental right itself renders the impugned action void. So also the violation of the principles of natural justice renders the act a nullity.""

27. The Supreme Court in the case of **Smt. Indira Nehru Gandhi v. Shri Raj Narain11**, has held that if an authority/ body is given power without any specific provision that rules of natural justice shall apply, the principle of natural justice would apply. Similar view was taken by the Supreme Court in **S.L. Kapoor v. Jagmohan and others12**.

28. Having due regard to the facts of the case, in my view, the impugned order dated 20.8.2015 is illegal for the reasons stated above and stands vitiated. It is accordingly set aside. Parties are at liberty to raise all other issues before the authority concerned/ the second respondent who shall decide the matter after furnishing opportunity to the petitioner and the sixth respondent as well as the Committee of Management of the Institution. The said exercise shall be completed expeditiously, not later than three months from the date of communication of this order.

29. The sixth respondent has joined the Institution and is working for the last one year. In view of the said facts, in my view he may continue but his continuance shall abide by the result of the fresh order to be passed by the second respondent.

30. The writ petition is, accordingly, allowed.

31. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.07.2016

BEFORE

THE HON'BLE SUDHIR KUMAR SAXENA, J.

Election Petition No.- 1 Of 2012

Ajay Kumar **...Petitioner**
Versus
Sri Bhim Prasad Sonkar **...Respondent**

Counsel for Petitioner:
Subhash Vidyarthi

Counsel for Respondent:
H S Jain, Manish Mathur, Sanjay Kumar

This Election Petition filed under Section 80 of the Representation of People Act 1951 (hereinafter referred to as 'the Act') challenges the election of Sri Bhim Prasad Sonkar (respondent) elected as Member to the Legislative Assembly from Alapur (279) constituency of District Ambedkar Nagar. No prayer for declaring petitioner- Ajay Kumar as elected Member of the Legislative Assembly has been made.

Briefly stated petitioner's case is that general elections to the Legislative Assembly were notified in the year 2012. Petitioner belongs to *Gond* caste, which is a Scheduled Castes and armed with a caste certificate, issued by Tehsildar, Akbarpur, Faizabad, on 27.09.1979, he had successfully contested the election of Pradhan, Gram Panchayat, Sugauti in the year 2010. Petitioner wanted to contest the election of the legislative assembly as such, he requested Returning Officer/ADM (Finance) to provide him nomination form which was not issued, asking petitioner to produce his caste certificate, issued after the year 1985, which demand was wholly unjustified.

Contention of Sri Subhash Vidyarthi, counsel for petitioner is that once he is able to show procedural irregularity or infraction of instructions issued by the Election Commission, it has to be assumed that nomination paper has been improperly rejected, and therefore, nothing more is required to be seen while submission of Sri H.S. Jain, learned counsel is that on merits also High Court has to see whether petitioner had a right to contest.

If a person is not qualified to contest the election and there is some procedural error in rejecting the nomination paper, holding that order is erroneous, same would not remove the disqualification and High Court has to decide whether person is eligible to contest the election or not. High Court, being original

Court in the election matters, has to give its decision on merits as well on impropriety in rejection of nomination paper. Order has to be correct on both counts procedural as well as substantive. On merits also petitioner has to satisfy that he was qualified to contest. Court is of the view that in this election petition not only decision making process adopted by Returning Officer but also genuineness of petitioner's claim to contest the election has to be examined.

After analyzing the fact, Court is not satisfied with the procedure adopted by the Returning Officer while rejecting the nomination paper Returning Officer has not adhered to Section 36 of the Act as well as guidelines issued by the Election Commission of India. Neither he has raised presumption of validity of the nomination paper nor sent the certificate for verification to the authority issuing it, as such, he has failed to follow the instructions issued by the Election Commission of India. It has been stated above that mere regularity in procedure in rejecting the nomination paper will not be sufficient to declare the election void unless it is found that on merits also, decision was not sustainable. Controversy does not rest here as it is settled position that High Court does not sit in appeal against the order passed by Returning Office while exercising original jurisdiction and therefore, High Court will have to record the finding on the basis of material available whether nomination was rightly rejected and whether applicant was qualified to contest the election.

Court is of the opinion that petitioner has not been able to establish that he is 'Gond' and belongs to Scheduled Caste, he was not entitled to contest the election in view of Section 5 of the R.P. Act. As such, decision of Returning Officer on merits rejecting the petitioner's nomination was correct.

Court came to conclusion that petition does not deserve rejection as it contains all the material facts contemplated under Section 83(1) of the R.P. Act. This Court found that petitioner has raised a triable issue and enough material facts have been pleaded which cannot be said to be irrelevant. Grounds for declaring election petition to be void have been specifically pleaded. With these findings, application was dismissed.

Petition is **dismissed** but with no costs.

(Delivered by Hon'ble Sudhir Kumar Saxena, J.)

1. This Election Petition filed under Section 80 of the Representation of People Act 1951 (hereinafter referred to as 'the Act') challenges the election of Sri Bhim Prasad Sonkar (respondent) elected as Member to the Legislative Assembly from Alapur (279) constituency of District Ambedkar Nagar. No prayer for declaring petitioner- Ajay Kumar as elected Member of the Legislative Assembly has been made.

2. Briefly stated petitioner's case is that general elections to the Legislative Assembly were notified in the year 2012. Petitioner belongs to *Gond caste*, which is a Scheduled Castes and armed with a caste certificate, issued by Tehsildar, Akbarpur, Faizabad, on 27.09.1979, he had successfully contested the election of Pradhan, Gram Panchayat, Sugauti in the year 2010. Petitioner wanted to contest the election of the legislative assembly as such, he requested Returning Officer/ADM (Finance) to provide him nomination form which was not issued, asking petitioner to produce his caste certificate, issued after the year 1985, which demand was wholly unjustified.

3. On 14.01.2012, petitioner sent a complaint through FAX to the Chief Election Commissioner, whereupon nomination paper was provided to him on 16.01.2012. Petitioner filed his nomination paper on 19.01.2012, before Assistant Returning Officer/SDM, Alapur, who threatened to cancel the nomination if petitioner did not submit a caste certificate issued after the year 1985. Complaint of this threat was also made to Chief Election Commissioner on 20.01.2012. Scrutiny of nomination papers was done where petitioner produced original caste certificate. Yet Returning Officer rejected the petitioner's nomination paper and declined to provide the copy of the

order. Petitioner immediately made complaint to District Election Officer as well as to Chief Election Commissioner, State Election Commissioner etc. On 23.01.2012, petitioner sent an application to the State Election Commision, complaining wrongful rejection of nomination paper, whereafter copy of the rejection order dated 20.01.2012 was provided. Petitioner did seek an information under Right To Information Act, which information showed that Returning Officer had asked Tehsildar, Bhiti to conduct an enquiry regarding petitioner's caste.

4. Tehsildar directed the Revenue Inspector to submit a report after enquiry. On 31.01.2012, Lekhpal submitted a report that upon enquiry, it was found that petitioner belongs to *Kahar*, a backward caste and relying upon this report, Tehsildar submitted a report that petitioner belongs to *Kahar*, which is a backward caste. It is stated that neither any information of enquiry was given nor any opportunity was provided to petitioner before submitting report.

5. On 01.02.2012, Returning Officer sent a letter to ADM, Ambedkar Nagar informing petitioner's son - Master Amarkant and Daughter- Km. Savita were getting scholarship under the Scheduled Castes quota but Sri Param Dev, the Head Master of Primary School, Sugauti was called who informed that although their names were included amongst the students belonging to Scheduled Castes but, in fact, they belong to Kahar-backward caste. There is no person of Caste Gond (Scheduled Castes) in village- Sugauti.

6. On 03.02.2012, Deputy District Election Officer, Ambedkar Nagar informed Chief Election Officer that as per report of Tehsildar, Bhiti, petitioner does not belong to Gond- a Scheduled Caste of village-Sughauti. Sri Param Dev, the Head Master of Primary School, Sugauti who had removed the names of the petitioner's children from the list of Scheduled Castes had himself issued a Transfer Certificate on 02.07.2007, certifying that petitioner's daughter- Km. Savita belongs to Gond caste.

7. It is further stated that in the caste certificate issued to petitioner that he belongs to Gond- a Scheduled Caste has not been cancelled nor it has been challenged by anybody before any committee/forum. Tehsildar had no jurisdiction to recall or cancel the same nor he can adjudicate upon the controversy regarding caste certificate.

8. Rejection of petitioner's nomination on the ground that petitioner does not belong to Gond caste ignoring the caste certificate issued to him, is absolutely illegal and arbitrary. After rejection of the petitioner's nomination paper, Bhim Prasad Sonkar (respondent) was declared as elected M.L.A. from Alapur constituency. Illegal rejection of nomination paper has rendered the election of Bhim Prasad Sonkar, void and same be annulled.

9. Written statement was filed by Sri Bhim Prasad Sonkar denying the allegations made in the Election Petition. It was submitted that petitioner is Kahar by caste and he does not belong to Gond caste. The caste certificate dated 27.09.1979, allegedly issued by Tehsildar Akbarpur, is not genuine. Returning Officer, who had rejected the nomination paper has done it after holding requisite and proper enquiry as he did not belong to Gond caste and his minor children were getting

scholarship, claiming themselves to be members of the Backward Caste. In addition to this, it was submitted that there is no material on record to establish that petitioner belongs to Gond caste. Some persons of the locality of Tehsil Akbarpur belonging to Kahar caste had started writing themselves as Gond. An intimation to this effect was sent by District Magistrate, Ambedkar Nagar on 26.09.2006 to the State Government.

10. In the Parivar Register of Gram Panchayat Sugauti, petitioner's caste is mentioned as *Kahar* but after over-writing, Gond is written. In the school admission register, caste of minor son of the petitioner is shown as *Kahar*. Principal, Ram Babu Vidya Mandir Inter College, District Ambedkar Nagar has issued a certificate that petitioner's father belongs to *Kahar*, by caste.

11. Principal of Primary School, Sugauti has also issued a certificate to the effect that petitioner's son- Master Amarkant is getting scholarship being *Kahar*. Election petition is not maintainable in view of Sections 81, 82 & 83 of the Act as grounds of challenge to the election have not been specified. No grounds contemplated under Section 100 (1) of the Act have been specified. No concise statement of facts has been given as required under Section 83 of the Act. Documents submitted along with the petition have not been verified as required by Section 82 of the Act. Since there is no allegation of corrrupt practice, affidavit filed by petitioner cannot be part of the election petition. No triable issue has been raised in the election petition. Moreover, same suffers from the vice of non-joinder of necessary party. Certificates of caste issued by Tehsildar on 12.09.1979 & 27.09.1979 cannot be conclusive and are subject to scrutiny and proof etc. etc. It was claimed that petition be dismissed with costs.

12. A replication was filed by petitioner on 23.08.2012 reiterating the case set up in election petition and further stating therein that petitioner was not informed about the enquiry being conducted regarding his caste and he was not provided any opportunity before determining his caste. Petitioner's father belongs to Gond caste. Tehsildar had issued certificate to petitioner's father showing him to be of *Gond* caste.

13. Caste of a person is determined on the basis of caste of his father as such, petitioner also belongs to Gond caste, which is further verified from the certificate issued by Tehsildar. Petitioner's son- Master Amarkant and daughter- Km. Savita were getting scholarship admissible to the Scheduled Castes as Gond but Sri Param Dev, the Head Master of Primary School, Sugauti, who informed that although they were getting scholarship as Scheduled Castes but they belong to Backward Caste Kahar. Headmaster had no authority to determine or change the caste. Said headmaster had himself issued transfer certificate on 02.07.2007 certifying that petitioner's daughter- Km. Savita belongs to Gond caste. Petitioner never applied for scholarship claiming his children to be Kahar by caste and he had absolutely no knowledge that children were paid scholarship admissible to other backward classes. Amount of Scholarship being same i.e. @ Rs. 300/- per month admissible to other backward classes and Scheduled Castes students, as such, petitioner could not know about this change. In any case, change made by Headmaster of this school, would not alter petitioner's caste. In para 23 of the replication, it is stated that petitioner as well as his father both belong to Gond caste and certificates were issued accordingly in the year

1979. Letter written by ADM is based upon an enquiry, which was not conducted after notice to the petitioner. Effect of certificate issued by Tehsildar cannot be affected in any manner by a letter written by ADM. In the Parivar Register, initially caste was wrongly mentioned, which was corrected showing him to be of Gond caste. There is no technical defect in the election petition and the same is liable to be allowed with cost.

14. On the basis of pleadings, following issues were framed by the Court on 15.01.2013:-

"1.Whether petitioner belongs to Scheduled Castes. If so, its effect ?

2.Whether nomination of petitioner has been wrongly rejected. If so, its effect?

3.Whether election petition is liable to be dismissed for non-compliance of the provisions of Sections 81, 82 and 83 of the Representation of the People Act, 1951, as alleged in para 31 of the written-statement ?

4.Relief, if any, to which petitioner is entitled ?"

15. Before trial could commence, two applications (C.M. Application Nos. 75103 & 75100 of 2012) were moved by respondent with the prayer that election petition be dismissed under Section 86 of the Representation of People Act. Principal grounds for seeking dismissal of the petition were :-

"(a) Petition has not been filed in conformity with the provisions of Section 81, 82 and 83 of the Act,

(b) Returning Officer has not been impleaded as party,

(c) Annexures to the petition have not been verified,

(d) Grounds as required under Section 100(1) of the Act and 101 have not been specified,

(e) No material facts have been given etc. facts mentioned are irrelevant."

16. Another application was filed under Order VI Rule 16 and order VII Rule 11 of C.P.C. for striking off paras 3 to 22 of the Election Petition. This Court vide order dated 17.12.2012 dismissed both the applications. It was informed at the Bar that Special Leave Petition against this very order was dismissed by Hon'ble Apex Court.

17. This Court held that impleadment of Returning Officer was not necessary. One of the grounds provided under Section 100 (1)(c) of the Act is improper rejection of nomination. Thus, it cannot be said that petition did not contain the ground contemplated under Section 100 of the Act. It was further held that schedules were properly verified. Petition has raised a triable issue. Relevant paragraphs of the order passed by this Court are being reproduced below clarifying the controversy:-

"In para 35, Hon'ble Court holds that an Election Petition must clearly and unambiguously set out all the material facts which the appellant is to rely upon during the trial,

and it must reveal a clear and complete picture of the circumstances and should disclose a definite cause of action. In the absence of the above, an Election Petition can be summarily dismissed.

In the petition, it is mentioned that petitioner belongs to the Gond (schedule caste). He has a certificate issued by Tahsildar Akbarpur, Faizabad. He had filed nomination which was rejected on 20.01.2012 which he claims, was erroneous exercise of power by the Returning Officer. It is apparent that the petitioner has given all the material facts. In fact petition does not involve much factual disputes. Controversy is whether petitioner's nomination was wrongly rejected as he was not found to be a Scheduled Castes candidate. No other ground has been taken by the petitioner like corrupt practice etc. as such, it cannot be said that the respondent is taken by surprise and it is not clear as to what allegations he has to meet."

18. Petitioner has filed following documentary evidence, in support of petition:-

Sl.	Paper no.	Particulars	Ext.
1.	32/2	Petitioner's caste certificate	1
2.	32/3	Caste certificate of petitioner's father issued by Tehsildar	2
3.	32/4	Caste certificate of petitioner's father issued by Gram Pradhan	3
4.	32/5	Copy of certificate dated 28-10-10 regarding petitioner's election as Gram Pradhan	4
5.	32/6	Certified copy of Parivar Register of Dayaram	5
6.	32/7	Certified copy of Parivar Register of Ajay Kumar	6
7.	32/8	Transfer Certificate of Ajay Kumar	
8.	32/9	Transfer Certificate of Km. Savita issued by Param Dev	8
9.	6/28	Copy of complaint dated 14-01-2012	10
10.	6/29	Copy of complaint dated 19-01-2012	
11.	6/32	Copy of complaint dated 20-01-2012	
12.	6/36	Copy of application dated 23-01-2012	
13.	6/40	Certified copy of rejection order dated 20-01-2012	
14.	6/42	Application under R.T.I. Act	
15.	6/45	Copy of reply dated 24-02-2012	
16.	6/47	Copy of letter dated 28-01-2012	16 A
17.	6/48	Copy of letter dated 01-02-2012	17
18.	6/49	Copy of letter dated 03-02-2012	17 A
19.	6/51	Copy of G.O. dated 05-01-1996	
20.	6/54	Copy of G.O. dated 28-02-2011	
21.	48/2	Certified copy of the complaint dated 15-10-2010 by Sri Ramesh Kumar to SC/ST Commission	
22.	48/4	Certified copy of the investigation report dated 27-11-2010 submitted by Sri Vinod Kumar, Circle Officer, Bhiti, Ambedkar Nagar on complaint of Sri Ramesh	

		Kumar	
23.	48/7	Certified copy of the order dated 01-04-2011 passed in writ petition no. 3120 (M/B) of 2011 staying the arrest of Sri Ajay Kumar pursuant to FIR lodged by Ramesh Kumar under Sections 419 and 420 IPC	
24.	48/9	Certified copy of the final report dated 28-04-2011 in FIR lodged by Sri Ramesh Kumar under Sections 419 and 420 IPC against Sri Ajay Kumar	
25.	52/14	Copy of report dated 21-07-2008 submitted by a Committee comprising of all Tehsildars of District Siddharth Nagar, Deputy Collector Siddharth Nagar Sri Ramashray and Sri Umashankar Gond, Advocate	
26.	52/18	Copy of Circular dated 12-12-2013 issued by Additional District Magistrate Administration, Gorakhpur	9
27.	25/2	A list of Scheduled Castes students in the Primary School, Sugauti, prepared by Sri Param Dev, Principal of the School	
28.	25/3	Transfer Certificate dated 04-01-2002 issued by the Principal, Thakur Deen Amar Punj Vidyalaya, Gaura Samarsinghpur, Distt. Ambedkar Nagar, stating the petitioner's caste as Gond	

19. Respondent has filed following documentary evidence :-

Sl. No.	No.	**Filed with W.S. on 26-07-2012**	
1.		Certified Copy Parivar Register of Gautam Kumar, which is not mentioned in any list of documents and which does not bear any paper number	**ख 1**
2.	15/2	Certified copy of parivar register of Ajay Kumar	**ख 2**
3.	15/3	Certified copy of letter dated 26-09-2006 sent by Collector, Ambedkar Nagar to U.P. Govt.	**ख 3**
4.	15/4	Uncertified Photocopy of Certificate dated 19-01-2012 by Head Master Param Dev, that Amar Kant is Kahar	**ख 4**
5.	15/5	Certificate dated 23-06-2012 issued by Principal Ram Baba Inter College certifying that Dayaram is Kahar	**ख 5**
6.	15/6	Uncertified photocopy of admission register maintained by school where Amar Kant is studying	**ख 6**

7.		**Filed on 28-02-2013**	
8.	35/3	Certificate of election of Dinesh Kumar as Gram Pradhan, Manaupur	**ख 7**
9.	35/4	Certified copy of application dated 21-02-2013 submitted by Tehsildar, Bhiti to D.M. Ambedkar Nagar to know about the caste of some persons alongwith report dated 23-02-2013	**ख 7/1**
10.	35/11	Copy of reply obtained under RTI relating to caste of Sri Ravi Kant along with information supplied from office of Tehsildar	**ख 9**
11.	35/14	Certified copy of parivar register of Ram Bujharat	**ख 10/2**
12.	35/16	Certified copy of parivar register of Suchit and Bahram	**ख 10/4**
13.	35/17	Certified copy of parivar register of Kesri	**ख 10/5**
14.	35/18	Certified copy of parivar register of Ganga Ram & Mansa Ram	**ख 10/6**
15.	35/19	Certified copy of parivar register of Agnu & Surma Devi	**ख 10/6**
16.	35/20	Certified copy of parivar register of Sri Phulvas & Phagu Ram	**ख 10/7**
17.	35/21	Certified copy of order dated 24-07-2012 passed by Tehsildar Bhiti	**ख 10/11**
18.	35/24	Certified copy of order dated 21-07-2012 passed by Scrutiny Committee	
19.	35/29	Certified copy of letter dated 26-09-2006 issued by D.M. Ambedkar Nagar to the Govt.	
20.	35/30	Certified copy of judgment of Divisional Level Committee dated 04-01-2013 passed by Commissioner	**ख 10/**
21.	35/34	Certified copy of election certificate of Ram Bujharat as Gram Pradhan, Madhupur Miranpur	
22.	35/35	Certified copy of list of students receiving OBC scholarship in Primary School Sugauti	
		Filed on 04-09-2013	
23.	40/2	Order dated 04-04-2005 passed by U.P. Madhymik Shiksha Sewa Chayan Board Re: Ram Anant Gond	
24.	40/4	Report dated 10-08-2007 by Tehsildar, Sadar, Faizabad	

20. The defendant's witnesses produced the following documents :-

52/1-2	Letter dated 19-06-2012 by Ratibhan, S.D.M., Akbarpur, Ambedkar Nagar, to D.M.	D 3/2
52/3	Statement of Mohd. Idris and 16 others	D 3/2
52/4	Statement of Jhabbu Singh	D 3/2
52/5	Statement of Dayaram	D 3/2
52/6	Letter dated 02-06-2012 of Pinki Joval D.M. to Ratibhan, S.D.M.	D 3/1
52/7	Order dated 21-07-2012 passed by District Level Caste Scrutiny Committee	D 3/4
52/12	Attendance sheet dated 20-07-2012 of hearing on complaint of Ramesh Kumar	D 3/3
59/1	Letter dated 02-06-2012 of Pinki Joval D.M. to Ratibhan, S.D.M.	D 4/4
59/2	Letter dated 19-06-2012 by Ratibhan, S.D.M., Akbarpur, Ambedkar Nagar to D.M.	D 4/5
59/4	Statement of Mohd. Idris and 16 others	D 4/1
59/5	Statement of Jhabbu Singh	D 4/2
59/6	Statement of Dayaram	D 4/3
C 64	Page 89 of Parivar Register of Phagu Ram	D 6/1
64/	Page 208 of Parivar Register of Dayaram	D 6/2
64/	Page 209 of Parivar Register of Ram Shiromani	D 6/3
64/	Page 279 of Parivar Register of Ganga Ram and Mansha Ram	D 6/4
65	Letter dated 25-03-2014 by Ram Jiawan Sharma	D 7/1
70	Parivar Register of Bhagauti Deen	D 8/1
77/1	OBC certificate register 2011	D 10/1
77/2	Page 22 of register	D 10/2
77/3	Statement of Ram Shankar	D 10/3
77/4	Report of Lekhpal re: Family details of Ram Shankar	D 10/4
85/1	School leaving certificate of Dayaram	D 12/1
85/2	Application for admission of Dayaram	D 12/2
85/3	Scholar's register and T.C. of Dayaram	D 12/3
90/1	Page 40 of Parivar Register of Bhupati	D 13/1
90/2	Page 41 of Parivar Register of Suchit	D 13/2

21. As many as 4 witnesses were examined by the petitioner and respondent examined 16 witnesses-including 14 official witnesses.

22. I have heard Sri Subhash Vidyarthi, learned counsel for the petitioner, Sri H S Jain and Sri Sanjay Kumar, learned counsels for the respondent.

23. Ground taken by the petitioner in the election petition is that his nomination paper was improperly rejected. Section 100 of the Representation of the People Act, 1951 prescribes the grounds for declaring election to be void. Section 100(1)(c) of the Act is relevant for the purpose of petition and is being reproduced below:

> ***"100. Grounds for declaring election to be void:-***
> *[(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion-*
> *(c) that any nomination has been improperly rejected; or*
> *.....*
> *the High Court shall declare the election of the returned candidate to be void."*

24. Thus, it is apparent that improper rejection of nomination paper is a ground for declaring the election to be void.

25. Contention of Sri Subhash Vidyarthi, counsel for petitioner is that once he is able to show procedural irregularity or infraction of instructions issued by the Election Commission, it has to be assumed that nomination paper has been improperly rejected, and therefore, nothing more is required to be seen while submission of Sri H.S. Jain, learned counsel is that on merits also High Court has to see whether petitioner had a right to contest. Submission is based upon Section 5 of the Act. Section 5(a) of the Act is being reproduced below:

> ***"5(a) Qualifications for a membership of a legislative assembly:*** *In the case on a seat reserved for a Scheduled Castes or for Scheduled Tribes of that State, he has a member of any of those castes or of those Tribes, as the case may be, as an elector for any assembly constituency in that State."*

26. Submission of Sri H.S. Jain is that petitioner being a person not belonging to Scheduled Castes had no right to contest the election from a reserved seat, even if there is some irregularity in the process of scrutiny while rejecting the nomination paper, and same would not cloth petitioner with a right to contest the election which he does not have.

27. In the case of **Uttamrao Shivdas Jankar Vs. Ranjitsingh Vijaysingh Mohite Patil [(2009) 13 SCC 131]**, Hon'ble Apex Court has decided the similar controversy. Court held that there exists distinction between the decision making process allotted by Statutory Authority and the merits of the decision. Para 36 of the judgment is being reproduced below:

> *"36. It is also now a trite law that once a finding is arrived at by the Election Tribunal that the order of rejecting the nomination was improper which would take within its umbrage not only the decision making process* ***but also the merit of the decision****, no further question is required to be gone into. The Tribunal had no other option but to set aside the election of the winning candidate."*
>
> *(emphasis supplied)*

28. Relying upon the decision of **N.T. Veluswami Thevar Vs. G. Raja Nainar (AIR 1959 SC 422) and Birad Mal Singhvi Vs. Anand Purohit (1988 Supp. SCC 604)**, improper rejection has been made referable to Section 36 of the Act. Section 36 (2)(a) is being reproduced below:

"that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely....."

29. Sri Subhash Vidyarthi, learned counsel has relied upon the decision of Hon'ble Apex Court in the case of **Somnath Rath Vs. Bikaram K. Arukhand others [AIR 1999 SC 3417]** wherein Court has held that improper rejection of a nomination paper by itself and without anything more is a ground under Section 100(1)(c) of the Act to declare the election void.

30. Improper rejection of nomination itself has been held a ground to declare the election void and material effect on result is not to be seen.

31. In the case of **Balram Singh Yadav Vs. Abhay Kumar Singh [(2014) 6 SCC 699]**, Hon'ble apex Court has held that *"once the Court comes to the conclusion that the nomination paper has been improperly rejected, it is obliged in law to declare the election void."*

32. In the case of **Anil Baluni Vs. Surendra Singh Negi [(2005) 5 SCC 793]**, Hon'ble Apex Court has held that only issue before the court is to examine the correctness and propriety of the order by which the nomination papers of a candidate are rejected. Relevant paragraph 19 of the judgment is being reproduced below:

"19. Shri Mohta has also submitted that the result of the election should not be lightly interfered with and the election petitioner must lead strong and cogent evidence to establish his case for setting aside the election of a returned candidate. This principle is not of universal application. This is not a case where the election petition may have been filed on the ground of corrupt practice or improper acceptance or rejection of ballot papers or any error in counting of votes. The election petition has been filed on the ground that the appellant's nomination papers had been improperly rejected, which is a ground contemplated by Section 100(1)(c) of the Act. In such a case the only issue before the ***Court is to examine the correctness and propriety of the order by*** *which the nomination papers of a candidate are rejected and the scope of inquiry is limited to the said consideration."*

(emphasis mine)

33. Hon'ble Apex Court has given the meaning to 'improper rejection' by saying that correctness as well as propriety of the rejection order has to be examined by the Court, therefore, order has to be both correct and proper. If rejection order is proper but incorrect, ground under Section 100(1)(C) would not be attracted. This has been clarified in the Apex Court in the case of **Uttamrao Shivdas Jankar (supra).**

34. Thus, Returning Officer has to see while rejecting nomination paper whether the candidate is qualified or disqualified for being chosen to fill the seat. Such decision is assailable in election petition. Therefore, election tribunal is required to go into the merits of the matter. Relevant part of paragraph 8 of the judgment in the case of **N.T. Veluswami Thevar (supra)** can be useful to be quoted hereunder:

"In the context, it appears to us that the improper rejection or acceptance must have reference to Section 36(2), and that the rejection of a nomination paper of a candidate who is qualified to be chosen for election and who does not suffer from any of the dis- qualifications mentioned in Section 36(2) would be improper within s. 100(1)(c), and that, likewise, acceptance of a nomination paper of a candidate who is not qualified or who is disqualified will equally be improper under Section 100(1)(d)(1)"

35. Similarly, in the case of **Birad Mal Singhvi (supra)**, in para 10, Hon'ble Court opines that it is open to the High Court to take a final decision in the matter in rejection order of Returning Officer. Relevant para of para 10 of the judgment is being reproduced below:

"In an election petition it is open to an election petitioner to place cogent evidence before the High Court to show that the candidate whose nomination paper was rejected had in fact attained the age of 25 years on the relevant date. It is open to the High Court to take a final decision in the matter notwithstanding the order of the returning officer rejecting the nomination paper. ***If on the basis of the material placed before the High Court it is proved that the candidate whose nomination paper had been rejected was qualified to contest the election it is open to the High Court to set aside the election.*** *Enquiry during scrutiny is summary in nature as there is no scope for any elaborate enquiry at that stage. Therefore it is open to a party to place fresh or additional material before the High Court to show that the Returning Officer's order rejecting the nomination paper was improper. It should be borne in mind that the proceedings in an election petition are not in the nature of appeal against the order of the returning officer. It is an original proceeding. In the instant case it was open to the respondent election petitioner to place material before the High Court to show that the two candidates were qualified and their nomination paper was improperly rejected."*

36. Apex Court made the important observations in paras 48 and 49 of the judgment rendered in the case of **Uttamrao Shivdas Jankar (supra).** Paragraph nos. 48 and 49 of the judgment are being reproduced below:

"48. In an election petition, the High Court acts as a Court of original jurisdiction and the election petition is a civil trial and the jurisdiction in such a trial, stricto sensu cannot be said to be appellate in nature. Clearly, the High Court acted illegally in treating its power only as an appellate authority and not as an original authority for it only proceeded to try and determine as to whether or not the decision making process is legal. That approach of the High court in our considered opinion was illegal and unjustified.

49. The High court was duty bound to treat the matter on merits by framing issues and thereafter calling for production of evidence in support of their respective cases. *The High court should have examined the veracity of the rival claims based on the evidence produced by the parties and should have tested the correctness of the affidavits. The opinion of the hand writing expert in that regard would have been sufficient and on the basis of the same it could be possible for the High court to decide the entire lis between the parties. The High Court despite being the Court of original jurisdiction acted as a court of appellate jurisdiction and dismissed the petition without allowing the parties to produce evidence in support of their contention."*

(emphasis supplied)

37. If a person is not qualified to contest the election and there is some procedural error in rejecting the nomination paper, holding that order is erroneous, same would not remove the disqualification and High Court has to decide whether person is eligible to contest the election or not. High Court, being original Court in the election matters, has to give its decision on merits as well on impropriety in rejection of nomination paper. Order has to be correct on both counts procedural as well as substantive. On merits also petitioner has to satisfy that he was qualified to contest.

38. In view of above discussion, this Court is of the view that in this election petition not only decision making process adopted by Returning Officer but also genuineness of petitioner's claim to contest the election has to be examined. Consequently, Court proposes to decide the issue nos. 1 & 2 together.

Issue nos. 1 & 2:

39. Contention of Sri Subhash Vidyarthi, learned counsel is that petitioner belongs to Scheduled Castes and certificate to this effect was issued by Tehsildar in favour of petitioner as well as his father Sri Dayaram who was also elected as 'Pradhan' of the village Sugauti. His children were getting scholarship, admissible to Scheduled Castes. Presumption of correctness attached to the certificate was not drawn by Returning Officer.

40. Submission is that certificates were issued on 27.09.1979 and 12.09.1979 in favour of petitioner and his father respectively (Exhibit 1 and 2). These documents were produced on 19.01.2012 on the date of filling of nomination, as such, documents were more than 20 years old and presumption had to be drawn regarding their genuineness. Section 90 of Indian Evidence Act is being reproduced below:

"Section 90 in The Indian Evidence Act, 1872 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. Illustrations....."

41. Learned counsel for petitioner has relied upon Section 114 of the Indian Evidence Act to contend that presumption in this regard may be drawn by the Court.

42. Submission is that in view of above provisions, presumption of genuineness regarding petitioner's Caste certificate had to be drawn which was not done by the Returning Officer, as such, he committed error of law.

43. Apart from submitting that Returning Officer had failed to raise a presumption available under Section 90 of the Indian Evidence Act. He has committed some more irregularities. Election Commission of India has issued certain guidelines for the Returning Officers regarding conduct of elections. These guidelines have been held to be statutory in nature. Similarly, Handbook of Returning Officer has been issued by Election Commission of India which prescribed the procedure for scrutiny. These guidelines have been held to be binding being statutory. Reference may be made to the case of **Sushil Kumar Vs. Rakesh Kumar [(2003) 8 SCC 673].**

44. Contention of learned counsel is that guidelines issued by the Election Commission of India have been brazenly violated. Clause 6.3 of the Handbook list of Returning Officer is being reproduced below:

Question of genuine case certificate (ECI's No. 4/3/2008/JS-II/Vol.III dt 2.7.2008) RO at the time of scrutiny should satisfy himself that candidate from a reserved constituency belongs to SC or ST. In case of doubt, the RO must insist on production of SC/ST certificate-Wherever certificate produced is also challenged. RO. need not go into question, except where it is alleged that the certificate is forged. In case of any allegation/suspicion about the genuineness of the certificate, RO should get the position cross checked with the authority with issued the certificate.

45. Similarly, Chapter VI of the Handbook for Returning Officer deals with the scrutiny. Clause 6.9 of the aforesaid handbook is being quoted hereunder:

"There is a presumption that every nomination paper is valid unless the contrary is prima facie obvious or has been made out. In case of a reasonable doubt as to the validity of a nomination paper, the benefit of such doubt must go to the candidate concerned and the nomination paper should be held to be valid. Remember that whenever a candidate's nomination paper is improperly rejected and he is prevented thereby from contesting the election, there is a legal presumption that the result of the election has been materially affected by such improper

rejection and the election will, therefore, be set aside. There is no such legal presumption necessarily in the converse case where a candidate's nomination has been improperly accepted. It is always safer, therefore, to adopt a comparatively liberal approach in dealing with minor technical or clerical errors."

46. Submission of learned counsel is that Returning Officer ought to have presumed certificate to be genuine unless it is alleged that same is forged. In case of suspicion, he ought to have got the position checked from the Authorities but he did not verify the certificate validly issued by Tehsildar which was duly issued. Moreover, Returning Officer has failed to draw presumption that nomination paper has to be valid unless proved contrary, as such, benefit of doubt must go to the candidate. It is specifically said that it is always safer, therefore, to adopt a comparatively liberal approach in dealing with minor technical or clerical errors. At this stage, it may be relevant to quote Section 36 of the Act which provides the procedure for scrutiny of nomination, which is as under :-

"36. Scrutiny of nominations.--(1) On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33.

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:--

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely: --

Articles 84, 102, 173 and 191,

Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34 ; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (b) or clause (c) of sub-section (2) shall be deemed to authorize the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.

(5) The returning officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:"

47. Grievance of petitioner is that scrutiny ought to have been done in the presence of candidate, their election agent, one proposer of these candidates and one other person duly authorized in writing by his candidate and by no other person but in instant case Returning Officer has permitted objector Ramesh, Jethuram and Paramdev to be present at the time of scrutiny. Complaint to this effect was sent to District Election Officer on 28.01.2012 itself (Exhibit 12). Their presence is not contemplated under Section 36 of the Act. Ramesh Kumar, Ramkaran and Kanti wife of Paramdev had participated in the election of Gram Pradhan alongwith petitioner in the year, 2010 and all had lost their election. There is gross negligence of Returning Officer in rejecting the nomination paper of petitioner.

48. Allegation that Rajesh, Jethuram and Paramdev were present, has to be established. Submission is that if statute permits presence of specified persons, presence of any external agency or outsider would vitiate the decision making process. Returning Officer has definitely acted contrary to Section 36 of the Act as well as Handbook.

49. It is apparent from the order passed by Returning Officer that he had at the very inception started suspecting the correctness of the caste certificate. Even nomination form was given at the intervention of Higher Officer. It is apparent from the order that he had entertained complaint of Ramesh Kumar. Order appears to be passed in the presence of Paramdev. Order does not show that he was authorized to remain present during scrutiny. Persons authorized are mentioned in Section 36 of the Act. This conduct shows that Returning Officer has not followed the guidelines issued by Election Commission of India.

50. Statutory Authority should have in mind if a particular procedure is prescribed, thing has to be done in accordance with that mode or not at all.

51. In view of above, Court is not satisfied with the procedure adopted by the Returning Officer while rejecting the nomination paper Returning Officer has not adhered to Section 36 of the Act as well as guidelines issued by the Election Commission of India. Neither he has raised presumption of validity of the nomination paper nor sent the certificate for verification to the

authority issuing it, as such, he has failed to follow the instructions issued by the Election Commission of India.

52. It has been stated above that mere regularity in procedure in rejecting the nomination paper will not be sufficient to declare the election void unless it is found that on merits also, decision was not sustainable.

53. Controversy does not rest here as it is settled position that High Court does not sit in appeal against the order passed by Returning Office while exercising original jurisdiction and therefore, High Court will have to record the finding on the basis of material available whether nomination was rightly rejected and whether applicant was qualified to contest the election.

54. If an underage candidate files nomination and nomination paper is rejected either deliberately or negligently by Returning Officer, without adhering to the procedure provided under Section 36 of the Act, can Election be cancelled on the ground of rejection ? Court has to see whether appellant had a right to contest the election or not. In this case, Court has to decide whether petitioner was qualified to contest as a Scheduled Castes candidate. If petitioner is able to satisfy that he belongs to Scheduled Castes, then rejection of nomination paper might result in the declaration of election as void.

55. Petitioner has made specific allegation in petition that he belongs to Gond Caste which is a Scheduled Castes. In the written statement, this paragraph has been specifically denied by returned candidate and in additional plea, it is stated that petitioner belongs to Kahar Caste, which comes in the category of Other Backward Classes (OBC). Article 341 of the Constitution of India refers to Scheduled Castes, which Article is being reproduced below :-

*"**341. Scheduled Castes.-(**1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be.*

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be valid by any subsequent notification."

56. Bare perusal of the Article shows that caste mentioned in the presidential order will be deemed to be Scheduled Castes in relation to particular State or Union Territory, as the case may be. Said clause cannot be varied by any notification and Parliament alone may by law include in or exclude from the list of Scheduled Castes, any caste, sub-caste or tribe. It is thus apparent from the above that Scheduled Castes, mentioned in the presidential order subject to the amendment made by the Parliament, were alone Scheduled Castes.

57. Gond has been mentioned as Scheduled Caste in the Presidential Order, in specified districts of U.P.

58. Presidential order displays the list of Scheduled Castes and Scheduled Tribes, which shows that in Uttar Pradesh Gonds have been declared to be Scheduled Castes. Relevant entry is being reproduced hereinbelow :-

36. Gond (excluding Mehrajganj, Sidharth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh, Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra Districts)

59. While Gonds are considered to be Scheduled Tribes in Uttar Pradesh in the districts mentioned below:-

6.Gond, Dhuria, Nayak, Ojha, Pathari, Raj Gond (in the districts of Mehrajganj, Sidharth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh, Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra).

60. From the above, it is apparent that Gonds are not Scheduled Castes in entire Uttar Pradesh and are Scheduled Castes only in the above mentioned districts. They are Scheduled Tribes in the district of Maharajganj, Mehrajganj, Sidharth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh, Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra. Dhuria, has not been declared as Scheduled Castes in Uttar Pradesh rather they are Scheduled Tribes in the above districts. Therefore, in State of the Uttar Pradesh, Dhuria cannot be a scheduled castes.

61. It is nobody's case that this order has been amended by Parliament making change in respect of Gond and Dhuria. Petitioner belongs to District Ambedkarnagar, which was earlier part of District Faizabad, as such, he claims the status of Scheduled Castes. It is relevant to state that in the Presidential Order, no amendment can be made except in the manner provided under Article 341 of the Constitution of India nor by means of interpretation any caste or sub-caste can be added or subtracted.

62. Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 2002 was enacted by which certain entries in the Constitution (Scheduled Castes) Order, 1950 and also in the Constitution (Scheduled Tribes) (Uttar Pradesh) Order, 1967 were amended. Section 3 of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 2002 provides that Scheduled Castes Order will stand amended in the manner and to the extent specified as per the Schedule. The Scheduled appended to Amendment, 2002 inter alia provides that in Entry 36 of the Scheduled Castes Order, 1950, at the end, "(excluding Mahrajganj, Sidharth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh, Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra Districts)" will be inserted. Entry 36 relates to "Gond Caste" which was inserted in the Constitution (Scheduled Castes) Order, 1950 by Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (Act No. 108 of 1976). Through 2002 Amendment Act, Gond, Dhuria, Nayak, Ojha, Pathari, Raj Gond (in the districts of Mahrajganj, Sidharth Nagar, Basti, Gorakhpur, Deoria, Mau, Azamgarh,

Jonpur, Balia, Gazipur, Varanasi, Mirzapur and Sonbhadra) have been inserted as Scheduled Tribes. Thus, the result of 2002 Amendment would be that so far as district Faizabad or Ambedkar Nagar are concerned, person belonging to "Gond Caste" will be treated Scheduled Caste. However, caste or sub-caste "Dhuria" in relation to resident of district Gonda are neither Scheduled Tribe nor Scheduled Caste as the Scheduled Caste Order has not been amended to the said effect. The caste or sub-caste "Dhuria" does not appear to be included amongst the Scheduled Castes in relation to these districts as per the existing entries in the Scheduled Caste Order.

63. In the case of ***State of Maharashtra vs. Milind and Ors. [(2001) 1 SCC 4],*** Hon'ble Apex Court has made clear that States have no power to amend Presidential Orders. Relevant paragraph is being reproduced below :-

"Courts cannot and should not expand jurisdiction to deal with the question as to whether a particular caste, sub-caste; a group or part of tribe or sub-tribe is included in any one of the Entries mentioned in the Presidential Orders issued under Articles 341 and 342 particularly so when in clause (2) of the said Article, it is expressly stated that said orders cannot be amended or varied except by law made by Parliament. The power to include or exclude, amend or alter Presidential Order is expressly and exclusively conferred on and vested with the Parliament and that too by making a law in that regard."

64. Paragraph 28 of the judgment is also relevant and is being reproduced below :-

"28. Being in respectful agreement, we reaffirm the ratio of the two Constitution Bench judgments aforementioned and state in clear terms that no inquiry at all is permissible and no evidence can be let in, to find out and decide that if any tribe or tribal community or part of or group within any tribe or tribal community is included within the scope and meaning of the entry concerned in the Presidential Order when it is not so expressly or specifically included. Hence, we answer Question 1 in the negative."

65. From the presidential order, it is apparent that Gonds are Scheduled Castes in Districts Faizabad or Ambedkarnagar. In the excluded districts, they have been given the status of Scheduled Tribes.

66. Petitioner's case is that he is Gond as such, he was entitled to contest the election against a constituency reserved for Scheduled Castes. Question before this Court is whether he is Gond, as claimed by petitioner or *Kahar*, as alleged in the written statement.

67. Petitioner has relied upon the certificate issued by Tehsildar as well as certificate issued in favour of his father, certifying them to be Gond by caste. He has also relied upon the certificate issued by Gram Pradhan (32/4), copy of the certificate declaring petitioner as Gram Pradhan against the reserved constituency, certified copy of the Pariwar Register of Dayaram and Ajay Kumar, transfer certificate of Ajay Kumar, transfer certificate of Kumari Savita, Param Dev and list of Scheduled Castes students, prepared by Param Dev.

68. Learned counsel also relied upon statements of Ajay Kumar (P.W. 1), Dayaram (P.W. 2), Ram Anant (P.W. 3) and Pyare Lal Gond (P.W. 4) the office bearers of Gond Mahasabha.

69. Certificate paper no. C-32/2, a certificate issued by Tehsildar Akbarpur, Faizabad on 27.09.1979, shows that petitioner belongs to Gond caste, which is a Scheduled Caste. Similar Certificate has been issued in favour of petitioner's father on 12.09.1979. Paper no. C 32/4 is a certificate issued by Mohd. Naseem, Pradhan, village- Sugauti stating that Dayaram Dhuria, s/o Shubhkaran Dhuria belongs to Gond caste. This certificate was issued on 26.10.2002.

70. State Election Commission certifies petitioner's election as Pradhan of village Sugauti. This does not say anything on caste. Copy of the Pariwar Register of Dayaram mentions petitioner's caste as Hindu Gond. Copy of the Pariwar Register of Ajay Kumar also mentions them as Hindu Gond. Second copy of the transfer certificate of petitioner issued on 04.01.2002 mentions petitioner's caste as Hindu Gond. Transfer certificate for Kumari Savita, daughter of petitioner mentions her caste as Gond, issued by Param Dev, Headmaster of Primary School, Sugauti on 12.10.2012.

71. It will be useful to deal with the oral evidence led by petitioner at this stage. Ajay Kumar (P.W. 1), while proving these papers stated that he belongs to Gond caste and he had successfully contested the election. In his statement, he also refers to the list of Scheduled Castes students prepared for the purpose of Scholarship by Param Dev, Headmaster of the School. This list mentions the name of Kumari Savita and Amar Kant, (daughter and son of petitioner) belonging to Gond caste. In paragraph 29, petitioner states that Tehsildar had not called him while holding enquiry nor he was given any notice or any opportunity before submitting report.

72. So far as scholarship of Kumari Savita is concerned, since no application is required and scholarship is given automatically and amount being same, admissible to Scheduled Castes or OBC students, it cannot be said as such that he was aware about the change of head of scholarship from Scheduled Castes to OBC. No opportunity was given about the above change.

73. In the cross-examination on 07.05.2013, he was unable to tell whether Grandfather had come from outside or was born here and whether he was original resident of this village or not. In para 8, he states that "My uncles are Faguram Dhuria, Gangaram Dhuria and Mansharam Dhuria". His grandfather was Shubhkaran. Banshraj Dhuria was brother of his grandfather, who is father of Fanguram Dhuria, Gangaram Dhuria and Mansharam Dhuria and sister Prema Devi. Raj Kumar and Jai Kumar are petitioner's brothers and Bittan is sister, who was married in the village Manaupur, Block Tarun, District Faizabad. In para 17, petitioner says "My brother-in-law is Dhuria". In para 18, he says that " Dhuria is synonym of Gond caste. Petitioner is a member of Gond Mahasabha. There is also Dhuria Mahasabha. Kahar is a group of caste, states petitioner.

74. In the cross-examination on 08.05.2013, he states that Dhuria and Gond have matrimonial relations and they can marry each other and his brother-in-law (Gautam), husband of Bittan is also Dhuria (para 7). His father-in-law is Ram Shanker Dhuria. In para 15 he says that

"Ravi Kant is in my relation and he belongs to Kahar caste". Kesari is father-in-law of my younger brother, who belongs to Dhuria caste of Kahar (para 21). In para 24, petitioner states "Banshraj is brother of my grandfather. Paper no. 10, which is pariwar register of Banshraj mentions caste as Kahar". In the statement dated 09.05.2013, petitioner states that "Ordinarily profession of 'Gond' caste is the same which is that of Dhuria. Main profession of 'Dhuria' caste is to work domestic works, bring water from well and fry various grains like gram etc".

75. Petitioner states in the cross-examination by Sri H.S. Jain in para 1 that "My father has personally gone to Tehsildar for obtaining caste certificate because I was young at that time. My date of birth is 1.5.1970. Since 1979, certificates were being issued. People belonging to Dhuria caste is belonging to Scheduled Caste". Petitioner was unaware about the formalities that were adopted by petitioner's father. Petitioner has two brothers namely Raj Kumar and Jai Kumar. Raj Kumar is working with some doctor in Delhi and Jai Kumar is a teacher in Jhunjhunwala School. Petitioner's father is a teacher in Primary School.

76. On 22.05.2013, in cross-examination, petitioner in para 2 stated "Dhuriya is sub-caste of Gond caste". He further stated in paras 9 to 11 that "Dinesh Kumar is uncle of my brother-in-law Gautam Kumar. Dinesh Kumar has been Pradhan of village Manaupur. Paper no. 1 filed by opposite party no. 1 was shown to the witness who said that Dinesh Kumar has been elected Pradhan on the seat reserved for other backward classes". In para 15, he admits that "He had not given any application before the said Committee for issuing caste certificate". In para 20, he states that " I did not move any application before the Committee as I had already obtained caste certificate". In paras 22 to 24, he states that "Certificate contains the seal of Tehsildar, therefore, I presume that it must have been signed by the Tehsildar. Certificate does not mention any initial signature of any of the officials except Tehsildar. I did not make any effort to ascertain the name of Tehsildar who has signed the certificate". He denied the suggestion that certificate was vague and does not bear the signature of Tehsildar. He used the certificate for the first time while taking admission in High School. He was given scholarship treating him as Scheduled Caste. In para 36, he stated that " My brothers did not take advantage of this certificate during study. I got as I have applied. My brothers did not apply". He denied the suggestion that papers filed by him are forged papers and the word "Gond" was added by him in pariwar register. He denied the suggestion that he was dummy candidate. On 20.05.2015, petitioner was again examined and he filed certain papers. Petitioner filed complaint made to Election Commission, applied under the RTI Act and a copy of Enquiry Report submitted by District Election Officer.

77. In the cross-examination, petitioner when confronted with Pariwar Register of Banshraj states that it mentions his caste as Kahar. From the above, it is apparent that according to petitioner Dhuria is sub-caste of Gond. His brother-in-law is Dhuria. Brother of his grandfather (Shubhkaran) had three sons and all are Dhuria. His father-in-law is also Dhuria. In one place, he says that Dhuria is synonym of Gond while he also says that Dhuria is sub-caste of Gond. Certificate was issued by Tehsildar, when he was only nine years old and he does not remember his father having completed all formalities.

78. P.W. 2- Dayaram is the father of the petitioner. In para 2, he categorically states that "I belong to Dhuria by caste". In para 4, he states that "Dhuria is sub caste of Gond". In para 13, he states that "Gond are treated as Scheduled Tribes in 13 districts of the State i.e. Maharajganj, Sonbhadra, Devaria, Azamgarh, Mirzapur, Sidharthnagr, Basti, Gonda, Ambedkar Nagar etc. whle in rest 57 districts they are treated as Scheduled Castes". In para 16, he states that " Gond caste persons can marry in caste of Dhuria while Dhuria girl normally did not marry outside the caste". In para 17, he states that " No enquiry was conducted in respect of caste certificate of Ajay Kumar". In para 3 of the statement recorded on 24.05.2013, Dayaram states that in his service record, he was shown as Gond and in para 7, he states that his both sons were issued caste certificate of Gond Scheduled Castes. In para 9, he admits that his son-in-law is Dhuria. In para 15, he states that "Ram Saware Dhuria has also been issued a caste certificate of gond Scheduled Caste. He was a member of BDC for five years. He contested for member of Zila Panchayat on the symbol of Samajwadi Party". In para 17, he states that "Some persons belong to my caste, the Administration is wrongly treating their caste as OBC". In para 18, he states that "Since Administration is not issuing the certificate to Dhuria caste treating them as Scheduled Castes, they are getting the certificate as member of Other Backward Classes". In the cross-examination in para 4, he states that "I am not aware as to what type of enquiry having been conducted by Tehsildar, Kanpur". In para 6, it is stated "No inquiry was conducted by Tehsildar in my village for issuing caste certificate". In paras 7 to 10, he mentions the process of enquiry. Said paras are reproduced below :-

"7. Before issuing caste certificate for me and for Ajay Kumar, enquiry was held by Lekhpal, Kanoongo and thereafter it was submitted before Nazarat, then, certificate was issued by Tehsildar, Akbarpur.

8. Nearly in four days, caste certificate was delivered.

9. No evidence was recorded.

10. Since Lekhpal knew us, he issued caste certificate."

79. It is thus clear that since Lekhpal knew a caste certificate was issued. In para 11, it is stated that "Dhuria is sub caste of Gond. Other sub castes are Nayak, Ojha, Rathari, Rajgond".

80. In the cross-examination dated 22.08.2013, Dayaram states that "Dhuria is sub-caste of Gond. Godiya, Batham, Raekwad, Dheemar etc. are part of Kahar. All these castes fall in Kahar, which is a group of castes". In para 3, it is stated that "Initially Gonds were found in Mirzapur and on the hills of Kaimur and they were declared Scheduled Castes in 1976 in Uttar Pradesh". In para 5, it is stated that "I am Gond as my father was Gond and my relatives are Gond". He was unable to say if the residents of Gond place of Madhya Pradesh were alone treated as Gond. In para 15, he says "Phaagu Ram, Mansa Ram and Ganga Ram are sons of Bansraj. May be, they may be issued certificate of Kahar (O.B.C.). In para 21, it is stated that "In Pariwar-register, entry of caste of Kahar against my father's name has been added under some conspiracy". In para 22, it is stated that "I have not moved any application for caste certificate before the Committee after the judgment of

Hon'ble Supreme Court. In para 24, it is stated that "Raj Kumar and Jai Kumar have not been issued caste-certificate as now it is not being issued", "may be because of some objection" (para 28).

81. From the above evidence, it is apparent that Dayaram admits himself as Dhuria. His son-in-law is also Dhuria. Certificate was issued because Lekhpal knew him. Profession of Dhuria and Kahar are same. Raj Kumar was issued certificate from District Kanpur Nagar. His other sons are not being issued certificates of Scheduled Castes. Dhuria is sub-caste of Gond.

82. P.W. 3-Ram Anant claims to be Provincial Organizing Secretary to Akhil Bhartiya Gond Mahasabha. In para 10, he states that in Ambedkar Nagar, for the last 20-25 years, no certificates were issued and according to last census of 2001, 1600 in Faizabad and nearly 1000 (families) in Ambedkar Nagar were belonging to Gond caste. Since certificates are not being issued, they have filed writ petition in the High Court wherein District Magistrate was directed to decide the matter within three months on 30.04.2013. Petitioner- Ajay Kumar belongs to Gond caste.

83. P.W. 3 -Ram Anant was issued certificate by District Welfare Officer- Ram Chandra Singh and he got the appointment on the basis of this certificate, which was later on canceled. Cancellation order has been challenged in the writ petition. It was also tried to trace the history of Gond, who originally belong to Madhya Pradesh. It was stated that Gond caste is found in entire Uttar Pradesh. This witness is not relevant so far as present controversy is concerned. In para 62, it is stated that "I am aware that certificate issued to Ajay Kumar petitioner has been canceled", which order has been challenged before the Commissioner. In para 71, he states that "There are five sub-caste of Gond namely Dhuriya, Nayak, Ojha, Pathari, Rajgond". In para 73, it is stated that "Outside, there are Netang, Ghorang, Dhuria, Ghurwe, Dhurwa, Dhuriyabhi". In para 76, he states that "Since Gond are tribals by nature therefore they should be included in Scheduled tribes". Gonds are not known as Kahar as occupation of Kahar is clearly different. In paras 82 & 83, he does not agree with the statement of his cousin Jagdev, who claims to be Kahar by caste. He denies the suggestion that for promoting the case of petitioner, he has given the statement.

84. From this witness, it is apparent that Dhuria is sub-caste of Gond and claims are being laid for declaring them as Scheduled Castes/Tribes. Witness was confronted with paper whereby his appointment was cancelled as he belongs to Kahar-OBC.

85. Last witness examined is Pyare Lal Gond, who states that his sub-caste is Dhuria, while his caste is Gond. He is a Social Worker and is Prantiya Sachiv of State Akhil Bhartiya Mahasabha. He has been issued a certificate of Scheduled Tribes as per status of Gond in district Varanasi. 'Before that, I was treated as Scheduled Castes' (Para 8). In para 9, it was stated that "Earlier in entire State, Gonds were treated as Scheduled Caste but on account of amendment, in 13 districts Gonds are treated Scheduled Tribe and in rest districts, they are Scheduled Caste". Demand of Gond Mahasabha is declined. Gond caste is Scheduled Tribes. Petitioner- Ajay Kumar is also Gond and he is in my relation (para 13). In para 14, he states that "Ram Ratan Gond is his own relative

and he has been issued certificate of Scheduled Tribe in Varanasi. He is Gond by caste". In para 18, he states that "His father is Dhuriya and he actively participates in Gond Mahasabha". Other sub-castes are found in Sonbhadra and Mirzapur districts and in rest districts of Uttar Pradesh, Dhuriya are found. Normally, Dhuriya are married in Dhuriya (para 21).

86. In cross-examination, again witness admits that petitioner is his relative being distant Samdhi and Sadhu (both) and there is no difference between Gond of Scheduled Tribes and Scheduled Castes (para 7, statement dated 20.09.2013). In para 10, he states that "Originally Gond came from Koshal which extended to Allahabad and Maha Koshal extended to Jabalpur. Maha Koshal lies in Madhya Pradesh". In Para 11, it was stated that "In regime of Akbar, Gond people had migrated from Madhya Pradesh to Uttar Pradesh". In para 12, witness states that they are fighting for their existence and declaration as Scheduled Caste. First he was issued certificate of Scheduled Castes in the year 1978. Thereafter, a certificate of Scheduled Tribes was issued in the year 2004 and 2010. In para 15, he states that "Tehsildar had issued the certificate. Certificate is not issued by Three Tier Committee but is only verified. Certificate is issued by Tehsildar. In para 16, he states that "This Three Tier Committee has not verified my claim or certificate". Further in para 17, he states that "Yes, I know that in pursuance of judgment of Apex Court, Three Tier Committee was constituted after the year 1994. "He denied the suggestion that he is deposing falsely for Mr. Ajay Kumar on account of his friendship. It is further stated in para 22 that "It is also wrong to say that I am supporting Mr. Ajay Kumar as I want to expand Gond caste".

87. According to this witness, situation becomes confusing that the same man is a Scheduled Castes and then becomes Scheduled Tribes, after some time but he admits that Ajay Kumar is his relative and father of Ajay Kumar is Dhuria.

88. From the above material submitted by petitioner, it comes out that petitioner and his father were issued certificate by Tehsildar in the year 1979, declaring them as Gond-Scheduled Castes. Committee constituted in pursuance of judgment of Hon'ble Apex Court was not involved in this process. It is also admitted that Dayaram (father of the petitioner) admits himself to be Dhuria. Most of the relatives of the petitioner are Dhuria by caste. Petitioner claims to be Gond by caste and admits Dhuria to be sub-caste of Gond. He does not say that he is not Dhuria or has not inherited the caste- Dhuria from his father. His father, father-in-law, brother-in-law, uncle, cousins are all Dhuria. Dhuria and Gond are definitely two different identities. Dhuria girls ordinarily do not marry Gond. Dhuria is sub caste while Gond is caste. In these circumstances, it is difficult to hold that petitioner is Gond and not Dhuria.

89. Petitioner relies upon the certificate issued by Tehsildar in the year 1979. Authenticity of this certificate has been challenged by contesting respondents, as such, it was for petitioner to have proved the certificate. Under Section 90 of the Indian Evidence Act, a presumption is available to the documents old more than 20 years, in Uttar Pradesh. Once a challenge is made that document is forged and not valid, burden comes to petitioner.

90. Petitioner's evidence as discussed above, does not show that he belongs to Gond caste. He might have been Dhuria. He might have been linked with Gond and his caste might have been sub caste of Gond but he cannot become Scheduled Caste, in view of the Presidential Order, as amended, which does not mention Dhuria as Scheduled Caste.

91. Claim of respondent is that petitioner is Kahar by caste, that evidence also needs to be considered.

92. Exhibit- Kha-1 is Pariwar Register of Gautam Kumar (brother-in-law of petitioner). This does not mention any caste, which was required to be mentioned in case person belongs to Scheduled Caste.

93. Exhibit-Kha-2 is extract of pariwar register of petitioner and his father, wherein against Shubh Karan name, entry of Kahar has been made but against Ajay Kumar, entry of Gond has been made.

94. Exhibit-Kha-3 is letter by District Magistrate, Ambedkar Nagar to State Government informing that after enquiry, it was found that in Ambedkar Nagar district people belonging to Kahar caste represent themselves as Gond, no Gond people are found in the district as such, certificate of Scheduled Caste is not being issued.

95. Exhibit-kha-4 is certificate given by the Headmaster of Primary School showing that petitioner's son-Amar Kant was getting scholarship as OBC candidate. Similar certificate has been issued by Principal of Ram Babu Vidya Mandir Inter College, District Ambedkar Nagar, certifying that caste of Dayaram is Hindu Kahar (Exhibit-Kha-5).

96. Exhibit-Kha-6 is admission register showing petitioner's son as OBC- Kahar.

97. Exhibit-Kha- 7 is certificate given to Dinesh Kumar, who was elected Pradhan as OBC.

98. Exhibit-Kha-7/1 & 7/2 are documents showing that Rambujharat and sons of Faguram Dhuria, Gangaram Dhuria and Mansharam Dhuria belong to OBC- Kahar.

99. Certificate to similar effect given by Tehsildar is Exhibit-kha-7/3.

100. Exhibit-kha-7/4 is the certificate showing that Bhagauti Deen belongs to Kahar. Pariwar register extract of Bhagauti Deen mentions religion as Hindu and does not mention his caste, which was required if are belonged to Scheduled Castes.

101. Exhibit-kha-7/6 is copy of pariwar register of Behram, which does not mention any caste so is the case with Ramjit. Ravikant, Keshri, Ganga Ram, Mansaram's extracts do not mention caste. However, extract relating to Faguram mentions caste as Hindu Kahar.

102. Exhibit-kha-11 is order passed by Tehsildar, whereby he has canceled the certificate issued in favour of petitioner on 27.09.1979, cancellation was done in pursuance of enquiry ordered by District Magistrate, Ambedkar Nagar on the complaint of Ramesh Kumar etc.

103. It appears that Ramesh Kumar filed complaint before District Magistrate challenging the certificate issued to Ajay Kumar alleging that he belongs to OBC- Kahar but his certificate was wrongly issued. An enquiry was conducted by a Committee.

104. Committee headed by District Magistrate came to the conclusion that certificate issued to the petitioner cannot be upheld. Consequently, necessary instructions were issued and Tehsildar cancelled the certificate. Details of the enquiry have been filed before this Court which are Exhibit-Kha-D-3/1 to Kha-D-4/5.

105. Exhibit-Kha-D-4/6 is the extract of Pariwar Register of Faguram, which mentions him as Kahar while that of Dayaram shows him as Hindu Gond (Exhibit-kha-D-4-6/2).

106. Ganga Ram and Mansa Ram have not been shown with their caste.

107. Exhibit-kha-D-7/1 is the certificate issued by Tehsildar which shows that there is no record pertaining to the year 1979 and register has been maintained since 1984.

108. Exhibit-kha-D-10/3 is the statement of Ram Shanker Dhuria, who claims to be Kahar.

109. Exhibit-kha-D-12/1 is the copy of the School Leaving certificate pertaining to Dayaram, showing him to be Kahar. This certificate seems to have been issued on 09.08.1969. Similarly, application for admission of Dayaram shows that he belongs to Hindu Kahar (Exhibit-kha-D-12/2 and D-12/3, which is Scholar's Register).

110. Respondent has examined as many as 16 witnesses. Out of which 14 are official witnesses.

111. DW-1 is the returned candidate who states that petitioner belonged to Kahar caste and he does not belong to Scheduled Caste. In respect of Pariwar Register, witness states that entry against Ajay Kumar showed him as Hindu Gond which was a result of overwriting and even date of birth was changed to 01.05.1970. He also produced the papers showing that Dayaram, father of petitioner has been shown as Kahar and Amarkant son of Ajay Kumar is shown as OBC Kahar. Dinesh Kumar, cousin of Ajay Kumar, brother-in-law Gautam was the election of Pradhan OBC candidate. Son of Faguram, namely, Vinod Kumar, Pawan, Pramod have been shown as Kahar. Gudia and Pooja, daughter of Gangaram, cousin of petitioner have also been shown as Kahar. On maternal side of petitioner Ajay Kumar, Ramjeet has not been shown belonging to Scheduled Caste (Exhibit kha-8). Ravikant maternally related to Dayaram, father of petitioner, is shown as Kahar (Exhibit kha-9). Madhu, daughter-in-law of Faguram, daughter of Ramjeet has also not been shown as Scheduled Caste (Exhibit kha-8). Witness proves the order passed by Tehsildar cancelling the

certificate. This witness was issued caste certificate in the year, 1973-74. Witness does not know Ajay Kumar personally as he resides in the village situated about 80-85 kilometres away from petitioner's village.

112. Ramesh Kumar DW-2 belongs to petitioner's village. He had contested against petitioner for the office of 'Pradhan' which was reserved for Scheduled Caste. He had filed objection which was rejected by Returning Officer and Ajay won. He filed election petition before SDM which is still pending. He admitted having objected to the nomination of petitioner before Returning Officer. He gave the details of pedigree of petitioner. In para 18, it is stated that father-in-law of Ajay Kumar Ram Shanker whose father is Bhagautideen has not been shown belonging to Scheduled Caste in Pariwar Register. In para 22, witness states that a Committee was constituted to enquire into the validity of the certificate which examined petitioner, who had also produced two to three certificates in his favour. His father Dayaram appeared as witness and Committee had directed Tehsildar to cancel the certificate of petitioner in cross examination. Witness states that in the year, 2010, he could not know that Ajay Kumar is not Gond but Kahar. He is Scheduled Caste, Chamar. He is a teacher of Bhagat Singh Inter College, Gonda. In the year, 2010, witness states that wife of Paramdev Smt. Kanti had also contested against Ajay Kumar wherein Ajay Kumar got 420 votes while witness got 207 votes. He was merely rival candidate. There is no other enmity. He admitted having lodged F.I.R. against Raj Kumar but the same was found to be false. In cross examination conducted on 11.12.2013, witness states that he had filed election petition in the year, 2012 challenging the election of Pradhan held in the year, 2010. He denied that Paramdev was lying in jail for three months in regard to charge of misappropriation of scholarship. He denied the suggestion that he has filed election petition in the year, 2012 only to extend help to Bheem Prasad Sonkar, MLA.

113. Ram Asre, DW-3 was posted as ADM from 14.12.2012 till 27.09.2013. He proved the enquiry report and the order passed by District Magistrate directing enquiry. In cross examination, witness states that under the Government Order dated 26.11.2011, Committee should be constituted having four members but in this matter Committed had five members. Ajay Kumar was given one day to file documents, dictation of report was given by District Magistrate in the presence of all the members on 21.07.2012. Formal meeting was held. All the Tehsildars had reported that no persons of Gond caste resides in Ambedkar Nagar. He was not competent to give reply in respect of Dhuria caste. While posted as SDM at Siddharth Nagar, he was member of a Committee which had agreed that Dhuria was sub caste of Gond and consequently, committeee recommended to issue Scheduled Caste certificate to such persons.

114. DW-4 Ratibhan was SDM, Sadar at the relevant time who had enquired into the caste of petitioner in pursuance of order passed by District Magistrate. Statements of 15 persons were recorded who all beonged to village Sugauti. In cross examination, witness states that all the statements were recorded on the same day and he is not aware of sub-castes of Gond and he does not know that Dhuria is sub caste of Gond. Report is based upon the statement of witnesses who termed Ajay Kumar as Kahar on the basis of vocation. Since Pariwar Register contained caste after overwriting, adverse inference was drawn by the Committee.

115. Deepcharan Shukla, Gram Panchayat Adhikari in Gram Panchayat Sugauti (DW-6) produced Pariwar Register. According to him, against the entry of Bansraj, Kahar was subsequently mentioned. On page 208, name of Dayaram is entered and against his name Hindu Gond is mentioned. After scoring out 'Hi Kahar', Hindu Gond has been mentioned. Gond is written in concentrated ink and upper part of the paper is torn. In cross examination witness admits that 'hi Kahar' written by same person. If a person is Hindu, then hindu be mentioned, if he belongs to Scheduled Caste, caste is mentioned; sometime other caste like Brahmin. is also mentioned. Against the name of Dayaram, hindu Gond must have been written together.

116. DW-7 Ram Jiyawan Verma posted as Kanoongo in Bheeti district Ambedkar Nagar. He stated that any caste register prior to the year 1984 is not available in Tehsil.

117. DW-8 Raj Kumar Yadav is Gram Panchayat Adhikari who produced Pariwar Register of village Java Bazar. Pariwar Register contained enteries of Bhagautideen, Ram Shanker, Kevalpati, Sushila Devi, Kali Prasad, Santosh Kumar, Gaya Prasad and K. Madhuri and register shows that no caste is mentioned. Caste is only mentioned when one belongs to Scheduled Caste. Pariwar Register does not have any entry of all the daughters of head of the family.

118. Ram Nawal Verma (D.W. 9), Kanoongo, Tehsil Milkipur did not bring register pertaining to Pariwar Register.

119. DW-10 Dinesh Kumar, Tehsildar, Bhikapur brought the register and states that no caste certificate has been issued to petitioner from his Tehsil. This witness brought register pertaining to caste certificate from 2011 onwards and according to witness, name Ram Shanker's father is not mentioned. Arti, daughter of Ram Shanker and his son- Vidya Ratan are shown as Kahar by caste. Witness does not know the caste of petitioner. In para 19 he states that Ram Shanker in his statement has stated that he is Dhuria by caste but Lekhpal has mentioned as Kahar. Witness stated that he cannot say if Dhuria is sub caste of Gond. In para 25, witness states that whenever Gond caste applies, Lekhpal describes them as Kahar. In para 26 witness says Ram Shanker does not belong to Dhuria although he writes Dhuria, Lekhpal does not menion any material on the basis of which he found Ram Shanker is not Dhuria.

120. DW-11 is Raja Ram, ADO, Panchayat who states that Bujharat was elected as village Pradhan of Gop Madhopur against the reserved set of backward class.

121. Prem Nath Singh DW-12 produced the Scholarship register consisting admission form, wherein caste of Dayaram is mentioned as Hindu Kahar. School Leaving Certificate also shows caste of Dayaram as Kahar. Witness admits that register is not properly maintained. Shubhkaran was not literate and witness cannot say that who had filled the form and made the entry. He has affixed thumb impression. He was deposing under the pressure of local MLA, is not correct, says witness.

122. Ashok DW-13 is Gram Panchayat Adhikari, Belia Bariarpur, who produced the Panchayat Register to show that Suchit, son of Darshan has been mentioned as Hindu Kahar. In cross examination, witness could not tell who made entries and corrections thereon.

123. DW-14 Murlidhar, Lekhpal, Sijhauli states that he knew entire family of Suchit who belonged to Kahar caste. In cross examination witness states that since he is Lekhpal, therefore, he knows the caste of Kahar. From the perusal of Pariwar Register and enquiries made from Pradhan from neighbourhood made him make this statement.

124. DW-15 Sant Prasad Maurya's testimony is irrelevant.

125. DW-16- Shiv Bahadur Singh is working as Lekhpal since 2007. He had conducted enquiry in pursuance of order passed by District Magistrate. He went to village alongwith Tehsildar and Kanoongo. Tehsildar has recorded the statement of witness from which it was deduced that Ajay Kumar belongs to Kahar, OBC. Dayaram was also examined. In cross examination, witness states that Tehsildar has recorded the statement but report was written by him. He denied that he submitted report under pressure. Tehsildar had directed him to call the villagers, which he did with the help of mobile.

126. Above is the entire evidence.

127. Respondent has led the evidence to show that not only Ajay Kumar belongs to Kahar caste but his relatives are also Kahar by caste. Documents pertaining to relatives of Ajay Kumar and his maternal side and his in-laws and sisters, his cousins have been filed. Some pariwar register did not mention caste, as such, it is submitted that caste is required to be mentioned only when person belongs to Scheduled Caste, otherwise religion alone will be mentioned. Entire evidence has been filed to show that relatives of Ajay Kumar do not belong to Scheduled Caste or Gond Caste.

128. Sri H.S. Jain, learned counsel for the respondent has placed the order passed by committee presided by District Magistrate which recommended the cancellation of certificate issued by Tehsildar.

129. Since report of Committee is not under challenge and has been filed for the first time in these proceedings and since petitioner may challenge it before other forum, it is not proper to make any comment upon the merits of the enquiry or enquiry report, prepared after rejection of nomination paper.

130. Material available at the time of nomination did show that petitioner was Gond, but this status was challenged there and in this Court, caste certificate having been challenged, evidence led, Court has to see whether decision of rejecting nomination was correct.

131. From the entire discussion, it has come out that except the certificate issued by Tehsildar and the Pariwar Register in which his caste his shown as Gond, there is no other material

establishing petitioner's caste. Pariwar Registesr is definitely relevant for determining the caste. Entry in the school certificate, pariwar register and caste of relatives are relevant consideration.

132. So far as Pariwar Register is concerned, against Ajay Kumar entry of Hindu Gond is made but against Shubhkaran, Hindu Kahar is mentioned. Even against Dayaram's name 'Hi Kahar' was written subsequently Hindu Gond was mentioned. Overwriting has been found in the Pariwar Register. In the School Register, petitioner has been shown as Gond by caste and got scholarship also as Scheduled Caste but the admission form and transfer certificate of Dayaram did not show him to be Gond.

133. So far as certificate of caste issued in favour of petitioner and his father are concerned, there is no material on the basis of which Tehsildar issued caste certificate in favour of petitioner or his father Dayaram. Satement of Dayaram that since he knew Lekhpal, therefore, certificate was issued; does not lead to anywhere. Witnesses are unable to give details of any enquiry conducted before the issuance of caste certificate. Certificate has been vehemently challenged by the respondent. Nobody has been examined to prove the signature or author of the certificate. No register showing the details on the basis of which caste certificate was issued, has been filed. Register has been maintained after 1984. When father, cousins, father-in-law, brother-in-law, grandfather's brother are shown as Dhuria, it is difficult to comprehend that petitioner would not be Dhuria. It requires lot of explanation that Father Dayaram is Dhuria while son Ajay Kumar is Gond. Thus all the three witnesses fail to establish that petitioner is Gond. In the absence of any material, register or witness to prove the signature of Tehsildar, Section 90 of Indian Evidence Act cannot be employed to raise the presumption of genuineness.

134. So far as caste of relatives of petitioner are concerned, petitioner's father himself has admitted that he is Dhuria. Petitioner admits that his brother-in-law, uncle, cousin, father-in-law all are Dhuria. Explanation that Dhuria and Gond are synonym or that 'Dhuria' is sub-caste of 'Gond' does not help as in the absence of any mention of Dhuria in presidential order, Dhuria cannot be treated as Gond or Scheduled Caste. Question whether petitioner is Dhuria or Kahar and whether Dhuria is sub caste of Gond is not required to be gone into. In this case only controversy is whether petitioner is Gond, a Scheduled Caste and is entitled to contest the election.

135. Since this Court does not find that petitioner has successfully established himself to be Gond, a Scheduled Caste, other questions are not required to be gone into and it is open to raise the same before appropriate forum. It is clear that Dhuria of Ambedkar Nagar are striving hard to claim recognition as Scheduled Caste or Scheduled Tribe, as reserve category brings automatically some benefits in view of affirmative action contemplated in the Constitution of India.

136. So far as respondent's claim is concerned, their evidence shows that somewhere relatives have been shown as Hindu Kahar, somewhere Dhuria. Some have also written Gond. Explanation submitted by Sri Sanjay Kumar, learned counsel that Kahars also write Dhuria as their vocation is same does not appeal. If they are not Scheduled Caste, then why mention of caste 'Hindu Kahar' as caste is required to be mentioned only when persons is of Scheduled Caste. In

some extracts of pariwar register, only Hindu is mentioned, his caste is not mentioned leading to inference that they belong to Scheduled Castes but which caste? Unless caste finds mention in Presidential Order, Court cannot give a declaration. As such, respondents too have failed to establish that petitioner is kahar by caste.

137. Since this Court is of the opinion that petitioner has not been able to establish that he is 'Gond' and belongs to Scheduled Caste, he was not entitled to contest the election in view of Section 5 of the R.P. Act. As such, decision of Returning Officer on merits rejecting the petitioner's nomination was correct. Therefore, issue nos. 1 & 2 are decided as under:

"Petitioner's nomination was not improperly rejected as petitioner has failed to establish that he belongs to Scheduled Caste".

Issue no. 3:-

138. Whether election petition is liable to be dismissed for non-compliance of provision of Section 81, 82 and 83 of the R.P., Act.

139. Application no. 75103 of 2012 was moved by respondent seeking dismissal of election petition on the ground that petition has not been filed in conformity with the provision of Sections 81, 82 and 83 of the R.P. Act. Application was decided after hearing both the parties at length vide order dated 17.12.2012 after discussing the decisions of Hon'ble Apex Court given in the cases of Kumari Madhuri Patil and Another Vs. additional Commissioner, Tribal Development and Others, reported in (1994) 6 Supreme Court Cases 241, 2012 (30) LCD 1047; Rajvir Singh Bath Vs. State of U.P. and Others, Laxmi Kant Bajpai Vs. Hazi Yaqoob and Others report in (2010) 4 SCC 81 and Hari Shankar Jain Vs. Sonial Gandhi report in AIR 2001 SC 3689,

140. Court came to conclusion that petition does not deserve rejection as it contains all the material facts contemplated under Section 83(1) of the R.P. Act. This Court found that petitioner has raised a triable issue and enough material facts have been pleaded which cannot be said to be irrelevant. Grounds for declaring election petition to be void have been specifically pleaded. With these findings, application was dismissed.

141. Apex Court did not interfere in the SLP filed against the above order.

142. In view of above, Issue No. 3 is decided in negative. **Petition was not liable to be dismissed for non-compliance of Sections 81, 82 and 83 of R.P. Act.**

Issue no. 4:- Relief ?

143. In view of findings recorded on issue nos. 1, 2 & 3, petitioner is not entitled to any relief.

144. There seems to be lot of confusion in respect of Dhuria. In some districts, they are Scheduled Tribes while in other districts, they are being treated as OBC. P.W. 4 (Pyare Lal Gond) has been issued two certificates, one as Scheduled Tribes and the other as Scheduled Castes. In appointment cancellation order, Dhuria has been shown as OBC. It is because of this reason that people are changing their residence and trying to obtain certificate from convenient districts to reap the benefits of reservation. Even petitioner's brothers had been issued certificate of Scheduled Caste from Kanpur District. This state of confusion or uncertainty must end, sooner the better. State Government would do well taking cognizance of this burning issue, to constitute a high level commission to give a report after making an in-depth study, in a fixed time frame, in order to curb unending litigation and do away with uncertainty in the mind of its subject.

145. While concluding, Court would like to appreciate the assistance provided by Sri H.S. Jain, Sri Sanjay Kumar. Court notices the labour put in by Sri Subhash Vidyarthi, Advocate who has meticulously placed his submission before this Court. His preparation and delivery both have been found to be commendable.

Order:

146. Petition is dismissed but with no costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 28 Of 2005
&
Sales/Trade Tax Revision No.- 29 Of 2005

M/S Singh Engineering Works Pvt. Ltd. ...Applicant

Versus

Commissioner Of Trade Tax U.P. ...Opposite Party

Counsel for Applicant:
Ashok Kumar

Counsel for Opposite Party:
S.C.

This revision is directed against an order imposing penalty upon the revisionistassessee in terms of the provisions of Section 4B (5) of the U.P. Trade Tax Act, 19481. Admittedly, the revisionistassessee held a recognition certificate under Section 4B of the 1948 Act for manufacture of "iron and steel". The penalty has

come to be imposed upon the assessee for the Assessment Years 197879 and 197980 consequent to iron and steel being used by it for manufacture of “two-way cages”.

This Court finds that the levy of penalty under sub section (5) of Section 4B would stand attracted upon a finding being returned that goods were being used for purposes other than for which the recognition certificate had been granted. Learned counsel for the revisionist does not dispute that the recognition certificate was granted for the purposes of manufacture of "iron and steel". The mere fact that the recognition certificate had not been cancelled would not, in the opinion of this Court, relieve the revisionist from the levy of a penalty. This simply because the provision does not mandate the cancellation of the recognition certificate as a sin qua non or condition precedent to the imposition of penalty.
This Court finds no merit in the challenge laid to the order imposing penalty under Section 4B (5) of the 1948 Act.
The revision shall consequently stand **dismissed**.

(Delivered by Hon’ble Yashwant Varma, J.)

1. This revision is directed against an order imposing penalty upon the revisionist-assessee in terms of the provisions of Section 4-B (5) of the U.P. Trade Tax Act, 19481. Admittedly, the revisionist-assessee held a recognition certificate under Section 4B of the 1948 Act for manufacture of *"iron and steel"*. The penalty has come to be imposed upon the assessee for the Assessment Years 1978-79 and 1979-80 consequent to iron and steel being used by it for manufacture of *"two-way cages"*. It is submitted by the learned counsel for the revisionist that "iron and steel" was a generic entry which found mention in Section 14 of the Central Sales Tax Act, 19562 and therefore use of iron and steel for the purposes of manufacture of two-way cages could not have visited the revisionist with penalty under sub section (5) of Section 4-B. It is further submitted that the recognition certificate held by the assessee had not been cancelled and therefore also the imposition of penalty was unjustified.

2. Learned Standing Counsel, on the other hand, has drawn the attention of the Court to the language of Section 14 and more particularly to the entry of *"iron and steel"* as carried in clause (iv) and submits that such an entry was not and could not have been accorded amplification and would have to be necessarily restricted to the specific articles which found mention in the various sub clauses appended to clause (iv).

3. Insofar as the second submission of the learned counsel for the revisionist is concerned, this Court finds that the levy of penalty under sub section (5) of Section 4-B would stand attracted upon a finding being returned that goods were being used for purposes other than for which the recognition certificate had been granted. Learned counsel for the revisionist does not dispute that the recognition certificate was granted for the purposes of manufacture of "iron and steel". The mere fact that the recognition certificate had not been cancelled would not, in the opinion of this Court, relieve the revisionist from the levy of a penalty. This simply because the provision does not mandate the cancellation of the recognition certificate as a sin qua non or condition precedent to the imposition of penalty.

4. Insofar as the question of manufacture of two-way cages and they being covered under the entry of "iron and steel" goes, the Court finds that Clause (iv) of Section 14 employs the words "that is, to say". Following the well settled principles and rules of statutory interpretation especially when the words *"that is, to say"* are employed by the legislative author, it is obvious that articles in order to fall under clause (iv) would have to stand encompassed under the various sub clauses which stand appended thereto. Admittedly, two-ways cages do not find mention in any of the sub clauses appended to Clause (iv). The use of the words *"that is, to say"* forbids and clearly restricts the Court from conferring an expansive meaning upon the phrase "iron and steel".

5. One may in this connection usefully refer to what was held by the Supreme Court in ***Bansal Wire Industries Limited and another Vs. State of Uttar Pradesh.***[3] Reiterating what was held by the Court in ***Pyare Lal Mehrotra*** [(1976) 1 SCC 834], the Court held: -

"**20.** In the aforesaid decision in *Pyare Lal Malhotra* [(1976) 1 SCC 834 : 1976 SCC (Tax) 102] the very word "that is to say", as per Section 14 of the Central Act was considered and it was held that originally expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined and that such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In the context of Section 14 of the Central Act, this Court in the said decision held that the expression "that is to say" is used in Section 14 apparently to mean to exhaustively enumerate the kinds of goods in a given list. It was also held in the said decision that the purpose of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales."

6. Consequently, this Court finds no merit in the challenge laid to the order imposing penalty under Section 4-B (5) of the 1948 Act.

7. The revision shall consequently stand **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 48 Of 2005

M/S Varshney Packaging Corporation ...Applicant

Versus

Commissioner, Trade Tax, U.P. Lucknow ...Opposite Party

Counsel for Applicant:

Suyash Agrawal, Rakesh Ranjan Agrawal

Counsel for Opposite Party:
C.S.C.

This revision lays challenge to an order passed by the Trade Tax Tribunal upholding an order made by the assessing authority rejecting the books of accounts of the assessee and consequently coming to hold that tax has been evaded in respect of the sale of jute bags valued at Rs. 20,00,000/. The disputed tax liability was pegged as Rs. 1,20,000/. The undisputed facts appear to be that the revisionist, who is a registered dealer under the provisions of the U.P. Trade Tax Act, 1948 Act was engaged in the manufacture of jute bags. Survey of his business premises is stated to have taken place on 29 April 1998 during the course of which a provisional balance sheet relating to the assessment year 199798 was seized. In the course of survey, the assessee is stated to have explained the balance sheet to be a rough and provisional statement of accounts and that it did not represent the actual books of accounts which was maintained by the assessee in terms of the provisions of the 1948 Act. It was contended that the correct books of accounts had been maintained and it is on the basis of audited accounts that the tax had been paid for the relevant assessment year.

The Court finds that the order of the assessing authority was based entirely on the rough/provisional balance sheet which is stated to have been seized during the course of survey on 29 April 1998. The first appellate authority found force in the contention of the revisionist that no ground existed for rejection of books of accounts and accordingly proceeded to annul the demand of additional tax. This order was taken by the State Government in revision to the Tribunal which has as noted above chosen to uphold the view taken by the assessing authority.

The issue of rejection of books of accounts by the registered dealer shall stand governed by the provisions of sub section (3) of Section 7 of the 1948 Act.

A reading of the order of the assessing authority as well as the Tribunal indicates that no reason whatsoever has been recorded to reject the audited balance sheet which was presented by the assessee and on the basis of which self assessed tax was deposited. In the absence of such a finding, in the opinion of this Court, there did not exist a circumstance which warranted rejection of books of accounts . The audited balance sheet would have to be faulted after a due enquiry and with reference to other contemporaneous materials which were maintained by the dealer. A rejection of the books of account of a dealer cannot be the outcome of a on whimsical or capricious exercise of power.

This Court finds that in terms of subsection (3) even if the assessing authority were to arrive at a conclusion that the returns were incorrect and incomplete, it was further obliged to undertake an enquiry to "determine" the turnover of the dealer to the "best of his judgment". When the provision employs the words "determine" and "best of his judgment", it places and casts an obligation upon the assessing authority to undertake an empirical exercise while endeavouring to make a best judgment assessment. While an estimation in the very nature of things would involve a degree of guess work, the statutory leeway afforded to the assessing authority cannot be treated as license to act arbitrarily. The estimation must necessarily have a reasonable nexus to the available material.

The order of the Tribunal cannot be sustained. The revision shall accordingly shall stand **allowed.**

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri R.R. Agrawal learned senior counsel for the revisionist and Sri B.D. Pandey, learned Standing Counsel.

2. This revision lays challenge to an order passed by the Trade Tax Tribunal upholding an order made by the assessing authority rejecting the books of accounts of the assessee and consequently coming to hold that tax has been evaded in respect of the sale of jute bags valued at Rs. 20,00,000/-. The disputed tax liability was pegged as Rs. 1,20,000/-. The undisputed facts appear to be that the revisionist, who is a registered dealer under the provisions of the U.P. Trade Tax Act, 1948 Act was engaged in the manufacture of jute bags. Survey of his business premises is stated to have taken place on 29 April 1998 during the course of which a provisional balance sheet relating to the assessment year 1997-98 was seized. In the course of survey, the assessee is stated to have explained the balance sheet to be a rough and provisional statement of accounts and that it did not represent the actual books of accounts which was maintained by the assessee in terms of the provisions of the 1948 Act. It was contended that the correct books of accounts had been maintained and it is on the basis of audited accounts that the tax had been paid for the relevant assessment year.

3. The assessing authority took note of an apparent discrepancy and variance between the rough/provisional balance sheet and audited accounts on the basis of which self assessment, tax was deposited by the revisionist.

4. The Court finds that the order of the assessing authority was based entirely on the rough/provisional balance sheet which is stated to have been seized during the course of survey on 29 April 1998. The first appellate authority found force in the contention of the revisionist that no ground existed for rejection of books of accounts and accordingly proceeded to annul the demand of additional tax. This order was taken by the State Government in revision to the Tribunal which has as noted above chosen to uphold the view taken by the assessing authority.

5. Sri Agrawal learned counsel has submitted that the precondition for formation of opinion as contemplated under Section 7(3) did not exist and therefore, the rejection of books of accounts was clearly illegal. He has further submitted that the self assessed tax which was paid by the revisionist on the basis of the audited accounts was not disputed by the State. It was contended that unless the respondents had come to a conclusion that the audited accounts was not worthy of credence, tax could not have been imposed on the basis of the rough/provisional balance sheet.

6. Learned Standing Counsel on the other hand has contended that great variance was found between the rough/provisional balance sheet and the audited books of accounts. In that view of the matter, it is his submission that the Tribunal has clearly acted in accordance with law in endorsing the view taken by the assessing authority.

7. Admittedly, the issue of rejection of books of accounts by the registered dealer shall stand governed by the provisions of sub section (3) of Section 7 of the 1948 Act. The said provision reads as follows:

"If no return is submitted be the dealer under sub-section (1) within the period prescribed in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such inquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof:

provided that before taking action under this sub-section dealer shall be given a reasonable opportunity of providing the correctness and completeness of any return submitted by him."

8. A reading of the said provision indicates that the assessing authority is empowered to reject the books of accounts maintained by a registered dealer if it appears to him that the return is either incorrect or incomplete. The provision also empowers the assessing authority to proceed to undertake a best judgment assessment, if no returns were filed. Admittedly, in the present case, the dealer had filed returns. The returns as well as the self assessed tax have been faulted by the respondents solely on the ground that the audited accounts were at variance with the balance sheet which was found in the business premises during the course of survey. This in the opinion of the Court would not justify the rejection of books of accounts maintained by the dealer for more than one reason.

9. A reading of the order of the assessing authority as well as the Tribunal indicates that no reason whatsoever has been recorded to reject the audited balance sheet which was presented by the assessee and on the basis of which self assessed tax was deposited. In the absence of such a finding, in the opinion of this Court, there did not exist a circumstance which warranted rejection of books of accounts . The audited balance sheet would have to be faulted after a due enquiry and with reference to other contemporaneous materials which were maintained by the dealer. A rejection of the books of account of a dealer cannot be the outcome of a on whimsical or capricious exercise of power.

10. More fundamentally, this Court finds that in terms of sub-section (3) even if the assessing authority were to arrive at a conclusion that the returns were incorrect and incomplete, it was further obliged to undertake an enquiry to *"determine"* the turnover of the dealer to the *"best of his judgment"*. When the provision employs the words "determine" and "best of his judgment", it places and casts an obligation upon the assessing authority to undertake an empirical exercise while endeavouring to make a best judgment assessment. While an estimation in the very nature of things would involve a degree of guess work, the statutory leeway afforded to the assessing authority cannot be treated as license to act arbitrarily. The estimation must necessarily have a reasonable nexus to the available material. The Supreme Court as far back as in **State of Kerala Vs. C.Vellukutty1** pithily explained the concept of a best judgment assessment in the following terms:-

"10. Under Section 12(2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment'. Judgment is a faculty to

decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice or a Judge, but on settled and invariable principles of justice. Though there is an element of guess work in a "best judgment assessment', it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub section (2) of Section 12 of the Act provides a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard to the available material."

11. Here, both the assessing authority as well as Tribunal have failed to discharge this statutory obligation which stood placed upon them. All that the two authorities have done is to assess the revisionist on the basis of the rough/provisional balance sheet which was found in the premises during the course of survey. This, in the opinion of the Court, does not comply with the mandatory obligation placed upon the statutory authorities by and under the provisions of sub section (3) of Section 7 of the 1948 Act.

12. In view of the above, the order of the the Tribunal cannot be sustained. The revision shall accordingly shall stand allowed. The order of the Trade Tax Tribunal dated 25 November 2004 passed in Second Appeal No. 87 of 2001 as also that of the assessing authority dated 30.12.1999 are hereby set aside. The matter shall stand remanded to the assessing authority to proceed in the matter afresh, if so permitted in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 139 Of 2009
&
Connected With Other Cases

Pradeep Kumar & Ors. **...Appellants**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Appellants:
Surendra Tewari, Madan Mohan, R.P. Mishra

Counsel for Respondents:
S.C., R.P. Singh, Rahul Sahai, SC.

Briefly stated facts giving rise to these appeals are that an area of 902.2046 acres land of village Khora, Pargana Loni, Tehsil Dadri, district Ghaziabad was acquired by a Notification No.11208 dated 17.3.1988, which was published in the U.P. Gazette dated 19.3.1988 under Section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'). However, possession was taken only of 337.892 acres. The award

was passed by the Special Land Acquisition Officer (SLAO) on 1.2.1991 awarding a sum of Rs.70/- per sq. yard along with statutory benefits and interest to the claimants land holders. At the instance of the claimants/land holders various references were made under Section 18 of the Act, and by a common judgment dated 26.5.1999 in 34 references, the compensation was enhanced to Rs.106/- per Sq. yard along with statutory benefits and interest.

Court after considering the submissions the following questions are framed :-

(i) What would be the appropriate amount of compensation of the acquired land of village Khora as on date of acquisition i.e., 19.3.1988 ?

(ii) Whether the claimants- appellants are entitled to compensation at the rate of Rs.297/- per Sq. yard in respect of their acquired land, in view of the Division Bench judgment in the case of **Pradeep Kumar** (supra) ?

Considering the evidences on record and the facts of the cases, the market value of the acquired land as on the date of acquisition, does not appear to be more than Rs.130/- per Sq. yard and consequently, the market value of

the acquired land is determined at Rs.130/- per Sq. Yard, which would be the just and fair compensation for the acquired land. The question No.1 framed above, is answered accordingly.

Court observed that the contention of the claimants-appellants that they are entitled to the same rate of compensation, as has been determined by a Division Bench in the case of Pradeep Kumar and others v. State of U.P. and another in respect of another village Makanpur, is not tenable. In the case of Kanwar Singh and others v. Union of India, (1998) 8 SCC 136, Hon'ble Supreme Court clearly held that if we go by the compensation awarded to the claimants of the adjoining village, it would not be correct assessment of the market value of the land acquired in village Rangpuri.

While determining the market value, court took the support from the principles/guidelines given by Hon'ble Supreme Court in the case of Chiman Lal Hargovinddas v. Special Land Acquisition Officer, Poona and another, (1988) 3 SCC 751. All the appeals filed by the Claimants-appellants deserve to be allowed to the extent that the appellants shall be entitled to receive compensation @ 130/- per Sq. yard along with all statutory benefits and interest after adjustment of the amount already received by them. The deficiency in Court fees shall be recovered from the Claimants-appellants at the time of preparation of final decree.

All the first appeals succeed and are hereby **allowed** to the extent indicated above, with cost of Rs. 5,000/- to each appellant which the respondents shall pay to the appellants within one month from today.

(Delivered by Hon’ble Surya Prakash Kesarwani, J.)

1. Heard Sri Anurag Khanna,learned Senior Counsel assisted by Sri Surendra Tiwari, Sri Madan Mohan and Sri Sanjeev Singh, learned counsel for the appellants, Sri Rahul Sahai and Sri Amit Manohar, learned counsel for respondent No.3 and Sri S.S.Shrinet, learned standing counsel for the State- respondents.

2. This bunch of 28 first appeals filed under Section 54 of the Land Acquisition Act, involves common facts and issues and as such with the consent of the learned counsels for the

parties, these appeals have been heard together and are being decided by a common judgment, treating First Appeal No.139 of 2009 as the leading appeal.

3. Briefly stated facts giving rise to these appeals are that an area of 902.2046 acres land of village Khora, Pargana Loni, Tehsil Dadri, district Ghaziabad was acquired by a Notification No.11208 dated 17.3.1988, which was published in the U.P. Gazette dated 19.3.1988 under Section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'). However, possession was taken only of 337.892 acres. The award was passed by the Special Land Acquisition Officer (SLAO) on 1.2.1991 awarding a sum of Rs.70/- per sq. yard along with statutory benefits and interest to the claimants land holders. At the instance of the claimants/land holders various references were made under Section 18 of the Act, and by a common judgment dated 26.5.1999 in 34 references, the compensation was enhanced to Rs.106/- per Sq. yard along with statutory benefits and interest.

4. Aggrieved with the aforesaid judgment passed by the Court of Xth Additional District Judge, Ghaziabad, the above noted appeals have been filed by the claimants- appellants, praying for enhancement of compensation to Rs. 125/- per Sq. yard.

Submission of the Parties

5. Learned counsel for the appellants submits that village Khora is adjoining to village Makanpur. In respect of village Makanpur, the matter went up before Hon'ble Supreme Court and it was remanded. In remand proceedings a Division Bench of this Court recently considered the matter and determined market value of the acquired land of Village Makanpur in respect of the acquisition made in the year 1988 at Rs.297/- per Sq. yard in **First Appeal No.522 of 2009, Pradeep Kumar and others v. State of U.P. and another, decided on 21.4.2016.** He submits that the reference court itself has noted the boundaries of the acquired land and found it to be surrounded by developed residential colonies and commercial establishments connected with NH-2. He submits that with respect to the similarly situated village Makanpur and other villages, the compensation has been awarded for the acquired land at Rs.297/- per Sq. yard and consequently, the claimants are also entitled to compensation at the same rate in view of the judgment of this Court in the case of Pradeep Kumar (supra).

6. Sri Rahul Sahai supports the impugned judgment. Sri Amit Manohar submits that the claimants-appellants have filed evidences in the form of sale deed exemplars showing sale consideration from Rs.125/- to Rs.200/- per Sq. yard for land of Village Khora, sold by registered sale-deeds of different dates near to the date of acquisition. He submits that no evidence has been led by the claimants to establish that lands of village Makanpur and village Khora stand on the same footing and potentiality. He relies upon a decision of Hon'ble Supreme Court in Kanwar Singh and others v. Union of India, (1998)8 SCC 136 (Paragraph-9). He submits that the mere fact that two villages are adjoining, the lands of both the villages can not have the same market value and potential. He submits that no evidence has been led by the claimants to demonstrate that the lands acquired possessed higher market value than awarded, as on the date of acquisition. He also

relies upon a judgment of Hon'ble Supreme Court in Chiman Lal Hargovinddas v. Special Land Acquisition Officer, Poona and another, (1988)3 SCC 751 and the provisions of Section 23 of the Act, and submits that the market value of the land has to be settled after considering the evidences on record. The judgment of Hon'ble Supreme Court in the case of Ashok Kumar and another v. State of Haryana, (2016) 4 SCC 544 is distinguishable on facts. The situation of the land of village Khora was different.

7. Sri Anurag Khanna, learned Senior Advocate, in reply to the submissions of Sri Rahul Sahai and Amit Manohar, submits that the judgments have also been held to be admissible in evidence and copies of such judgments have also been filed as additional evidences in First Appeal No.139 of 2009. He submits that this Court may take judicial notice of the judgment of Hon'ble Supreme Court in the case of **Pradeep Kumar** (supra). He submits that there is no ceiling or cap on the upper side of compensation, although there is a cap on the lower side of compensation. He submits that even if the claimants- appellants have not made any claim for specific amount of compensation yet it is to be awarded to the claimants-appellants on the basis of the market value, as on the date of acquisition. He submits that the Act is a welfare legislation intended to protect the land holders to enable them to get appropriate amount of compensation. If the Court finds market value higher than claimed, the Court is bound to determine the amount of compensation at the higher rate.

Discussions and Findings

8. I have carefully considered the submissions of the learned counsel for the parties and perused the records. Considering the submissions the following questions are framed :-

(i) What would be the appropriate amount of compensation of the acquired land of village Khora as on date of acquisition i.e., 19.3.1988 ?

(ii) Whether the claimants- appellants are entitled to compensation at the rate of Rs.297/- per Sq. yard in respect of their acquired land, in view of the Division Bench judgment in the case of **Pradeep Kumar** (supra) ?

9. Perusal of the impugned judgment shows that before the reference court, the claimants-appellants have led documentary as well as oral evidences. They have filed evidences in the form of sale-deeds of dates near to the date of acquisition to demonstrate that the market value of the acquired land of village Khora as on the date of acquisition was; as under :

Paper No.	**Date of Sale-deed**	**Description of Plots of Village Khora (Sold)**	**Boundaries of the Vended plot**	**Selling rate per Sq. Yd.**
15C	21/01/88	Plot No.529 measuring 400 Sq. Yard sold for	**East**- Plot **West**- Road **North**-Plot	Rs.125/-

		Rs.50,000/-	**South**-Plot	
16C	22/03/88	Plot No.42 measuring 200 Sq. Yard for shops sold for Rs.28,000/-	**East**- Park **West**- Main Road **North**- Plot shops of Champat Ram **South**- 15 Ft wide road	Rs.140/-
17C	04/04/88	200 Sq. Yard of Khasra Plot No.785 sold for Rs.30,000/-	**East**- Abadi of Gajraj Singh **West**-16 Ft wide road **North**- Abadi of Balraj Singh **South**- Abadi of vendor Vijendra Singh	Rs.200/-

10. The documentary evidences as led by the claimants/appellants before the Reference Court being sale-deeds Paper No.15-C, 16-C and 17-C clearly demonstrate that these sale-deeds were executed on 21.1.1988, 22.3.1988 and 4.4.1988, while, the acquisition in question was made by Notification under Section 4(1) of the Act, published on 19.3.1988. The above noted sale-deed being Paper No.15-C is about two months prior to the date of acquisition, the sale deed being Paper No.16-C is three days after the acquisition and the sale-deed being Paper No.17-C is about 15 days after the present acquisition. Paper No.17-C was the sale-deed executed by one of the claimants/appellants on whose instance Reference No.145 of 1992 was filed and decided by the impugned common judgment of the Reference Court. No other documentary evidences in the form of sale-deeds were led by the Claimants-appellants. These Sale-deeds clearly demonstrate that certain plots of the village in question were sold at the then prevailing market rate by the land holders including one of the Claimants-appellants @ Rs.125/- , Rs. 140/- and Rs. 200/- per Sq. yard depending upon its location. These plots were small size plots of 200 Sq. yards and 400 Sq. yards. The boundaries, as mentioned in the sale-deed, clearly shows that all the three plots were on road. Paper No.16-C shows that there was road on two sides of the plot and was meant for shop as noted in the sale-deeds itself. These Sale-deeds exemplars are nearest in date to the date of present acquisition. The aforesaid three Sale-deeds exemplars record that the consideration mentioned therein is the prevailing market value of the plot sold. Thus, it is evident that residential or commercial plots situate on main road were being freely bought and sold at the rates ranging from Rs.125/- to Rs.200/- per Sq. yard. Thus, the maximum market value of small plot of 200 Sq. yard comes to Rs.200/- per Sq. Yard, while the market value of comparatively larger plot of 400 Sq. yard comes to Rs. 125/- per Sq. yard. Thus, as per documentary evidences on record, the market value of the acquired land measuring 337.25 acres could have been determined after appropriate deduction towards development costs etc. and smallness of the sale deed exemplar plots which this Court assumes it to be not less than 30% under the present set of facts. The sale-deed instances

(Paper No. 15C, 16C and 17C being nearer to the point of time of the present acquisition under section 4 of the Act, are best pieces of evidence of the market value of the acquired land as on the date of acquisition.

11. Under the circumstances, the market value of the acquired land as on the date of acquisition, on the basis of highest selling rate of Sale-deeds exemplar (Paper No.17-C) and after deduction of 35% towards development cost etc., comes to Rs.130/- per Sq. Yard. No other evidence relating to market value of land of village Khora as on the date of present acquisition or near to it, could be led by the Claimants-appellants. In the memorandum of appeal also the Claimants-appellants have prayed for enhancement of compensation to Rs.125/- per Sq. Yard.

12. Considering the evidences on record and the facts of the cases, the market value of the acquired land as on the date of acquisition, does not appear to be more than Rs.130/- per Sq. yard and consequently, the market value of the acquired land is determined at Rs.130/- per Sq. Yard, which would be the just and fair compensation for the acquired land. The question No.1 framed above, is answered accordingly.

13. The Claimants-appellants have placed much reliance on a Division Bench judgment in the case of **Pradeep Kumar** (supra). I have perused the said judgment and I find that it was passed on the ground that in respect of acquisition of the year 1986, compensation was determined at the rate of Rs.297/- per Sq. Yard and, therefore, in respect of subsequent acquisition in the year 1988, the Claimants/land-holders are entitled for compensation at least on the same rate, as was given for the acquisition in the year 1986. The acquisition in the case of Pradeep Kumar (supra) was of land of village Makanpur. No evidence has been led by the claimants-appellants even before this Court to establish that the acquired land of village Khora and the acquired land of village Makanpur are situationally the same. The concept of adjoining village cannot be stretched to such an extent that similar amount of compensation be given in ignorance of the legislative mandate of Section 23 (1) of the Act, and the law settled by Hon'ble Supreme Court in various cases that market value of the acquired land has to be determined as on the date of acquisition.

14. In the case of **Ashok Kumar and another v. State of Haryana (2016) 4 SCC 544**, Hon'ble Supreme Court relied upon the amended provision of Section 25 (effective from 24.9.1984) and the judgments in the cases of Bhag Singh v. Union Territory of Chandigarh (1985) 3 SCC 737 (Para 3), Krishi Utpadan Mandi Samiti v. Kanhaiya Lal (2000) 7 SCC 756 and Bhimasha v. Land Acquisition Officer, (2008) 10 SCC 797 and held that the amount of compensation that a Court can award is no longer restricted to the amount claimed by the applicant, inasmuch as it is the duty of the Court to award just and fair compensation taking into consideration the true market value and other relevant factors, irrespective of the claim made by the owner. In the case of Ashok Kumar (supra), Hon'ble Supreme Court noted the arguments of compensation similar to that awarded for lands of adjoining village, but rejected the same holding as under :

"2. Around 46.93 acres of Land was acquired by the respondent- State of Haryana initiating the proceedings by Notification dated 19-9-1983 issued under Section 4 of the Land

Acquisition Act, 1894. The purpose of acquisition is residential and commercial for Panchkula, Sector-21. The acquired property is in Village Fatehpur. In respect of the same development, we have seen that this court in many cases has based the fixation of the land value based on acquisition proceedings initiated in 1981 in Village Judian. Those properties in village Judian had access to State Highway and the value fixed by this Court was Rs. 250/- per square yard. In respect of properties situated in the adjoining village of the appellants namely, Devi Nagar, we have fixed land value at the rate of Rs. 250/- per square yard that was the acquisition initiated in the year 1987 and that property had extensive national highway frontage.

3. The Learned counsel for the appellants submitted that in all the adjoining villages for the properties acquired for the same purpose, this court having fixed the land value at Rs. 250/- per square yard and above, the appellants may also be granted the same value.

12. In the case of the appellants herein, it is an admitted position that the properties do not abut the national highway. Admittedly, it is situated about 375 yards away from the national highway and it appears that there is only the narrow Nahan Kothi Road connecting the properties of the appellants to the national highway. Therefore, it will not be just and proper to award land value of Rs.250/- per square yard, which is granted to the property in adjoining village. Having regard to the factual and legal position obtained above, we are of the considered view that the just and fair compensation in the case of appellants would be Rs. 200/- per square yard.

13. Therefore, these appeals are disposed of fixing the land value at Rs. 200/- per square yard and the appellants shall also be entitled to all the statutory benefits. The amount as above shall be paid and deposited after adjusting the deficit court fee, if any, before the Executing Court within a period of three months from today."

15. In the case of Kanwar Singh and others v. Union of India, (1998) 8 SCC 136 (Paras 9,10 and 11), Hon'ble Supreme Court rejected the contention of the claimants to award same rate of compensation, as was awarded to the claimants of the adjoining villages and held as under :

"9. The contention of appellants' counsel that the appellants deserved to be awarded the same rate of compensation as it was awarded to the claimants of village Masoodpur and Mahipalpur, in the present facts and circumstances of the case, is not tenable. If we go by the compensation awarded to claimants of adjoining village it would not lead to the correct assessment of market value of the land acquired in the village Rangpuri. For example village 'A' adjoins village 'B', village 'B' adjoins village 'C', village 'C' adjoins village 'D', so on and so forth and in that process the entire Delhi would be covered. Generally there would be different situation and potentiality of the land situated in two different villages unless it is proved that the situation and potentiality of the land in two different villages are the same. The High Court in the present case has found that the situation and potentiality of land in village Malikpur Khoi are different than that of village Masoodpur, This finding of the High Court is based on correct appreciation of evidence on record and does not call for interference. **Another reason why the High Court declined to rely upon the judgments**

referred to above was that the sale instances relating to village Malikpur Khoi were available for determining the market value of the land acquired in village Malikpur Khoi and, as such, there was no need to rely upon the judgments which related to acquired land of different villages. Yet another reason why the two judgments referred to by learned counsel for appellant cannot be relied upon for assessing the market value of acquired land in village Malikpur Khoi was that RFA No. 567/90 filed by the Union of India relating to the grant of compensation in respect of land in village Masoodpur was dismissed summarily, as the only challenge in the appeal was in respect of grant of interest to the claimants which matter was already settled by the Supreme Court. In fact, the High Court had adversely commented upon the working of the Land Acquisition Department of Delhi Administration in not challenging the market value of the land acquired in village Masoodpur as assessed by the. Additional District Judge, in Regular First Appeals although the court fee to that effect was paid. In this connection, it is relevant to reproduce the finding of the High Court, which runs as follows:-

"Before leaving the judgment, we are constrained to make a few observations regarding the working of the land Acquisition Department in Delhi Administration and contest of these appeals by the counsel for Union of India. Although an appeal filed by the Union of India against the judgment of the ADJ in LAC 186/91 is pending in this court, this fact was not brought to our notice by the counsel for Union of India. This decision of the ADJ in LAC 186/81 has been substantially relied upon by another ADJ in LAC 15/81. When the appeal against the said decision of the ADJ in LAC 15/81 came before (RFA 567/90) the only question pressed by the counsel for Union of India was in regard to the payment of interest after the amendment in the Land Acquisition Act in 1984. But when we found that the dismissal of the said appeal by the Division Bench was relied upon in Hoshiar Singh V. Union of India, we sent for the file. What is discovered on the file is shocking. The Union of India had purchased stamp worth Rs. 1,19,300. Obviously, the intention was to file an appeal against the quantum of compensation awarded by the ADJ. However, the grounds of appeal mostly relate to the payment of interest in terms of the Amending Act of 1984. The appeal memo was drafted by Mr. Gulab Chandra, Advocate, who also appeared before us in RFA 567/90. Since the questions regarding payment of interest after the Amending Act of 1984 are now fully settled by the decisions of the Supreme Court and since that was the only question argued before us by the counsel for the Union of India, the appeal was dismissed by us we had not noticed at that stage that a stamp of Rs.1,19,300 was affixed by the Union of India. This was only discovered now. The purchase of stamp worth Rs. 1,19,300 would show that the claim would be over a crore of rupees. The claimants have been benefited because Union of India did not argue the matter on compensation. Apart from the lack of interest and inefficiency in the Land Acquisition matters on behalf of the Land Acquisition Department, these facts raise grave suspicion about the credibility of the working of the said Department. We, therefore, direct that a copy of this judgment be sent to the Lt. Governor for appropriate action."

The judgment of the High Court in RFA No. 567 of 1990 was relied upon in Hoshiar Singh v. Union of India as there was no sale instance In respect of the land in village Mahipalpur available for assessing the market value of acquired land in the village Mahipalpur. It may be seen that in both the cases, the High Court had no occasion to

examine the market value of acquired land in Villages Masoodpur and Mahipalpur and under such circumstances, it is not safe to rely upon two judgments of the High Court for arriving at the market value of the land in Village Rangpuri.

10. The High Court has considered the following sale instances in detail which were from the same village, viz., Rangpuri

Sl. No.	**Ext. No**	**Description of document sale/Regn.**	**Date of Notification**	**Field No., area and Situation**	**Rate per Bigha Rs.**
1	A-1	Deed of Sale	14/03/61	14 (2 bighas) Malikpur Kohi	25000
2	A-2	-do-	07/07/62	72 min (6 bis) -do-	4000
3	A-5	-do-	28/04/64	1587/1 (1 bigha) -do-	5000
4	A-2	-do-	26/10/62	1677 (4 bighas) -do-	344
5	R-1	Copy of Mutation	09/04/63	769,770 etc. (91 bighas & 1 bis) -do-	300
6	R-2	Deed of Sale	19/08/64	1637,1650,1651, 1652,1653/1& 1653/2 (24 bighas) -do-	500

and came to the conclusion that sale transaction with regard to Khashra No. 1587/1 is not genuine sale transaction and, as such, it cannot be relied upon for assessing the market value of the land acquired. **The High Court also found that the sale instances of the year 1964 at serial No. 4 and 6 which were nearer to the point of time of notification under Section 4 of the Act, are the best pieces of evidence for assessing the market value of the land acquired.**

11. After having considered the sale instances, the High Court assessed the market value of the land acquired @ Rs. 3000 per bigha. **The judgment of the High Court is neither perverse nor illegal and does not call for any interference, since it is based on correct appreciation of the evidence on record and proper application of law to the established facts.** The appeals are, accordingly,dismissed but in the circumstances of the case, there shall be no order as to costs."

(Emphasis supplied by me)

16. In view of the above discussions, the contention of the claimants-appellants that they are entitled to the same rate of compensation, as has been determined by a Division Bench in the case of Pradeep Kumar (supra) in respect of another village Makanpur, is not tenable. In the case of Kanwar Singh (supra), Hon'ble Supreme Court clearly held that if we go by the compensation awarded to the claimants of the adjoining village, it would not be correct assessment of the market value of the land acquired in village Rangpuri. For example village 'A' adjoins village 'B', village 'B' adjoins village 'C', village 'C' adjoins village 'D', so on and so forth and in that process, the entire Delhi would be covered. These observations of Hon'ble Supreme Court have direct bearing on the present set of facts and for that reason the claimants-appellants are not entitled to the same rate of compensation , as determined in the matter of land acquisition of the adjoining village Makanpur. The Claimants-appellants have neither pleaded nor proved by leading any evidence that the situation and potentiality of the land in two villages, namely, village "Makanpur" and village "Khora" are the same. Perusal of paras 16 to 39 of the Division Bench Judgment in the case of Pradeep Kumar (supra) clearly shows that the Division Bench awarded the same rate of compensation with respect to some more land of the same village Makanpur, acquired by a subsequent notification under Section 4 of the Act, which is not the case of the appellants in the present appeals. Thus, the judgment in the case of Pradeep Kumar (supra) is distinguishable on facts. The question No.2 is answered accordingly.

17. For the reasons and findings recorded in the preceding paragraphs of this judgment, various orders filed by the Claimants-appellants along with Misc. Application No.189998 of 2015 are also distinguishable on the facts of the present appeals.

18. The view taken by this Court in determining the market value of the acquired land of village Khora, also finds support from the principles/guidelines given by Hon'ble Supreme Court in the case of Chiman Lal Hargovinddas v. Special Land Acquisition Officer, Poona and another, (1988) 3 SCC 751 (Para 4) which is reproduced below :

"4. The following factors must be etched on the mental screen:

(1) A reference under section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition officer in his Award unless the same material is produced and proved before the Court.

(2) So also the Award of the Land Acquisition officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the Court hearing the Reference. It is merely an offer made by the Land Acquisition officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the Court to sit in appeal against the Award,approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition officer, as if it were an appellate court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under Section 4 of the Land Acquisition Act (dates of Notifications under sections 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) only genuine instances have to be taken into account. (Some times instances are rigged up in anticipation of Acquisition of land).

(9) Even post notification instances can be taken into account (1) if they are very proximate,(2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(l0) The most comparable instances out of the genuine instances have to be identified on the following considerations:
(i) proximity from time angle,
(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus

factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has there after to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

Plus factors	Minus factors
1. smallness of size.	1. largeness of area.
2. proximity to a road.	2. situation in the interior at a distance from the Road.
3. frontage on a road.	3. narrow strip of land with very small frontage compared to depth.
4. nearness to developed area.	4. lower level requiring the depressed portion to be filled up.
5. regular shape.	5. remoteness from developed locality.
6. level vis-a-vis land under acquisition.	6. some special disadvantageous factor which would deter a purchaser.
7. special value for an owner of an adjoining property to whom it may have some very special advantage.	

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say l0000 sq. yds or more. **Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by**

preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20 percent to 50 percent to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be looked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense."

(Emphasis supplied by me)

19. In view of the above discussion, all the appeals filed by the Claimants-appellants deserve to be allowed to the extent that the appellants shall be entitled to receive compensation @ 130/- per Sq. yard along with all statutory benefits and interest after adjustment of the amount already received by them. The deficiency in Court fees shall be recovered from the Claimants-appellants at the time of preparation of final decree.

20. In result, all the first appeals succeed and are hereby allowed to the extent indicated above, with cost of Rs. 5,000/- to each appellant which the respondents shall pay to the appellants within one month from today.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Income Tax Appeal No.- 231 Of 2006
&
Connected With Other Cases

U.P. State Industrial Development Corp. Ltd. (Upsidc) ...Appellant
Versus
Commissioner Of Income-Tax-II, Kanpur ...Respondent

Counsel for Appellant:
S.K. Garg

Counsel for Respondent:
A.N. Mahajan, B.Agrawal

Present appeal has been filed by the UPSIDC claiming exemption from Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961') on the ground that it is a "local authority" within the meaning of Section 10(20) or an authority constituted by or under an enactment in India under Section 10(20A) but it was not accepted by Income Tax Authorities.

Learned counsel for appellant though has argued that UPSIDC may also be treated as a "local authority" under Section 10(20) of Act, 1961 but it does not appear that any such issue was raised before the court below. In the present appeals, thus, the claim of UPSIDC about its origin under UPID Act, 1962 cannot be accepted.

Court has considered the questions by excluding the applicability of UPID Act, 1962. Unless appellant is an authority constituted in India by or under any law enacted, Section 10 (20A) of Act, 1961 shall not be attracted.

Thereafter referring to Section 10(20A) of Act, 1961, Court said that in order to qualify exemption under aforesaid provision one must satisfy two requirements (i) it is an authority constituted by or under any enacted law (ii) the authority is constituted by law for dealing with the need to provide housing accommodation. There is another alternative of this second limb that if first alternative is not available, then authority must show that it is constituted by law for the purpose of planning development or improvement of cities, towns and villages or both.

The provision has been considered by Supreme Court in **Gujarat Industrial Development Corporation vs. CIT (1997) 227 ITR 414**. Therein "Gujarat Industrial Development Corporation" (hereinafter referred to as 'GIDC') claimed benefit under Section 10(20A) of Act, 1961 on the ground that it is an authority constituted under Gujarat Industrial Development Act, 1962 (hereinafter referred to as 'GID Act, 1962').

Court observed the present case in the light of aforesaid case and held that the first limb of requirement to attract Section 10(20A) of Act, 1961 that one who is claiming exemption thereunder must be "an authority" constituted by or under any law enacted in India, is not satisfied. Therefore, even if second limb of Section 10(20A) of Act, 1961 is satisfied, appellant- UPSIDC will not qualify for exemption since satisfaction of both requirement is must.

Court had admitted the appeal on three substantial question of law which has been answered by the court against appellant- assessee and in favour of Revenue by holding that since UPSIDC is a company incorporated under Act, 1956 and not an authority constituted by or under any enactment in India, therefore, is not entitled for claiming exemption under Section 10(20A) of Act, 1961.

All appeals are dismissed. No costs.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard learned counsel for the parties.

2. These appeals are connected having arisen from common judgment and order dated 17.11.2005 passed by Income Tax Appellate Tribunal (Lucknow) in five connected appeals i.e I.T.R. Nos. 1216, 1217, 1218, 1219 and 1220 relating to assessment years 1977-78, 1978-79, 1981-82, 1985-86 and 1987-88.

3. The appeals were admitted on the following three substantial questions of law:-

(i) Whether the ITAT, was legally correct in holding that UPSIDC did not have the status of "Authority" as stipulated in section 10(20A) of the Act and in rejecting its claim for exemption, thereunder ?

(ii) Whether the Tribunal was legally correct in holding that in the absence of a specific notification having been issued by the State Government to create UPSIDC, it cannot be treated to be an "Authority" constituted in India "for the purposes of planning, development or improvement of cities, towns or villages or both" as stipulated under Section 10(20A) of the Act so as to be entitled to avail exemption thereunder ?

(iii) Whether on a true and correct interpretation of the preamble of U.P. Industrial Development Act (Act No.19), 1962 and various provisions as appearing therein, as are related to setting of a requisite type of corporation and defining its area of operation, UPSIDC was liable to be treated as an 'authority' for the purposes of its claim for exemption under Section 10(20A) ?

4. The undisputed facts are that U.P. State Industrial Development Corporation (hereinafter referred to as 'UPSIDC') is a company incorporated under the Companies Act, 1956 (hereinafter referred to as 'Act, 1956') and is a State Government undertaking incorporated inter-alia to promote, establish and execute industries, works, projects and enterprises and/or to provide aid or assistance to industrial undertakings, and/or to establish industries in Industrial Areas and Industrial Estates in State of U.P.

5. UPSIDC claimed exemption from Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961') on the ground that it is a "local authority" within the meaning of Section 10(20) or an authority constituted by or under an enactment in India under Section 10(20A) but it was not accepted by Income Tax Authorities, hence these appeals.

6. Learned counsel for appellant though has argued that UPSIDC may also be treated as a "local authority" under Section 10(20) of Act, 1961 but it does not appear that any such issue was raised before the court below. Even otherwise during the course of argument it has not been disputed before us that the term "local authority" has not been defined under Act, 1961. It has been defined under Section 3 (31) of The General Clauses Act, 1897 which reads as under :-

"3(31). "local authority" shall mean a municipal committee, district board, body of port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund"

7. Counsel for appellant fairly conceded that considering aforesaid definition of "local authority" it is difficult to advance any submission so as to claim status of local authority for UPSIDC.

8. Thereafter, he proceeded and confined his arguments with respect of Section 10(20A) of Act, 1961, founded whereunder three substantial questions of law as noted above were formulated and appeals have been admitted.

9. Though in memo of appeals, appellant has claimed its existence under U.P. Industrial Development Act, 1962 (hereinafter referred to as "UPID Act, 1962') but learned counsel for appellant fairly stated that neither before Tribunal nor before this Court, appellant could produce any notification showing its creation or existence under UPID Act, 1962.

10. In fact, learned counsel for appellant fairly admits that there is no notification issued under Section 3 of UPID Act, 1962 resulting in creation of UPSIDC thereunder, therefore, claim of appellant that it has been constituted under UPID Act, 1962 is not founded on any material on record. On the contrary, it is an admitted case of appellant that it is a company incorporated under Act, 1956.

11. We also find that status of UPSIDC has been discussed by this Court in I.T.A. No. 191 of 2006 connected with I.T.A. No. 192 of 2006 decided on 9.3.2015 and some observations made therein, relevant for the purpose of present appeals, may be reproduced as under:

"11.....From the facts noticed by Tribunal, in the impugned judgment, it is said that Assessee M/s U.P. State Industrial Development Corporation Ltd. (hereinafter referred to as 'UPSIDC'), is a company registered under the Companies Act, 1956 and wholly owned by State of Uttar Pradesh, therefore, it is a State undertaking. The objects and purposes incorporating the aforesaid company is to acquire and develop land for the purposes of promoting industrialisation in State of Uttar Pradesh. UPSIDC, got the land acquired through State of Uttar Pradesh for developing industrial area, allot land to entrepreneurs and receives premium and lease rent etc., in instalments from such Entrepreneurs"

"15.....UPSIDC was incorporated under the Companies Act, 1956 on 29th March, 1961. The object of incorporation, mentioned in the said letter was to provide loan, term advances to Industrial Entrepreneurs, by providing developed land on deferred payment basis and also loans. However, from the aforesaid order, we find that there is also some contradictory facts and in paragraph 7, it is mentioned that UPSIDC was formed under U.P. Industrial Development Act, 1962 (hereinafter referred to as 'UPID Act, 1962'), but paragraph 11 shows that UPSIDC was already incorporated on 29th March, 1961. Once UPSIDC was already incorporated on 29th March, 1961, it is not possible to claim that it could have been established under UPID Act, 1962, which came into existence after more than a year since when UPSIDC was already incorporated as a State Government Company under the provisions of Companies Act, 1956.

16. We have also gone through the UPID Act, 1962, Section 3 thereof reads as under:

"Establishment and Constitution of the Corporation

3. (1) For the purposes of securing and assisting in the rapid and orderly establishment, and organisation of industries in the State of U.P. there shall be established by the State Government notification in the Official Gazette, a Corporation by the name of the U.P. Industrial Development Corporation.

(2) The Corporation shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name, and shall be competent to acquire, hold and dispose of property, both movable and immovable, and to contract, and do all things necessary for the purposes of this Act."

17. Term 'corporation' is also defined in Section 2(d) of UPID Act, 1962, and reads as under :

"2(d) "Corporation" means the U.P. Industrial Development Corporation established under Section 3;

18. Therefore, what was contemplated in Act, 1962, is a 'Corporation' named 'U.P. Industrial Development Corporation, while, Assessee in question was incorporated as "U.P. State Industrial Development Corporation Ltd." and came into existence much before the enactment of UPID Act, 1962. Whether there was any change in the name of Corporation at any subsequent point of time is not known.

19. Section 12 of UPID Act, 1962, on the contrary shows that 'Corporation' under the aforesaid Act, shall take over and employ all the existing staff serving for the purposes in U.P. State Industrial Development Corporation etc. who would give their willingness to serve in the Corporation.

20. Section 13 of UPID Act, 1962, which discusses the functions and powers of Corporation, further provides that Corporation would take over and manage industrial areas owned and managed by UPSIDC. ***It is thus clear that Corporation to be set up under UPID Act, 1962, is different then UPSIDC and the said legislation in fact intended for complete take over of UPSIDC by the Corporation, who would work to give effect to the objectives of UPID Act, 1962.***

21. Therefore, aforesaid Act would not provide any assistance for the purposes of understanding functions and objectives for which UPSIDC was incorporated in 1961."

12. In the present appeals, thus, the claim of UPSIDC about its origin under UPID Act, 1962 cannot be accepted.

13. Now we come to consider the above questions by excluding the applicability of UPID Act, 1962. Unless appellant is an authority constituted in India by or under any law enacted, Section 10 (20A) of Act, 1961 shall not be attracted. This is evident from a bare reading of the aforesaid provision which reads as under:-

"10(20A). any income of an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both;"

14. This provision has been considered by Supreme Court in **Gujarat Industrial Development Corporation vs. CIT (1997) 227 ITR 414.** Therein "Gujarat Industrial Development Corporation" (hereinafter referred to as 'GIDC') claimed benefit under Section 10 (20A) of Act, 1961 on the ground that it is an authority constituted under Gujarat Industrial Development Act, 1962 (hereinafter referred to as 'GID Act, 1962'). Court recorded a finding to this effect by accepting this claim as is evident from para 3 of judgment:-

"3. Corporation has been created under the Gujarat industrial Development Act, 1962, (for short 'the Gujarat Act') with the right to hold properties and the right to sue and be sued in its own name....."

15. Thereafter referring to Section 10(20A) of Act, 1961, Court said that in order to qualify exemption under aforesaid provision one must satisfy two requirements (i) it is an authority constituted by or under any enacted law (ii) the authority is constituted by law for dealing with the need to provide housing accommodation. There is another alternative of this second limb that if first alternative is not available, then authority must show that it is constituted by law for the purpose of planning development or improvement of cities, towns and villages or both.

16. This Court finds that in **Gujarat Industrial Development Corporation vs. CIT (supra)** that GIDC was created under a provincial enactment for the purpose of planning or development or improvement of cities, towns or villages or in combination of them. Court also negated the view taken by High Court that the second limb of the requirement was not satisfied since GIDC was established for the purpose of developing or establishing industries in any particular area and not for the purpose of planning developing or improving a particular city, town or a particular area. This view taken by High Court was not approved by Supreme Court and referring to the provisions of GID Act, 1962, Court held that second alternative of second limb of Section 10(20A) of Act, 1961, as noticed above is satisfied. Relevant observations, in this regard, as contained in para 9, 10 and 11 of judgment are reproduced as under:-

"9. The Gujarat Act was enacted "to make special provision for securing the orderly establishment of industries in industrial areas and industrial estates in the State of Gujarat, and to assist generally in the organisation thereof, and for that purpose to establish an Industrial

Development Corporation, and for purposes connected with the matters aforesaid as can be discerned from the preamble thereof.

10. Section 2 (g) of the Act defines "industrial area" as any area declared to be an industrial area by the State Government by notification in the Official Gazette which is to be developed and where industries are to be accommodated. Section 2(n) defines "industrial estate" as any site selected by the State Government where the Corporation builds factories and other buildings and makes them available for any industries or class of industries. Section 13 of the Gujarat Act enumerate the functions of the Corporation and they contain, inter alia, "to promote and assist in the rapid and orderly establishment, growth and development of industries in the State of Gujarat.

11. We have no doubt that a proper planning is absolutely necessary for creation of an industrial area. Inside roads, sub-roads buildings, sanitation, parks and other amenities have also to be provided in a planned industrial area as per the modern concept of any industrial complex. Even educational institutions may have to be provided in such complex. Therefore, development of industrial area would have its direct impact on the development or improvement of that part of the city or town or village where such area is located. Delinking industrial area from the scope of development of any area is, thus, without any practical sense."

17. The Court also relied on its earlier decision in **Sri Ramtanu Cooperative Housing Society Ltd. vs. State of Maharashtra (1971) 1 SCR 719** which was in respect of Maharashtra Industrial Development Corporation (hereinafter referred to as 'MIDC') created under Maharashtra Industrial Development Act, 1962 (hereinafter referred to as 'MID Act, 1962') and reproduced following observations made in judgment in the context of MID Act, 1962 and Corporation created thereunder :-

"The functions and powers of the Corporation indicate that the Corporation government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing property for those purposes, constructing building, allotting building, factory sheds to industrialists or industrial undertakings. It is obvious that the Corporation will receive moneys for disposal of lands buildings and other properties and also that the Corporation would receive rents and profits in appropriate cases. Receipts of these moneys arise not out of any business or trade but out of sole purpose of establishment growth and development of industries. The Corporation has to provide amenities and facilities in industrial estates and industrial areas. Amenities of road, electricity, sewerage and other facilities in industrial estates and industrial areas are within the programme of work of the Corporation."

18. It was also held that the word "development" under Section 10(20A) of Act, 1961 should be understood in its wide sense. There is no warrant to exclude all development programmes relating to an industry from purview of the word "development" in the said sub-section. There is no indication in Act, 1961 that development envisaged should confine to non-industrial activities. Development of a place can be accelerated through varieties of schemes and

establishment of an industry is one of the modes for developing an area. Court also observed that the purpose of granting exemption from income-tax to certain authorities under Section 10(20A) of Act, 1961 is to protect public bodies, created under law, for achieving the purpose of developing urban or rural areas, for public good. When object is such, an interpretation which would preserve it should be accepted even if the provision is capable of more than one interpretation.

19. If we examine the present case in the light of aforesaid exposition of law laid down in **Gujarat Industrial Development Corporation vs. CIT (supra)** we find that the first limb of requirement to attract Section 10(20A) of Act, 1961 that one who is claiming exemption thereunder must be "an authority" constituted by or under any law enacted in India, is not satisfied. Therefore, even if second limb of Section 10(20A) of Act, 1961 is satisfied, appellant- UPSIDC will not qualify for exemption since satisfaction of both requirement is must.

20. A similar question was considered by a Division Bench of Karnataka High Court in **M/s Karnataka State Small Industries Development Corporation Ltd vs. The Assistant Commissioner of Income Tax** in I.T.A. No. 1281 of 2006 decided on 3rd September, 2012. Therein also Karnataka State Small Industries Development Corporation (hereinafter referred to as 'KSSIDC') claimed exemption under Section 10(20A) of Act, 1961. It was negated by assessing authority holding that KSSIDC is not an authority constituted in India by or under any law but is a creation incorporated under Companies Act. The appeal of KSSIDC also failed before Commissioner of Income Tax (Appeals) (hereinafter referred to as 'CIT (A)') and further appeal was rejected by Income Tax Appellate Tribunal at Bangalore. Like UPSIDC, KSSIDC was also promoted as Government Company incorporated under Companies Act. Karnataka High Court found that KSSIDC was incorporated for the purposes of (a) developing small scale industries; (b) constructing and managing of industrial estates; (c) granting financial assistance to small scale industrialists; (d) marketing products of small scale industries.

21. Examining Section 10(20A) of Act, 1961 and the functions and manner in which KSSIDC came into existence, Karnataka High Court said that one, in order to claim exemption, must be an 'authority' and said authority should be constituted in India by or under any law and such law should be enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages or for both. KSSIDC was not constituted under any law. It was incorporated pursuant to a resolution of Government of Karnataka. The objectives and purposes for which it was incorporated and manner of its creation under Companies Act, cannot be equated with the authority constituted in India by or under any law enacted. Moreover, KSSIDC is not discharging functions of housing accommodation and also planning and development of cities, towns and villages or both. Hence, KSSIDC was not held entitle to claim exemption under Section 10(20A) of the Act, 1961.

22. Some part of observations and findings of Karnataka High Court with regard to purpose and objective for which KSSIDC was created is not consistent with the law laid down in **Gujarat Industrial Development Corporation vs. CIT (supra)** and to that extent we find ourselves in

respectful disagreement thereto but the first part that KSSIDC was a 'company' incorporated under Act, 1956 and not an 'authority' constituted under any law enacted in India is fully applicable in the present case and consistent with what has been said above by Supreme Court in **Gujarat Industrial Development Corporation vs. CIT (supra)** and only to that extent we find ourselves in agreement therewith.

23. To the same extent is the law laid down by Madras High Court in **CIT vs. State Industrial Promotion Corporation of Tamil Nadu (2009) 311 ITR 197**, wherein Court said as under:-

"It was admitted that the assessee was not an authority constituted in India by or under any law enacted. It was also admitted that the assessee had been incorporated under the provisions of the Companies Act, 1956. Hence, the assessee could not claim the benefit under Section 10(20A)"

24. In view of above discussion, we answer all the three questions against appellant-assessee and in favour of Revenue by holding that since UPSIDC is a company incorporated under Act, 1956 and not an authority constituted by or under any enactment in India, therefore, is not entitled for claiming exemption under Section 10(20A) of Act, 1961.

25. The judgment of Tribunal is confirmed in so far as it denies exemption to appellant-assessee but in the manner and for the reasons as discussed above.

26. In the result, all appeals are dismissed. No costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Special Appeal No.- 822 Of 2015

Govind Singh Tyagi **...Appellant**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Appellant:
Mohd. Afzal, A.K. Rai

Counsel for Respondents:
C.S.C.

This Special Appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules has been filed against the judgment of the learned Single Judge dated 7th September, 2012 whereby Civil Misc. Writ Petition No. 45424 of 2012 (Govind Singh Tyagi vs. State of U.P. and others) filed by the present petitioner has been dismissed.

From the records of the present writ petition, it is apparent that the vacancy on the post of Lecturer in Sociology arose on 5th March, 1981. According to the petitioner the said vacancy when it was within promotion quota but no teacher with qualification was available in the feeding cadre was advertised for direct recruitment, but it could not be filled. Thus it continued to remain under the Promotional Quota.

It was contended on behalf of the petitioner before the Learned Single Judge that under Rule 14 of the 1998 Rules, five years of continuous service in the feeding cadre namely LT grade in the instant case, had to be computed on the first day of the year of the recruitment and since the Committee of Management had decided to fill the vacancy through promotion of the petitioner in the year 2012, the petitioner stood qualified as he had completed five years of continuous service as LT grade teacher in the institution on the said date.

Learned Single Judge has come to a conclusion that the appointment of the petitioner in the feeding cadre itself was made in the year 2007, much after the date when the vacancy on the post of lecturer came into existence i.e. in the year 1981, i.e. when the petitioner was not even born in the cadre of teacher in the institution. He had no case for consideration for promotion against the said vacancy as he was not within the zone of consideration on the relevant date of occurrence of vacancy or the 1st date of the year of recruitment.

Court observed that In the instant case, the petitioner was not even born in the feeding cadre on the date of occurrence of the vacancy in the Lecturer grade on the first date of the year of the recruitment as the Rules 1998. The petitioner can have no claim for consideration for promotion. There is no error in the judgment of the learned Single Judge.

The appeal is **dismissed.**

(Delivered by Hon'ble Arun Tanodn, J.
&
Mrs. Sunita Agarwal, J.)

1. This Special Appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules has been filed against the judgment of the learned Single Judge dated 7th September, 2012 whereby Civil Misc. Writ Petition No. 45424 of 2012 (Govind Singh Tyagi vs. State of U.P. and others) filed by the present petitioner has been dismissed.

2. Facts in short leading to the present writ petition are as follows:-

3. Sri Gandhi Smarak Inter College, Muzaffara Bagarpur, Panchsheel Nagar, District Ghaziabad is a recognized Intermediate College receiving grant in aid from the State Government. The provisions of the Intermediate Education Act, 1921 and the Regulations framed thereunder as well as the provisions of the U.P. Secondary Education (Services Selection Board) Act 1982 and the U.P. Secondary Education Services Selection Board Rules, 1998 and the Regulations framed thereunder are fully applicable to the teachers of the said institution.

4. From the records of the present writ petition, it is apparent that the vacancy on the post of Lecturer in Sociology arose on 5th March, 1981. According to the petitioner the said vacancy when it was within promotion quota but no teacher with qualification was available in the feeding cadre was advertised for direct recruitment, but it could not be filled. Thus it continued to remain under the Promotional Quota.

5. It is further the case of the petitioner that he was engaged as a subject expert in the said institution in terms of the Government Order dated 13th June, 2000 and thereafter he was absorbed as Assistant Teacher vide order dated 17th May, 2007. The Committee of Management had undertaken the proceeding for promotion against the post of Lecturer (Sociology) which fell vacant on 5th March, 1981. Recommendation for promotion of the petitioner against the said vacancy was forwarded to the District Inspector of Schools for approval. The District Inspector of Schools vide letter dated 21st June, 2012 returned the papers so received from the Committee of Management after rejecting the proposal for promotion of the petitioner. Resultantly the petitioner filed the aforesaid writ petition with the prayer to set aside the order of the District Inspector of Schools and to direct the respondents to grant promotion to the petitioner as lecturer in Sociology.

6. Before the learned Single Judge, it was contended on behalf of the petitioner that under Rule 14 of the 1998 Rules, five years of continuous service in the feeding cadre namely LT grade in the instant case, had to be computed on the first day of the year of the recruitment and since the Committee of Management had decided to fill the vacancy through promotion of the petitioner in the year 2012, the petitioner stood qualified as he had completed five years of continuous service as LT grade teacher in the institution on the said date.

7. Accordingly, his promotion was liable to be approved by the District Inspector of Schools, decision to the contrary was totally illegal and unsustainable.

8. Counsel for the petitioner has placed reliance upon the Full Bench judgment of the High Court in the Case of **Raeesul Hasan vs. State of U.P.**[1] as well as upon the judgment of the Division Bench of this Court in the Case of **Vijay Kumar Sonkar vs. State of U.P. and 2 others** namely **Special Appeal No. 547 of 2015** decided on 12.8.2015.

9. Learned Single Judge has specifically recorded that the vacancy against which promotion was being claimed, was in existence on the date of commencement of the U.P. Secondary Education Services Selection Board Rules, 1998. The rules do contemplate that if any vacancy in the year of recruitment cannot be filled by promotion due to non-availability of a suitable candidate, the post may be filled by direct recruitment.

10. Learned Single Judge has come to a conclusion that the appointment of the petitioner in the feeding cadre itself was made in the year 2007, much after the date when the vacancy on the post of lecturer came into existence i.e. in the year 1981, i.e. when the petitioner was not even born in the cadre of teacher in the institution. He had no case for consideration for promotion against the said vacancy as he was not within the zone of consideration on the relevant date of occurrence of vacancy or the 1st date of the year of recruitment.

11. Counsel for the petitioner has reiterated before us the same grounds which had been taken before the learned Single Judge. He referred to the same judgments which have been mentioned therein, including the Full Bench judgment of this Court in the case of **Raeesul Hasan** (supra).

12. We may record that the Full Bench of the Court in the case of **Raeesul Hasan** (supra) was considering the issue as to what would be the date on which a candidate must be considered to have completed five years of service for being eligible for promotion on the post of lecturer under the Rules, 1998. The Full Bench to answer the said question as follows:-

"For these reasons, we answer the reference by holding that it is not the date on which the vacancy has occurred, but the year of recruitment which is relevant for the determination ***of eligibility*** *for promotion to the Lecturers' grade under the Rules of 1998."*

13. It will be seen that the Full Bench has held that the first date of the year of the recruitment is relevant for the determination of eligibility for promotion to the post of Lecturers' grade under the Rules, 1998.

14. What would be the first date of the year of recruitment has been settled by a number of Division Benches of this Court in the case of **Subhash Prasad vs. Regional Selection Committee2, Poonam vs. State of U.P.** [3] and **Vijai K. Singh vs. Joint Director of Education**[4]**,**

15. In view of the law so declared, we have no hesitation to hold that the question which has been answered by the Full Bench does not help the petitioner-appellant in the present appeal.

16. In the instant case, the petitioner was not even born in the feeding cadre on the date of occurrence of the vacancy in the Lecturer grade on the first date of the year of the recruitment as the Rules 1998. The petitioner can have no claim for consideration for promotion. There is no error in the judgment of the learned Single Judge.

17. The appeal is **dismissed**.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 1910 Of 2016

U.P.S.R.T.C. ...Appellant
Versus
Smt. Gudia Devi & Ors. ...Respondents

Present appeal under Section 173 of the Motor Vehicles Act (for short the 'Act') has been filed by the appellant-corporation challenging the judgment and award dated 24.02.2016 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 1, Aligarh awarding a sum of Rs.8,75,500/- as

compensation on account of death of one Satish Kumar in an accident involving the bus of the appellant-corporation.

On the question of quantum, the Tribunal found that the salary of Rs.7,500/- per month as driver was established by the salary certificate dated 13.08.2015 issued by the Principal of the college, which was duly proved by him as P.W. 3. The Tribunal further awarded 50% towards future prospect in accordance with the dictum of the Hon'ble Apex Court in the case of **Reshma Kumari Vs. Madan Mohan, 2013 (2) TAC 369 (SC)** and after deducting 1/4th towards personal expenses, determined the compensation of a sum of Rs.12,15,000/- after applying the multiplier of 18 in accordance with the age of the deceased. 30% of the said amount was deducted towards contributory negligence and, accordingly, the Tribunal determined a sum of Rs.8,50,000/-. Tribunal further awarded a sum of Rs.5000/- towards funeral expenses, Rs.5000/- towards loss of estate, Rs.10,000/- towards loss of love and affection and Rs.5000/- to the wife towards loss of consortium.

Court observed that Insofar as the determination of the compensation is concerned, court does not find any illegality in the methodology adopted by the Tribunal in determining the same.

On the a perusal of the impugned award goes to show that only a sum of Rs.5000/- has been awarded towards funeral expenses, Rs.5000/- towards loss of estate, Rs.10,000/- towards loss of love and affection and Rs.5000/- towards loss of consortium. These amounts awarded by the Tribunal under non-pecuniary heads, are extremely on the lower side.

Hon'ble Apex Court in the case of **Rajesh & Ors. Vs. Rajbir Singh & Ors., (2013) 9 SCC 54** and **Kalpanaraj & Ors. Vs. Tamil Nadu State Transport Corporation, 2014(3) TAC 707(SC)** held that guiding principle for determining compensation is that it must be just and reasonable and the Court should not succumb to niceties or technicalities, in such matters while considering the issue of award of compensation under non-pecuniary damages such as loss of consortium, loss of love, care and guidance to children and funeral expenses.

Court held that the claimant-respondents are entitled to be awarded a total sum of Rs.11,00,000/- as compensation along with 7% simple interest from the date of making of the application till the date of actual payment. The apportionment of the amount to be paid to the claimants under this order shall be made in the same proportion as directed in the award passed by the Tribunal.

Accordingly, though the appeal filed by the appellant Insurance Company stands **dismissed** but the award stands **modified** to the extent directed above.

(Delivered by Hon’ble Krishna Murari, J.
&
Hon’ble Prashant Kumar, J.)

1. This appeal under Section 173 of the Motor Vehicles Act (for short the 'Act') has been filed by the appellant-corporation challenging the judgment and award dated 24.02.2016 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 1, Aligarh awarding a sum of Rs.8,75,500/- as compensation on account of death of one Satish Kumar in an accident involving the bus of the appellant-corporation. Respondent-claimants filed a claim petition under Section 140 read with Section 166 of the Act against the appellant-corporation claiming compensation to the tune of Rs.19,75,000/-. According to the claimants, on 21.05.2014, Satish Kumar along with his wife-claimant no. 1 and his friends, Sanju, Surendra and Bunty was

travelling to Aligarh by Indica car bearing registration no. HR 51 W 2390, at about 10.00 p.m., when they reached near Jain petrol pump at Atrauli-Aligarh road, the offending bus bearing registration no. UP81 AF 2725, which was being driven rashly and negligently, all of a sudden came on the wrong side and hit the car, which caused grievous injuries to all the occupants and Satish Kumar died while undergoing treatment in J.N. Medical College, Aligarh. A First Information Report was lodged at P.S. Harduaganj, which was registered as Case Crime No. 230 of 2014 under Sections 279, 338, 427, 304A IPC. It was further pleaded that the deceased was aged about 23 years and was employed as a driver in J.P.S. Public School, Narauna and was earning Rs.7,500/- per month.

2. The appellant-corporation and the driver of the bus contested the proceedings by filing written statements denying the allegations. It was pleaded that driver after seeing that the car was being driven rashly and negligently, stopped the bus, but the driver of the car could not control it and dashed into the bus. On the basis of the evidence brought on record by the parties, the Tribunal returned a finding that accident was a result of contributory negligence of the bus to the extent of 70% and that of the car to the extent of 30%.

3. The said finding has been recorded by the Tribunal after analysing the evidence of P.W. 2, Surendra Singh, who was travelling in the car along with deceased and also the driver of the offending bus. On an analysis of the aforesaid two witnesses, the Tribunal arrived at the conclusion that accident was caused due to contributory negligence of both the parties.

4. On the question of quantum, the Tribunal found that the salary of Rs.7,500/- per month as driver was established by the salary certificate dated 13.08.2015 issued by the Principal of the college, which was duly proved by him as P.W. 3. The Tribunal further awarded 50% towards future prospect in accordance with the dictum of the Hon'ble Apex Court in the case of **Reshma Kumari Vs. Madan Mohan, 2013 (2) TAC 369 (SC)** and after deducting 1/4th towards personal expenses, determined the compensation of a sum of Rs.12,15,000/- after applying the multiplier of 18 in accordance with the age of the deceased. 30% of the said amount was deducted towards contributory negligence and, accordingly, the Tribunal determined a sum of Rs.8,50,000/-. Tribunal further awarded a sum of Rs.5000/- towards funeral expenses, Rs.5000/- towards loss of estate, Rs.10,000/- towards loss of love and affection and Rs.5000/- to the wife towards loss of consortium.

5. Insofar as the determination of the compensation is concerned, we do not find any illegality in the methodology adopted by the Tribunal in determining the same.

6. Monthly income of Rs.7,500/- of the deceased was duly proved by the claimants by filing the salary certificate and producing the Principal of the institution in the witness box to prove the same. Award of 50% towards future prospect is also in accordance with the well established principle laid down by the Hon'ble Apex Court in the case of **Reshma Kumari** (supra) and **Munna Lal Jain & Anr. Vs. Vipin Kumar Sharma & Ors., 2015 (3) TAC 1 (SC)**. The age of the deceased was found to be 25 years and, thus, the Tribunal has rightly applied the multiplier of 18

prescribed by the Hon'ble Apex Court in the case of **Smt. Sarla Varma & Ors. Vs. Delhi Transport Corporation & Anr, JT 2009 (6) SC 495.**

7. There were three major dependants and two minor dependants, who were taken to be one unit, as such, there were four dependants and, thus, the Tribunal rightly made deductions of 1/4th towards personal expenses.

8. Thus, the methodology adopted by the Tribunal in determining the compensation is in accordance with the well established principles settled down by the Hon'ble Apex Court and no illegality is reflected therefrom, which may require any interference.

9. However, a perusal of the impugned award goes to show that only a sum of Rs.5000/- has been awarded towards funeral expenses, Rs.5000/- towards loss of estate, Rs.10,000/- towards loss of love and affection and Rs.5000/- towards loss of consortium. These amounts awarded by the Tribunal under non-pecuniary heads, are extremely on the lower side.

10. Hon'ble Apex Court in the case of **Rajesh & Ors. Vs. Rajbir Singh & Ors., (2013) 9 SCC 54** and **Kalpanaraj & Ors. Vs. Tamil Nadu State Transport Corporation, 2014(3) TAC 707(SC)** held that guiding principle for determining compensation is that it must be just and reasonable and the Court should not succumb to niceties or technicalities, in such matters while considering the issue of award of compensation under non-pecuniary damages such as loss of consortium, loss of love, care and guidance to children and funeral expenses. It has been observed in paragraph 17 as under :

"17. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in Santosh Devi. We may therefore, revisit the practise of awarding compensation under conventional heads: loss of consortium to thee spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2500 to Rs. 10,000 in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In Sarla Verma case, it was held that compensation for loss of consortium should be in the range of Rs. 5000 to 10,000. In legal parlance. "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection. etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United State of America, Australia, etc. English courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal

heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts awards at least rupees one lakh for loss of consortium."

11. Again in the case of Kalpanaraj and others (supra), Hon'ble Apex Court raised compensation of Rs.30,000/- awarded towards loss of consortium and Rs.20,000/- towards loss of love and affection of the minor children to Rs.1,00,000/- each under the said heads finding the sum awarded to be on the lower side in the light of principles laid down in the case of Rajesh (supra).

12. In view of the aforesaid law laid down by the Hon'ble Apex Court, we feel that the claimants are entitled to be awarded a sum of Rs.50,000/- towards funeral expenses, Rs.25,000/- towards loss of estate, Rs. 50,000/- for minor children towards loss of love and affection and a sum of Rs.1,00,000/- to the respondent-wife towards loss of consortium.

13. At this stage, learned counsel for the appellant vehemently contended that non-pecuniary damages have rightly been awarded in accordance with the Rule 220A of the Motor Vehicle Rules and the two judgements of the Hon'ble Apex Court in the **Rajesh** (supra) and **Kalpanaraj** (supra) are clearly distinguishable on the ground that they do not deal with a situation where Rule has been framed by the State for determination of compensation. It is also submitted that in an appeal filed by the Insurance Company, no order can be passed adverse to the appellant by increasing the amount of compensation without there being any cross-appeal by the claimants.

14. In so far as the first submission of the learned counsel for the appellant in respect of Rule 220A of the Motor Vehicles Rules is concerned, we do not find any reason to distinguish the aforesaid two judgements of the Hon'ble Apex court on the ground that they do not deal with a situation where Rule was framed by the State for determination of compensation. Hon'ble Apex Court has clearly ruled that main guiding principle for determining the compensation is that it must be just and reasonable and the court and tribunal are not required to frugal with regard to award compensation towards funeral expenses and other non-pecuniary damages. The other argument advanced by learned counsel for the appellant that amount of compensation cannot be increased in an appeal filed by the Insurance Company in the absence of cross-appeal by the claimant, is also without any force.

15. Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not file any appeal or objection. Order XLI Rule 33 of the Code reads as under :

"33. Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in

favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [any may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]

[Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]"

16. The provisions of Order XLI Rule 33 C.P.C. was explained by the Hon'ble Apex Court in the case of **Mahant Dhangir Vs. Madan Mohan, AIR 1988 SC 54** in following words :

"The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

17. The same view has again been reiterated in a later decision by the Hon'ble Apex Court in the case of **Delhi Electric Supply Undertaking Vs. Basanti Devi, AIR 2000 SC 43.**

18. We are of the considered view that the conditions as laid down in provisions of Order XLI Rule 33 are satisfied in the present case. In **Delhi Electric Supply Undertaking** (supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers.

19. Thus, the argument in this regard made by the learned counsel for the appellant has no legs to stand and is not liable to be sustained.

20. In view of above facts and discussions, we are of the considered opinion that the claimant-respondents are entitled to be awarded a total sum of Rs.11,00,000/- as compensation

along with 7% simple interest from the date of making of the application till the date of actual payment.

21. The apportionment of the amount to be paid to the claimants under this order shall be made in the same proportion as directed in the award passed by the Tribunal.

22. Accordingly, though the appeal filed by the appellant Insurance Company stands dismissed but the award stands modified to the extent directed above.

23. The Registry is directed to remit the statutory deposit made before this Court to the Tribunal, which shall be liable to be adjusted towards the deposit to be made by the appellant.

24. However, in the facts and circumstances, we do not make any order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Appeal No.- 6119 Of 2003
&
Connected With Other Cases

Anand Kumar Shukla **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Shiv Nath Singh, Murtuza Ali, Rajiv Lochan Shukla, Ravesh Kumar Singh, Yogesh Srivastava

Counsel for Respondent:
Govt. Advocate

Present appeals have been preferred by three appellants, namely, Anand Kumar Shukla, Smt. Kusum Lata @ Baby and Smt. Sharda Devi against the judgment and order of conviction dated 18.11.2003 passed by Additional Sessions Judge, court no. VIII, Shahjahanpur in Sessions Trial No.199 of 2001, State Vs. Anand Kumar Shukla and others, arising out of Case Crime No.494 of 2000, under Sections 302, 201 IPC, Police Station Kotwali, District Shahjananpur, whereby each of the appellants has been sentenced to life imprisonment and a fine of Rs.5000/- under Section 302/34 IPC. Similarly appellants have been sentenced to three years rigorous imprisonment coupled with a fine of Rs.500/- each under Section 201 IPC and, in case of default, in the above two offences, the concerned convicts shall have to suffer additional rigorous imprisonment for one year and one month, respectively. Both the sentences shall run concurrently.

It has been claimed on behalf of the appellants that the entire case is outcome of shrewd handy work of the police and there is no reasonable evidence, which may prove or indicate complicity of the appellants in the commission of offence. One of the witness is a tutored witness and he was arranged deliberately by the police in order to give thrust to its misdeeds and hollowness of the prosecution case stands exposed when it deliberately refrained from producing Satish Verma as a witness of recovery of the dead body in order to safeguard its position. This inaction on the part of prosecution is self speaking and needs no explanation. The prosecution has tried to prove commission of murder by introducing child witness Alok Shukla P.W.6 and tried its best to establish charge of murder against the appellants but his testimony on the whole is tutored one and does not inspire confidence. His statement recorded under Section 161 Cr.P.C. by the Investigating Officer is in gross contradiction to what he has deposed before the trial court. There are certain interpolations in the signatures of witnesses in inquest report. Question put to accused Anand Kumar Shukla is in form of judicial confession and it shows that trial court is biased and relying on it. This way, proceeding of trial court becomes prejudiced. The motive assigned for committing offence is very weak. No strong and apparent motive has been suggested for committing the crime. Whatever motive has been suggested by the prosecution is not befitting in the circumstances of the case and there is no proof of any such motive for committing the crime. Motive has been tried to be elicited from confession of accused.

Further, it was also claimed that a question mark is raised on the factum of recovery from the house in question for various reasons. The house in question is not in exclusive possession of accused Anand Kumar Shukla but also in possession of others. All doors of the house were opened when the police came to the house. Similarly, the recovery made against accused Kusum Lata @ Baby cannot be brought under purview of Section 27 of the Evidence Act. There was no animosity between husband and wife and therefore, Kusum Lata @ Baby had no occasion to cause such ghastly murder of her own husband. Case of the prosecution is false and reasonable doubtful in the prosecution case is pervading overwhelmingly.

Sri Rahul Mishra, amicus curiae for the appellant Smt. Sharda Dixit has adopted aforesaid arguments and has further added that P.W.6 Alok Shukla is a tender child who is solitary eye-witness. His testimony alone would suggest that the entire case is fabricated and handy work of police. The recovery is tainted and the FIR is ante-timed. Under the circumstances, it is most unnatural that P.W.6-child witness, on the admonition of Anand Kumar Shukla while he watched the incident, went to sleep in baramda. This conduct is highly improbable and unnatural. His statements given before trial court are contradictory to the statement recorded under Section 161 Cr.P.C.

The moot point involved for consideration primarily relates to the fact whether the prosecution has been able to prove its case beyond reasonable doubt or not?

Court observed that the prosecution has not been able to establish fact of recovery of weapon used in the offence and after articles so recovered from the place of occurrence-house of Sharda Devi after considering the facts and in view of absence of signatures of the accused persons on these recovery memos and signature of the SHO Kotwali at remote corner of the pages of various recovery memos creates doubt and affects adversely the authenticity of the same and as such the same legally not admissible under Section 27 of the Indian Evidence Act and cannot be read against the accused persons.

The prosecution case is full of hollowness and full of loopholes, facts coming out from prosecution testimony and the attendant circumstances of this case generate doubt on the authenticity and veracity of the prosecution case. There are so many inherent shortcomings in the prosecution case, which hit to the root of charges framed against the appellants. The first informant has made his presence casual on the road when he allegedly sighted the jeep on the high way. But no circulation, no order or authority was produced to confirm the fact that the first informant was infact on VIP duty on 24.12.2000.

As per the Court, in the present case, the facts and circumstances are so roughly scattered that it is hard to make a coherence of the same merely by putting one circumstance over the another. If one circumstance is taken to be correct and acted upon then the same is confronted with certain reasonable queries, which queries create substantial loophole in the prosecution case, which renders the prosecution case suspicious and doubtful. It is a case which is based neither on circumstantial evidence nor on direct testimony and the exercise done by the investigating agency creates eternal vacuum in prosecution story for which none but the prosecution alone is to be blamed.

It is cardinal principle of criminal jurisprudence that the prosecution is required to prove its charge beyond reasonable doubt against the accused and in case, the prosecution fails to prove the charge beyond reasonable doubt then the accused would be entitled to benefit of doubt and they are to be acquitted and no conviction can be recorded on such testimony, which is not inspiring confidence and is tainted.

Court observed that Learned trial Judge adopted casual approach and could not appraise evidence on record qua the circumstances of the case and misread the statement of various prosecution witnesses, therefore, judgment and order of conviction dated 18.11.2003 passed by Additional Sessions Judge, court no. VIII, Shahjahanpur in Sessions Trial No.199 of 2001, State Vs. Anand Kumar Shukla and others, under Sections 302/34, 201 IPC, Police Station Kotwali, District Shahjananpur arising out of Case Crime No.494 of 2000 is not sustainable in the eye of law and is hereby set aside.

It is obvious that the aforesaid three appeals carry force and the same are **allowed.** The appellants are in jail. They shall be set at liberty forthwith if they are not wanted in connection with any other case after complying provisions of Section 437-A Criminal Procedure Code.

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Arvind Kumar Mishra-I, J.)

1. The aforesaid appeals have been preferred by three appellants, namely, Anand Kumar Shukla, Smt. Kusum Lata @ Baby and Smt. Sharda Devi against the judgment and order of conviction dated 18.11.2003 passed by Additional Sessions Judge, court no. VIII, Shahjahanpur in Sessions Trial No.199 of 2001, State Vs. Anand Kumar Shukla and others, arising out of Case Crime No.494 of 2000, under Sections 302, 201 IPC, Police Station Kotwali, District Shahjananpur, whereby each of the appellants has been sentenced to life imprisonment and a fine of Rs.5000/- under Section 302/34 IPC. Similarly appellants have been sentenced to three years rigorous imprisonment coupled with a fine of Rs.500/- each under Section 201 IPC and, in case of default, in the above two offences, the concerned convicts shall have to suffer additional rigorous imprisonment for one year and one month, respectively. Both the sentences shall run concurrently.

2. Heard at length Sri Rajiv Lochan Shukla, Sri P.K. Singh, learned counsel for the appellants as well as Sri Rahul Mishra learned Amicus Curie and J.K. Upadhayay, Km. Meena, learned AGA for State and Mrs. Manju Thakur, Brief Holder for the State.

3. Facts of prosecution story has its genesis in the first information report lodged on 24.12.2000 at 4.30 p.m. at Kotwali, District Shahjananpur at Case Crime No.494 of 2000, under Sections 302, 201 IPC. The first informant is S.H.O. Jitendra Nath Singh. The incident is stated to

have occurred in the morning at 4:00 a.m. on 24.12.2000. First information report proceeds to allege facts to the effect that the informant in company of other police personnel was busy at Jamuka tiraha (junction of three roads) in VIP duty. The reference of the same finds mention in general diary rapat no.14, 11.30 hours. It was around 1:00 p.m., one Commander jeep bearing no. UP 32 R-6711, being driven at high speed by its driver was coming from Shahjananpur side and going to Sitapur. When the jeep crossed the first informant he noticed some blood dropping down from the jeep. The first informant became apprehensive of the situation gave hot chase to the jeep and tookover the commander jeep infront of 'Gurri' police outpost around 1.30 p.m. On inquiry being made from its driver, he disclosed his name Anand Shukla son of Kamlesh Shukla, resident of Village Baruwa, police station Azgain, District Unnao, (present address tenant of Sharda Devi, Mohalla Sinjai, police station Kotwali, Shahjananpur) and apologized in the presence of witness Satish Chandra Verma son of Lala Ram Verma R/o Barnai, P.S. Rowza, District Shahjananpur, whereupon search was made in the Commander Jeep in the presence of Satish Chandra Verma. On search being made one dead body, in two pieces, was recovered from rear side of jeep, the trunk having been found in a gunny bag almost naked except an underwear and the head above neck was kept in another small polythene bag somewhere under the seat in rear side of the jeep.

4. A memo of this recovery was prepared and inquiry was made from the driver Anand Shukla, whereupon he told that this dead body is that of Anoop Shukla son of Ram Kumar Shukla, resident of Bharkhani, police station Pali, district Hardoi. He also told that deceased (Anoop Shukla) is son-in-law of Sharda Devi. He was not on good terms with Sharda Devi and Smt. Kusum Lata @ Baby (wife of the deceased) on account of house of Sharda Devi. Relation of deceased with Smt. Kusum Lata @ Baby and Sharda Devi were not normal on account of dispute pertaining to house. The deceased had come over to Shahjananpur today at 3:00 a.m. Anand Kumar Shukla told that deceased has been killed by me in association with Smt. Kusum Lata @ Baby and Sharda Devi by chopping off his head with 'garasa' at 4:00 a.m. in the morning. He was going to dispose of the dead body when the first informant caught him. Anand Kumar Shukla also told that he can get the garasa recovered, which was used for chopping off head and the other blood stained clothes kept at the house of Sharda Devi. When this information was furnished by accused Anand Kumar Shukla, then, S.I. Mahendra Singh and Ravish Chandra Katiyar were left over the place to take care of the jeep and to prepare the inquest report of the dead body on the spot and a wireless message was sent to SHO Kotwali regarding the incident. Thereafter the first informant Jitendra Nath Singh proceeded to locality Singai where house of Sharda Devi was located. The first informant started for mohalla Singai with Anand Kumar Shukla. As soon as they reached near State Bank Colony, they met with M.P. Kureel, the Incharge police station Kotwali who also accompanied them to the house of Smt. Sharda Devi. When they reached house of Sharda Devi, they found Sharda Devi and Kusum Lata @ Baby present in the house. Anand Shukla in the presence of first informant and other police personnel, asked them (Kusum Lata @ Baby and Sharda Devi) that secret has been unravelled. Blood stained clothes of Anoop Shukla, pillow cover and mattress should be handed over to the police. Anand Kumar Shukla also stated to them that he is handing over the garasa by which the neck was chopped off, while saying so, he proceeded towards his rented room, he was followed by the police. After reaching to his room, he took out 'garasa' from taarnh (cemented shelf), which was containing blood staines. Similarly, Kusum Lata

@ Baby also made recovery of blood stained clothes kept in a kanister and one blood stained cloth kept behind hand-pump. Likewise, Sharda Devi also gave one pillow cover, one bed-sheet and mattress.

5. The memo of each recovery was separately prepared on the spot and it was stated that Anand Shukla, Smt. Kusum Lata @ Baby and Smt. Sharda Devi have conjointly murdered Anoop Shukla, therefore, report be lodged and appropriate action be ensured. This written report is Exhibit Ka-2 on record.

6. Contents of written report were noted in the Check FIR No.412 of 2000 at police station Kotwali, District Shahjananpur at 24.12.2000 at 4.30 P.M., at Case Crime No.494 of 2000, under Sections 302, 201 IPC against the accused persons. Check FIR is Exhibit Ka-7 on record. On the basis of entries made in the Check FIR case was registered against the appellants in the concerned General Diary rapat no.31 at 16.30 hours under aforesaid section of IPC at the same police station. This general diary entry is Exhibit Ka-8 on record.

7. It is noteworthy that in this case before lodging of the first information report, a recovery memo of dead body of Anoop Shukla recovered from Commander Jeep was prepared by the first informant Jitendra Nath Singh. This recovery memo is Exhibit Ka-1.

8. In the same sequence of development (that led to the lodging of first information report), weapon - 'Garasa'- and other connected materials say clothes, piece of quilt, mattress, bed-sheet, pillow etc. were recovered from the place of occurrence from house of Sharda Devi. Memo of aforesaid weapon 'Garasa' is Exhibit Ka-3. Memo of blood stained clothes of deceased- one vest and one jarsi and one piece of cloth- seeped with blood were recovered at the instance of accused appellant Smt. Kusum Lata @ Baby. This recovery memo is Exhibit Ka-4. Similarily, recovery memo of quilt, mattress, bed-sheet and pillow is Exhibit Ka-5 on record.

9. The Investigating Officer also collected blood stained cemented piece from the place of occurrence (House of Sharda Devi) and he also took sample of cemented piece and prepared a memo of the same, which is Exhibit Ka-6 on record. It is reflected from record that after recovery of dead body from the Commander Jeep UP 32 R-6711, the inquest report was prepared by S.I. Mahendra Singh. Its preparation commenced at 15.15 hours and it was completed at 16.30 hours on 24.12.2000. This inquest report is Exhibit Ka-11.

10. Mahendra Singh also prepared certain papers for sending the body for autopsy. Photonash is Exhibit Ka-12. Police form-13 (challan dead body) is Exhibit ka-13, letter to C.M.O. Shahjahanpur is Exhibit ka-14, specimen seal is Exhibit ka15. Relevant to note that preparation of inquest report and the aforesaid exhibited papers Exhibit Ka-12 to ka-14 were prepared by S.I. Mahendra Singh before lodging of the first information report at 16.30 hours on 24.12.2000 at P.S. Kotwali, Shahjahanpur.

11. Record also discloses that autopsy on the dead body of the deceased Anoop Shukla son of Ram Kumar Shukla was conducted at mortuary Shahjahanpur on 25.12.2000 at 4 P.M. It was mentioned in the postmortem report that rigor mortis was passing over upper extremities and present over lower extremities. The doctor found following ante-motem injuries on the dead body:-

(1) Wound of circumference 38 cm, length 12 cm x 11 cm x through and through present over neck at the level of cervical 5th and 6th vertebra 2 cm above the suprasternal notch margin of wound clean cut. Bone cut clean cut. Head separated from the rest of body.

(2) Multiple abraded contusion over area of 20 cm x 6 cm external from top of left shoulder upto middle part of left arm of varying size 3 cm x 1 cm x 2 cm x 0.5 cm.

12. In the opinion of the doctor, the cause of death was stated to be shock and haemorrhage due to ante-mortem injuries. This postmortem examination report is Exhibit Ka-9 on record.

13. The recovered clothes and the weapon Garasha etc. were sent for chemical examination at Vidhi Vigyan Progshala, Agra, whereupon a report dated 16.5.2001 endorsed on 21.6.2001 was also obtained, which has also been kept on record.

14. Investigating Officer took various steps in completing the investigation and he also recorded statement of various persons and filed charge sheet (Exhibit Ka-10) against the present appellants under aforesaid sections of IPC at aforesaid crime number. Consequently, the case was committed to the court of Sessions from where it was made over for trial to the court of concerned Additional Sessions Judge, court no.VIII, Shahjahanpur.

15. Accused were heard on point of charge by the trial court and prima facie ground was found existing for framing charges under Sections 302, 201 IPC. Accordingly, charges were framed and explained to the accused, who denied the charges and opted for trial.

16. Consequently, the prosecution was asked to adduce its testimony whereupon the prosecution produced in all 8 witnesses. Brief reference of the same is as hereunder.

17. P.W. 1 is Jitendra Nath Singh, he is the first informant and he was S.H.O. of police station Rowza on 24.12.2000. He is said to have recovered the dead body and arrested appellant Anand Shukla and on his information, he came to 'Mohalla Singai' from where he made certain recovery of weapon and clothes and got prepared different recovery memos. He also effected arrest of two lady accused from the house-the place of occurrence. He has proved written report Exhibit Ka-2.

18. P.W.2 is M.P. Kureel, who has testified fact of recovery in his presence from the house of Sharda Devi- one of the accused. He has also proved various material Exhibits-1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

19. P.W.3 is S.I. Shafeeq Ahmad Khan. He has testified that he along with first informant was present on the Jamuna Tri Crossing at the relevant point of time on 24.12.2000.

20. P.W.4 is Head Moharrir, who has proved Check FIR and the relevant GD entry as Exhibit Ka-7 and Ka-8, respectively.

21. P.W.5 is V.P. Singh, Medical Officer who conducted postmortem examination on the dead body of deceased Anoop Shukla on 25.12.2000 and has proved postmortem examination report as Exhibit ka-9.

22. P.W. 6 is Alok Shukla, the child witness aged about 13 years. He is stated to be star witness, who has seen the occurrence/commission of murder of his father Anoop Shukla.

23. S.S.I. Gambhir Singh is P.W.7. He is the Investigating Officer. He has described the various steps taken by him for completing the investigation and he has proved, inter-alia, preparation of site plan Exhibit Ka-9A besides, proving Charge sheet Exhibit Ka-10.

24. Mahendra Singh P.W.8 prepared inquest report Exhibit ka-11. Besides proving relevant papers Exhibit ka-12, 13, 14 and 15.

25. All these witnesses have been cross-examined by the defence/accused. Thereafter evidence for the prosecution was closed and the statement of the appellants recorded under Section 313 Cr.P.C. In their statement, accused persons have termed their implication false by the police and it has been specifically stated by Anand Kumar Shukla that Satish Verma and he himself are employed in the same firm. Satish Verma took him in the jeep for taking meal and took him to the police station Rowza where police arrested him and he was wrongly challaned. The other appellants Smt. Kusum Lata @ Baby and Smt. Sharda Devi have stated that they had gone outside on the day of incident and came back around 5 p.m. Police came over there and took them to police station Kotwali, from where they were sent to jail. The defence has not led any evidence, whatsoever.

26. Learned trial court after hearing both the sides on merit passed the aforesaid judgment and order of conviction dated 18.11.2003 against the appellants and sentenced all the accused to life imprisonment under Section 302/34 IPC and three years R.I. under Section 201 IPC coupled with fine of Rs.5000/- and Rs.500/- respectively with default stipulation.

27. Consequently, this appeal.

28. It has been claimed on behalf of the appellants that the entire case is outcome of shrewd handy work of the police and there is no reasonable evidence, which may prove or indicate complicity of the appellants in the commission of offence. Satish Verma is a tutored witness and he was arranged deliberately by the police in order to give thrust to its misdeeds and hollowness of the prosecution case stands exposed when it deliberately refrained from producing Satish Verma as a

witness of recovery of the dead body in order to safeguard its position. This inaction on the part of prosecution is self speaking and needs no explanation.

29. The prosecution has tried to prove commission of murder by introducing child witness Alok Shukla P.W.6 and tried its best to establish charge of murder against the appellants but his testimony on the whole is tutored one and does not inspire confidence. His statement recorded under Section 161 Cr.P.C. by the Investigating Officer is in gross contradiction to what he has deposed before the trial court. He is wholly unreliable witness and his conduct under circumstance is most unnatural. The very commencement of the crime is deeply rooted in the recovery of Commander Jeep No. UP 32 R-6711 and the prosecution has failed out and out, to prove the factum of recovery of dead body from the aforesaid jeep. Factum of recovery of dead body is vitiated in the absence of any independent witness of recovery, in the absence of non-preparation of site plan of the place of recovery. Thus, it is still uncertain as to from where the police actually recovered the dead body of deceased Anoop Shukla. No police personnel from police outpost 'Gurri' was present on the spot although the alleged recovery place is stated in front of Gurri police outpost. Thus, the very recovery of dead body itself becomes uncertain and suspicion.

30. The entire prosecution testimony is silent on point of VIP duty roster. There is no proof of any such VIP duty or movement. Neither any circular nor any order issued by any administrative authority pertaining to VIP duty in the area has been placed for reliance before the trial court. Recovery of dead body is extremely improbable and doubtful on the highway. Every action was taken by the police in a mechanical way, clandestinely, in utmost hurry which smacks of guess work. The recovery memos pertaining to the three appellants whereby weapon and blood stained clothes and other materials are stated to have been recovered do not bear signature of accused persons and the signature of police officials concerned has been deliberately made on each page at far below a place than the place from where the signature normally ought to have been made after the write up was over. Place of signature of police officials on recovery memos is self speaking that things have been done in perfunctory manner and things have been tried to be adjusted mechanically.

31. There are certain interpolations in the signatures of witnesses in inquest report. Question No.3 put to accused Anand Kumar Shukla is in form of judicial confession and it shows that trial court is biased and relying on it. This way, proceeding of trial court becomes prejudiced. Similar, questions have been put to other two appellants and question no.3 has been covertly as judicial confession putting in garb of statement under Section 313 Cr.P.C. In the absence of any site plan of the place of recovery of jeep and dead body, the connectivity of the jeep in the offence and the place of recovery of dead body itself becomes doubtful.

32. The motive assigned for committing offence is very weak. No strong and apparent motive has been suggested for committing the crime. Whatever motive has been suggested by the prosecution is not befitting in the circumstances of the case and there is no proof of any such motive for committing the crime. Motive has been tried to be elicited from confession of accused. In this case motive is not established. There is no motive on the part of Anand Kumar Shukla to

commit the crime and so is the case with the other two ladies accused Smt. Kusum Lata @ Baby and Smt. Sharda Dixit. In order to skip motive, the prosecution introduced child witness P.W.6 and claimed him to be an eye-witness of the incident. Except that witness, there is no any other independent witness. There is no corroborative testimony regarding Anand Kumar Shukla being tenant of Smt. Sharda Devi. No proper chemical examination has been conducted. Blood stains found have purposely not been tallied with the blood stained clothes of deceased. Non matching of blood with blood group of deceased indicates planting of clothes and weapons. Prosecution deliberately produced eye-witness account in order to fix time of death.

33. In the postmortem examination report, it has been suggested by the doctor that rigor mortis was passing over upper extremities. As per Modi jurisprudence, in such circumstances, duration of death would vary from 24 to 48 hours. Therefore, the time the death is also most uncertain. Development of the case right from 1.30 p.m. on 24.12.2000 upto the lodging of first information report indicates only fill in the blanks exercise done by the police. The distance from the place of recovery of dead body to the police station is about 7-8 kms from the place where police is stated to have chased the jeep. The place of occurrence also falls almost at the some distance. Then as per respective distance of places the timings have been tried to be fixed in order to plug loopholes, which is exposed under the circumstances of the case.

34. On seeing blood dripping down from the jeep, it was chased and stopped but accused Anand Kumar Shukla was not under custody at that point of time. Therefore, recovery of dead body cannot be brought within the purview of Section 27 of the Evidence Act. There is no evidence regarding dripping of blood from jeep. Even the jeep was not produced for inspection. Therefore, search and recovery of jeep and dead body becomes illegal. This way, things have been tried to be done in a mechanical way.

35. Further, a question mark is raised on the factum of recovery from the house in question for various reasons. The house in question is not in exclusive possession of accused Anand Kumar Shukla but also in possession of others. All doors of the house were opened when the police came to the house. Similarly, the recovery made against accused Kusum Lata @ Baby cannot be brought under purview of Section 27 of the Evidence Act. There was no animosity between husband and wife and therefore, Kusum Lata @ Baby had no occasion to cause such ghastly murder of her own husband. Case of the prosecution is false and reasonable doubtful in the prosecution case is pervading overwhelmingly.

36. Sri Rahul Mishra, amicus curiae for the appellant Smt. Sharda Dixit has adopted aforesaid arguments and has further added that P.W.6 Alok Shukla is a tender child who is solitary eye-witness. His testimony alone would suggest that the entire case is fabricated and handy work of police. The recovery is tainted and the FIR is ante-timed. Fact that the deceased took food around 3 p.m. and thereafter he went for sleep stands belied by the postmortem report because small intestine was vacant. Under the circumstances, it is most unnatural that P.W.6-child witness, on the admonition of Anand Kumar Shukla while he watched the incident, went to sleep in baramda. This conduct is highly improbable and unnatural. His statements given before trial court are

contradictory to the statement recorded under Section 161 Cr.P.C. Description regarding incident that the leg of the deceased were caught by Sharda Devi, but no injury whatsoever was found on legs.

37. Thus, medical evidence is not corroborated with the testimony of witnesses. In presence of eyewitness, Section 106 of Evidence Act goes into oblivion and it cannot be resorted to. In this context, confession of the co-accused cannot be relied on against other appellant- Sharda Devi. Recovery as brought before the trial court is legally not admissible and there is no explanation as to why Anand Kumar Shukla is assisting the other two ladies in the very commission of the offence.

38. Kumari Meena and Narendra Singh Yadav, learned AGAs have in reply submitted that the entire incident is self speaking right from the moment when the dead body was recovered and recovery of weapon and blood stained clothes and other articles were made from the place of occurrence (House of Sharda Devi). Recovery is consistent and within the ambit of Section 27 of the Evidence Act. Police had no motive to falsely implicate the appellants. Injuries of garhasa is very much on the dead body. In so far as motive is concerned, it is relegated to the background in view of eyewitness account of the incident given by the prosecution witness P.W.6. He is a natural witness. The place of occurrence i.e. the house of Smt. Sharda Devi has been proved by the testimony of P.W.6-Alok Shukla. The prosecution has proved charges beyond reasonable doubt.

39. Also considered above rival submissions.

40. The moot point involved for consideration primarily relates to the fact whether the prosecution has been able to prove its case beyond reasonable doubt or not?

41. In order to ascertain veracity and authenticity of the prosecution case, it would be better and convenient that holistic view of the case is taken and consistency of circumstances vis a vis evidence of prosecution witnesses is also analyzed by us.

42. We may began with the first information report, Exhibit Ka-2. This first information report was lodged by Jitendra Nath Singh, who happened to be SHO of police station Rowza, district Shahjahanpur on 24.12.2000. As per contents of FIR, the first informant in company with other police personnel at that point of time around 11.30 a.m. was on VIP duty. However, it is profusely reflected from record that no such proof has been brought on record regarding any VIP duty of first informant on such date i.e. 24.12.2000. In this regard, no worthy order of any authority whatsoever has been brought on record and explanation given by all the prosecution witnesses on this point including the first informant is sketchy and evasive. The content of FIR further reflects that around 1:00 p.m., one Commander Jeep UP 32 R-6711 was seen coming from Shahjahanpur side and going towards Sitapur and blood was dripping from the jeep. The first informant after seeing blood dripping from jeep gave chase to the jeep and overtook the same in front of 'Gurri' police outpost around 1.30 p.m. On inquiry being made, name from the driver it was disclosed that he is Anand Kumar Shukla son of Kamlesh Shukla, resident of Village Barua, police station

Azgain, District Unnao, (present address tenant of Sharda Devi in Mohalla Sinjai, police station Kotwali, district Shahjananpur). He apologized in presence of witness Satish Chandra Verma son of Lala Ram Verma R/o Bannai, P.S. Rowza, District Shahjananpur.

43. On search being made in the jeep, one headless almost necked dead body except an underwear on body was recovered from a gunny bag kept in the rear side of jeep. In the same jeep, head above neck of the dead body was recovered in a polythene bag, which was kept in a wallet. The first informant prepared a recovery memo of dead body and inquired about the same, whereupon, Anand Kumar Shukla told that this dead body is that of Anoop Shukla son of Ram Kumar Shukla, resident of Bharkhani, police station Pali, district Hardoi and he is son-in-law of his landlady Sharda Devi. It was stated that his relation with Smt. Kusum Lata @ Baby were strange on account of some dispute regarding house of Sharda Devi. He came over to Shahjahanpur from Delhi this morning around 3 a.m. He in the company with Smt. Kusum Lata @ Baby and Sharda Devi committed murder of Anoop Shukla in a pre-planned manner around 4:00 a.m. today (24.12.2000) and he was going to dispose of the dead body with this jeep. He also stated that he can give him 'garhasa' by which neck of Anoop Shukla was chopped off.

44. Further, he stated that blood stained clothes of deceased can also be recovered from the house of Sharda Devi and Kusum Lata @ Baby. Thereafter the first informant left the dead body and the jeep in custody of S.I. Mahendra Singh and Constable Raveesh Chandra Katiyar and instructed them to prepare inquest report and a wireless message was sent to SHO Kotwali regarding the incident. He proceeded to the house of Sharda Devi situated in Mohalla Sinjai along with police personnel and accused Anand Kumar Shukla. On way, near State Bank Colony, M.P. Kureel, SHO Kotwali met him who also accompanied him along with police force to the house of Sharda Devi. Both Kusum Lata @ Baby, Sharda Dixit and other co-accused were present in the house. As soon as Anand Kumar Shukla arrived there, he asked them to handover the blood stained clothes of deceased, bed sheet and mattress etc. as secrecy has been detected. He handed over 'garhasa' and thereafter recovery of garhasa was made from the 'taarnh' (cemented shelf upper side in room) of the room inside the house and Kusum Lata @ Baby also got recovered blood stained clothes of deceased from kanister and she also gave a piece of cloth from behind the hand-pump. Sharda Devi also got recovered one bed sheet and mattress and recovery memos of all above articles were prepared by the first informant.

45. In the backdrop of such scenario, a bare perusal of the recovery memos regarding the weapon, clothes, bed sheets etc., Exhibit Ka-3, 4 and 5 respectively disclose fact that in all the three recovery memos, the signatures of SHO Kotwali Shahjahanpur, M.P. Kureel have been marked at extreme right place near at the bottom of the page of each recovery memo, whereas, some gap exists in between the last line of the recovery memo and signature of M.P. Kureel P.W.2. Obviously, Shiv Kishore Bajpayee is witness in all the three aforesaid recovery memos. He is resident of Malkhana Moreh Kasba, police station Kotwali, Shahjahanpur and Manoj Mishra, the another witness is resident of Anand Puram Colony Kasba and P.S. Kotwali, Shahjahanpur.

46. It is obvious that no person from the locality Sinjai was asked for being witness to the fact of recovery. Although as per prosecution testimony, almost all the persons of the locality had gathered on the spot during recovery. It is reflected from testimony of M.P. Kureel P.W.2 on page 34 of paper book, wherein he has stated that he did not call any person from near the house, however, people of the locality had arrived on the spot. As stated by S.I. Shafeeq Ahmad Khan at page 42 of the paper book. ''पास पड़ोस क्या पूरा मोहल्ला आ गया था। ''

47. Moreover, all the recovery memos Exhibit Ka- 3, 4 and 5 are silent on the point as to under what circumstances people of the locality, who had gathered on the spot were not asked to become witness to fact of recovery.

48. Further, all the recovery memos (Ex. Ka-3, Ka-4 and Ka-5) do not bear signature or thumb impression of the respective accused. Thus, the signature of the SHO Kotwali P.W.2 M.P. Kureel on the recovery memo and particularly the place on which it has been made, generates doubt on the genuineness and authenticity of these recovery memos- Exhibit Ka-3, 4 and 5. In the absence of independent witness though available on the spot to the police they were not asked to be witness to fact of recovery generates doubt. The entire recovery memos thus become doubtful when these do not contain signature of the concerned accused from whom recovery was effected. The recovery memo Exhibit Ka-5 does not contain any recital regarding arrest of the accused. It does not spell the name of the accused from whom the recovery was made. Thus, this recovery memo is hit directly by the provisions of Section 27 of the Evidence Act.

49. For the reasons aforesaid and in view of absence of signatures of the accused persons on these recovery memos and signature of the SHO Kotwali at remote corner of the pages of various recovery memos creates doubt and affects adversely the authenticity of the same and as such the same legally not admissible under Section 27 of the Indian Evidence Act and cannot be read against the accused persons. Thus the prosecution has not been able to establish fact of recovery of weapon used in the offence and after articles so recovered from the place of occurrence-house of Sharda Devi.

50. Now, we may consider the meritorial aspect of the case. What a blunder the prosecution has committed in this case particularly relating to recovery of jeep and the dead body of Anoop Shukla. No doubt the statement and the testimony of P.W.1 would have inspired confidence had he also prepared site plan of place of recovery of dead body and the jeep. It has also come in the testimony that the blood trickled out and dropped from the jeep, but no such attempt was ever made by the Investigating Officer or the first informant Jitendra Nath Singh, SHO Rowza, District Shahjananpur to collect such blood stained spots or soils, as the case may be. Absence of any site plan of the place of recovery of dead body of Anoop Shukla vitiates factum of recovery as claimed by the prosecution. It has also come in the testimony of the prosecution witnesses that no blood stains were found inside the jeep. This statement is most improbable under circumstances of the case, because as per testimony, the blood dropped from the jeep when the first informant (P.W.1) spotted the jeep and he gave hot chase to the Commander jeep and tookover the same infront of Gurri police outpost at 1.30 p.m. but it also generates suspicion on point of recovery of

jeep and dead body that no police personnel from Gurri police outpost arrived on the spot or marked his presence at that point of time. This also creates lot of doubt in the authenticity of prosecution version regarding recovery of jeep and dead body in front of Gurri police outpost. Therefore, the genesis and theory of recovery of dead body from in front of Gurri Police outpost has not been proved. Similarly, statement of witnesses that no blood stains were found in the jeep is fair enough to give way to fact that no such recovery was ever effected from the jeep.

51. Now, we may consider the eyewitness account testimony of the prosecution. We have before us Alok Shukla P.W.6-the son of deceased Anoop Shukla. He is aged about 13 years. His testimony was recorded on 25.4.2013 and the incident occurred on 24.12.2009, therefore, at the relevant point of time, this witness must have been around 10 years of age. However, his competency has been tested by the trial court and in the opinion of the trial court he was a competent witness. His testimony regarding the incident appears on page-49 of the paper book.

'' आज से दो साल चार महीने पहले की बात है। मैं अपने घर पर रात में बरामदे में सो रहा था। सर्दी का मौसम था। पापा मेरे रात में आए थे, उस समय मैं जाग गया था। पापा खाना खाकर सो गए थे, फिर मैं भी सो गया। उसके बाद रात में खटपट की आवाज हुई और मैं जाग गया था। तब मैने कमरे में देखा कि आनन्द, मेरी मम्मी व नानी मेरे पापा को गडांसे से मार रहे थे। आनन्द मुल्जिम के पास गडांसा था। मेरी मम्मी सिर पापा का पकड़े थी और नानी ने पापा के पैर पकड़ रखे थे। तब आनन्द ने मुझे देख लिया और मुझसे कहने लगा कि जल्दी जाकर सो जाओ नहीं तो तुमको भी मार डालेंगे और मैं डर कर सो गया।

सुबह मैं 8–9 बजे जगा था। ''

52. In cross-examination, he has testified two facts what he has actually seen. He has denied suggestion that he ever gave any statement to the I.O. that he could not see the assailant as to who killed his father. If the Investigating Officer had recorded any such statement, he could not give any reason for the same. Testimony given in the examination-in-chief brings out a case that all the three appellants were seen together while they were committing the crime around 4:00 a.m.- by this child witness. But in the statement of Investigating Officer i.e. S.S.I. Gambhir Singh P.W.7., the statement so given in the examination-in-chief by this child witness is contradicted by his testimony given before trial court. The Investigating Officer has stated in his cross-examination that Alok Shukla has given statement '' कि मैने किसी को नही देख पाया कि किसने मार डाला ''- He has further deposed in his cross-examination that Alok Shukla gave statement '' पापा दिल्ली से कब आए, मुझें नही मालूम मैं सो रहा था। जब पुलिस वाले गए तो पता चला ''

53. Meaning thereby that child witness Alok Shukla P.W.6 has not given any statement that he was an eye-witness of the occurrence and that occurrence infact took place around 4:00 a.m. and was caused by the three appellants. His statement recorded by the Investigating Officer is in complete contrast to what he has deposed before the trial court. Thus, Alok Shukla P.W.6 the star eye-witness looses credibility and is not worthy of credit and he appears to have been tutored as such wholly unreliable witness and such testimony cannot be believed and acted upon under the facts and circumstances of the case.

54. We may also observe that the very recovery memo of jeep and dead body Exhibit Ka-1 prepared by the first informant also bears signatures of Satish Chandra Verma son of Lala Ram Verma. In his examination, P.W.1 has expressed his ignorance regarding fact that he does not know whether Satish Chandra is an employee of Dayal Fertilizer. He expressed his ignorance regarding fact that Satish Chandra Verma is an employee of the same jeep, whereas, in the statement of Anand Shukla recorded under Section 313 Cr.P.C., it has been specifically stated that Satish Chandra Verma is an employee of Dayal Fertilizer and he took him to the police station on pretence of taking food.

55. The testimony of P.W.1 in regard to aforesaid witness Satish Chandra Verma stands exposed by the testimony of Investigating Officer P.W.7 Gambhir Singh, who has testified in his cross-examination on page-55 of paper book that Satish Chandra had stated in his statement that he is an employee of Dayal Fertilizer and the accused (Anand Kumar Shukla) was also an employee in the same company and he knew him.

56. Further, on page 56 of paper book, Investigating Officer has stated that he did not visit the place from where the dead body was recovered and he did not prepare any site plan of that place. Therefore, it is obvious that no one witnessed the incident. Therefore, the entire testimony of so called eye-witness Alok Shukla P.W.6 appears to be arranged and has been adduced with a view to give thrust to prosecution case. In presence of such eye witness account, applicablility of Section 106 Indian Evidence Act becomes redundant. It cannot be assumed that in case eye-witness account fails the Court may fall back and have recourse to provisions of Section 106 Indian Evidence Act, 1872. How can first informant feign ignorance that he does not know Satish Chandra Verma when he was an employee of Dayal Fertilizer. His testimony reflects that number of people were passing through the road from where the jeep and dead body was recovered. But no independent witness was either asked or arranged to be an witness to fact of recovery. Similarly, the so called place of occurrence in the absence of establishment of recovery of weapon and clothes etc. becomes doubtful and as per statement of the first informant Jitendra Nath Singh on page-27 of the paper book, all the rooms from where recovery was made were open rooms. Meaning thereby that the rooms were neither bolted nor locked. How is it possible that murder was committed early in the morning around 4:00 a.m. still no arrangement was made for either locking or bolting the room by the accused persons. Further, the conduct of eye-witness Alok Shukla is most unnatural under the circumstances of the case. Assuming it to be; that he saw the incident around 4:00 a.m. and at the admonition of Anand Shukla, he went for sleep is unbecoming of a boy of tender age who saw such ghastly murder scene. Here we may take note of his contradiction regarding statement given to the I.O. and the deposition made before court as confronted in his cross-examination on page-50 of paper book. Specific contradiction in his statement was refused like the one when he says that he could not know as to when his father came from Delhi because he was sleeping. He came to know about the incident only when the police arrived and as per testimony on record, it is admitted fact that police arrived at the house of Sharda Devi around 3:00 p.m. on 24.12.2000. Further on the same page he has testified that he was told by counsel about what he has to state before the court. This way tutoring of witness is self-evident. Therefore, this witness is highly tutored, and at the cost of repetition, we may observe that the so called eye-witness is wholly unreliable.

57. Further, in the presence of eye-witness account though motive is relegated to background of the case, however, the motive imputed for commission of the offence is so trivial that a man of ordinary prudence would hardly act on it and would cause death of a person. Motive suggested is confined to the ambit that the relationship between deceased and his wife Kusum Lata @ Baby had strained on account of dispute pertaining to house of Sharda Devi. But there is no worthy evidence in regard to such motive particularly core of dispute except suggestion and statement only. There were several tenants occupying the house of Sharda Devi, but they have not been produced by the prosecution in order to authenticate fact of recovery of weapon and blood stained clothes from house of Sharda Devi.

58. The contention raised to the extent that the police personnel tried to give coherence to the incident carries force. In fact the incident was not seen by anyone though so claimed by the prosecution. In fact the place of recovery of jeep and dead body becomes suspicious and in the absence of preparation of any site plan of the place of recovery no credence can be given to the place of recovery of dead body. Prosecution case is further shattered by non-production of independent witness to fact of recovery of blood stained clothes and the weapon allegedly used in the commission of offence and non-examination of Satish Chandra Verma, the witness of Exhibit ka-1- recovery memo of jeep and dead body.

59. We may further observe that the rigor mortis was passing off upper extremities and was present over lower extremities. This way the duration of death may vary from 24 hours to 48 hours, as per dictum of Modi Medico Jurisprudence.

60. Factum of recovery from the house of Sharda Devi for the aforesaid various reasons becomes tainted and hit by Section 27 of the Indian Evidence Act. It would be pertinent to take note of fact that Anand Kumar Shukla had neither any motive nor any occasion to commit any such ghastly murder along with other two lady accused and the entire prosecution remained silent about the motivating force, which impelled Anand Kumar Shukla to commit such a crime. There is no whisper in the entire prosecution case that Anand Kumar Shukla ever entered into any illicit relationship with any of the two lady co-accused.

61. The prosecution case is full of hollowness and full of loopholes, facts coming out from prosecution testimony and the attendant circumstances of this case generate doubt on the authenticity and veracity of the prosecution case. There are so many inherent shortcomings in the prosecution case, which hit to the root of charges framed against the appellants. The first informant has made his presence casual on the road when he allegedly sighted the jeep on the high way. But no circulation, no order or authority was produced to confirm the fact that the first informant was infact on VIP duty on 24.12.2000.

62. S.I. Shafeeq Khan P.W.3 merely stated in his testimony on page 39 of the paper book that there was some dispute between Sharda Devi and Anoop Shukla (deceased) and, therefore, they in company with Kusum Lata @ Baby committed murder of Anoop Shukla. Here, we may

observe that there was no occasion for Kusum Lata @ Baby to kill her husband and what type of dispute existed between Sharda Devi and Anoop Shukla has not been explained by the prosecution.

63. In this case, the facts and circumstances are so roughly scattered that it is hard to make a coherence of the same merely by putting one circumstance over the another. If one circumstance is taken to be correct and acted upon then the same is confronted with certain reasonable queries, which queries create substantial loophole in the prosecution case, which renders the prosecution case suspicious and doubtful.

64. It appears that the police agency particularly the investigating agency involved in the investigation of this case has deliberately worked out the case on guess. How alarming is the fact that the place of recovery of dead body though stated to be in front of Gurri police outpost, however, no site plan of the place of recovery of dead body/jeep was prepared by the Investigating Officer nor any pain was taken by any of the higher police authorities to remove this material lacuna. The point is when the place of recovery of dead body itself is dubious and this is starting point of the entire episode from where the other instances of this case follow then obviously the foundation of the case goes which invariably collapses the entire prosecution case. Needless to say anything on testimony of P.W.6 as discussed above, the same appears to be wholly unreliable. It appears that this witness has been thrusted upon by the prosecution in order to create a case of direct testimony.

65. Now, the final outcome suggests that it is a case which is based neither on circumstantial evidence nor on direct testimony and the exercise done by the investigating agency creates eternal vacuum in prosecution story for which none but the prosecution alone is to be blamed.

66. It is cardinal principle of criminal jurisprudence that the prosecution is required to prove its charge beyond reasonable doubt against the accused and in case, the prosecution fails to prove the charge beyond reasonable doubt then the accused would be entitled to benefit of doubt and they are to be acquitted and no conviction can be recorded on such testimony, which is not inspiring confidence and is tainted.

67. Learned trial Judge adopted casual approach and could not appraise evidence on record qua the circumstances of the case and misread the statement of various prosecution witnesses, therefore, judgment and order of conviction dated 18.11.2003 passed by Additional Sessions Judge, court no. VIII, Shahjahanpur in Sessions Trial No.199 of 2001, State Vs. Anand Kumar Shukla and others, under Sections 302/34, 201 IPC, Police Station Kotwali, District Shahjananpur arising out of Case Crime No.494 of 2000 is not sustainable in the eye of law and is hereby set aside.

68. For the reasons aforesaid, it is obvious that the aforesaid three appeals carry force and the same are allowed. The appellants are in jail. They shall be set at liberty forthwith if they are not wanted in connection with any other case after complying provisions of Section 437-A Criminal Procedure Code.

69. Let a copy of this order be certified to the trial court concerned for information and necessary follow-up action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Habeas Corpus No.- 13799 Of 2016

Mukesh **...Petitioner**
Versus
State Of U.P & Ors. **...Respondents**

Counsel for Petitioner:
Alok Srivastava, Ratna Singh

Counsel for Respondents:
G.A

This petition seeks issuance of a writ in the nature of habeas Corpus directing release of Mukesh, the petitioner, who is in jail in context of Case Crime No.65 of 2016, under Sections 363, 366 I.P.C., Police Station Maholi, District Sitapur.

Learned AGA contented that the petitioner is in jail in compliance of procedure prescribed by law. In such circumstances, the petitioner cannot plead that his right vested under Article 21 of the Constitution of India has been abrogated or denied. Shri Dwivedi, has relied on judgment dated 13.5.2016 rendered by this Court (this Bench) in ***Writ Petition No.10570 (H.C.) of 2016 : Rajesh through his wife Goldy Raj Vs. State of U.P. and others.***

Court after considering the aforesaid judgement held that the writ petition has been filed without any legal basis. The petitioner has been taken in custody as per procedure established by law and therefore it cannot be pleaded that the liberty of the petitioner has been curtailed, illegally. In such circumstances, the petitioner is not entitled to invoke a writ in the nature of habeas corpus. The petitioner might have a good case for grant of bail under the Code of Criminal Procedure, however, cannot be plead release through issuance of a writ in the nature of habeas corpus.

The petition is **dismissed.**

(Delivered by Hon'ble Ajai Lamba, J.
&
Hon'ble Ravindra Nath Mishra-II, J.)

1. This petition seeks issuance of a writ in the nature of habeas Corpus directing release of Mukesh, the petitioner, who is in jail in context of Case Crime No.65 of 2016, under Sections 363, 366 I.P.C., Police Station Maholi, District Sitapur.

2. Contention of learned counsel for the petitioner is that criminal proceedings were initiated vide Crime number, above noted, at the instance of Ram Das, father of Madhu. It has been pleaded that Madhu and the petitioner Mukesh are married. The marriage, however, has not been accepted by father of Madhu and therefore impugned proceedings have been initiated. In the course of investigation, Madhu did not support the prosecution case yet the petitioner has been arrested. It has been argued that there is no legal reason to keep the petitioner in custody thereby depriving the petitioner of his liberty and therefore the petitioner is entitled to issuance of a writ in the nature of habeas corpus.

3. Shri R.K.Dwivedi, learned Additional Government Advocate appearing for the respondent State has argued that the petitioner is in jail in compliance of procedure prescribed by law. In such circumstances, the petitioner cannot plead that his right vested under Article 21 of the Constitution of India has been abrogated or denied. Shri Dwivedi, has relied on judgment dated 13.5.2016 rendered by this Court (this Bench) in ***Writ Petition No.10570 (H.C.) of 2016 : Rajesh through his wife Goldy Raj Vs. State of U.P. and others.***

4. We have heard learned counsel for the parties and have considered the facts and circumstances of the case.

5. The undisputed facts are that the petitioner is an accused in Case Crime No.65 of 2016(supra) and in the course of investigation, the accused has been arrested and is being kept in jail.

6. In Rajesh' case (supra), the following has been held (relavant paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15) :-

5. Before we embark on the issue of considering the prayer of the petitioner for issuing the writ we would like to refer to the nature of the writ sought to be issued, and the circumstances under which it can be issued.

6. Habeas Corpus has certain limitations though it is a writ of right, it is not a writ of course. Writ of Habeas Corpus is a guarantee against any detention that is forbidden by law, but it does not necessarily protect other rights, such as entitlement to a fair trial. In the circumstances, if imposition such as internment without trial is permitted in law, then Habeas Corpus may not be a useful remedy.

7. A writ of Habeas Corpus is one of what are called the "extraordinary", "common law", or "prerogative writs", which were historically issued by the English Courts in the name of the monarch to control inferior courts and public authorities within the kingdom. The due process for such petition is not simply civil or criminal, because they incorporate the presumption of non-authority. The official who is the respondent must prove his authority to do or not to do something.

8. A writ of Habeas Corpus is known as "the great and efficacious writ in all manner of illegal confinement", being a remedy available to the meanest against the mightiest. It is a summons with the force of a court order; it is addressed to the custodian (a prison official for example) and demands that the prisoner be taken before the court, and that the custodian to present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his or her authority, then the prisoner must be released. Any prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of habeas corpus.

9. There can be no doubt that personal liberty is a precious right, therefore, the writ of Habeas Corpus provides a prompt and effective remedy against illegal detention. By this writ, the Court directs the person or authority who has detained another person to bring the body of the detenue before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention of liberty or freedom of the prisoner or detenu.

10. The writ of habeas corpus is a prerogative writ by which, the causes and validity of detention of a person are investigated by summary procedure and if the authority having his custody does not satisfy the court that the deprivation of his personal liberty is according to the procedure as established by law, the person is entitled to his liberty. The order of release in the case of a person suspected of or charged with commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law, for this writ is not designed to interrupt the ordinary administration of criminal law.

(emphasised by us)

(Vide judgment rendered by Hon'ble Supreme Court of India in Criminal Appeal No. 417 of 2008 (arising out of Special Leave Petition (Crl) No. 583 of 2007) State of Maharashtra and others vs. Bhaurao Punjabrao Gawande).

11. On consideration of the law it is evident that personal liberty is a precious right, however, confinement for valid reasons with legal justification would not tantamount to denial of personal liberty, or illegal detention.

12. Article 21 of the Constitution of India is explicit in the sense that no person shall be deprived of his personal liberty except according to procedure established by law. Under the circumstances, it is imperative for the writ petitioner claiming a writ of habeas Corpus to establish or indicate that his personal liberty has been deprived without following procedure established by law.

13. Procedure for detention of an accused in the course of investigation of a case, and trial process, and subsequently if followed by judgement of conviction and order of sentence, is ordinarily provided under the Cr.P.C. In the case in hand, it is evident that Case Crime No. 60 of 16 (supra) has been registered making allegations of kidnapping and of sexual offences against the petitioner. The petitioner in

accordance with procedure established by law under Cr.P.C. has been remanded to custody vide the impugned order, during the process of investigation of the case. In such circumstances, it cannot be held by any figment of imagination that the petitioner is in illegal confinement or has been kept in custody without authority of law.

14. To plead that there is sufficient material available on record to establish innocence of the petitioner at this stage itself and, therefore, writ in the nature of Habeas Corpus be issued, would be a fallacy in law. At this stage, the petitioner might have a good case for grant of bail under the Cr.P.C., however, detention of the petitioner cannot be termed as illegal confinement without following procedure establish by law. It is not even the case of the petitioner that the court had no legal authority or jurisdiction to remand the petitioner in custody.

15. In view of the above, we are of the considered opinion that the present case has been filed without there being any legal basis for issuance of a writ in the nature of Habeas Corpus."

7. Considering the law as noted above, in the extracted portion of the judgement from Rajesh' case (supra), we are of the considered opinion that the writ petition has been filed without any legal basis. The petitioner has been taken in custody as per procedure established by law and therefore it cannot be pleaded that the liberty of the petitioner has been curtailed, illegally. In such circumstances, the petitioner is not entitled to invoke a writ in the nature of habeas corpus. The petitioner might have a good case for grant of bail under the Code of Criminal Procedure, however, cannot be plead release through issuance of a writ in the nature of habeas corpus.

8. In view of the above, we find no ground to interfere under extraordinary writ jurisdiction.

9. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Criminal Misc. Writ Petition No.- 15223 Of 2016

Ramesh Rajbhar **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Mohd. Irfan, Mainuddin Ahamad

Counsel for Respondents:
G.A.

The present petition has been filed with a prayer to quash the show cause notice dated 01.06.2016 issued against the petitioner in Case No. D2016155100520, under Section 3 (1) U.P. Control of Goondas Act, 1970 (hereinafter referred to as 'Act, 1970'), Police StationSarailakhansi, District Mau.

Learned AGA, has raised a preliminary objection that against the show cause notice issued, the present writ petition is not maintainable and the petitioner is under obligation to submit his reply to the competent authority respondent no.2. He has further placed reliance upon a judgment of this Court in the case of Jainendra @ Chhotu Singh Vs. State of U.P. & others reported in 2007(57) ACC 791 and prayed that the present petition be dismissed on this ground alone.

From a perusal of the records, it appears to the court that the show cause notice was issued on 1.6.2016 against the petitioner under Section 3 (1) of the 'Act, 1970' by the District Magistrate, Mau (respondent no.2) and the petitioner, instead of replying to the show cause notice to the respondent no.2, has directly rushed to this Court for quashing of the same.

The Division Bench of this Court on the basis of the judgment of the Apex Court in the case of **Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others reported in AIR 1996 (SC) 691** was also of the view that normally a writ petition is not maintainable against a show cause notice and it interfered in the said case only on the ground of the fact that the impugned notice which was passed by the District Magistrate in the said case was without jurisdiction, as is also evident from para18 of the said judgment.

Court observed that in the present case is concerned, the petitioner has not alleged that the impugned notice which has been issued to him by the District Magistrate, Mau was without jurisdiction or it was defective on any account. He simply has tried to submit explanation which he ought to have tendered before the District Magistrate concerned. the present writ petition is not maintainable against the show cause notice issued under Section 3(1) of the 'Act, 1970'.

The present writ petition is **dismissed**

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

1. Heard Sri Mohd. Irfan, learned counsel for the petitioner and Sri Ashish Pandey, learned AGA for the State.

2. The present petition has been filed with a prayer to quash the show cause notice dated 01.06.2016 issued against the petitioner in Case No. D2016155100520, under Section 3 (1) U.P. Control of Goondas Act, 1970 (hereinafter referred to as 'Act, 1970'), Police Station-Sarailakhansi, District Mau.

3. It has been contended by learned counsel for the petitioner that there are three cases shown in the show cause notice issued against the petitioner and has also tried to give some

explanation of the same and prayed that the notice be quashed. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgment passed by a Division Bench of this Court in **Crl. Misc. Writ Petition No.11020 of 2016 (Sujeet Kumar Vs. state of U.P. and Others).**

4. Learned AGA, on the other hand, has raised a preliminary objection that against the show cause notice issued, the present writ petition is not maintainable and the petitioner is under obligation to submit his reply to the competent authority- respondent no.2. He has further placed reliance upon a judgment of this Court in the case of **Jainendra @ Chhotu Singh Vs. State of U.P. & others reported in 2007(57) ACC 791** and prayed that the present petition be dismissed on this ground alone.

5. Considered the submissions advanced by learned counsel for the parties and perused the record.

6. From a perusal of the records, it appears that the show cause notice was issued on 1.6.2016 against the petitioner under Section 3 (1) of the 'Act, 1970' by the District Magistrate, Mau (respondent no.2) and the petitioner, instead of replying to the show cause notice to the respondent no.2, has directly rushed to this Court for quashing of the same.

7. From a perusal of the judgment of the **Sujeet Kumar (supra)** shows that a writ petitions were entertained by this Court against show cause notice and in view of the Division Bench judgment of this Court in the case of **Imran @ Abdul Qudus Khan Vs. State of U.P. and others, reported in 2000 (Suppl.) ACC 171 (HC)**, the said notice has been quashed.

8. In our considered opinion, the order has been passed by a Division Bench of this Court in the case of **Imran @ Abdul Qudus Khan (supra)** in which the impugned notice has been quashed, from perusal of paragraph no.3 of the said judgement, it is evident that the Court has held and observed that generally a writ petition against a show cause notice is not maintainable except in some circumstances, which is quoted as under:

*"3. Normally, a writ petition against a show cause notice is not maintainable as has been held in **Engineer, Bihar State Housing Board v. Ramesh Kumar Singh, AIR 1996 SC 691** wherein, the Apex Court was concerned with the entertainment of the writ petition against a show cause notice issued by the competent authority. In that case there was no attack against the vires of the statutory provisions governing the matter and no question of infringement of any fundamental right guaranteed by the Constitution was alleged or proved. It could also not be said in that case that the notice was ex facie 'nullity' or totally 'without jurisdiction' in the traditional sense of that expression that is to say, that even the commencement or initiation of the proceedings on the face of it and without anything more, was totally unauthorized. In the backdrop of these facts, the Apex Court observed as follows :-*

...In such a case, for entertaining a writ petition under Article 226 of the Constitution of India against a show cause notice, at that stage, it should be' shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the party should avail of the alternative remedy and show cause against the same before the authority concerned and take up the objection regarding jurisdiction also, then. In the event of an adverse decision, it will certainly be open to him, to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article 226 of the Constitution of India.

Learned counsel for the petitioner urged that in view of the law laid down by a Full Bench decision of this Court in ***Bhim Sain Tyagi v. State of U.P., 1999 UP Cri R 417 : 1999 All LJ 1845*** *in which the earlier decision of this Court in* ***Ramji Pandey v. State of U.P., (1982) UP Cri R 1 : 1981 All LJ 897 : 1981 Cri LJ 1083 (FB)*** *has been relied upon and approved and in the light of the observations of the Apex Court in the case of* ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai, (1998) 8 SCC 1 : AIR 1999 SC 22 : 1998 AIR SCW 3345*** *alternative remedy does not affect the jurisdiction of the High Court under Article 226 of the Constitution of India, the present writ petition is maintainable."*

9. The Division Bench of this Court on the basis of the judgment of the Apex Court in the case of **Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others** reported in **AIR 1996 (SC) 691** was also of the view that normaly a writ petition is not maintainable against a show cause notice and it interfered in the said case only on the ground of the fact that the impugned notice which was passed by the District Magistrate in the said case was without jurisdiction, as is also evident from para-18 of the said judgment.

10. It would be noteworthy to mention here that another Division Bench judgment of this Court in the case of **Jainendra @ Chhotu Singh (supra)** has also held that though there is no legal bar to entertain a writ petition against a notice but the same can only be entertained if notice under the Act,1970 is defective. All the proceedings are *void-ab-initio*, the notice should be in accordance with Section 3(1) of the 'Act, 1970' and in the said case the Court had held that the learned Magistrate has given reasonable opportunity to explain the notice.

11. So far as as the applicability of the law as has been laid down in the case of **Imran @ Abdul Qudus Khan (Supra)** which has been followed by this Court in case of **Sujeet Kumar (supra)**, in the present case is concerned, the petitioner has not alleged that the impugned notice which has been issued to him by the District Magistrate, Mau was without jurisdiction or it was defective on any account. He simply has tried to submit explanation which he ought to have tendered before the District Magistrate concerned.

12. In view of above discussion, the present writ petition is not maintainable against the show cause notice issued under Section 3(1) of the 'Act, 1970'.

13. Accordingly, the present writ petition is **dismissed** on this ground alone with a liberty to the petitioner to approach the competent authority to submit his reply and the authority concerned may pass appropriate order in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2016

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE DR. VIJAY LAXMI, J.

Misc. Bench No.- 15277 Of 2016

Azad Vikram Singh ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioner:
Rajendra Prasa Mishra

Counsel for Respondents:
C.S.C.

The main question in the present writ petition is whether the petitioner, a Block Pramukh of Kshettra Panchayat, who is an undertrial prisoner for the commission of offences under Section 147, 148, 149, 302 read with Section 34 IPC, shall be allowed to participate in the meetings of the Kshettra Panchayat and to perform his duties as Block Pramukh (Chairperson) under the various provisions of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961.

Court had examined the relevant provisions of the Act of 1961 and the constitutional scheme. Section 13 of Act 1961 prescribes disqualifications for membership of Kshettra Panchayat in its Sub-clauses (a) to (o) and enumerates different sort of disqualifications. There are some disqualifications like holding any office of profit under a State Government or the Central Government or a local authority, or a Nyaya Panchayat established under Section 42 of the United Provinces Panchayat Raj Act, 1947 or being in arrears of any tax fee rate or any other dues payable by him to the Grame Panchayat, Kshettra Panchayat or Zila Panchayat for such period as may be prescribed, or has been convicted of an offence involving moral turpitude etc.

In the present case the petitioner being an undertrial prisoner is not covered within the ambit of Section 13 of the said Act. The petitioner being in jail is unable to attend the said meetings and to discharge his functions as Block Pramukh as mentioned under Section 81 and other relevant provisions of the Act. However, in order to meet such a situation, Section 9A of the Act makes a provision that when the Pramukh is unable to discharge his functions due to his absence, the District Magistrate may make such arrangements, as he thinks fit.

Coming to the constitutional Scheme, in case of a person who has come in conflict with law and, in particular, in conflict with law on offences involving moral turpitude, the question arises about their allegiance to the Constitution of India, faithful and conscientious discharge of the duties, doing right to people and about the duties of the courts under such situations. Under criminal jurisprudence, a person is presumed to be innocent

unless proved otherwise and convicted by a Court of law. Thus, in strict legal parlance, a criminal may be one who has been convicted of crime by a Court of law. But a common man perceives otherwise. It would be pertinent to point out that the Gram Panchayat is a democratic body at the village level and is endowed with powers by the Constitution to function as "institutions of Self Government". Similarly, in 3-tier Panchayat Level System, the next tier is that of the Kshetra Panchayat headed by the Block Pramukh and at the District Level is the Zila Panchayat headed by the Adhyaksh. It is incumbent upon this Court to see that respect for the Constitution, democracy and the Rule of Law is maintained.

Under Article 226 of the Constitution, the High Court is required to act as a sentinel on the qui vive to guard against the violations of the fundamental rights of the citizens. It is the obligation of this Court to enforce their fundamental rights.

Court observed that Even assuming for the sake of arguments that an undertrial had a right to contest elections or vote would not necessarily lead to the conclusion that he can be permitted to participate in the proceedings of the local body to which he is elected as a matter of right during valid judicial custody. It does not find the petitioner to be entitled to enforce such a right through the discretionary jurisdiction of this Court under Article 226 of the Constitution of India. where the question is of enforcing the fundamental rights guaranteed to the citizens vis-a-vis the claim of the petitioner, the Block Pramukh, who is an undertrial prisoner facing trial of heinous crime of murder, court is of the opinion that no mandamus can be granted to the petitioner as prayed for to perform his duties as Block Pramukh particularly when he is detained in prison under a valid judicial process and the Act 1961 contains a specific provision under Section 9A for making an alternative arrangement under such circumstances.

The writ petition is accordingly **dismissed.**

(Delivered by Hon'ble Dr. Vijay Laxmi, J.)

1. Heard Shri R.P. Mishra, learned counsel for the petitioner and learned Standing Counsel for the State.

2. A perennial question of intriguing constitutional importance that touches upon the ongoing debate of morality and law in this writ petition, namely, whether the petitioner, a Block Pramukh of Kshettra Panchayat, who is an undertrial prisoner for the commission of offences under Section 147, 148, 149, 302 read with Section 34 IPC, shall be allowed to participate in the meetings of the Kshettra Panchayat and to perform his duties as Block Pramukh (Chairperson) under the various provisions of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, (hereinafter referred to the 1961 Act).

3. The petitioner prays for a mandamus commanding the respondents to allow the petitioner to participate in the meetings of the Kshettra Panchayat, Block Mankapur, Tehsil Mankapur, District Gonda and perform his duties as Block Pramukh (Chairperson) under the provisions of the Act, 1961 in police custody as and when required.

4. The petitioner had filed his nomination papers as a candidate for being elected as a Member of the Kshettra Panchayat while he was in jail. He was elected as a Member of the Kshettra Panchayat from Gram Panchayat Madhai Pur, Ward No.23, Block Mankapur, Tehsil

Mankapur, District Gonda. The election of Block Pramukh took place on 07.02.2016 in which the petitioner having obtained 53 votes as against his rival Sandhya Singh who had obtained 37 votes, came to be elected by a margin of 16 votes.

5. The petitioner is facing trial and is still under valid judicial custody in Sessions Trial No.84 of 2015 (State Vs. Rajesh Vikram Singh & others) arising out of Case Crime No.254 of 2014 under Sections 147, 148, 149, 302/34 IPC relating to Police Station Wazirganj, District Gonda. The case is pending in the Court of Additional Sessions Judge/FTC-I, Gonda. On administrative grounds, the petitioner was transferred from District Jail, Gonda to District Jail, Orai.

6. The petitioner filed Writ Petition No.1544 (M/B) of 2016 (Azad Vikram Singh Vs. State of U.P. & ors.) for directing the authorities to allow the petitioner to cast his vote and to contest the election of the Block Pramukh, Block Mankapur, District Gonda. The High Court permitted the petitioner to contest the election and cast his vote vide order dated 02.02.2016 extracted hereunder:-

"Heard Sri R.P. Misra, learned counsel for the petitioner, learned Addl. Chief Standing Counsel for the respondents no. 1, 2, 4 and 5 and Ms. Aprajita Bansal for the respondent no. 3 for the State Election Commission.

The petitioner is an under-trial and is in custody and presently lodged in District Jail, Orai.

The petitioner has filed this writ petition for the exercise of his voting rights in the elections of the post of Block Pramukh of Block Mankapur, District Gonda as he is the elected member of the Kshettra Panchayat from Ward No. 23, Madhaipur, Block Mankapur, District Gonda.

The petitioner was elected as a member of the Kshettra Panchayat while remaining in custody and was in jail. He, therefore, contends that the right to cast his vote vests in him and he cannot be divested of the same as such he may be permitted to cast his vote while in custody. He also proposes to contest the election of Block Pramukh and, therefore, prays that he should be permitted to file the nomination paper as well.

Sri Misra has invited the attention of the Court to Rule 8 of U.P. Kshettra Panchayat (Election of Pramukh and Up-Pramukh and Settlement of Election Disputes) Rules, 1994 to urge that the petitioner should be permitted file his nomination as there is no prohibition against an under under-trial, moreso in the background of the petitioner himself who has been elected while in custody as a member of the Kshettra Panchayat. He, therefore, submits that he should be permitted to file his nomination papers and be also allowed to cast vote. The last date of filing of nominations is 5.2.2016 and the date of election is 7.2.2016.

Learned counsel for the Election Commission and the learned Addl. Chief Standing Counsel both contend that the petitioner neither has any fundamental right nor is there any statutory prohibition so as to allow him to cast his vote as an under-trial while being in custody. They contend that even if there is no such provision, the ordinary rights of the citizen stands curtailed if he is in lawful custody. They, therefore, submit that the petitioner cannot claim his right to cast his vote and to contest the elections in the aforesaid background.

Having considered the aforesaid submissions, let a counter affidavit be filed by the respondents within two weeks and the matter thereafter shall be listed on 18.2.2016.

As an interim measure, we provide that the petitioner shall be permitted to file his nomination papers from jail itself and for that purpose it shall be open to the Jail Superintendent, District Jail, Orai to verify the signatures of the petitioner. The nomination papers shall be presented as per Rule 8 of the 1994 Rules alongwith a proposer and another member as a seconder, subject to scrutiny by the returning officer. The permission granted by us will not mean acceptance of the nomination paper but is only a direction for filing of nomination papers. Acceptance or otherwise of the nomination papers shall be subject to the result of scrutiny.

In the event, the petitioner's nomination papers are accepted and he is allowed to contest the elections, then in that event, we direct the District Magistrate, Gonda and the Superintendent, District Jail, Orai to ensure that the petitioner is allowed to cast his vote in custody on 7.2.2016.

In the event, the petitioner is not a candidate himself for any reason, then the petitioner will be allowed to cast his vote but in that event if the result of the election would depend only on casting of one vote, then the outcome of the election shall be dependent upon the final outcome of the writ petition.

Copy of this order be issued by tomorrow. "

7. Sri Mishra urged that since the petitioner had been elected as Block Pramukh of Block Mankapur he has to participate in the meetings and also to carry out the duties and responsibilities as provided under the Act 1961. Learned counsel has invited the attention of the Court to Section 81 read with Section 84 of Act 1961 and urged that the meetings of the Kshettra Panchayat have to be convened, which should be at least once within two months. The Block Pramukh has to preside over the meetings where financial decisions are taken and superintend the executive administration. According to Section 86 of this Act, schemes are to be formulated for the development and welfare of the panchayatas of the Block. Section 87 of the Act provides for formation of various committees. The utilization of Rs.15 lakh in the bank account for the development schemes under the various heads of Kshettra Panchayat cannot be made in the absence of the petitioner. The members who have elected the petitioner should not be deprived of the valuable rights of development and other benefits provided under the Act of 1961. The petitioner is in jail and it is desirable in the interest of justice that the opposite party be directed to allow the petitioner to

participate in the meetings of Kshettra Panchayat and also to perform his duties and obligations as Block Pramukh.

8. Learned Standing Counsel for the respondents contended that the petitioner has no fundamental right nor there is any statutory provision so as to command the respondents to allow the petitioner to participate in the meetings of the Kshettra Panchayat as an undertrial while being in custody. He contends that the rights of a citizen stand curtailed if he is in lawful custody and the petitioner cannot be permitted to attend the meetings of Kshettra Panchayat in the aforesaid background.

9. We have considered the aforesaid submissions and have gone through the records. To appreciate the contentions, it is necessary to first examine the relevant provisions of the Act of 1961 and the constitutional scheme. Section 9 of the Act 1961 provides the term of the Pramukh which reads as under:-

"**Term of Pramukh and [xxx].-** [(1)] Save as otherwise provided in this Act the term of office of a Pramukh or [xxx] of a Kshettra Panchayat shall commence upon his election and shall extend up to the term of the Kshettra Panchayat.

2. [x x x]

3. [(2)] Where the office of the Pramukh is vacant, the District Magistrate may, by order, make such arrangement as he thinks fit for the discharge of the functions of the Pramukh, till the Pramukh is elected.)

[9-A. Temporary arrangement in certain cases.-When the Pramukh is unable to discharge his functions owing to absence, illness or any Magistrate may, by order, make such discharge of the functions of the Pramukh until the date on which the Pramukh resumes his duties.]"

10. Section 13 of Act 1961 prescribes disqualifications for membership of Kshettra Panchayat in its Sub-clauses (a) to (o) and enumerates different sort of disqualifications. There are some disqualifications like holding any office of profit under a State Government or the Central Government or a local authority, or a Nyaya Panchayat established under Section 42 of the United Provinces Panchayat Raj Act, 1947 or being in arrears of any tax fee rate or any other dues payable by him to the Grame Panchayat, Kshettra Panchayat or Zila Panchayat for such period as may be prescribed, or has been convicted of an offence involving moral turpitude etc. Section 13 of the Adhiniyam of 1961 provides as under:-

"**13. Disqualifications for membership of Kshettra Panchayat.**-- A person shall be disqualified for being chosen as and for being a member of a Kshettra Panchayat, if he -

(a) is so disqualified by or under any law for the time being in force for the purpose of election of the State Legislature:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) holds any office of profit under a State Government or the Central Government or a local authority, or a Nyaya Panchayat established under Section 42 of the United Provinces Panchayat Raj Act, 1947;

(c) has been dismissed from the service of a State Government, the Central Government or a local authority, or a Nyaya Panchayat established under Section 42 of the United Provinces Panchayat Raj Act, 1947;

(d) is in arrears of any tax, fee rate or any other dues payable by him to the Gram Panchayat, Kshettra Panchayat or Zila Panchayat for such period as may be prescribed, or has, inspite of being required to do so by the Gram Panchayat or Zila Panchayat failed to deliver to in any record or property belonging to it which had come into his possession by virtue of his holding any office under it;

(e) is an undischarged solvent;

(f) has been convicted of an offence involving moral turpitude;

(g) has been sentenced to imprisonment for a term exceeding three months for contravention of any order made under the Essential Commodities Act, 1955;

(h) has been sentenced to imprisonment for a term exceeding six months or to transportation for contravention of any order made under the Essential Supplies (Temporary Powers) Act, 1946 or the U.P. Control of Supplies (Temporary Powers) Act, 1947;

(i) has been sentenced to imprisonment for a term exceeding three months under the U.P. Excise Act, 1910;

(j) has been convicted for an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985;

(k) has been convicted of an election offence;

(l) has been convicted of an offence under the U.P. Removal of Social Disabilities Act, 1947 or the Protection of Civil Rights Act, 1955;

(m) is debarred from practising as a legal practitioner by order of any Competent Authority;

(n) has been declared under Section 23 to have committed any corrupt practice within the meaning of that section and such declaration continues to be effective; or

(o) is not registered in the electoral rolls for any territorial constituency of the Kshettra Panchayat:

Provided that the period of disqualification under Clauses (c), (e), (f), (g), (h), (i), (j), (k) or (l) shall be five years from such date as may be prescribed:

Provided further that the disqualification under Clause (d) shall cease upon payment of arrears or deliver of the record or property, as the case may be:

Provided also that a disqualification under any of the clauses referred to in the first proviso may, in the manner prescribed, be removed by the State Government."

11. Section 81 of the Act provides about the duties of the Block Pramukh as under:-

"**81. Duties of Pramukh.**-- It shall be the duty of Pramukh--

i. to convene and preside at all meetings of the Kshettra Panchayat and of such of its Committees as may be prescribed in this behalf; and

ii. otherwise to control in accordance with any regulation made in this behalf the transaction of business at all meetings of the Kshettra Panchayat.

(b) to watch over the financial and superintend the executive administration of the [Kshettra Panchayat, and bring to the notice of the Kshettra Panchayat any defect therein, and]

(c) to perform such other duties as are required or imposed on him under this Act or the rules made thereunder or any other law for the time being in force."

12. In the instant case, the petitioner being an undertrial prisoner is not covered within the ambit of Section 13 of the said Act. The petitioner being in jail is unable to attend the said meetings and to discharge his functions as Block Pramukh as mentioned under Section 81 and other relevant provisions of the Act. However, in order to meet such a situation, Section 9A of the Act makes a provision that when the Pramukh is unable to discharge his functions due to his absence, the District Magistrate may make such arrangements, as he thinks fit.

13. Now coming to the constitutional Scheme, in case of a person who has come in conflict with law and, in particular, in conflict with law on offences involving moral turpitude, the question

arises about their allegiance to the Constitution of India, faithful and conscientious discharge of the duties, doing right to people and about the duties of the courts under such situations. Under criminal jurisprudence, a person is presumed to be innocent unless proved otherwise and convicted by a Court of law. Thus, in strict legal parlance, a criminal may be one who has been convicted of crime by a Court of law. But a common man perceives otherwise. The common man perceives criminalisation of politics if he experiences a history-sheeter or a notorious bad character involved, though perhaps not finally convicted, in various crimes of heinous nature like murder, dacoity or rape, contesting elections and getting elected. In **Manoj Narula Vs. Union of India and Ors., (2014) 9 SCC 01/64** the Apex Court observed in this regard as under:-

"The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offence-be it in the form of an off-the-cuff allegation or an allegation in the form of a First Information Report or a complaint or an accusation in a final report under Section 173 of the Code of Criminal procedure or even on charges being framed by a competent Court. The reason for this is fundamental to criminal jurisprudence, the rule of law and is quite simple, although it is often forgotten or overlooked-**a person is innocent until proven guilty. This would apply to a person accused of one or multiple offences. At law, he or she is not a criminal-that person may stand 'condemned' in the public eye."**

14. There has been mounting corruption in all walks of public life. People are generally lured to enter politics or contest elections for getting rich over night the public eye. It is widely believed that there is a growing nexus between the political parties and anti-social elements, which is leading to criminalization of politics, where the criminal themselves are now joining election fray and often even getting elected in the process. Some of them have even adorned ministerial berths and, thus, law breakers have become law makers. The 18th Report presented to the Rajya Sabha on 15th March, 2007 by the Department-Related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice on Electoral Reforms (Disqualification of Persons From Contesting Elections on Framing of Charges Against Them For Certain Offences acknowledged the criminalization of our polity and the necessity of cleansing the political climate where it was reported as under:

...the Committee is deeply conscious of the **criminalization of our polity and the fast erosion of confidence of the people at large in our political process** of the day. This will certainly **weaken our democracy** and will render the democratic institutions sterile. The Committee therefore feels that **politics should be cleansed of persons with established criminal background.** The objective is to prevent criminalisation of politics and maintain probity in elections. Criminalization of politics is the bane of society and negation of democracy.

15. The rule of law and representative parliamentary democracy are essential features of our Constitution. The people of the country, the organs of the government, Legislature, executive and judiciary are all bound by the Constitution. The Constitution is the supreme lex in our country and beyond the pale of any controversy. All organs of the State derive their authority, jurisdiction

and powers from the Constitution and owe allegiance to it. This includes this Court also which represents the judicial organ. In the celebrated case of **Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225: AIR 1973 SC 1461,** this Court found certain basic features of the Constitution that include, besides supremacy of the Constitutional, the republican and democratic form of Government, and the separation of powers between the legislature, the executive and the judiciary. The principle of supremacy of the Constitution has been reiterated by this Court post **Kesavananda Bharati** in case after case including to name just some of them, **Indira Nehru Gandhi vs. Raj Narain, 1975 Supp. SCC 1; AIR 1975 SC 2299, Minerva Mills Ltd., v. Union of India, (1980) 3 SCC 625: AIR 1980 SC 1789, Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699, I. Manilal Singh v. Dr. H. Borobabu Singh, 1994 Supp. (1) SCC 718, Union of India v. Assn. For Democratic Reforms, (2002) 5 SCC 294, Special Reference No.1 of 2002, In re (2002) 8 SCC 237, (Gujarat Assembly Election Matter), People's Union for Civil Liberties v. Union of India (2003) 4 SCC 399, Pratap Singh v. State of Jharkhand (2005) 3 SCC 551, Rameshwar Prasad (VI) v. Union of India (2006) 2 SCC 1 and Kuldip Nayar v. Union of India (2006) 7 SCC 1.** The court has been ascribed the duty of interpreting the Constitution and when the Court finds that manifestly there is an unauthorised exercise of power under the Constitution, it would be the solemn duty of the court to intervene. Here it would be relevant to quote the observations of the Apex Court about the role of the courts in Manoj Narula (Supra):-

"143. Court is the conscience of the Constitution of India. Conscience is the moral sense of right and wrong of a person (Ref.: Oxford English dictionary).Right or wrong, for court, not in the ethical sense of morality but in the constitutional sense. Conscience does not speak to endorse one's good conduct; but when things go wrong, it always speaks; whether you listen or not. It is a gentle and sweet reminder for rectitude. That is the function of conscience. When things go wrong constitutionally, unless the conscience speaks, it is not good conscience; it will be accused of as numb conscience."

16. It is urged on behalf of the respondents that the Court should decline to interpret the constitutional provisions in a manner which would attribute to the founding fathers an intention to permit persons who have committed grave criminal offences involving moral turpitude to head the Government at the Centre or in the States or at grass root level. Such an interpretation would strike at the roots of democracy and the rule of law and should be eschewed. The Apex Court in Manoj Narula (Supra) observed about good governance as follows:-

"140. Good governance is only in the hands of good men. No doubt, what is good or bad is not for the court to decide: but the court can always indicate the constitutional ethos on goodness, good governance and purity in administration and remind the constitutional functionaries to preserve, protect and promote the same. Those ethos are the unwritten words in our Constitution. However, as the Constitution makers stated, there is a presumption that the Prime Minister/Chief Minister would be well advised and guided by such unwritten yet constitutional principles as well. According to Dr. B.R. Ambedkar, as specifically referred to by my learned brother at paragraph-70 of the leading judgment, such things were only to be left to the good sense of the Prime Minister,

and for that matter, the Chief Minister of State, since it was expected that the two great constitutional functionaries **would not dare to do any infamous thing by inducting an otherwise unfit person to the Council of Ministers. It appears, over a period of time, at least in some cases, it was only a story of great expectations.** Some of the instances pointed out in the writ petition indicate that Dr. Ambedkar and other great visionaries in the Constituent Assembly have been bailed out. **Qualification has been wrongly understood as the mere absence of prescribed disqualification.** Hence, it has become the bounden duty of the court to remind the Prime Minister and the Chief Minister of the State of their duty to act in accordance with the constitutional aspirations. To quote Dr. Ambedkar:

However, good a Constitution may be, it is sure to turn out bad because those who are called to work it happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution.

141. Fortunately for us, our Constitution has stood the test of time and is acclaimed to be one of the best in the world. Problem has been with the other part, though sporadically. **Kautilya**, one of the great Indian exponents of art of government, has dealt with qualification of king and his councillors at Chapter IX in **Arthasastra**, said to be compiled between BC 321-296. To quote relevant portion:

CHAPTER IX

THE CREATION OF COUNCILLORS AND PRIESTS

NATIVE, born of high family, influential, well trained in arts, possessed of foresight, wise, of strong memory, bold, eloquent, skilful, intelligent, possessed of enthusiasm, dignity and endurance, pure in character, affable, firm in loyal devotion, endowed with excellent conduct, strength, health and bravery, free from procrastination and fickle mindedness, affectionate, , and free from such qualities as excite hatred and enmity-these are the qualifications of a ministerial officer.

The attempt made by this Court in the above background history of our country and Constitution **is only to plug some of the bleeding points in the working of our Constitution so that the high constitutional functionaries may work it well and not wreck it.** Beauty of democracy depends on the proper exercise of duty by those who work it.

17. **In Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil and Ors. MANU/SC/0599/1994: AIR 1994 SC 678,** the Supreme Court observed that **the best available men should be chosen as people's representatives for proper governance of the country.** It was held by the Supreme Court that the real education of the electorate contemplates informing them of the past achievements and future plans of the political parties and their candidates' qualifications. To quote the relevant extract (at p. 691 and 692 of AIR) :--

".....For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. **This can be best achieved through men of high moral and ethical values** who win the elections on a positive vote obtained on their own merit and not by the negative vote of process of elimination based on comparative demerits of the candidates. It is also necessary that the impact of money power which has eliminated from electoral contest many men of undoubted ability and credibility for want of requisite financial support should be able to re-enter the field to make the people's choice meaningful. This can be achieved only if elections are contested on a positive vote and the comparison is between the merits and abilities of the contestant without the influence of power and pelf and not between their comparative demerits and the support of money power. Apart from the other adverse consequences, the growing influence of money power has also the effect of promoting criminalization of politics.

18. In Association for Democratic Reforms Vs. Union of India (UOI) and Ors., MANU/DE/1175/2000, the Supreme Court observed that **for making a right choice of the candidate it is essential that the past of the candidate should not be kept in dark as it is not in the interest of the democracy and well being of the country. The antecedents of a person standing for election** must be placed under public gaze and that is possible only when all wraps covering information about him are cast away. For the survival of democracy it is essential that **the voter casts an educated vote based upon his knowledge derived from information** supplied to him about the candidates.

19. It would be pertinent to point out that the Gram Panchayat is a democratic body at the village level and is endowed with powers by the Constitution to function as "institutions of Self Government". Similarly, in 3-tier Panchayat Level System, the next tier is that of the Kshetra Panchayat headed by the Block Pramukh and at the District Level is the Zila Panchayat headed by the Adhyaksh. It is incumbent upon this Court to see that respect for the Constitution, democracy and the Rule of Law is maintained. Under Article 226 of the Constitution, the High Court is required to act as a sentinel on the qui vive to guard against the violations of the fundamental rights of the citizens. It is the obligation of this Court to enforce their fundamental rights.

20. It would be appropriate to examine another line of decisions where such issues had been raised before this Court in the case of ***Raghu Raj Pratap Singh alias Raja Bhaiya v. State of U.P. And others [2003 (3) AWC 2106]***. The petitioner therein was under judicial custody under the Prevention of Terrorism Act, 2002 and other criminal cases including under the Gangster and Anti-Social Activities (Prevention) Act. The prayer made by the petitioner was that he should have been permitted to participate in the session of the State Legislative Assembly as he had already been elected as the Member of the Legislative Assembly and during the session, he should also be transferred to Lucknow Jail, the capital city of the State. The Court went on to discuss the entire law of the Representation of the People Act and the constitutional provisions as well as other statutory laws and after a consideration of various judgments of the Supreme Court and other Courts, came to the conclusion as follows:-

"32. We are of the view that the arguments advanced in this connection are not well placed. Unless the two Legislators convince us that they have any enforceable right to participate in the session of the House even they are lawfully detained under orders of the Courts. The rights and obligation are being referred to by the learned counsel for the petitioners are the rights and privileges inside the House and if they are detained by a valid order, it is implied that they cannot enjoy those privileges and rights so long as they are under detention.

35. We are of the view that so long as the two ***Legislators are detained under valid detention order, they have no right or privilege to participate in the session of the House.*** *We do not agree with Dr. Mishra on the point that this Court is bound to permit any such Legislator to participate in the session. Power under Article 226 of the Constitution is discretionary one and no one can say that this Court will have no option but to act in a particular manner.*

36. Arguments of the learned counsel for the petitioners that if a detained person can contest election, can cast vote and if elected can take oath, then ***why the detained Legislator cannot participate in the session of the House does not appeal to us because the logic does not work in every case. Right to vote, right to contest election of the Assembly or Parliament or right to take oath as Legislator or a Parliamentarian, are different rights. Right to vote and right to contest elections are the statutory rights and are governed by the statutes.*** *There may be provision where person in jail may file nomination without being present before the authority concerned and there may be provision where a person can cast his vote in the manner given in the law and rules. Therefore, those are not the arguments, which help the two Legislators or Vimla Devi and others to say that these two detained Legislators should be permitted to participate in the House."*

21. The writ petition was ultimately dismissed with the aforesaid observations holding that the right of participation not being an enforceable right during a valid judicial custody, the prayer made by the petitioner cannot be granted.

22. In the instant case also, the petitioner is seeking a similar right which for the abovementioned reasons and the ratio of decisions here-in-above and here-in-after cannot be extended.

23. A very illustrative judgment of a Division Bench of the Patna High Court also deals with the issue of criminalisation in politics in the case of ***Jan Chaukidar (Peoples Watch) v. Union of India and others [2004 (2) BLJR 988].*** Paragraph - 5 of the said judgment posed the following question:-

"5. These two cases concern (a) criminals in politics, and the question; (b) ***if the candidate is imprisoned*** *and has no vote, may he stand for election?"*

24. The Court then went on to discuss the provisions of Section 62 (5) of the Representation of the People Act and then posed another question in paragraph - 9 as follows:-

"9. The further question arising in this case is "though the man behind bars may not vote, may he stand for election? What is wrong with prisoners conducting their election campaigns while in custody?"

25. The Court then went on to quote the Constitution Bench judgment in the case of ***N.P. Ponnuswami v. Returning Officer [AIR 1952 SC 64*** and extracted the following lines:-

"The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

26. The aforesaid judgment vis-a-vis disqualification and the inherent right of a voter was under consideration. The Court posed the following question in paragraph - 15:-

"15. This Court is dealing with the aspect of crime. The expression "crime" as it occurs in the Constitution in reference to elections is not an empty word nor a platitude. The expression is short, and used without elaboration, but it has been used by the founding fathers with much meaning. ***Crime may mean conviction, and yet it may also be understood as criminality. The Constitution does not spell out the details and expects the Law to provide for it.*** *Has the Law provided for it is the issue before the Court."*

27. While making observations, the Court went on to consider the Supreme Court decisions and proceeded to rule on the expression "crime". When crime is a stigma that can attract disqualification, for how long or how short a period, that may be permitted under the law. The Court however held as follows in paragraph - 20:-

"... Elections are controlled by the law of the Legislature, the Constitution of India does not provide all the rules of the game. But the rules of the game have to be as strict as those of any game which kicks up a hysteria. It's like a leg before wicket ruling, where you're neither bowled out nor caught out. Cover a wicket arid get a ball on your leg pads and you're out. It's not fair to cover a wicket. Why is this rule of the game so strict? ***A fair opportunity must exist to get the player out if he presents an occasion. It's a foul to cover a wicket. Criminality is also a foul in elections. It is not a qualification. It is certainly a disqualification."***

28. In paragraph - 22 of the judgment, the Court while considering the impact of Sub-section (5) of Section 62 of the Representation of the People Act held as under:-

"22. The debate before the Court is particularly on Sub-section (5) of Section 62. To understand its true import one needs to understand that this right conferred, whether on a voter or on a candidate who has to be a voter, recognizes the qualification as a generality of all who come within the arena of elections. Suffice it to say that it is not anybody's case that a person who will stand for election, call him a candidate or an "election" will not have the inherent qualification, call it generic or otherwise, of being a voter first. But Sub-section (5) is about those accused of crime, imprisoned, undertrials, convicts or transportation or otherwise, or in the ***lawful custody of***

police. This section is like an anaesthesia given to a certain category of those who wish to participate in an election, to keep them out of the election arena for as long as it has its effect. The anaesthesia in election law is known *as being disenfranchised, legally deprived of the right to vote."*

29. Not only this, in paragraph - 27, the Court went on to hold that an elector is a person legally entitled to vote, but if he is in prison then he is debarred from voting. Thus, an undertrial under legal detention is not entitled to vote at that point of time and consequently, a prisoner is not an elector and cannot stand for office.

30. In paragraph - 33, the Court explained that the law temporarily takes away the power of any such person to go anywhere near the election scene and the privilege to vote is taken away when in lawful custody.

31. The necessity to mention the aforesaid judgment has arisen because the aforesaid judgment went up before the Apex Court on a challenge raised by the Chief Election Commissioner. The said decision is reported in ***2013 (7) SCC 507, Chief Election Commissioner and others v. Jan Chaukidar (Peoples Watch) and others.***

32. Approving the judgment of the High Court, Civil Appeals were dismissed by a speaking judgment. The judgment, therefore, became a cause of concern and the Parliament immediately swung into action to overcome the said decision by enacting the Representation of the People (Amendment and Validation) Act, 2013. An amendment was brought about in Section 62 of the principal Act in Sub-section (5) and a validating clause, which are as follows:-

"3. In section 62 of the principal Act, after the proviso to sub-section (5), the following proviso shall be inserted namely:-

"Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector."

4. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, the provisions of the Representation of the People Act, 1951, as amended by this Court, shall have and shall be deemed always to have effect for all purposes as if the provisions of this Act had been in force at all material times."

33. It can thus be seen that in spite of judicial pronouncements, the Parliament did make such provisions so as to dilute the cause that had been taken up by the Courts.

34. There is yet another judgment of our Court by a Division Bench in the case of ***Shekhar Tiwari v. State of U.P. And others [2009 (4) AWC 3181]*** where also a Member of the Legislative Assembly was detained, facing criminal charges including that of murder. A mandamus was prayed

by him to participate in the Assembly proceedings which was clearly denied by concluding as follows:-

"29. The judgments in the cases of Pillalamarri Venkateswarlu and Ansumali Majumdar (supra) lays down a similar proposition and fully supports the view that a M.L.A. Detained in a prison has no right or privilege to claim participation in the proceedings of the assembly. The submission of the counsel for the petitioner that in case the petitioner is not permitted to participate in the proceedings of the assembly then his constituency shall remain unrepresented also has no substance.

30. Non-participation in the proceedings of the assembly by the petitioner is a natural consequence of his detention in prison on criminal charges. Right of participation in the proceedings of the assembly by a member and the privileges in the assembly given to members are rights and privileges of those members who are participating in the proceedings. When the petitioner is detained in prison by lawful order, he cannot claim a writ of mandamus permitting him to participate in the proceedings of the Assembly. The judgment of the Apx Court in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another, 2005 (3) SCC 311: 2005 (1) ACR 1002 (SC), also deserves to be noted in which case the petitioner was detained in Tihar Jail an elected M.P. was permitted by the Apex Court to take oath in the House as a Member of Parliament. The said case was with a different prayer and has no bearing on the right of a M.L.A. or M.P. to participate in the proceedings of the Parliament or Assembly. The Apex Court in the said judgment in the facts of that case permitted the petitioner to take oath and it does not help the petitioner in the present case.

31. In view of the foregoing discussions, the petitioner is not entitled for the relief claimed in the writ petition. The writ petition is dismissed."

35. The sum and substance of all these judgments has its genesis in the pronouncement of the Apex Court as early as in the case of ***K. Ananda Nambiar v. Chief Secretary to the Government of Madras [AIR 1966 SC page 657]*** which also approved of the earlier judgments of the Madras High Court in the case of ***Venkateswarlu v. District Magistrate, Guntur [AIR 1951 Madras 269]*** in re: ***Ananda Nambiar [AIR 1952 Madras 117]***.

36. On a consideration of the entire law on this subject, we find substantial legal support for our conclusions from the ratio of the decisions referred to here-in-above. Even assuming for the sake of arguments that an undertrial had a right to contest elections or vote would not necessarily lead to the conclusion that he can be permitted to participate in the proceedings of the local body to which he is elected as a matter of right during valid judicial custody. This interpretation can be supported by the doctrine of legitimate deduction as explained in the case of ***Manoj Narula (supra)***. We therefore do not find the petitioner to be entitled to enforce such a right through the discretionary jurisdiction of this Court under Article 226 of the Constitution of India.

37. In this view of the matter, where the question is of enforcing the fundamental rights guaranteed to the citizens vis-a-vis the claim of the petitioner, the Block Pramukh, who is an undertrial prisoner facing trial of heinous crime of murder, we are of the considered opinion that no mandamus can be granted to the petitioner as prayed for to perform his duties as Block Pramukh particularly when he is detained in prison under a valid judicial process and the Act 1961 contains a specific provision under Section 9A for making an alternative arrangement under such circumstances.

38. The appropriate course in case of the petitioner, the undertrail prisoner for offences u/s147/148/149/302 r/w 34 IPC, is to seek a direction for the Sessions Court concerned that the case be fast tracked. The petitioner being an undertrial prisoner cannot be permitted by the court to participate in the deliberations of the meetings of Kshettra Panchayat in the background of what has been observed above. On being tried, if the petitioner is convicted, he becomes disqualified for continuing as a Block Pramukh u/s 13 of Act 1961. If, he is acquitted, he is entitled to continue as Block Pramukh. Though this may sound cumbersome, that apparently is what the Constitution and the Statute intends.

39. In view of these circumstances, we do not find this case to be a case for exercise of discretionary jurisdiction as no prejudice would be caused either to the functioning of the Kshetra Panchayat nor it would impede the same any way. In the result, for the foregoing reasons all the contentions urged by the petitioner in support of his claim fail.

40. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 24435 Of 2014

Neeraj Kumar Katiyar **...Applicant**
Versus
Union Of India **...Opposite Party**

Counsel for Applicant:
Chandrakesh Mishra, Daya Shankar Mishra

Counsel for Opposite Party:
Sanjay Kumar Singh, Spp, A.G.A.

The present bail application has been filed on behalf of the applicant Neeraj Kumar Katiyar involved in Criminal Case No.226 of 2013, under Sections 8/20/23 of NDPS Act, D.R.I, District Varanasi.

Counsel for the applicant content that the applicant has been falsely implicated; that allegedly recovered quantity of Charas has not been recovered from the applicant; that the entire story mentioned in memo of recovery and arrest is false and concocted; that the alleged recovery of contraband from the Car is and the Car does not belong to the applicant; that there there is no independent witness of alleged recovery; that the compliance of provisions of Sections 42, 50 , 52 and 57 of NDPS Act has not been made in view of law laid down in State of Rajasthan Vs. Parmanand, AIR (SC)-2014-1384.

Counsel for Customs and Central Excise vehemently opposed the prayer of bail and contended that huge commercial quantity of Charas weighing 46.5 kg. has been recovered from the vehicle being driven by the applicant; that the Narcotic drugs were being smuggled from neighbouring country Nepal, by the applicant in a very clever and planned manner by making a cavity within the bonut and rear portion of the old car.

Court after perusing the records and considering the complicity of offence, severity of punishment as well as totality of facts and circumstances, without commenting on the merits of the case, did not find it as a fit case for bail.

The bail application of applicant **Neeraj Kumar Katiyar** is liable to be rejected.

(Delivered by Hon'ble Harsh Kumar, J.)

1. Heard Shri Daya Shankar Mishra learned counsel for the applicant, Shri Sanjay Kumar Singh, Special Public Prosecutor (Narcotics) on behalf of opposite party, the Union of India.

2. The bail application has been filed on behalf of the applicant Neeraj Kumar Katiyar involved in Criminal Case No.226 of 2013, under Sections 8/20/23 of NDPS Act, D.R.I, District Varanasi.

3. Learned counsel for the applicant contended that the applicant has been falsely implicated; that allegedly recovered quantity of Charas has not been recovered from the applicant; that the entire story mentioned in memo of recovery and arrest is false and concocted; that the alleged recovery of contraband from the Car is and the Car does not belong to the applicant; that there there is no independent witness of alleged recovery; that the compliance of provisions of Sections 42, 50 , 52 and 57 of NDPS Act has not been made in view of law laid down in State of Rajasthan Vs. Parmanand, AIR (SC)-2014-1384; M. Prabhulal Vs. The Assistant Director, Directorate of Revenue Intelligence [2003(47) ACC 1151]; and Dilip Vs. State of Madhya Pradesh, AIR(SC)-2007-369; that out of the allegedly recovered material, three samples are alleged to have been prepared which is against the prescribed procedure of preparing two samples and so the entire proceedings are wrong and illegal; that the car being driven by the applicant is alleged to have been stopped at about 12.00 in noon on 24.4.2013 and the search is alleged to have been made at a distant place, at the office at Nadesar, Varanasi; that due notice of search before Gazetted Officer was not given to the two accused separately and giving the joint notice to them is wrong and illegal; that the search of applicant and the vehicle before the Gazetted Officer who was accompanying the raiding party is wrong and illegal and ought to have been made before the nearest Magistrate; that recovery of huge quantity has been shown in order to show good work and the applicant was arrested near hotel India when after meeting his father, a railway employee at

Allahabad, he was going to have Darshan of Vishwanath Baba; that the confessional statement of applicant recorded in police custody is not admissible in evidence; that the applicant is in custody since 24.4.2013 and the trial is not proceeding in accordance with law rather progress of trial is very slow; that as per provisions of Section 36 of NDPS Act the trial must be conducted before special court but no special court was constituted and so the entire proceedings of trial before additional sessions judge are liable to be quashed; that the copy of the order sheet filed by opposite party along with Supplementary Counter Affidavit, shows that the prosecution is not taking due interest in early disposal of the trial; that the applicant has no criminal history; that the applicant undertakes that he will not make misuse the liberty of bail; that the applicant is in custody since 24.4.2013.

4. Per contra learned counsel for Customs and Central Excise vehemently opposed the prayer of bail and contended that huge commercial quantity of Charas weighing 46.5 kg. has been recovered from the vehicle being driven by the applicant; that the Narcotic drugs were being smuggled from neighbouring country Nepal, by the applicant in a very clever and planned manner by making a cavity within the bonut and rear portion of the old car; that the case laws relied on behalf of applicant are not applicable to the facts of the case and moreover since the compliance of all the provisions has been made the correctness of the same is to be considered at the time of disposal of trial after evidence; that it is wrong to say that compliance of Sections 42, 50, 52 or 57 of the NDPS Act has not been made; that it is wrong to say that joint notice was served on both the accused which does not comply with provisions of Section 50 of the N.D.P.S. Act rather separate notices of search were not served on the two accused; that page nos.24 and 25 of the counter affidavit clearly show that separate notices of search were served on each of the two accused; that it is wrong to say that search before the gazetted officer accompanying the squad was not proper or ought to have been made before some Judicial Magistrate; that it is pertinent to mention that on request of accused, for search of some secured place, instead at the place of arrest on Gazipur - Vanarasi Road, on which the applicant driven the Car to nearest office; that it is wrong to say that making of search at some distance was wrong or improper and there is no allegation of any meanwhile manipulation or tampering with the goods recovered; that the arguments that three samples were taken in contravention of rules are absolutely wrong and baseless, rather same were taken in accordance with rules; that in any case by taking 3 samples of recovered goods in accordance with the rules the applicant has not been affected adversely; that in the case of Vijay Singh Chandubha Jadeja vs. State of Gujarat, (2011) 1 SCC (Cri) 497 it has been held that the issues as raised by the applicant can only be raised at the time of trial; that it is wrong to say that trial is being conducted before an incompetent court and the applicant has not raised any such plea before the trial court; that after framing of charges the trial has commenced and is in progress; that statement of P.W.-1 was recorded on 23.8.2014 and despite part cross examination on 6 dates 2.5.2015, 8.5.2015, 2.6.2015, 3.7.2015 and 22.7.2015, the accused has not concluded the cross examination with P.W.-1 as yet after lapse of about 2 years; that the accused himself is delaying the progress of trial and whenever the prosecution witness appears before the court either the applicant moves adjournment application with the plea of his counsel being engaged in some other case in some other court or get the witness cross examined in part to some short extent with oral request by counsel of being busy elsewhere; that despite specific orders of the court on applicant's

adjournment application, granting adjournment on 31.8.2015 for completing the cross examination on next date 19.9.2015, the accused again moved adjournment application on 19.9.2015; that the prosecution witness has returned several times without further cross examination during the period of last 2 years and if on any date the P.W.-1 could not appear for further cross examination, the prosecution cannot be blamed for the slow progress of trial; that the accused himself is obstructing and delaying the progress of trial in order to make a ground for bail; that the bail application is not liable to be allowed in view of provisions of Section 37 of NDPS Act; that there is nothing to show that after release on bail the applicant will not again get involved in similar offences; that if the applicant is released on bail he will delay and defraud the trial and will abscond to Nepal or to elsewhere and continue to commit similar offences.

5. Upon hearing the learned counsel for the parties, perusal of record and considering the complicity of offence, severity of punishment as well as totality of facts and circumstances, without commenting on the merits of the case, I do not find it a fit case for bail. The bail application of applicant **Neeraj Kumar Katiyar** is liable to be rejected.

6. Accordingly, the bail application is **rejected**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Public Interest Litigation (PIL) No.- 29592 Of 2016
&
Writ C No.- 49534 Of 2015

Akhil Bhartiya Manav Kalyan Evam Samajothhan & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioners:
Amar Nath Singh

Counsel for Respondents:
C.S.C., A.N. Singh, A.S.G.I., Amit Misra, Anjali Upadhya, B.B. Jauhari, Shivam Yadav

Present two Public Interest Litigations (PILs) have been filed before this Court raising serious concern in the matter of appointment and continuance of officers including the highest officer namely Chief Executive Officer (CEO) in three Industrial Development Authorities created around the National Capital Region (NCR) namely NOIDA, Greater NOIDA and Yamuna Expressway Industrial Development Authority.
Court took a judicial notice of the fact that during all this period, serious scams in respect of allotment of land and wrongful utilization of the property put in the hands of above named Development Authorities have come

in light and employees/officers of these Authorities like Yadav Singh, Ramendra Singh and V.K. Goel are confined to prison for accumulating wealth/ properties worth hundreds of crores of rupees. Investigation of the scams is being done by CBI. But the State has continued with the same officers as Chief Executive Officer/Chairman under whom Yadav Singh etc. were working during the period the scams had taken place.
Court is of the opinion that the State Government even in the matter of posting of its officers must act in a manner, which may inspire confidence in the public at large and its action must not reflect favoritism in favour of the selected few. Transparency must be the rule of the day. If the State Government is not able to find suitable officers to replace the blue eyed officers, it would be a sad day for the administration in the State.
Court is the prima facie opinion that one person cannot work as a whole-time officer for three different Industrial Development Authorities, as it belies the very concept of the incumbent being whole-time officer subject to the condition that for some short duration, till regular appointment is made, an officer already appointed as Chief Executive Officer for one Industrial Development Authority may hold the charge of other Industrial Development Authority. But the said arrangment has to be for a very limited duration. Giving of additional charge for years in respect of three Industrial Development Authorities to one person frustrates the very intent of the word "whole-time officer" as contemplated by Section 4 of the U.P. Act No. 6 of 1976.
Another issue, which was examined in the present Public Interest Litigation is as to whether the appointment of Mr. Rama Raman is on deputation and if so, then can such deputation continue for unlimited period or it must also come to an end within the maximum time period fixed for such appointment on deputation under the Government Orders applicable. Reference may be made to the Office Memorandum dated 19th January, 1988 bearing No. G-1-70/10-88-250/87, which inturn refers to the Uttar Pradesh Sarvajanik Upkramon Mey Sarkari Sevokon Ka Aamelan Niyamawali, 1984

Court permitted the respondents to file their objections with regard to the credentials of the petitioners so disclosed. But having regard to the facts as are on record of these petitions, court feel that a case for exercise of suo motu powers is made out, even if some statement of facts required to be stated by the petitioners, as are wanting in these two petitions, qua their credentials. Larger public interest must prevail.
Court are, therefore, entertaining the present public interest litigations.

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard learned counsel for the petitioners, learned Chief Standing Counsel, Sri M.C. Chaturvedi, learned Senior Advocate on behalf of the respondent-Noida Development Authority, Sri Bhanu Bhushan Jauhari, learned Advocate on behalf of respondent-Greater Noida Development Authority.

2. These two Public Interest Litigations (PILs) have been filed before this Court raising serious concern in the matter of appointment and continuance of officers including the highest officer namely Chief Executive Officer (CEO) in three Industrial Development Authorities created around the National Capital Region (NCR) namely NOIDA, Greater NOIDA and Yamuna Expressway Industrial Development Authority.

3. According to the petitioners Mr. Rama Raman an IAS officer is the blue eyed boy of the Government of Uttar Pradesh. The same officer holds charge of Chief Executive Officer (CEO) of NOIDA, Greater NOIDA and Yamuna Expressway Industrial Development Authority. The extra

ordinary competence of the officer can be seen from the said fact itself and the lack of competent officers with the State Government for manning three different posts is also apparent from the same assertion. The State Government for last six years i.e. since 2010 has not been able to find required number of suitable officers, who can hold the post of Chief Executive Officers for three Industrial Development Authorities, independently.

4. The High Court, while entertaining the first writ petition in the year 2015 vide order dated 2.9.2015, had noticed as under:-

"Heard Counsel for the petitioner, Standing counsel and Sri Bhanu Bhusan Jauhari, learned counsel for respondent no. 8 and Sri Rajesh Kumar Tiwari, learned counsel for respondent nos. 4 and 10.

If the allegations made in the present writ petition are correct then prima facie it is established that respondent nos. 11 to 16 are blue eyed boys of the State Government. By way of example of respondent no. 11, Sri Rama Raman, is presently posted as Chief Executive Officer, Noida, Greater Noida and Chairman of Yamuna Expressway Authority. He has remained posted in these authorities for years together.

We fail to understand as to why the State Government could not appoint any other officer and why Sri. Rama Raman has not been transfered to any other post in any other district, what is so special about him and why should he remain as head of three authorities at the same time.

Learned counsel for the Yamuna Express Way Authority submits that Sri Santosh Yadav, Chief Executive Officer, Yamuna Express Way Authority has joined recently on 10.06.2015.

He may supply the details of other officers appointed in Yamuna Express Way Authority since the date of initial appointment.

The Court has been informed that the officers who are appointed in Noida Industrial Development Authority, Greater Noida Development Authority, and in Yamuna Express Way Authority continue to remain posted therein as they are not holdes of transferable post.

We may record that the posts in all other development authorities in State of Uttar Pradesh established under the U.P. Urban Planning Development Act are transferable posts. The Chief Secretary must explain as to why the post in these Industrial development authorities have not been made transferable.

Sri. Bhanu Bhushan Jauhri appearing for respondent no. 8 has informed the Court that Sri. Rama Raman has been posted in Noida since 05.07.2010 on deputation. The Chief Secretary may inform the Court as to whether the posts held by Rama Raman are cadre posts and whether Cadre Rules admit appointment by deputation or not.

All other respondents are also granted time to file their reply to the averments made in the writ petition by the next date. Particulars of their place of posting since they have entered into Government Service/ Service of Industrial Development Authority must be disclosed in form of a chart. Personal affidavit must be filed by the Chief Secretary of U.P. by the next date in response to what is state above."

5. An affidavit has been filed on 30th September, 2015 by the then Chief Secretary of the Government of U.P., Lucknow and in paragraphs 8, 9 and 11 to 14 of the affidavit, it has been stated as under:-

"8. That it is clarified that the senior officers in rank of Additional CEO, Deputy CEO, and at times the Head of the Finance and Planning Department, Chairman are sent on deputation by the State Government.

9. That the Chief Executive Officer is appointed by the State Government in terms of Section 4 of the U.P. Industrial Development Act, 1976. The said provisions is extracted herein below for ready reference of the Hon'ble Court:-

'Section 4 of the U.P. Industrial Development Act, 1976

"(1) The Chief Executive Officer of the Authority shall be appointed by the State Government and shall be a whole-time officer of the Authority.

(2) The Chief Executive Officer shall be entitled to receive from the funds of the Authority such salaries and allowances and be governed by such conditions of service as may be determined by general or special order of the State Government in this behalf.

(3) The Chief Executive Officer shall exercise such power and perform such duties as may be specified in the regulations or delegated to him by the Authority."

11. That as far as the posting of Shri Rama Raman is concerned, he was substantively posted as CEO, Greater NOIDA, Gautam Budh Nagar since 4.7.2010 and the same is the cadre post of IAS. Sri Rama Raman was, at different times, given additional charge of Chairman & CEO NOIDA, Chairman Greater NOIDA and Chairman & CEO Yamuna Expressway Industrial Development Authority.

12. That at present Shri Rama Raman is substantively posted on the cadre post of CEO Greater NOIDA and he is holding additional charge of Chairman NOIDA, Chairman Greater NOIDA, Chairman Yamuna Expressway Industrial Development Authority and CEO NOIDA.

13. That it is clarified that posts of CEO NOIDA and CEO Greater NOIDA are cadre posts of Indian Administrative Service.

14. That it is further clarified that posts of Chairman & CEO NOIDA, Greater NOIDA and Yamuna Expressway Industrial Development Authority are transferable and officers posted on these posts are transferred time and again."

6. This Court, therefore, enquired from the learned Chief Standing Counsel of the State of U.P. defending the State Government to explain that when the post of Chief Executive Officer has been created under the U.P. Industrial Development Act, 1976 and it has been provided under Section 4 of the Act that the Chief Executive Officer shall be a whole-time officer of the Authority and that he shall draw salary and allowances from the funds of the Authority and shall be governed by such conditions, as may be determined by general or special order of the Government, then what is the intent of the statement made in paragraph '11' of the affidavit of the Chief Secretary that the post of CEO, NOIDA and CEO, Greater NOIDA are cadre posts of IAS.

7. The Court enquired from the Chief Standing Counsel (a) can a particular post fall within two cadres, one created under the statutory provisions of Industrial Development Act and the other under the IAS cadre? (b) can a person be a full time officer for three statutory bodies at the same time. (c) if the statutory provisions do not permit appointment on a post by deputation can such mode of appointment be restored to?

8. The learned Chief Standing Counsel made a statement in the open Court that he cannot answer the query made by the Court without obtaining instructions from the State Government.

9. After the Court dictated the said part of the order, the learned Chief Standing Counsel stood up to state that the learned Advocate General shall appear in the matter and the Court may adjourn the matter for today.

10. It is admitted to the respondents that Mr. Rama Raman has been continuing at a particular place for six years as on date and that he is admittedly an IAS officer holding a transferable post. As on date he is holding charge of the following statutory posts:- (i) CEO, Greater NOIDA (ii) Chairman, NOIDA (iii) CEO NOIDA, (iv) Chairman, Yamuna Expressway Industrial Development Authority.

11. We may take judicial notice of the fact that during all this period, serious scams in respect of allotment of land and wrongful utilization of the property put in the hands of above named Development Authorities have come in light and employees/officers of these Authorities like Yadav Singh, Ramendra Singh and V.K. Goel are confined to prison for accumulating wealth/ properties worth hundreds of crores of rupees. Investigation of the scams is being done by CBI. But the State has continued with the same officers as Chief Executive Officer/Chairman under whom Yadav Singh etc. were working during the period the scams had taken place.

12. This Court had indicated to the State in its order dated 2nd September, 2015 in so many words that it must decide for itself as to how long Mr. Rama Raman could continue at one particular place and hold charge of so many statutory posts simultaneously for such a long period.

13. We are of the opinion that the State Government even in the matter of posting of its officers must act in a manner, which may inspire confidence in the public at large and its action must not reflect favoritism in favour of the selected few. Transparency must be the rule of the day. If the State Government is not able to find suitable officers to replace the blue eyed officers, it would be a sad day for the administration in the State.

14. Section 3 of U.P. Act No. 6 of 1976 provides for the constitution of the Industrial Development Authority for any industrial area. Sub-section (2) of Section 3 of U.P. Act No. 6 of 1976 declares that the authority shall be a body corporate. The Secretary to the Government, Uttar Pradesh, Industries Department or his nominee not below the rank of Joint Secretary shall be ex officio Member-Chairman.

15. So far as the Chief Executive Officer is concerned, as already noticed above, he has to be appointed by the State Government as a whole-time officer of the Authority with a right to draw salary and other allowances from the funds of the Authority itself. His conditions of service etc. are to be determined by general or special orders of the State Government made in this behalf.

16. Prima facie what logically follows is that the post of Chief Executive Officer is a statutory post created under the provisions of the U.P. Act No. 6 of 1976.

17. Section 4 of the U.P. Act No. 6 of 1976 contemplates that Chief Executive Officer shall be a whole-time officer of the Authority.

18. From the aforesaid, it can be seen that for each Industrial Development Authority, there has to be a separate whole-time officer.

19. We are of the prima facie opinion that one person cannot work as a whole-time officer for three different Industrial Development Authorities, as it belies the very concept of the incumbent being whole-time officer subject to the condition that for some short duration, till regular appointment is made, an officer already appointed as Chief Executive Officer for one Industrial Development Authority may hold the charge of other Industrial Development Authority. But the said arrangment has to be for a very limited duration. Giving of additional charge for years in respect of three Industrial Development Authorities to one person frustrates the very intent of the word "whole-time officer" as contemplated by Section 4 of the U.P. Act No. 6 of 1976.

20. Another query, which has gone unanswered, despite specific order passed by the High Court as early as on 2nd September, 2015 in Writ-C No. 49534 of 2015 (Jitendra Kumar Goel vs. State of U.P. & 15 Others), namely, if the statutory provisions do not contemplate appointment by deputation, how can an IAS officer be appointed on the post of Chief Executive Officer of Industrial Development Authority, the post whereof has been statutorily created.

21. The Chief Secretary of the State has not responded to the said query in his counter affidavit nor the learned Chief Standing Counsel is ready to answer the same.

22. Surprisingly, the Chief Secretary in his affidavit has not disclosed as to whether or not the State Government has determined by general or special orders the conditions of service for the post of Chief Executive Officer as required under Section 4 (2) of the U.P. Act No. 6 of 1976 even after expiry of 40 years of the enforcement of the said Act.

23. In the perception of a common man, continuance of such person as the top administrative officer of the Authority can never be in the interest of the Authority. Every day's continuance of such officer would be detrimental to the interest of the Statutory Authority itself.

24. In our opinion, in the aforesaid legal and factual background, the continuance of an I.A.S. officer against the post for such long period and his continuance to hold charge of three different Industrial Development Authorities at the same time cannot be said to be proper, fair and just. It adversely reflects upon the administration of the Development Authorities, which are facing huge scams as already noticed above.

25. Another issue, which needs to be examined in the present Public Interest Litigation is as to whether the appointment of Mr. Rama Raman is on deputation and if so, then can such deputation continue for unlimited period or it must also come to an end within the maximum time period fixed for such appointment on deputation under the Government Orders applicable. Reference may be made to the Office Memorandum dated 19th January, 1988 bearing No. G-1-70/10-88-250/87, which inturn refers to the Uttar Pradesh Sarvajanik Upkramon Mey Sarkari Sevokon Ka Aamelan Niyamawali, 1984 (hereinafter referred to as the "Rules, 1984"). Rule-3 of Rule, 1984 provides that no government servant beyond the age of 50 years could be appointed on deputation and the maximum period of such deputation would be 5 years, only. In case it is proposed to extend the period of deputation beyond 5 years, as an exceptional case, then in that circumstance, the proposal must be submitted three months prior to the expiry of the maximum period.

26. The learned Chief Standing Counsel had referred to us a letter sent by the Special Secretary, U.P. Government at Lucknow dated 30th June, 2016, wherein after noticing the prayer made in the present petition, the learned Chief Standing Counsel has been informed that the matter pertaining to the transfer of an IAS officer has to be considered by the Civil Service Board constituted under the Chairmanship of the Chief Secretary of the State vide Office Memorandum dated 18th February, 2014 and that there is no time limit fixed in the matter of continuance of an IAS officer on a particular post. The final decision is taken with the concurrence of the Chief Minister of the State.

27. The learned Chief Standing Counsel suggested that the matter pertaining to the transfer of Mr. Rama Raman may be directed to be considered by the Civil Service Board created under the Office Memorandum dated 18th February, 2014.

28. We may not express any opinion on the aforesaid aspect, inasmuch as it is always open to the Civil Service Board to make its recommendations in the matter of transfer of an IAS officer and the same does not require any order from the High Court. We leave it open to the State Government to place the matter pertaining to transfer of Mr. Rama Raman before the Civil Service Board, if it so desires. However, we clarify that if any decision is taken by the Civil Service Board as suggested by the learned Chief Standing Counsel, the same may be brought to the notice of the Court when the matter is listed next.

29. We must also fairly take note of the two preliminary objections, which have been raised by the learned Chief Standing Counsel and Sri M.C. Chaturvedi, learned Senior Advocate on behalf of respondent-State & Noida Development Authority, namely, (a) that the averments made in the present petitions do not satisfy the required disclosures for maintaining the Public Interest Litigation on behalf of the petitioner and (b) no application disclosing the urgency for entertaining the present Public Interest Litigations during summer vacation has been filed.

30. For explaining the urgency, averments made in paragraph-32 of Public Interest Litigation No. 29592 of 2016 have been reiterated by the learned counsel for the petitioner.

31. So far as the first objection is concerned, material averments are on record of these two petitions, namely, paragraph-3 of the Public Interest Litigation No. 29592 of 2016 and paragraph-4 of Writ C No. 49534 of 2015. The petitioners have disclosed their identity in both the petitions.

32. We permit the respondents to file their objections with regard to the credentials of the petitioners so disclosed. But having regard to the facts as are on record of these petitions, we feel that a case for exercise of suo motu powers is made out, even if some statement of facts required to be stated by the petitioners, as are wanting in these two petitions, qua their credentials. Larger public interest must prevail. We are, therefore, entertaining the present public interest litigations.

33. In the totality of the circumstances on record, we feel compelled to issue following directions:

(a) Mr. Rama Raman shall not exercise any powers of the Chief Executive Officer of NOIDA Industrial Development Authority, Greater NOIDA Industrial Development Authority, Yamuna Expressway Industrial Development Authority hence forth. However, he shall continue to draw his salary and other allowances as earlier.

(b) Notice be issued to the respondent nos. 10 to 18 by speed post fixing 20th July, 2016 as the date. Steps be taken within a week. All the respondents may file counter affidavit by the next date.

34. List on the date fixed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE V.K. SHUKLA, A.C.J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 29995 Of 2016

Pooram Singh & Ors. **...Petitioners**
versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioners:
Anil Kumar Rai, Durgesh Kumar Singh

Counsel for Respondents:
C.S.C., Pratik J. Nagar

In the present writ the Petitioners are before the Court with request to issue a writ, order or direction in the nature of mandamus restraining respondents not to interfere in peaceful possession of their land detailed in the present writ petition by re-aligning the high tension wire alongwith the poles sought to be set up on their land without giving any notice of personal hearing.

The main contention of learned counsel for the petitioners is that no consent has been taken from the petitioners for laying down the high tension power line, which was obligatory for the respondents to have obtained permission from the District Magistrate for the same. In the present matter, since the respondents are exercising the powers under Sections 10 and 16 of Telegraph Act, the provisions itself oblige the respondents to obtain the consent of the District Magistrate.

Court had observed the scheme of Electricity Act, 2003, Telegraph Act and Works of Licensees Rules, 2006 which clearly provide for the authority to the Corporation for placing electricity supply line and apparatus for transmission of power which the telegraph authority possesses under the Telegraph Act. If a person objects to establishment of poles and drawing electricity lines over his land, the authority has to apply for permission to the District Magistrate and in such a case the District Magistrate has to work out a fair compensation to be paid to the persons within reasonable time. In case the person is not satisfied with the quantum of compensation, which has been offered to him by the District Magistrate, the District Judge in such cases has been authorised to work out compensation under sub-section (3) of Section 16 of the Telegraph Act. Sub-rule (4) of Rule 3 of Works of Licensees Rules, 2006 clarifies the situation that nothing contained in Rule shall effect the powers conferred upon any licensee under Section 164 of the Act. The provisions of Section 164 of the Act are not at all controlled/governed/subject to the provisions of Works of Licensees Rule, 2006 and same is an independent exercise of authority.

Court is of the considered opinion that the construction of transmission power service lines cannot be stopped for want of payment of compensation. However, an appropriate direction can be issued to the competent

authority for determining the compensation in accordance with law and pay the same to the tenure holders over whose land the towers are being erected.

Court has disposed of this petition, with liberty to the petitioners to move an appropriate application before the concerned District Magistrate

(Delivered by Hon'ble V.K. Shukla, A.C.J.
&
Hon'ble Mahesh Chandra Tripathi, J.)

1. Pooram Singh and 30 others are before this Court with request to issue a writ, order or direction in the nature of mandamus restraining respondents not to interfere in peaceful possession of their land detailed in the present writ petition by re-aligning the high tension wire alongwith the poles sought to be set up on their land without giving any notice of personal hearing. They have further prayed for direction to the respondents to determine and pay the compensation to the persons, who are sought to be displaced by such exercise and to decide the representations dated 20.5.2016 and 18.5.2016, after giving the opportunity of personal hearing to the persons concerned.

2. The petitioners claim to have transferable rights in the agricultural land detailed in para-5 of the writ petition. It is alleged that the respondents, without obtaining the consent of the petitioners, have resumed their land to realign the high tension power lines alongwith the poles sought to be set up on their land without giving notice of personal hearing to them. On account of high tension power lines drawn over their land, they are unable to use their land for any purpose. The cause of action for filing the present writ petition had arisen when the respondent authorities had started making inspection over the petitioners' land on 20.5.2016 through a team led by one Sri B.S. Saraswat of Power Grid Department. The petitioners were informed that the Power Grid Department in consultation with Agra Development Authority has decided to set up a high tension power line alongwith the poles on their land.

3. Learned counsel for the petitioners submits that the high tension power lines cannot be drawn over the land of any person without taking his expressed consent. If any objection is raised for digging up the land to instal poles and drawing electricity lines, which may affect beneficial enjoyment of the land, the respondents must compensate the persons who suffer the loss of the beneficial utilisation of the land. He submits that in view of Section 164 of the Electricity Act read with Electricity Rules, and Sections 10, 16, 16 (1) of the Indian Telegraph Act, 1885 (13 of 1985), the petitioners are entitled to compensation at the rates for which they have represented.

4. The claim of the petitioners has been opposed by Shri J. Nagar, Senior Advocate assisted by Shri Pratik J. Nagar and Shri M.C. Chaturvedi, Senior Advocate assisted by Shri S.C. Dwivedi, appearing for the respondents. It has been contended that the Power Grid Corporation of India Limited (the Corporation) has been empowered under Section 164 of the Act to exercise powers of the telegraph authorities including the power under Section 10 of the Telegraph Act. It can also erect towers on any immovable property and lay overhead electrical lines over any immovable

property. It has been contended that the Corporation is a licensee under the Act. Such towers can be fixed as the provisions of Section 10 of the Telegraph Act are applicable and all the petitioners can claim compensation for damages.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. The main contention of learned counsel for the petitioners is that no consent has been taken from the petitioners for laying down the high tension power line, which was obligatory for the respondents to have obtained permission from the District Magistrate for the same. In the present matter, since the respondents are exercising the powers under Sections 10 and 16 of Telegraph Act, the provisions itself oblige the respondents to obtain the consent of the District Magistrate.

7. It is relevant to indicate that both telegraph lines and electrical lines are required to be drawn over the agricultural lands and/or other properties belonging to third parties. In drawing such lines, the entire land cannot be acquired but the effect thereof would be diminution of value of the property over which such line is drawn. The Telegraph Act provides for the manner in which the amount of compensation is to be computed therefor. Section 10 of the Telegraph Act empowers the authority to place and maintain a telegraph line under, over, along or across, or posts in or upon any immovable property. Section 11 empowers the officers to enter on property in order to repair or remove telegraph lines or posts. Section 12 empowers the authority to grant permission for laying down such lines to a local authority in terms of clauses (c) & (d) of the proviso to Section 10 of the Telegraph Act subject to reasonable conditions as it may think fit. Sections 10 and 16 of Telegraph Act read as under:-

"10 Power for telegraph authority to place and maintain telegraph lines and posts.—The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property: Provided that?

(a) the telegraph authority shall not exercise the powers conferred by this section except for the purposes of a telegraph established or maintained by the 1 [Central Government], or to be so established or maintained;

(b) the 1 [Central Government] shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and

(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and

(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers.

16. **Exercise of powers conferred by Section 10, and disputes as to compensation, in case of property other than that of a local authority.-** (1) If the exercise of the powers mentioned in Section 10 in respect of property referred to in clause (d) of that section is resisted or obstructed, the District Magistrate may, in his discretion, order that the telegraph authority shall be permitted to exercise them.

(2) If, after the making of an order under section (1), any person resists the exercise of those powers, or, having control over the property, does not give all facilities for their being exercised, he shall be deemed to have committed an offence under Section 188 of the Indian Penal Code, 1860 (45 of 1860).

(3) If any dispute arises concerning the sufficiency of the compensation to be paid under Section 10, clause (d), it shall, on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him.

(4) If any dispute arises as to the persons entitled to receive compensation, or as to the proportions in which the persons interested are entitled to share in it, the telegraph authority may pay into the court of the District Judge such amount as he deems sufficient or, where all the disputing parties have in writing admitted the amount tendered to be sufficient or the amount has been determined under sub-section (3), that amount; and the District Judge, after giving notice to the parties and hearing such of them as desire to be heard, shall determine the persons entitled to receive the compensation or, as the case may be, the proportions in which the persons interested are entitled to share in it.

(5) Every determination of a dispute by a District Judge under sub-section (3), or sub-section (4) shall be final:

Provided that nothing in this sub-section shall affect the right of any person to recover by suit the whole or any part of any compensation paid by the telegraph authority, from the persons who has received the same."

8. Section 10 of the Telegraph Act is titled "power for telegraph authority to place and maintain telegraph lines and posts". It empowers them to place and maintain the telegraph lines under, over, along, or across, or posts in or upon, any immovable property. Under this Section, a telegraph authority is empowered to erect poles and place telegraph line over any immovable property. The generation and distribution of electricity was governed by the Indian Electricity Act, 1910 (the old Act). At present, it has been replaced by the Electricity Act, 2003 (the Act). The Power Grid Corporation of India Limited (the Corporation) is a company incorporated under the

Companies Act, 1956. Its shares are owned by the President of India and it is a Central Government Company. The main purpose of the Corporation is to set up national infrastructure for distribution of electricity. The Corporation has electric sub-stations in different districts. The old Act and the Act envisage different kinds of utilities and licenses, one of them is transmission utility and transmission licence. The Corporation was declared Central Transmission Utility under Section 27 (A) (i) of the old Act by the notification dated 31.12.1998. It has also been so declared under Section 38 (1) of the Act by the notification dated 27.11.2003.

9. At this stage, it is relevant to indicate that the Act also defines who is a licensee under Section 2 (39) of the Act. It means a person, who has been granted a licence under Section 14 of the Act. Section 14 of the Act empowers the appropriate commission to grant a licence. Among the other licenses, a person can be granted transmission licence to transmit electricity. However, proviso to Section 14 clearly provides that the Central Government Transmission Utility or the State transmission utility is deemed to be transmission licensee under the Act. The Corporation has been declared to be a Central Transmission Utility and is a transmission licensee under the Act. Section 164 of the Act is titled as 'Exercise of powers of Telegraph Authority in certain cases'. It empowers appropriate Government to empower any public officer or any other licensee or any person engaged in the business of supplying electricity under the Act with the same powers to place electric lines or electrical posts as the telegraph authority possesses under the provisions of the Telegraph Act. The Central Government is the appropriate government for the Corporation. It has issued a notification in favour of the Corporation on 24.12.2003 under section 164 of the Act. In view of this, the Corporation is entitled to exercise the same powers as a telegraph authority has while placing lines or posts under the Telegraph Act. Section 10 of the Telegraph Act is titled 'Power for telegraph authority to place and maintain telegraph lines and posts'. It empowers them to place and maintain the telegraph lines under, over, along, or across; and posts in or upon, any immovable property. Under this section, a telegraph authority is empowered to erect poles and place telegraph line over any immovable property. The Corporation has been empowered under section 164 of the Act to exercise powers of the telegraph authorities including the power under section 10 of the Telegraph Act. It can also erect towers on any immovable property and lay overhead electrical lines over any immovable property.

10. We have occasion to go through the scheme of Electricity Act, 2003, Telegraph Act and Works of Licensees Rules, 2006 which clearly provide for the authority to the Corporation for placing electricity supply line and apparatus for transmission of power which the telegraph authority possesses under the Telegraph Act. If a person objects to establishment of poles and drawing electricity lines over his land, the authority has to apply for permission to the District Magistrate and in such a case the District Magistrate has to work out a fair compensation to be paid to the persons within reasonable time. In case the person is not satisfied with the quantum of compensation, which has been offered to him by the District Magistrate, the District Judge in such cases has been authorised to work out compensation under sub-section (3) of Section 16 of the Telegraph Act. Sub-rule (4) of Rule 3 of Works of Licensees Rules, 2006 clarifies the situation that nothing contained in Rule shall effect the powers conferred upon any licensee under Section 164 of the Act. The provisions of Section 164 of the Act are not at all controlled/governed/subject to the provisions of Works of Licensees Rule, 2006 and same is an independent exercise of authority.

11. In **Deva Raj Vs. U.P. State Electricity Board, Lucknow & Ors.**, AIR 1977 Allahabad 452, a Division Bench of this Court had examined the provisions of Section 51 of the Indian Electricity Act, 1910, which is similar to the provisions of Section 164 of the Electricity Act, 2003 and observed that in view of the notification issued by the State Government under Section 51 of the 1910 Act read with Section 10 of the Telegraphs Act, the respondents have the power to instal the towers on the land owned by a person. Similarly the Madras High Court, in **E. Venkatesan & Ors. Vs. Chairman, Tamil Nadu Electricity Board, Madras & Ors.,** AIR 1977 Madras 64 while dealing with the powers under Section 51 of the Act of 1910, also observed :-

"From the above settled position of law, it is clear that when the Electricity Board exercises power under Section 51 of the Electricity Act read with Section 10 of the Telegraphs Act, they are not acquiring any land. They are only making use of the land for the purpose of laying electricity lines for which full compensation is given for the damage caused. It is also clear therefrom that no notice is required to the owner before laying the poles or constructing any tower, nor any consent is required from them."

12. In the aforesaid facts and circumstances, this Court is of the considered opinion that the construction of transmission power service lines cannot be stopped for want of payment of compensation. However, an appropriate direction can be issued to the competent authority for determining the compensation in accordance with law and pay the same to the tenure holders over whose land the towers are being erected.

13. We accordingly dispose of this petition, with liberty to the petitioners to move an appropriate application before the concerned District Magistrate with regard to their claim alongwith certified copy of this order and other supported materials, whereupon the District Magistrate shall pass appropriate orders on the claim of the petitioners for compensation in accordance with law within three months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 34386 Of 2015

Manoj Bansal & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicants:
Ram Kishore Pandey

Counsel for Opposite Parties:
G.A., Manoj Kumar Srivastava, Sudhir Shukla

In the present application applicant had filled the affidavit to bring the compromise on record which was entered between the parties and the order passed by the learned A.C.J.M., Pilibhit on the said compromise which shows that the said compromise has been duly verified and accepted by the learned trial court.
Counsel for opposite party no. 2 has opposed on the ground that the offence under Section 498-A I.P.C. being non compoundable, the matter cannot be settled by way of compromise.
In (2012) 10 Supreme Court Cases 303; Gian Singh Versus State of U.P., a Bench of three Hon'ble Judges of Supreme Court has held as under :-
"Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although 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."
Court observed that in view the fact that the parties have put to an end their all disputes by means of settlement, it does not appear just and proper to continue the criminal proceedings under Section 498-A I.P.C. against the husband, father-in-law and mother-in-law that too in a case where no injury has been caused to the victim.
Application is allowed and the entire proceedings of Case No. 1051 of 2015 (State Vs. Manoj Bansal and others) arising out of Case Crime No. 508 of 2014, under Sections 498-A, 323, 504 and 506 I.P.C. and Section ¾ of D.P. Act, Police Station Amariyan, DistrictPilibhit including charge sheet no. 9 of 2015 pending in the court of A.C.J.M.-IInd, Pilibhit are hereby quashed.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Learned counsel for both the parties are present.

2. Learned counsel for the applicant has filed an affidavit today to bring on record the compromise entered into between the parties and the order passed by the learned A.C.J.M., Pilibhit on the said compromise which shows that the said compromise has been duly verified and accepted by the learned trial court. He prays that in view of the facts as mentioned in the said compromise the continuance of criminal proceedings are nothing but a futile exercise and the same may be quashed.

3. Learned counsel for opposite party no. 2 has no objection but learned A.G.A. has opposed on the ground that the offence under Section 498-A I.P.C. being non compoundable, the matter cannot be settled by way of compromise.

4. In so far as the contention of learned A.G.A. regarding the non compoundability of offence under Section 498-AI.P.C. is concerned, in a catena of judgments the Hon'ble Supreme Court has laiddown the guidelines and has directed the High Courts to exercise its inherent powers and to quash the criminal proceedings of the F.I.R. or the complaint in view of the compromise even in the cases related to non compoundable offences.

5. In **(2012) 10 Supreme Court Cases 303; Gian Singh Versus State of U.P.,** a Bench of three Hon'ble Judges of Supreme Court has held as under :-

"Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although 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 wrong doing that seriously endangers and threatens well-being of 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.....

.... 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 victim and the offender and 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 F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of 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.

The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry,

etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

6. In **(2003) 4 Supreme Court Cases 675; B.S. Joshi and others Versus State of Haryana and another,** in paragraphs 14 and 15 the Supreme Court has held as under : -

"14. There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 382 of the Code."

7. In **(2008) 4 Supreme Court Cases 582; Madan Mohan Abbot Versus State of Punjab**, the Supreme Court has held in paragraph 6 as under : -

"6. We need to emphasize that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the Courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilized in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law."

8. Hence in view of the judgment of the Apex Court it is clear that in the interest of justice, even non compoundable cases which are settled between the parties, can be decided in terms of the settlement between the parties.

9. Keeping in view the fact that the parties have put to an end their all disputes by means of settlement, it does not appear just and proper to continue the criminal proceedings under Section 498-A I.P.C. against the husband, father-in-law and mother-in-law that too in a case where no injury has been caused to the victim.

10. In view of the above application is **allowed** and the entire proceedings of Case No. 1051 of 2015 (State Vs. Manoj Bansal and others) arising out of Case Crime No. 508 of 2014, under Sections 498-A, 323, 504 and 506 I.P.C. and Section of D.P. Act, Police Station Amariyan, District Pilibhit including charge sheet no. 9 of 2015 pending in the court of A.C.J.M.-IInd, Pilibhit are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Writ A No.- 39215 Of 1998

Anil Kumar Singh **...Petitioner**
versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Ashok Khare, A.K. Singh, B.N.Singh

Counsel for Respondents:
C.S.C., Gautam Baghel, Prakash Padia, V.K.Singh

In the present writ the Petitioner Anil Kumar Singh has challenged impugned advertisement No. 1 of 1998 (Annexure 28 to the writ petition), whereby Allahabad University, Allahabad (hereinafter referred to as 'University') has advertised one post of Librarian in pay scale of Rs.4500-7300/- in daily newspaper 'Rojgar Samachar' dated 7- 13/11/1998. He has also sought mandamus commanding respondents to comply with Government Orders dated 18.2.1995 and 26.7.1995 and in compliance thereto, transfer Library of Kali Prasad University College (hereinafter referred to as 'College') to University Library and adjust petitioner against post of 'Librarian' in the Library of University with all consequential benefits. Lastly, he has prayed for placing him in pay scale of Rs. 4500-7300 w.e.f 26.7.1995 pursuant to Government Order dated 29.2.1996, and make regular disbursement of salary and also pay arrears of salary from July, 1995.

It has not been argued before the court that petitioner is a person who can be said to be appointed as 'Librarian' in accordance with provisions of Statutes under Central Act, 2005. There is no other provision brought to the notice of the court under which a person appointed by a Principal of College can be absorbed as 'Librarian' of University which is a separate individual post governed by different Statutes and petitioner has never been appointed, following the aforesaid procedure prescribed in the Statutes.

Relief sought by petitioner, in our view, cannot be granted. Writ petition lacks merit and is, accordingly, **dismissed** with cost which we quantify to Rs. 25,000/-.

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri B.N. Singh, learned counsel for petitioner and Sri Gautam Baghel, learned counsel for respondents.

2. Petitioner Anil Kumar Singh has challenged impugned advertisement No. 1 of 1998 (Annexure 28 to the writ petition), whereby Allahabad University, Allahabad (hereinafter referred to as 'University') has advertised one post of Librarian in pay scale of Rs.4500-7300/- in daily newspaper 'Rojgar Samachar' dated 7-13/11/1998. He has also sought mandamus commanding respondents to comply with Government Orders dated 18.2.1995 and 26.7.1995 and in compliance thereto, transfer Library of Kali Prasad University College (hereinafter referred to as 'College') to University Library and adjust petitioner against post of 'Librarian' in the Library of University with all consequential benefits. Lastly, he has prayed for placing him in pay scale of Rs. 4500-7300 w.e.f 26.7.1995 pursuant to Government Order dated 29.2.1996, and make regular disbursement of salary and also pay arrears of salary from July, 1995.

3. Brief facts as disclosed in writ petition are that 'University' was a State University and governed by the provisions of U.P. State Universities Act, 1973 (hereinafter referred to as 'U.P. Act, 1973') and Statutes and Ordinances framed there-under. Section 47 of Act, 1973 is applicable only to Universities of Lucknow, Allahabad and Gorakhpur and such other University as may be specified by State Government by means of a notification issued in this regard. It reads as under :-

"**47.** Halls, hostels and delegacy of the University;- (1) This section shall apply to the University of Lucknow, Allahabad, Gorakhpur and such other University the State Government may by notification specify.

(2) The Halls and hostels of the University shall be-

(a) those maintained by the University and names in the Statutes;

(b) those recognised by the Executive council on such general or special conditions as may be provided by the Ordinances.

(3) The warden and other staff of the Halls and hostels shall be appointed in the manner provided by the Ordinances.

(4) The Executive Council shall have power to suspend or withdraw the recognition of a hall or hostel which is not maintained in accordance with the condition referred to in clause (b) of sub-section (2).

Provided that no such action shall be taken without giving to the management of such hall or hostel an opportunity of making a representative against the proposed section.

(5) There shall be a Delegacy to supervise the arrangements relating to the residence, health and welfare of students of the University not residing in or under the care of any constituent college or hall. The constitution, power and duties of the Delegacy shall be prescribed by the Statutes."

4. College has a Library attached therewith. Earlier all the fund for staff of College including its library was disbursed directly through Directorate of Higher Education. Subsequently, vide Government Order dated 20.3.1992, University was directed to pay salary of staff of three tutorial colleges from University funds and thereafter staff of College started getting salary from University funds.

5. Petitioner was appointed as a 'Library Assistant' in the grade of Rs. 200-320 in College Library vide order dated 11.8.1982 issued by Principal of College. He was confirmed on the said post of 'Library Assistant' by resolution dated 27.8.1993 passed by Executive Council of K.P. Trust. Post of 'Library Assistant' as sanctioned by K.P. Trust was upgraded as 'Librarian' in pay scale of Rs. 570-735 w.e.f. 1.11.1987. It was communicated vide letter dated 3.11.1987 to petitioner.

6. Director, Higher Education (hereinafter referred to as 'DHE') vide letter dated 5.2.1988 informed Principal of College that in view of Government Order dated 8.9.1982, 'Librarian's pay scale of Rs.570-1100 was made applicable w.e.f. 1.7.1979 for Grade 'C' colleges. Principal of College vide letter dated 25.2.1988 informed petitioner that his salary in scale of Rs.570-1100 w.e.f. 01.11.1987 has been approved by DHE on 5.2.1988.

7. Thereafter, President, K.P. Trust confirmed petitioner as 'Librarian' w.e.f. 01.11.1988. This was also communicated by Principal of College vide letter dated 16.8.1990.

8. DHE vide letter dated 28.6.1990 informed Principal of College that it is not an affiliated college of University but part of University, therefore, pay scale of non-teaching staff should be got determined by Finance Officer of University. Petitioner's papers for pay fixation as 'Librarian' of College were returned in original. Finance Officer of University, vide letter dated 23.8.1990, informed DHE that salary of petitioner, as per his option, has been fixed in the pay scale of Rs. 1400-2600 w.e.f. 01.11.1987.

9. Petitioner in the meantime obtained 'Bachelor Degree in Library and Information Science' from Bhagalpur University, in the examination conducted in February, 1990 and degree

was issued by Bhagalpur University on 25.6.1992. In view of above qualification, Principal of College, recommended petitioner to be placed in pay scale of Rs. 2000-3200 w.e.f. 25.8.1990. Vide office order dated 10.11.1990, issued by Assistant Registrar (Accounts), petitioner's salary was fixed in pay scale of Rs. 2000-3200 w.e.f. 25.8.1990 at Rs.2060/-.

10. A Government Order was issued on 29.2.1996 in the light of recommendations of Equivalence Committee 1989, constituted for revision of pay scale of State Government employees stating that for 'Librarians', 'Deputy Librarians' and 'Assistant Librarians' of State Universities and Associated, Affiliated and Constituent colleges as also Non-Government aided colleges, pay scales of University Grant Commission are being sanctioned.

11. Consequently, it approved following pay scales w.e.f. 1.1.1986 for different categories of post and cadre:-

स्तम्भ–1	स्तम्भ–2
पदनाम	वेतनमान रू0
विश्वविद्यालय के पुस्तकालय स्टाफ।	
1. पुस्तकालयाध्यक्ष	4500–150–5700–200–7300
2. उप पुस्तकालयाध्यक्ष	3700–115–4950–150–5700
3. सहायक पुस्तकालयाध्यक्ष	2200–75–2800–100–4000
महाविद्यालय के पुस्तकालयाध्यक्ष	
सम्बद्ध/सहयुक्त/संघटक शासकीय तथा अशासकीय सहायता प्राप्त महाविद्यालयों के पुस्तकालयाध्यक्ष	2200–75–2800–100–4000

Column-1	Column-2
Designation	Pay-scale Rs.
Library staff of University	
1. Librarian	4500-150-5700-200-7300
2. Deputy Librarian	3700-115-4950-150-5700
3. Assistant Librarian	2200-75-2800-100-4000
Librarian of Degree College	
Librarian of affiliated/associated/ constituent government and non-government aided Degree Colleges.	2200-75-2800-100-4000

(English Translation by Court)

12. Petitioner claimed that he satisfied all conditions as contained in Government Order dated 29.2.1996 for sanction of pay-scale of Rs. 4500-7300 w.e.f. 1.1.1986. He obtained 'Master's Degree in Commerce' in the year 1986 from Kanpur University, and "Master Degree in Library and Information Science" in August, 1994 in Session of 1992-93 and onward. He was sanctioned study leave from 13.10.1992 to 4.1.1993 vide letter of Vice Chancellor dated 23.9.1992. For implementing Government Order dated 29.1.1997, University constituted a Committee and on the basis of recommendation, petitioner was granted pay scale of Rs. 2200-4000 treating 'College' as affiliated college of University. Petitioner made a representation against such fixation on 11.6.1997 but received no reply. Though petitioner is entitled for pay scale of Rs. 4500-7300 but he has not been sanctioned said pay scale illegally and there is no justification for not providing said pay scale w.e.f. 26.7.1995.

13. It is also pointed out that by Government Order dated 18.2.1995, College was directed to transfer Library to Central Library of University. Thereupon, Registrar requested Government that in the Library of College, there is a permanent post of 'Librarian' in pay scale of Rs. 2000-3200, wherein petitioner is working for several years, hence alongwith transfer of books from 'Library' of College to Central Library of University, petitioner alongwith post be also transferred to Central Library of University. This proposal was turned down by State Government by order dated 26.7.1995 (Annexure-19 to the writ petition). Petitioner then made a representation dated 24.1.1996 enquiring from Secretary, Higher Education, when direction was issued for absorption/merger of College Library with Central Library of University, why it was not acted upon. He also requested that Government may direct for transfer/absorption of petitioner in Central Library. Thereafter several other representations were also made by petitioner.

14. Special Secretary, U.P. Government, by letter dated 26.4.1996 enquired, why petitioner has not been transferred to Central Library. Similar enquiry was made by Principal Secretary, U.P. Government by letter dated 28.3.1997 but thereafter University published advertisement in question, though petitioner was already working as 'Librarian' and Government having approved its absorption/merger in Central Library of University, he is entitled to work as Librarian in Central Library of University in pay scale of Rs. 4500-7300 and there could not have been any occasion to fill up this post by direct recruitment.

15. Claim set up by petitioner for the post of 'Librarian' of University with all consequential benefits has to be examined in the aforesaid factual background.

16. Allahabad University had different status at different times, hence it would be necessary to examine relevant Statutes as applicable from time to time. Initially, Allahabad University was governed by provisions of Allahabad University Act, 1921. Aforesaid Act was repealed by Section 74 of U.P. Act, 1973. Under Section 2(8) of U.P. Act, 1973, Allahabad University was an existing University, which, after promulgation of U.P. Act, 1973, was governed by provisions of said Act, Statutes and Ordinances framed there-under. 'Colleges' which could have been included for examination conducted by Allahabad University, were in the category of

associated colleges, autonomous colleges, constituent colleges and affiliated colleges, which were defined in Sections 2(2), 4, 5 and 6, are as under:-

"2(2) 'affiliated college' means an institution affiliated to the University in accordance with the provisions of this Act and Statutes of that University;

2(4) 'associated college' means any institution recognised by the University and authorised under the provisions of this Act and the Statutes of the University to provide for the teaching necessary for admission to a degree of the University;

2(5) 'autonomous college' means an affiliated or associated college declared as such in accordance with the provisions of Section 42;

6. 'constituent college' means an institution maintained by the University or by the State Government and named as such by the Statutes;"

17. There was another category namely 'Hall of University' defined under Section 2(10) as under:-

"2(10) "hall (or college) of a University" means a unit of residence, for students maintained or recognised by the University at which provision is made for imparting tutorial and other supplementary instructions."

18. In exercise of powers conferred under Section 50(1), Governor framed First Statutes for University of Allahabad (hereinafter referred to as 'First Statutes') published in U.P. Gazette Extraordinary dated 15th July, 1976. Under First Statutes of Allahabad University, Statutes 12.01 provided that Moti Lal Nehru Medical College, Allahabad maintained by State Government shall be Constituent College of University. Statutes 13.01 named Associated Colleges of Allahabad University and reads as under:-

"13.01. The following shall be the Associated Colleges of the University:

(1) Allahabad Agricultural Institute, Naini, Allahabad.

(2) Allahabad Degree College, Allahabad.

(3) Arya Kanya Degree College, Allahabad.

(4) Chaudhary Mahadev Prasad College, Allahabad.

(5) Ewing Christian College, Allahabad.

(6) Hamidia Girls Degree College, Allahabad.

(7) Jagat Taran Girls Degree College, Allahabad.

(8) Moti Lal Nehru Regional Engineering College, Allahabad.

(9) Rajarshi Tandon Girls Degree College, Allahabad.

(10) Sanwal Das Sadan Lal Khanna Girls Degree College, Allahabad.

(11) Ishwar Saran Degree College, Allahabad."

19. Statutes 19.01, 19.02 and 19.03 read as under:-

"19.01. The hostels maintained by the University are:
(1) Diamond Jubilee Hostel.

(2) Dr. Amar Nath Jha Hostel.

(3) International House.

(4) Sarojini Naidu Girls Hostel.

(5) Sir Ganga Nath Jha Hostel.

(6) Sir P.C. Benerji Hostel.

(7) Sir Sunder Lal Hostel.

19.02. The hostels recognised by the University are:

(1) Muslim Boarding House.

(2) Sumer Chandra Digamber Jain Hostel.

(3) Ishwar Saran Hostel.

19.03. The **halls** (or colleges) **of the University** are:

(1) William Holland University College.

(2) **Kali Prasad University College.**

(3) Madan Mohan Malviya University College."

(Emphasis added)

20. Statutes 19.01 details hostel maintained by University, Statutes 19.02 details hostel recognised by University and Statutes 19.03 details 'Halls (colleges) of University'. Statutes 19.03, we have already quoted above.

21. Kali Prasad University College is recognized by Allahabad University but it is a unit of residence and separate entity for management and governance. It is in these circumstances, appointment of staff is made, in college, by Principal or Committee of Management, as the case may be and not by University. Power of appointment of officers, teachers and employees of University is vested in Executive Council under Section 21(1) (vii).

22. University has separate post of 'Librarian' governed by Statutes 2.21 to 2.25. A 'Librarian' in University was to be appointed by University, with prior approval of State Government. Procedure for appointment of 'Librarian', specified in Statutes 2.21 reads as under:-

"2.21. (1) The **University may**, with the **prior approval of the State Government, appoint a whole time Librarian.** The Librarian shall be **appointed by the Executive Council on the recommendation of a Selection Committee**, consisting of the following, namely:

(a) the Vice-Chancellor;

(b) two experts in Library Science, to be nominated by the Chancellor;

(2) Until the Librarian appointed under clause (1) assumes charge of his office the Executive Council may appoint an Honorary Librarian from amongst the Professors of the University for such terms as it thinks fit."

(Emphasis added)

23. Qualifications and emoluments of such 'Librarian' are governed by Statutes 2.22 and 2.23. 'Librarian' is under disciplinary control of Vice Chancellor vide Statutes 2.25.

24. Here it may be noted that in respect of other employees of University, Registrar has authority of exercising disciplinary control except 'officers' of University, 'teachers' of University, 'Librarian' and 'employees' referred to in Section 7. In case of Librarian, disciplinary control is with Vice Chancellor.

25. It is an admitted position that petitioner was never appointed as 'Librarian' following Statutes 2.21 and 2.22. College management on its own took a decision to upgrade post of 'Library Assistant' as 'Librarian' and thereupon petitioner, who was appointed as 'Library Assistant' by Principal of College, was upgraded and given salary in a higher pay-scales. Irrespective of fact that petitioner was given a particular pay-scale or that subsequently books of College Library have been

transferred to University or that service of petitioner has also been transferred to University, fact remains that he is not 'Librarian' appointed in accordance with statutory provisions of U.P. Act, 1973 readwith Statutes 2.21 and 2.22 of First Statutes. Therefore, petitioner cannot claim parity with 'Librarian' of University, contemplated under First Statutes. This is the position which remains throughout during relevant period when books of College Library were transferred to Central Library of University and petitioner's services were also transferred to Allahabad University.

26. Allahabad University ceased to be State University under U.P. Act, 1973 with enactment of University of Allahabad Act, 2005 (hereinafter referred to as 'Central Act, 2005') by Parliament. It was declared an institution of National Importance and became 'University' governed by Central Act, 2005. Under the Central Act, 2005 all the acts already done under U.P. Act, 1973 have been protected. This protection also does not confer any benefit to petitioner since he was never appointed as 'Librarian' in University.

27. Under Schedule appended to Central Act, 2005 which is Statutes of University, we find that 'Librarian' is to be appointed through a Selection Committee constituted under Statutes 15, which reads as under:-

15. Selection Committees.- (1) There shall be Selection Committees for making recommendations to the Executive Council for appointment to the posts of Professor, Reader, Lecturer, Registrar, Finance Officer, Librarian and Directors of University Institutes and Heads of independent Centres maintained by the University.

(2) The Selection Committee for appointment to the posts specified in Column I of the Table below shall consist of the Vice-Chancellor, a nominee of the Visitor and the persons specified in the corresponding entry in Column 2 of the said Table;

Table

1	2
Librarian	(i) Three persons not in the service of the University or an institution maintained by, or admitted to, the privileges of the University; who have special knowledge of the subject of the Library Science/ Library Administration to be nominated by the Executive Council. (ii) One person not in the service of the University or an institution maintained by, or admitted to, the privileges of the University, nominated by the Executive Council.

28. Statutes 24 provides that 'Librarian of University' shall be appointed by Executive Council on recommendation of Selection Committee, which reads as under:-

"24. The Librarian.- There shall be a Librarian of the University, who shall be appointed by the Executive Council on the recommendations of the Selection Committee

constituted for the purposes and shall exercise such powers and perform such duties as may be prescribed by Ordinances."

29. It has not been argued before us that petitioner is a person who can be said to be appointed as 'Librarian' in accordance with provisions of Statutes under Central Act, 2005. There is no other provision brought to our notice under which a person appointed by a Principal of College can be absorbed as 'Librarian' of University which is a separate individual post governed by different Statutes and petitioner has never been appointed, following the aforesaid procedure prescribed in the Statutes.

30. In view thereof, relief sought by petitioner, in our view, cannot be granted. Writ petition lacks merit and is, accordingly, dismissed with cost which we quantify to Rs. 25,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 58051 Of 2015

Ram Sevak **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for Petitioner:
Manish Pandey

Counsel for Respondents:
C.S.C.

Present petition has been filed regarding direction to District Magistrate (respondent no. 2) to consider the complaint made by the petitioner against the illegal appointment of the sixth respondent on the post of Aanganwadi Sahayika.

The grievance of the petitioner is that in spite of several reminders, the District Magistrate has not passed any further order on his complaint and has kept the further proceedings in abeyance, without any plausible reason.

The issue with regard to locus of the petitioner is to be examined at the very threshold. In Court a large number of writ petitions are filed against the selected candidates.

In the present writ appointment are made under the different schemes of the Government and most of which are made in different welfare schemes launched and financed by the Central Government. These schemes are carried out by the State Government in terms of the guidelines/ circulars issued by the Government of India.

A large number of appointments are made under the Sarva Shiksha Abhiyan (Education to All), National Health Scheme and Mahatma Gandhi National Rural Employment Guarantee Act. In these schemes, the recruitment is made at the local level after following the procedure prescribed in the relevant rules/ Government orders, etc.. After the selection, spate of writ petitions are filed on somewhat similar grounds that the employment has been secured by the selected candidate on the basis of the fabricated documents. Serious disputed question of facts are raised in such writ petitions with regard to educational qualifications, date of birth/ age, B.P.L. Certificates, domicile and caste certificates. large number of the writ petitions are filed by the residents of the village or third persons, who claim that appointment has been secured by the suppression of facts and fabrication of the documents.

The Supreme Court has considered the issue of locus in such matters way back in 1976 in the case of **Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and others.** Court considered several English and American decisions and found that as per English decisions, in order to have the locus standi, the petitioner should be an aggrieved person, and if he does not fulfil that character and he is simply a stranger, the Court in its discretion can deny him the extraordinary remedy, certiorari jurisdiction, except in very special circumstances.

Court observed that in the matters where an appointment of an employee is challenged on the ground that he has secured the employment on the basis of fabrication of documents/ suppression of fact or any such kind of fraud, the Court must insist for the following requirements:

(a) The petitioner must disclose his/her locus clearly in the writ petition;

(b) A specific pleading regarding the fraud should be given in the writ petition and general and sweeping allegation should not be entertained, and the petitioner should file the documents in support of his/her allegations; and,

(c) In case the claim/allegation is found to be bogus and motivated, a heavy cost should be imposed upon the petitioner to deter the other persons from filing the frivolous petitions and for wasting valuable public time and money.

The writ petition is disposed of.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner has instituted this writ proceeding for a direction upon the second respondent, the District Magistrate, Jalaun, to consider the complaint made by the petitioner against the illegal appointment of the sixth respondent on the post of Aanganwadi Sahayika.

2. A brief reference to the factual aspects would suffice.

3. The petitioner is a resident of Village Riniyan, Block, Pargana and District Jalaun. An advertisement was made for appointment on the post of Aanganwadi Sahayika in the said village. The sixth respondent made her application against the said advertisement and she was selected and accordingly, appointed on the said post. The petitioner made a complaint against the sixth respondent on 07th October, 2014 on the ground that she has secured appointment on the basis of forged academic certificates. On the said complaint, Bal Vikas Pariyojna Adhikari, Jalaun issued a

letter dated 20th October, 2014 to the Principal of Lok Nayak Jai Prakash Memorial Junior High School, Orai for verification of certificates of Class-V and Class-VIII of the sixth respondent as she had mentioned in her application form that she did her Junior High School from the said institution. It is stated that the Headmaster of the said Junior High School vide his letter dated 22nd November, 2014 reported that Smt. Seema Devi, daughter of Sri Atar Singh Thakur, resident of Naya Ram Nagar, Orai was not a student of his school nor he has issued any transfer certificate to her. It is further stated that serial number mentioned in her transfer certificate was also not mentioned in his register with the name of the sixth respondent.

4. On receipt of the said information from the Headmaster, the Bal Vikas Pariyojna Adhikari, Jalaun submitted his report dated 25th November, 2014. In his report he has mentioned that the certificate of the sixth respondent was found to be fabricated and action against her is being taken. Pursuant thereto, a show cause notice dated 01st December, 2014 was issued to the sixth respondent. The sixth respondent on 28th January, 2015 appeared before the District Magistrate and submitted a reply, wherein she has made allegation against her father in-law that he has deliberately enclosed the fabricated documents along with her application. She claimed that her certificates are genuine and originals thereof are in her possession. She has requested the Bal Vikas Pariyojna Adhikari to verify the statement of marks and the certificates of the petitioner. A copy of the reply submitted by the sixth respondent is on the record as annexure-3 to the writ petition. It is averred in the writ petition that the sixth respondent has submitted a totally different document with regard to her academic qualification issued by Sardar Patel Vidya Mandir, Dhanaura, Jalaun, which were not appended with her application form.

5. The Bal Vikas Pariyojna Adhikari thereafter again sent the statement of marks and certificates submitted to him, by the sixth respondent along with her reply to the show cause notice, to the Headmaster of Sardar Patel Vidya Mandir, Dhanaura, District Jalaun for verification. In response to the said query, the Headmaster submitted his report that the academic certificates issued by his institution are genuine and the sixth respondent has passed her Class-VI to Class-VIII examinations from his institution as a regular student and also reported that she has passed her Class-VIII in 1995-96.

6. The grievance of the petitioner is that in spite of several reminders, the District Magistrate has not passed any further order on his complaint and has kept the further proceedings in abeyance, without any plausible reason.

7. It is stated that the District Magistrate has orally allowed the sixth respondent to continue in service.

8. I have heard learned counsel for the petitioner and learned Standing Counsel for the State functionaries.

9. Learned counsel for the petitioner submits that the subsequent document submitted by the sixth respondent is also a fabricated one as she passed her Class-V in academic session 1988-89

from Sardar Patel Shishu Mandir, Dhanaura, Jalaun and took admission in Class-VI in academic session 1993-94 and there is no explanation why she has missed four academic sessions. He further submitted that in collusion with the Headmaster of Lok Nayak Jai Prakash Memorial Junior High School she got prepared the fabricated documents. He has also pointed out the discrepancy in her date of birth mentioned in her various certificates.

10. Learned Standing Counsel submits that the petitioner does not have any locus to challenge the selection and appointment of the sixth respondent as he was not a candidate for the post in question and he is simply a busybody. He has further submitted that the petitioner is not an aggrieved person. The petitioner has not disclosed his locus in the writ petition also as he has made only a general and bald statement that he is a peace loving and law abiding citizen.

11. I have considered the submissions advanced by the learned counsel for the parties and perused the record.

12. The issue with regard to locus of the petitioner is to be examined at the very threshold. In this Court a large number of writ petitions are filed against the selected candidates particularly in respect of Aanganbari Karyakatri, Aanganbari Sahayika, Shiksha Mitra, Rojgar Sewak, Asha Worker, Asha Sangini, etc. These appointments are made under the different schemes of the Government and most of which are made in different welfare schemes launched and financed by the Central Government. These schemes are carried out by the State Government in terms of the guidelines/ circulars issued by the Government of India. A large number of appointments are made under the Sarva Shiksha Abhiyan (Education to All), National Health Scheme and Mahatma Gandhi National Rural Employment Guarantee Act. In terms of the guidelines issued by the Government of India, the State Government has issued executive orders, circulars, etc. to regulate the recruitment in these schemes. In some of the schemes, the State Government has framed the statutory rules also. In these schemes, the recruitment is made at the local level after following the procedure prescribed in the relevant rules/ Government orders, etc.. After the selection, spate of writ petitions are filed on somewhat similar grounds that the employment has been secured by the selected candidate on the basis of the fabricated documents. Serious disputed question of facts are raised in such writ petitions with regard to educational qualifications, date of birth/ age, B.P.L. Certificates, domicile and caste certificates.

13. It is also a common experience that a large number of the writ petitions are filed by the residents of the village or third persons, who claim that appointment has been secured by the suppression of facts and fabrication of the documents.

14. The Supreme Court has considered the issue of locus in such matters way back in 1976 in the case of **Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and others**[1]. The Court considered several English and American decisions and found that as per English decisions, in order to have the locus standi, the petitioner should be an aggrieved person, and if he does not fulfil that character and he is simply a stranger, the Court in its discretion can deny him the extraordinary remedy, certiorari jurisdiction, except in very special circumstances. The expression

"aggrieved person" was also examined in the light of the decisions of English cases and it was found that "aggrieved person" denotes an elastic and elusive concept and it cannot be kept or confined within the bounds of a rigid definition. To consider a person as aggrieved person, it will depend upon the scheme of the statute and the intention of the legislature. The nature and extent of the prejudice or injury suffered by such person shall also go a long way to consider him as an aggrieved person. After considering English and American cases, the Supreme Court found that in the context of locus standi broadly there are three categories. The relevant paragraphs of the judgement are extracted herein-below:

"37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

38. The distinction between the first and second categories of applicants, though real, is not always well-demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer-circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be "persons aggrieved".

39. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person

against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something?

Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in

the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community ? Or is it a statute dealing with private rights of particular individuals ?

40. Now let us apply these tests to the case in hand. The Act and the Rules with which we are concerned, are not designed to set norms of moral or professional conduct for the community at large or even a section thereof. They only regulate the exercise of private rights of an individual to carry on a particular business on his property. In this context, the expression "person aggrieved" must receive a strict construction."

15. The view taken by the Supreme Court in **Jasbhai Motibhai Desai (supra)** was water down for the first time in the case of **S.P. Gupta and others v. President of India and others etc.** [2]. The change in the trend was noticed by the Supreme Court in the case of **Chairman, Railway Board and others v. Chandrima Das (Mrs) and others**[3]. In the said case, the Supreme Court has considered the decision of **Jasbhai Motibhai Desai (supra)** and observed as under:

"15. The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, maybe of a minimum nature, may give locus standi to a person to file a writ petition, but the concept of "locus standi" has undergone a sea change, as we shall presently notice. In Satyanarayana Sinha (Dr) v. S. Lal & Co. (P) Ltd.4 it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of the petitioner himself. In writs like habeas corpus and quo warranto, the rule has been relaxed and modified.

16. In **S.P. Gupta v. Union of India5** the law relating to locus standi was explained so as to give a wider meaning to the phrase. This Court laid down (at SCC p. 220, para 26) that

practising lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary.

It was further observed that

lawyer's profession was an essential and integral part of the judicial system; they could figuratively be described as priests in the temple of justice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system; they are equal partners with the Judges in the administration of justice. The lawyers, either in their individual capacity or as representing some lawyers' associations have the locus standi to challenge the circular letter addressed by the Union Law Minister to the Governors and Chief Ministers directing that one-third of the Judges of the High Court should, as far as possible, be from outside the State."

16. In the same year, the Supreme Court in another case in **M.S. Jayaraj v. Commissioner of Excise, Kerala and others**[6], observed as under:

"**12.** In this context we noticed that this Court has changed from the earlier strict interpretation regarding locus standi as adopted in Nagar Rice & Flour Mills v. N. Teekappa Gowda & Bros.7 and Jasbhai Motibhai Desai v. Roshan Kumar8 and a much wider canvass has been adopted in later years regarding a person's entitlement to move the High Court involving writ jurisdiction. A four-Judge Bench in Jasbhai Motibhai Desai pointed out three categories of persons vis-à-vis the locus standi: (1) a person aggrieved; (2) a stranger; and (3) a busybody or a meddlesome interloper. Learned Judges in that decision pointed out that anyone belonging to the third category is easily distinguishable and such person interferes in things which do not concern him as he masquerades to be a crusader of justice. The judgment has cautioned that the High Court should do well to reject the petitions of such busybody at the threshold itself. Then their Lordships observed the following: (SCC p. 683, para 38)

"38. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly stand in the category of 'persons aggrieved'. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved'."

13. A recent decision delivered by a two-Judge Bench of this Court (of which one of us is a party -- Sethi, J.) in Chairman, Railway Board v. Chandrima Das 9 after making a survey of the later decisions held thus: (SCC pp. 478-79, para 17)

"17. In the context of public interest litigation, however, the Court in its various judgments has given the widest amplitude and meaning to the concept of locus standi. In People's Union for Democratic Rights v. Union of India10 it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. (See also Bandhua Mukti Morcha v. Union of India11 and State of H.P. v. A Parent of a Student of Medical College12 on the right to approach the court in the realm of public interest litigation.) In Bangalore Medical Trust v. B.S. Muddappa13 the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of locus standi or the absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere 'busybody'."

14. In the light of the expanded concept of the locus standi and also in view of the finding of the Division Bench of the High Court that the order of the Excise Commissioner was passed in violation of law, we do not wish to nip the motion out solely on the ground of locus standi. If the Excise Commissioner has no authority to permit a liquor shop owner to move out of the range (for which auction was held) and have his business in another range it would be improper to allow such an order to remain alive and operative on the sole ground that the person who filed the writ petition has strictly no locus standi. So we proceed to consider the contentions on merits."

17. Regard may also be had to the fact that in the last decade from 2000-2010, the issue with regard to locus standi in the context of public interest litigation has been diluted. But now again the trend is changing and the Court is now strictly screening the locus of the petitioner in filing the public interest litigation. Reference may be made to the judgment of the Supreme Court in the case of **State of Uttaranchal v. Balwant Singh Chaufal and others**[14]. In the said case, the appeal of the State was allowed by the Supreme Court and the writ petition filed by a lawyer before the Uttaranchal High Court was dismissed and a cost of Rs. 1 lac (Rupees One lakh) was imposed upon the writ petitioner. Following the judgment of **Balwant Singh Chaufal (supra)** this Court has also amended its Rules of the Court in respect of the public interest litigation to avoid frivolous petitions. From the judgment of **Balwant Singh Chaufal (supra),** it is evident that now the Supreme Court is again scrutinizing the locus of the petitioner even in public interest litigations as per the law laid down in **Jasbhai Motibhai Desai (supra)**. However, in a country like India where large number of writ petitions are instituted in the High Court of such nature and many of them are frivolous, the requirement that at the very outset a strict ascertainment regarding the standing of the petitioner must be insisted upon, has come true as a large number of public interest litigation in the last decade had been filed in the Supreme Court and various High Courts, but later most of them were found frivolous and by the busybodies.

18. A Division Bench of this Court in the case of **Salauddin v. State of U.P. and others, Special Appeal No. 266 of 2015, decided on 01st May, 2015** considered the issue of locus in service matter. In the said case the appointment of an Assistant Teacher was challenged by his own brother on the ground that his brother had secured the appointment on the basis of fabricated documents. The learned Single Judge had dismissed the writ petition on the ground of locus of the petitioner therein, who was not a candidate and had moved the petition only due to personal animosity to his brother. But the Division Bench did not agree with the learned Single Judge. The Division Bench opined thus:

"...It is not in dispute that the appellant is the complainant at whose behest the enquiry was initiated against the sixth respondent. The sixth respondent has obtained employment as an Assistant Teacher in an aided institution and is in receipt of salary from the public exchequer. The private dispute between the appellant and the sixth respondent may be a reason for the Court to tread in a matter, such as the present, with a great deal of circumspection and caution. However, the issue still remains as to whether the Court should shut its eyes to the facts which have been placed on the record. In our view, there is an element of public interest involved where a person, who has

obtained public employment and is in receipt of salary from an institution which is aided by the State, seeks to do so on the basis of documentary record indicating a particular date of birth.

*** *** ***

.... The Court must not also be oblivious of the fact that in such matters, the process of enquiry is set in motion often by a complainant. The fact that the complainant may have some interest of his own, is a ground for the Court to act with care but that cannot shut out a proper enquiry altogether, particularly in a case, such as the present, where the sixth respondent is in the employment of an aided educational institution and is drawing his salary from the public exchequer. For these reasons, we allow the special appeal in part. ... "

19. It is equally true that in case the rigour of the locus standi is relaxed/ liberalized, in that event the busybodies will file petitions to settle their personal scores. In such situations public money and public time will be wasted.

20. In the light of the judgments referred above, I find that in the matters where an appointment of an employee is challenged on the ground that he has secured the employment on the basis of fabrication of documents/ suppression of fact or any such kind of fraud, the Court must insist for the following requirements:

(a) The petitioner must disclose his/her locus clearly in the writ petition;

(b) A specific pleading regarding the fraud should be given in the writ petition and general and sweeping allegation should not be entertained, and the petitioner should file the documents in support of his/her allegations; and,

(c) In case the claim/allegation is found to be bogus and motivated, a heavy cost should be imposed upon the petitioner to deter the other persons from filing the frivolous petitions and for wasting valuable public time and money.

21. In view of the conspectus of the aforesaid facts and circumstances, I am of the considered view that the ends of justice would be subserved by issuing a direction upon the District Magistrate, Jalaun, the second respondent, to enquire into the allegations made by the petitioner, after furnishing opportunity to the sixth respondent, and pass the appropriate order in accordance with law expeditiously, preferably within a period of four months from the date of communication of this order.

22. It is made clear that any observation made in the order shall be without prejudice to the rights and contentions of the parties.

23. With the above observations and directions, the writ petition is disposed of.

24. No order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 1 Of 2006

M/S Shyam Behari Lal Keserwani ...Applicant

Versus

Commissioner, U.P. Trade Tax, Lucknow ...Respondent

Counsel for the Applicant:
Rishi Raj Kapoor, Krishna Agarwal

Counsel for the Respondent:
C.S.C.

The present revision which pertains to Assessment Year 2002-03 is restricted in respect of the assessment undertaken under the provisions of the U.P. Trade Tax Act, 19481. No issues have been urged insofar as the assessment of the revisionist under the Central Sales Tax Act, 19562 is concerned. The revisionist asserts that he purchases and sells lead and lead plates which it obtains from scrap batteries. As is recorded by the Tribunal, it was urged before the authorities that the revisionist purchases old and scrap batteries, extracts the lead plates therefrom, melts them, undertakes a cleaning process and then converts them into a flat form which is described as lead plate. These plates are then sold to manufacturers of batteries.

In view of the above and in the absence of any reasoning having been adopted or assigned either by the assessing authority or the first appellate authority while quantifying the turnover the orders are not liable to be sustained.

Accordingly this revision shall stand allowed in part. The orders of the assessing authority, first appellate authority as also that of the Tribunal affirming them to the extent of quantification, shall stand set aside. The matter is remitted to the assessing authority for a decision afresh on this aspect of the matter alone and in light of the observations made hereinabove.

Held: Para-

Case Law discussed:
M/s. Attar Singh Sarraf Bazar Natdara, Rampur Vs. Commissioner of Sales Tax,
B.P. Oil Mills Ltd. V. Sales Tax Tribunal [(1998) 6 SCC 577 : AIR 1998 SC 3055],

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the revisionist and the learned Standing Counsel.

2. The present revision which pertains to Assessment Year 2002-03 is restricted in respect of the assessment undertaken under the provisions of the U.P. Trade Tax Act, 19481. No issues have been urged insofar as the assessment of the revisionist under the Central Sales Tax Act, 19562 is concerned. The revisionist asserts that he purchases and sells lead and lead plates which it obtains from scrap batteries. As is recorded by the Tribunal, it was urged before the authorities that the revisionist purchases old and scrap batteries, extracts the lead plates therefrom, melts them, undertakes a cleaning process and then converts them into a flat form which is described as lead plate. These plates are then sold to manufacturers of batteries.

3. Two submissions were advanced in support of this revision. It was firstly urged that the revisionist is not liable to be treated as a "manufacturer" and could have only been classified as a dealer inasmuch the process undertaken by it did not amount to manufacture. The second issue which was raised was in respect to the computation of turnover on best judgment basis in respect of which it was submitted that no empirical standards were followed while quantifying the turnover.

4. Sri Krishna Agarwal, learned counsel for the revisionist elaborating upon the above submissions has submitted that in the admitted facts of the case since no new commodity has come into existence, it cannot be said that the revisionist was a manufacturer. He submits that the process which was undertaken by the revisionist brought into existence only lead plates and therefore this process would not amount the manufacture. He has in this connection, referred to the judgment rendered by a learned Single Judge of the Court in **M/s. Attar Singh Sarraf Bazar Natdara, Rampur Vs. Commissioner of Sales Tax, U.P.**[3] which was considering a case of a jeweller who was cleaning and performing certain processes on old ornaments. On the strength of this judgment, it was submitted that since there was no essential difference between the original commodity and the processed article, the revisionist was not liable to be taxed as a manufacturer. Insofar as the second aspect is concerned, Sri Agarwal has taken this Court through the order of the assessing authority to submit that although a survey had taken place wherein certain quantities of goods were found not to be duly reflected or accounted for in the stock register, the assessing authority has recorded no reasons for rejecting the declared turnover or for that matter assessing the turnover of the revisionist as Rs.10,00,000/-. He has in this connection submitted that the revisionist had declared a turnover of Rs. 2,98,254/- which was enhanced by the assessing authority to Rs. 10,00,000 and subsequently reduced by the first appellate authority to Rs. 8,00,000/-.

5. Sri B.K. Pandey, learned Standing Counsel, on the other hand, contended that as per the submissions advanced before the authorities below it was the admitted case of the dealer that the lead plates which had been obtained from scrap batteries were melted, cleaned and thereafter converted back into lead plates which were then sold to manufacturers of batteries. He submits that this clearly amounts to manufacture and therefore the view taken by the Tribunal in this regard does not commend any interference. He has further referred to what the assessing authority found in respect of the stock which had not been duly reflected or accounted for in the books. He submitted that once it was found that stock had not been duly registered or accounted for, the assessing authority had no option but to proceed to reject the books of account and assess the turnover of the revisionist on a best judgment basis.

6. Insofar as the first submission advanced by Sri Agarwal is concerned, the Court takes note of Section 2(e-1) of Act 1948, which defines the expression ***"manufacture"*** as under:

"manufacture means producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods but does not include such manufacture or manufacturing processes as may be prescribed."

7. A reading of the definition would establish that it encompasses the following activities viz. producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods.

8. The submission advanced on behalf of the revisionist and which so stands recorded by the Tribunal is that, lead plates which are extracted from scrap batteries are melted, cleaned and lead plates made therefrom. This activity in the opinion of this Court would clearly fall within the expression *"manufacture"* as defined under the Act. As noted above, the activities included under the definition clause of the 1948 Act includes not just producing goods but also the activities of *extraction, alteration, finishing and "or otherwise processing, treating or adapting any goods"*. Once it was the admitted case of the assessee that the lead plates were obtained from old batteries, melted, the lead extracted therefrom, cleaned and thereafter pressed in order to make them into plates, the activity, in the opinion of this Court, would clearly fall within the expression *"manufacture"*.

9. The submission that manufacture can only mean the production of a new commercial commodity wholly distinct from the original commodity is not liable to be accepted. There may be varied processes which a person may undertake in order to create a commodity. Admittedly, the old and scrap batteries were destroyed and only the lead extracted therefrom. The original commodity therefore ceased to exist. The revisionist thereafter extracted the lead, applied a cleaning process and thereafter the extracted lead was pressed into plate form.

10. One may in this connection also notice the expansive definition of "manufacture" under the 1948 Act when compared to other statutes. The distinctive features of the word "manufacture" as employed under the 1948 Act was also noticed by the Supreme Court in **Sonebhadra Fuels v. Commr., Trade Tax,**[4]

"The above definition is very wide as held by this Court in B.P. Oil Mills Ltd. v. Sales Tax Tribunal [(1998) 6 SCC 577 : AIR 1998 SC 3055]. The definition of "manufacture" in Section 2(e-1) of the Act includes meaning of "manufacture" in the U.P. Trade Tax Act is wider than that in the Central Excise Act, 1944. A dealer will be liable to pay tax on sale of any goods he makes by processing, treating, or adapting the goods he purchased by complying with the requirements of clause (ii) of Section 3(3)(b) of the U.P. Trade Tax Act.

22. We may mention that, as noted above, decisions construing the word "manufacture" in other statutes are not necessarily applicable when interpreting Section 2(e-1) of

the U.P. Trade Tax Act. As stated above, the definition of "manufacture" in Section 2(e-1) of the U.P. Trade Tax Act is very wide, which includes processing, treating or adapting any goods. Hence, in our opinion, the expression "manufacture" covers within its sweep not only such activities which bring into existence a new commercial commodity different from the articles on which that activity was carried on, but also such activities which do not necessarily result in bringing into existence an article different from the articles on which such activity was carried on. For example, the activity of ornamenting of goods does not result in manufacturing any goods which are commercially different from the goods which had been subjected to ornamentation, but yet it will amount to manufacture within the meaning of Section 2(e-1) of the U.P. Trade Tax Act since an artificial meaning of "manufacture" is given in Section 2(e-1). Hence, whether the commercial identity of the goods subjected to the processing, treating or adapting changes or not, is not very material."

11. The test of a new commercial commodity would not therefore come to the aid of the revisionist.

12. Lastly this Court notes that what the revisionist purchased were scrap batteries. What he manufactured was lead plates. The two commodities, therefore, even otherwise cannot be said to be identical whether one applies the *"common parlance test"* or the *"commercial sense test"*.

13. Insofar as the judgment relied by Sri Agarwal is concerned, the Court notes that in the said case the jeweler was only engaged in cleaning and joining certain parts of old ornaments. This judgment notes that the steps undertaken by the jeweler was basically an exercise of processing. In the opinion of this Court, the mere act of cleaning cannot be placed on the same pedestal as the activity undertaken by the revisionist where admittedly the lead plates were melted and cleaned and the lead extracted therefrom then made into lead plates.

14. While having held against the assessee on the first score and agreeing with the view taken by the Tribunal that the assessee was liable to be treated as a manufacturer, the Court then takes up the second submission. A reading of the order of the assessing authority establishes that during the course of survey of business premises the team found various articles which had not been duly accounted for in the books of account. Having arrived at this conclusion the assessing authority obviously and justifiably proceeded to reject the books of account and undertook an exercise of assessment to the best of his judgment. What the Court however finds is that all that the assessment order records is the quantity of articles which had not been found accounted for. The quantification of estimated turnover which was placed at Rs. 10,00,000/- is not imbued by any reasoning. At least, the assessment order does not disclose as to and or on what basis the value of the escaped turnover was arrived at. While, it is true that a best judgment assessment would necessarily entail a degree of guess work and confers a certain degree of discretion in the hands of the assessing authority to estimate turnover, the Court cannot loose sight of the fact that this estimation itself is to be made on the basis of "judgment". The very use of this word indicates that the exercise which the assessing authority undertakes would have to follow some empirical principles and not be wholly whimsical and capricious.

15. In view of the above and in the absence of any reasoning having been adopted or assigned either by the assessing authority or the first appellate authority while quantifying the turnover the orders are not liable to be sustained.

16. Accordingly this revision shall stand **allowed** in part. The orders of the assessing authority, first appellate authority as also that of the Tribunal affirming them to the extent of quantification, shall stand set aside. The matter is remitted to the assessing authority for a decision afresh on this aspect of the matter alone and in light of the observations made hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.07.2016

BEFORE

THE HON'BLE TARUN AGARWALA, J.

Election Petition No.- 4 Of 2014

Ramesh Singh **...Petitioner**
Versus
Sonia Gandhi & Anr. **...Respondents**

Counsel for Petitioner:
Sri Hari Shankar Jain, Sri Subash Vidyarthi, Ms. Ranjana Agnihotri, Ms. Sudha Sharma

Counsel for Respondents:
Sri P.P. Rao (Sr. Counsel), Sri Umesh Narain Sharma (Sr. Counsel), Sri K.C. Mittal, Sri Ravi Shankar Prasad, Ms. Maha Lakshmi Pavani

Election Law -- Representation of the People Act, 1951 -- Section 81, 83, 100 -- Election Petition -- Material Facts -- Pleadings -- Order 7 Rule 11 CPC -- Citizenship of Respondent-Candidate -- Election petition challenged the election of Smt. Sonia Gandhi from 36 Rae Bareli Lok Sabha Constituency on grounds: (i) she is not a citizen of India being a citizen of Italy by birth and having acquired Indian citizenship only by registration under Section 5(1)(c) of the Citizenship Act, 1955, which the petitioner contended was not equivalent to citizenship by birth or descent as required by Article 84 of the Constitution; (ii) Section 5(1)(c) of the Citizenship Act and Rule 4 of the Citizenship Rules, 1956 are unconstitutional; (iii) corrupt practice in appealing to vote on ground of religion through Syed Ahmad Bukhari -- Respondent filed application under Order 7, Rule 11 CPC for dismissal on ground of non-disclosure of cause of action -- Held: the averments in paragraphs 8 to 54 of the petition are virtually identical to those in the election petition of Hari Shankar Jain challenging the 1999 election, which was dismissed by the High Court and affirmed by the Supreme Court in Hari Shankar Jain v. Sonia Gandhi (2001) 8 SCC 233, on the ground that bald and vague allegations not satisfying the requirement of Section 83(1)(a) cannot disclose a cause of action -- the present petition being based on substantially the same pleadings must meet the same fate -- a ground negated by the Court on an earlier occasion cannot be improved upon in another election petition by the same counsel.

Election Law -- Section 5(1)(c) Citizenship Act, 1955 -- Citizenship by Registration -- Validity -- Vires -- Challenge in Election Petition -- Absence of Challenge to Citizenship Order -- Held: the

Central Government issued an order dated 30th April, 1983 registering respondent no.1 as a citizen of India under Section 5(1)(c) of the Citizenship Act, 1955 -- such order of registration has not been cancelled, withdrawn or annulled -- so long as the certificate of registration stands, the respondent continues to remain a citizen of India -- the vires of the Citizenship Act can be challenged in an election petition only provided the grant of certificate under the said provision is also questioned -- since the order of citizenship dated 30th April, 1983 has not been challenged, the Court is not inclined to answer hypothetical or academic questions testing the validity or vires of any law -- the presumption of validity of the certificate granted under Section 5 continues under Section 114 of the Evidence Act -- whether a person who has acquired citizenship by registration can be equated with a citizen by birth or descent for the purposes of Article 84(a) of the Constitution is an academic question which cannot be decided without the order of citizenship being challenged. (Paras 27-36)

Election Law -- Section 9 Citizenship Act, 1955 -- Termination of Citizenship -- Jurisdiction of High Court -- Italian Citizenship -- Held: the question whether a candidate has acquired citizenship of a foreign state can be decided by the High Court trying an election petition only on the basis of a declaration made by the Central Government under Section 9 of the Citizenship Act -- if no such declaration has been made, the High Court should proceed on the ground that the candidate has not ceased to be an Indian citizen -- it cannot independently hold an inquiry into that question on its own -- assertion that respondent continues to be a citizen of Italy in view of the laws of Italy is a bald allegation verified only on personal knowledge and legal advice without stating the source -- such assertions do not disclose material facts and cannot warrant an inquiry. (Paras 33-37)

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner has filed the present election petition under Section 81 of the Representation of People Act, 1951 (hereinafter referred to as the Act) challenging the election of Smt. Sonia Gandhi, who was declared elected from 36 Rae Bareli Lok Sabha Constituency on 16th May, 2014. The petitioner contends that he is a resident of Rae Bareli and is also an elector and contends that the election of Sonia Gandhi should be declared void.

2. The facts, in brief, are that the Election Commission of India declared the election schedule for the 16th Lok Sabha on 5th March, 2014. The notification was issued on 2nd April, 2014. Smt. Sonia Gandhi filed her nomination papers on 2nd April, 2014. The polling was held on 30th April, 2014 and the result was declared on 16th May, 2014 on which date Smt. Sonia Gandhi was declared elected.

3. The petitioner contends that Smt. Sonia Gandhi was born on 9th December, 1946 in village Lusiana in the Republic of Italy and is a citizen of Italy. Her real name is Anotinia Manio. The respondent married Rajiv Gandhi on 25th February, 1968 and, after marriage, changed her name to Sonia Gandhi.

4. The petitioner contends that the respondent was granted the Indian citizenship w.e.f. 30th April, 1983 under Section 5(1)(c) of the Indian Citizenship Act, 1955 (hereinafter referred to as the Citizenship Act). The petitioner contends that under the Citizenship Act, there are two categories of citizens of India, namely, (1) citizenship as a right, i.e. citizenship acquired by a person by birth or by descent and (2) conferred citizenship, i.e. a person on whose application, the

Central Government has a discretion to grant or not to grant Indian citizenship. The petitioner further contends that the conferred citizenship is of two types, namely, (a) citizenship by Registration and (b) citizenship by Naturalisation. The petitioner has made an elaborate submission contending that a person registered as a citizen of India becomes a citizen of India by a deeming fiction but is not 'actually" a citizen of India within the meaning of Article 84 of the Constitution of India and cannot be considered at par with the citizens of India by birth or by descent. In other words, only persons who are citizens by birth or by descent qualify to be citizens of India under Article 84 of the Constitution of India and, therefore, could qualify to be elected as a member of Lok Sabha. The petitioner contends that the respondent being granted a citizenship of India by registration under Section 5(1)(c) of the Citizenship Act cannot enjoy the same rights as conferred to those persons who are granted citizenship of India by birth or descent.

5. The petitioner, therefore, contends that the words "citizen of India" as contemplated under Article 84 of the Constitution of India refers to those persons who are citizens by birth or descent and not to those persons who have acquired citizenship of India by registration. It was thus contended that since Smt. Sonia Gandhi is a citizen of India by registration, she was not qualified to get elected as a member of the Lok Sabha under Article 84 of the Constitution of India. Further, she could not be registered as a voter in view of the provisions of Article 326 of the Constitution of India.

6. The petitioner further contended that Section 5(1)(c) of the Citizenship Act, 1955, Rule 4 of the Citizenship Rules, 1956 and Form III prescribed therein are unconstitutional and should be declared ultra vires the Constitution. Necessary pleadings have been spelt out in para 46 of the petition.

7. The petitioner further contended that the respondent is still a citizen of Italy and the laws of Italy does not permit its citizens to hold a dual citizenship. It was contended that the respondent has not renounced her citizenship of Italy and, therefore, the respondent could not become an Indian citizen.

8. The petitioner petitioner further contended that the respondent committed corrupt practice, namely, she made an appeal to vote on the ground of religion. The petitioner contended that as per news reports, it was revealed to the petitioner that on 31st March, 2014, Sri Rajiv Shukla a Congress Party leader, invited Syed Ahmad Bukhari to meet the respondent at her residence. The petitioner alleged that as per television news channel broadcast on 1st April, 2014, it was revealed to him that a meeting took place between the respondent and Syed Ahmad Bukhari, Shahi Imam of Jama Masjid, New Delhi which lasted for about 45 minutes, and, on coming out of the meeting, Syed Ahmad Bukhari claimed that the respondent had requested him to endeavour and ensure that the Muslim votes should not split in the upcoming Lok Sabha elections. The petitioner further contended that the television news channel report of 4th April, 2014 revealed that Syed Ahmad Bukhari in a Press Conference declared his support to the Congress Party on the basis of the meeting held with the respondent on 1st April, 2014. According to the petitioner, Syed Ahmad

Bukhari appealed to the muslim community to vote for the Congress Party and ensure that the secular votes are not split.

9. The petitioner contended that the appeal made by Syed Ahmad Bukhari was given wide publicity by the media, which influenced the Muslim voters to vote in favour of the respondent due to which the respondent won the election. The petitioner contended that the appeal by Syed Ahmad Bukhari to vote on religious lines is a corrupt practice and, therefore, the election of the respondent is void under Section 100(1)(b) of the Act. The petitioner, therefore, prayed that the election of Smt. Sonia Gandhi from 36 Rae Bareli Lok Sabha Constituency be declared void and her election be set aside. The petitioner has also prayed that Section 5(1)(c) of the Citizenship Act be declared unconstitutional and void.

10. The respondent has filed her written statement. Shorn of details, the respondent contended that the election petition is totally false, frivolous, malicious and is liable to be dismissed. The respondent was duly granted citizenship of India and that she has renounced her citizenship of her native country Italy. The respondent has denied that she continues to be a citizen of Italy. The respondent further contended that she is a citizen of India for the purposes of Article 84(a) and 326 of the Constitution of India. Further, the issue of her citizenship has been decided by the High Court in Election Petition No.1 of 2009 (Rakesh Singh Vs. Sonia Gandhi) vide judgment dated 14th February, 2011, which has attained finality and that the same issue cannot be raised again and is consequently, barred by the principle of res judicata. The respondent further denied that she indulged in corrupt practice on the ground of religion. The respondent contended that she had not given her consent to Syed Ahmad Bukhari on 4th April, 2014 to make an appeal on religious grounds. The respondent contended that she has been validly elected as a Member of Parliament.

11. The respondent has filed an application under Order 7, Rule 11(a) of the Code of Civil Procedure for the dismissal of the petition on the ground of lack of cause of action as well as under Section 86(1) of the Act for non-compliance of Section 81(1) and 81(3) of the Act. The respondent contended that the grounds raised in the election petition are vexatious and frivolous and is otherwise an abuse of the process of the Court. The respondent contended that even if the allegations made in the petition are taken into consideration in entirety, the petition is liable to be dismissed as it does not disclose any cause of action. The respondent contended that only vague and general allegations have been made which does not disclose any material fact nor any triable issue arises for consideration. The respondent contended that there is lack of "facta probanda" and, therefore, there is lack of cause of action. The assertions made in the petiition is the personal opinion of the petitioner based on misinterpretation of law. Such assertion, based on personal opinion, and which does not contain any material fact are irrelevant, unnecessary and frivolous and is also an abuse of the process of law. The respondent contended that no cause of action has arisen for adjudication and thus the petition should be dismissed.

12. The respondent has also filed an application under Order 6, Rule 16 of the Code of Civil Procedure contending that imaginary and false insinuation has been levelled against the

respondent without giving any details thereof. The respondent contended that paras 6 to 68 of the election petition has been verified by the petitioner on the basis of personal knowledge and information received but the petitioner has not disclosed the source from where the information or knowledge has been gathered. The respondent thus urged that on this ground itself the petition was liable to be dismissed at the threshold itself. The respondent contended that a newspaper report or television news cannot be a source of information for trial in an election petition and since the verification clause is contrary to the provisions of Order 6, Rule 16 of the Code of Civil Procedure, such pleading cannot amount to disclosure of any cause of action and, therefore, paras 6 to 68 of the petition should be struck off from the pleadings of the election petition.

13. The petitioner has contested the applications under Order 7, Rule 11(a) and under Order 6, Rule 16 of the Code of Civil Procedure contending that the applications are misconceived and without any foundation. The petitioner contended that on the basis of the pleadings made in the petition, a cause of action was made out and that the election petition deserves a full trial. The petitioner further contended that the verification of the paragraphs of the election petition are in consonance with the provisions of Order 6, Rule 15 of the Code of Civil Procedure.

14. In this backdrop, I have heard Sri Hari Shankar Jain, Sri Subash Vidyarthi, Ms. Ranjana Agnihotri and Ms. Sudha Sharma, the learned counsels for the petitioner and Sri P.P. Rao, the learned Senior Counsel, Sri Umesh Narain Sharma, the learned Senior Counsel assisted by Sri K.C. Mittal, Sri Ravi Shankar Prasad, Ms. Maha Lakshmi Pavani, the learned counsel for respondent no.1.

15. By virtue of Section 87 of the Act, the provisions of the Code of Civil Procedure applies to the trial of an election petition and consequently, the Court trying an election petition can exercise the provisions of the Code of Civil Procedure, including Order 6, Rule 16 and/or Order 7, Rule 11. For facility the provisions of Section 87 of the Act, Order 6, Rule 16 and Order 7, Rule 11(a) of the Code of Civil Procedure are extracted hereunder:

*"**87. Procedure before the High Court**.--(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:*

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.]"

*"**Order 6, Rule 16: Striking out pleadings.**-The Court may at any stage of the proceedings order to be struck out or amend any matter in any pleading-*

(a)which may be unnecessary, scandalous, frivolous or vexatious; or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit; or

(c) which is otherwise an abuse of the process of the Court."

*"**Order 7, Rule 11. Rejection of Plaint** - The plaint shall be rejected in the following case:-*

(a) Where it does not disclose a cause of action."

16. Under Section 87 of the Act, every election petition shall be tried by the High Court in accordance with the procedure applicable under the Code of Civil Procedure. Section 83 of the Act provides that an election petition shall contain a concise statement of the material facts on which the petitioner relies. For facility, the provisions of Section 83 of the Act is extracted hereunder:

*"**83. Contents of petition**.--(1) An election petition—*

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]"

17. Consequently, from a conjoint reading of Section 83 read with Order 7, Rule 11(a), if material facts have not been pleaded in the petition, appropriate orders can be passed in exercise of the powers given to the Court under the Code of Civil Procedure.

18. *In* ***Samant N. Balakrishna Vs. George Fernandez, (1969) 3 SCC 238***, the Supreme Court held that an omission of a single material fact would lead to an incomplete cause of action and that an election petition would consequently fail. The Court held:

"The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point of purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action.

19. Similarly, in ***Udhav Singh Vs. Madhav Rao Sindhia, 1977 (1) SCC 511***, the Supreme Court held that all primary facts, which are required to be proved by a party to establish a cause of action are material facts. Thus, in an election petition, it is essential or rather mandatory to plead the material facts. Failure to plead even a single material fact would lead to the dismissal of the petition.

20. In ***T. Arivandandam Vs. T.V. Satyapal and another, 1977 (4) SCC 467***, the Supreme Court held:-

"..... that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11, CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has creating the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage...."

21. In ***Azhar Hussain Vs. Rajiv Gandhi, 1986 (Supp.) SCC 315***, the Supreme Court after reviewing the case laws under Order 7, Rule 11 of the Code of Civil Procedure held that a suit which does not furnish a cause of action can be dismissed under Order 7, Rule 11 of the Code of Civil Procedure. The Supreme Court held that the omission of a single material fact amounts to an incomplete cause of action and can lead to the rejection of the election petition. The Supreme Court held that all the facts, which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact, would amount to a disobedience of the mandate provided under Section 83(1(a) of the Act.

22. The Supreme Court, after considering the numerous decisions of the Court, restated the settled position on the question as to what exactly the expression "material facts and particulars" means which the election petitioner was required to incorporate in his petition by virtue of Section 83(1) of the Act, namely:

"(1) What are material facts and particulars ? Material facts are facts which if established would give the petitioner the relief asked for. The test required to be answered is

whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. ***Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi & Ors., [1969] 3 S.C.R. 217. (2)*** *In regard to the alleged corrupt practice pertaining to the assistance obtained from a Government servant, the following facts are essential to clothe the petition with a cause of action which will call for an answer from the returned candidate and must therefore be pleaded.* ***Hardwari Lal v. Kanwal Singh, [1972] 2 S.C.R. 742:***

a) mode of assistance;

b)measure of assistance; and

c) all various forms of facts pertaining to the assistance.

(3) In the context of an allegation as regards procuring, obtaining, abetting or attempting to obtain or procure the assistance of Government servants in election it is absolutely essential to plead the following :

a) kind or form of assistance obtained or procured;

b) in what manner the assistance was obtained or procured or attempted to be obtained or procured by the election-candidate for promoting the prospects of his election Hardwari Lal v. Kanwal Singh. (supra)

(4) The returned candidate must be told as to what assistance he was supposed to have sought, the type of assistance, the manner of assistance, the time of assistance, the persons from whom the actual and specific assistance was procured Hardwari Lal v. Kanwal Singh (supra)

(5) There must also be a statement in the election petition describing the manner in which the prospects of the election was furthered and the way in which the assistance was rendered. Hardwari Lal v. Kanwal Singh (supra).

(6) The election petitioner must state with exactness the time of assistance, the manner of assistance, the persons from whom assistance was obtained or procured, the time and date of the same, all these will have to be set out in the particulars Hardwari Lal v. Kanwal Singh (supra).

23. The distinction between "material facts" and "particulars" and the requirement in election petition was again explained by the Supreme Court in ***Virender Nath Gautam Vs. Satpal Singh, 2007 (3) SCC 617***, wherein the Supreme Court held:

"There is distinction between facta probanda (the facts required to be proved, i.e. material facts) and facta probantia (the facts by means of which they are proved, i.e. particulars or

evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. The material facts on which the party relies for his claim are called facta probanda and they must be stated in the pleadings. But the facts or facts by means of which facta probanda (material facts) are proved and which are in the nature of facta probantia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue."

24. In ***Ram Sukh Vs. Dinesh Aggarwal, 2009 (10) SCC 541,*** the Supreme Court held that:-

"Undoubtedly, by virtue of Section 87 of the Act, the provisions of the Code apply to the trial of an election petition and, therefore, in the absence of anything to the contrary in the Act, the court trying an election petition can act in exercise of its power under the Code, including Order VI Rule 16 and Order VII Rule 11 of the Code. The object of both the provisions is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts....."

25. In ***I.T.C. Ltd. Vs. Debts Recovery Appellate Tribunal, 1998 (2) SCC 70*** the Supreme Court held:

"The basic question to be decided while dealing with an application filed under Order 7, Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code."

26. In ***Sopan Sukhdeo Sable and others Vs. Assistant. Charity Commissioner and others, 2004 (3) SCC 137***, the Supreme Court held that:

"... The real object of Order 7, Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to which and by a searching examination of the party, in case the court is prima facie of the view that the suit is an abuse of the process of the court, in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised."

27. And again held:

"Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant."

28. In ***Liverpool and London S.P. & I Association Ltd. Vs. M.V. Sea Success I and another, 2004 (9) SCC 512,*** the Supreme Court held:

"The idea underlying Order 7 Rule 11A is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of Civil Procedure, the Courts would interpret the provisions in such a manner so as to save expenses, achieve expedition, avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of the court is doomed to fail would not further be allowed to be used as a device to harass a litigant."

29. In view of the settled position of law with regard to the expression "material facts", it becomes essential to consider the grounds on which the election of the returned candidate is being assailed.

30. To recapitulate, the election of respondent no.1 has been challenged on the following grounds:

(1) That respondent no.1 is not a citizen of India and, therefore, was not qualified to be chosen to fill the seat in the Lok Sabha and, consequently, her nomination paper could not be accepted by the Returning Officer.

(2) Section 5(1)(c) of the Citizenship Act, 1955 read with Rule 4 of the Citizenship Rules, 1956 along with Form 2 of the Rules is unconstitutional and void and,

(3) Respondent no.1 committed corrupt practice by appealing to vote on the ground of religion.

31. Based on the aforesaid grounds, the petitioner has prayed that the election of respondent no.1 be set aside and further declare Section 5(1)(c) of Citizenship Act and the Rules made thereunder as unconstitutional.

32. Sri P.P. Rao, the learned Senior Counsel for respondent no.1 contended that with regard to the challenge that respondent no.1 is not a citizen of India, necessary assertion has been made in paragraphs 8 to 54 of the election petition. It was contended that the averments made in these paragraphs are substantially the same, if not verbatim as made by one Hari Shankar Jain in his election petition questioning the election of respondent no.1 when she was elected to the 13th Lok Sabha from Amethi parliament constituency in 1999, which election petition was dismissed under Order 7, Rule 11 of the Code of Civil Procedure for non-disclosure of cause of action by the Allahabad High Court. The said decision was affirmed by the Supreme Court in ***Hari Shankar Jain Vs. Sonia Gandhi, 2001 (8) SCC 233.*** It was contended that in view of the aforesaid, the present election petition being based on the same set of facts should be dismissed under Order 7, Rule 11 of the Code of Civil Procedure on the ground of non-disclosure of cause of action.

33. The learned Senior Counsel contended that respondent no.1 was again elected in the Lok Sabha election in the year 2009. Election petition was filed by one Rakesh Singh challenging the election of respondent no.1. The ground of challenge was that respondent no.1 was not a citizen of India. The said petition was dismissed wherein the Court held that so long as the certificate granted to respondent no.1 under Section 5(1)(c) of the Citizenship Act was not cancelled or withdrawn, the said respondent no.1 would continue to remain a citizen of India. It was asserted that the said judgment is a judgment "in rem" upholding the status of respondent no.1 as a citizen of India under the Citizenship Act. It was urged that in any case, the declaration of law being delivered by the High Court is a binding precedent and would apply to the present facts.

34. On the issue of vires of the Citizenship Act, the learned Senior Counsel contended that the vires of an Act can be considered in an election petition but contended that the vires of an Act cannot be tried in an election petition on the basis of vague and indefinite pleas raised in the election petition. Further, the cause of action for challenging the vires of the Act could only arise when the order of citizenship dated 30th April, 1983 was challenged. The learned Senior Counsel contended that the order of citizenship dated 30th April, 1983 has not been challenged and, therefore, the Court should decline to answer an academic question.

35. On this issue, the learned counsel for the petitioner Sri H.S. Jain contended that the question raised has not been decided by the High Court in the earlier two election petitions and, in any case, the decisions given therein does not operate as res judicata. It was urged that the earlier decisions given under Order 7, Rule 11 of the Code of Civil Procedure does not bar the petitioner from filing the present election petition. In any case, the earlier decisions was not a decision "in rem". The petitioner contended that the election petitioner raises triable issues, which has to be decided on merits and, therefore, the application under Order 7, Rule 11 of the Code of Civil Procedure should be dismissed.

36. The learned counsel has drawn a distinction between "citizen of India" and being "an Indian citizen". The learned counsel for the petitioner urged that in Part II of the Constitution of India while dealing with citizenship, Articles 5 to 10 of the Constitution uses the expression "citizen of India". Article 11, which empowers Parliament to make law with respect to the acquisition and termination of citizenship speaks of "citizenship" only and not of citizenship of India. It was therefore, urged that Parliament cannot therefore, make any law conferring status of "citizen of India" on anyone and if it does so, the parliamentary enactment would be ultra vires the Constitution. The learned counsel for the petitioner contended that under the Constitution persons have been categorized as persons, citizens and citizens of India. The learned counsel contended that the rights and privileges conferred on citizens of India are not available to Indian citizens and asserted that the provisions of the Citizenship Act, 1955, which confers the status of citizen of India as distinguished from Indian citizen on a person other than the one in whom the citizenship vests by right, i.e. by birth or by descent are ultra vires the Constitution. The learned counsel contended that the right to contest an election is conferred only on a citizen of India as defined in Part II of the Constitution. Respondent no.1 could not and is not a "citizen of India". It was urged that respondent

no.1 could not have cleared the status and qualify as a "citizen of India" solely by virtue of registration under Section 5 of the Citizenship Act, 1955.

37. In order to appreciate the submission of the learned counsel for the parties on this aspect, it would be essential to consider Article 11 of the Constitution, which for facility is extracted hereunder:-

*"**11. Parliament to regulate the right of citizenship by law**. - Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matter relating to citizenship."*

38. To achieve the aforesaid object, parliament enacted the Citizenship Act, 1955. For facility, Section 5(1)(c), Section 9 and Section 10 are extracted hereunder as it will have a bearing to the case:-

*"**5. Citizenship by registration.** - (1) Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provision of this Act if he belongs to any of the following categories, namely: -*

(a) --------

(b) -------

(c) A person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration.

***9. Termination of citizenship.** - (1) Any citizen of India who by naturalisation, registration otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.*

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires, the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any citizen of India has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

10. Deprivation of citizenship. *- (1) A citizen of India who is such by naturalisation or by virtue only of clause (c) of article 5 of the Constitution or by registration otherwise than under clause (b)(ii) of article 6 of the Constitution or clause (a) of sub-section (1) of section 5 of this Act, shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.*

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that –

(a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

(b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or

(c) that citizen has, during any war in which India may be engaged unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or

(d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or

(e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India."

39. The Citizenship Act, 1955 is an Act to provide for the acquisition and determination of Indian citizenship. Acquisition of citizenship can be by birth (Section 3), by descent (Section 4), by registration (Section 5) and by naturalisation (Section 6). Clause (c) of sub-section (1) of Section 5, as amended by Act 6 of 2004, provides that a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration, may, subject to satisfying other provisions including procedural ones, be registered as a citizen of India by the prescribed authority of the Central Government. The Citizenship Act does not provide for cancellation of a certificate of registration issued under Section 5. Section 9 speak of termination of citizenship upon acquisition of the citizenship of another country which event entails cessation of citizenship of India. Sub-section (2) of Section 9 provides that if any question arises as to where, when and how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence as may be prescribed in this behalf. Section 10 of the Citizenship Act provides for deprivation of citizenship by an order of the Central Government passed under sub-Section (2) of Section 10 of the Citizenship Act.

40. The Court find that the assertions contained in paragraph 8 to 54 of the petition is substantially the same, if not verbatim to the averments made in the election petition filed earlier by Hari Shankar Jain. A copy of the election petition of Hari Shankar Jain has been placed on record. The Court has perused the pleadings in the said election petition. A comparative table was was placed before the Court showing the averments in the present election petition and the corresponding averments made in the earlier election petition filed by Sri Hari Shankar Jain and one finds that the pleadings are substantially the same, if not verbatim. The election petition of Hari Shankar Jain was dismissed under Order 7, Rule 11 of the Code of Civil Procedure for non-disclosure of cause of action. The Supreme Court affirmed the decision of the High Court reported in 2001 (8) SCC 233 holding:-

".....it would suffice to say that we have carefully read each of the two election petitions and heard each of the two election-petitioners (appellants) in very many details specially on the aspect of the election petitions suffering from the vice of not satisfying the mandatory requirement of pleading material facts as required by Section 82(1)(a) of RPA 1951 and we are satisfied that the two election petitions do not satisfy the requirement statutorily enacted and judicially explained in umpteen number of decisions. The petitions are hopelessly vague and completely bald in the allegations made, most of which could not possibly be within the personal knowledge of the petitioners but still verified as true to their knowledge, without indicating the source. Such pleadings cannot amount to disclosing any cause of action and are required to be rejected/dismissed under Order VII Rule 11 IPC."

41. In the opinion of the Court, the said decision of the Supreme Court in Hari Shankar Jain's case (supra) is squarely applicable.

42. The Court also finds that in another election petition against respondent no.1 filed by Rakesh Singh questioning the election on the same ground that the said respondent was not a citizen of India, the High Court held:-

"In the instant case, it is crystal clear that by virtue of the certificate granted to her under Section 5(1)(c) of the Citizenship Act, which has never been cancelled, withdrawn or annulled till date, the respondent No.1 is "a citizen of India". The present petition is filed nearly three decades after the grant of citizenship to the respondent. The citizenship certificate was issued on 30th April, 1983 in the name of Sonia Gandhi alias Antonio Maino (copy on record). At no point of time, the petitioner did even challenge the inclusion of her name in the Electoral Roll. Making vague and bald allegations, without giving any material facts, show that proper care was not taken before filing the petition by gathering and stating all material facts. The challenge laid to the validity of election on the basis of the marriage certificate as well as certificate by registration of the respondent no. 1 not only suffers from deficiency in pleadings but is also scandalous."

43. The learned Senior Counsel thus urged that the aforesaid two decisions is a judgment "in rem" upholding the status of the respondent as a citizen of India under the citizenship Act. In

this regard, one finds that the Supreme Court in ***C.M. Arumugam Vs. S. Rajgopal, 1976 (1) SCC 863*** held:

"that every election furnishes a fresh cause of action for a challenge to that election and an adjudication in a prior election petition cannot be conclusive in the subsequent proceeding. Res judicata is nothing but the merger of a cause of action in a decree, transit in rem judicatum. So, even if the cause of action in the earlier election petition merged in the final adjudication therein, since according to this Court, the subsequent election furnishes a fresh cause of action, the merger of the earlier cause of action with the decision therein cannot bar the trial of the fresh cause of action arising out of subsequent election. It is true that the earlier election petition was filed by a voter in the constituency concerned and he had also raised the plea that the appellant did not belong to the "Konda Dora" community. An election petition filed, though it abates on the death of the petitioner therein, could be pursued by another person coming forward to prosecute that election petition as enjoined by Section 12 of the Act. But that does not make an election petition a representative action in the sense in which it is understood in law. Therefore, normally, the adjudication in an election petition, not inter-parties, cannot operate as res judicata in a subsequent election petition challenging that subsequent election."

44. In ***Satrucharla Vijaya Rama Raju Vs. Nimmaka Jaya Raju and others, 2006 (1) SCC 212*** the Supreme Court held that an election petition under Section 80 of the Representation of People Act, 1951 cannot be held to lead to an adjudication which declares or determines the status of a person. The Supreme Court held that the election petition was merely an adjudication of a statutory challenge on the question whether the election of the successful candidate was liable to be voided on any of the grounds available under Section 100 of the Representation of People Act, 1951. The Supreme Court further held that if the election petitioner fails to establish his claim, it could not be said that it amounted to a declaration of the status of the respondent in that election petition or that such finding would operate as a judgment "in rem".

45. In the light of the aforesaid, the contention of the learned Senior Counsel for the respondent that the decision of the Court in the earlier election petition filed against the respondent no.1 would operate as a judgment "in rem" cannot be accepted.

46. However, the Court is of the opinion that the decisions of the Court, even though it is not inter parties, has a high evidentiary value while considering the case of the parties in the present election petition. The High Court, dismissed the election petition in ***Hari Shankar Jain's case (supra)*** and ***again in Rakesh Singh's case (supra)*** under Order 7, Rule 11 of the Code of Civil Procedure on the finding that material facts have not been incorporated in the election petition. The Supreme Court affirmed the decision of the High Court in Hari Shankar Jain's case (supra) holding that bald and vague averments have been made in the election petition, which does not satisfy the requirement of pleading material facts. This Court has found that the pleadings in this petition is virtually the same as pleaded in the election petition of Hari Shankar Jain. The Court is of the opinion that the present petition must meet the same fate.

47. The distinction drawn by the learned counsel for the petitioner between "citizen of India" and being "an Indian citizen" and thus contending that a person acquiring Indian citizenship will not come within the ambit of the phrase "citizen of India" enumerated in Article 84(a) of the Constitution of India should be considered in the present election petition as the same was not decided by the Supreme Court in ***Hari Shankar Jain's case (supra)*** on the ground of lack of pleadings in that election petition is misconceived. The contention that sufficient pleadings have been made in this regard, in the present election petition, which requires the interpretation of the word "of" occurring in Article 84(a) of the Constitution by the Court cannot be accepted and must fail. The Court is of the opinion that since the petitioner himself admitted that the respondent was granted Indian citizenship on 30th April, 1983, coupled with the fact that there is no challenge by the petitioner in the acquisition of the citizenship upon the respondent, such plea cannot be looked into at this belated stage after three decades.

48. There is another aspect of the matter which is also relevant. Hari Shankar Jain is an Advocate who contested the 1999 election and lost. He filed the election petition raising various pleas. His election petition was rejected under Order 7, Rule 11 of the Code of Civil Procedure and was also affirmed by the Supreme Court. Same plea has again been taken in the present election petition. The petitioner has also tried to cover the lacuna which was found in the petition of Hari Shankar Jain. The plea relating to the interpretation of Article 84(a) of the Constitution has been made in paragraphs no.13, 14, 15, 28, 29, 31, 34, 43, 44 and 45 of the election petition. Such assertions made in the aforesaid paragraphs have been sworn on legal advice. Can such a petition be entertained and the question be answered on pleas which are solely based on legal advice ? What is the source of such legal advice which the petitioner professes it to be true? The source has not been shown nor asserted. Such bald assertion, without indicating the source of knowledge cannot amount to disclosure of any cause of action and the same is required to be dismissed under Order 7, Rule 11 of the Code of Civil Procedure.

49. At this stage, the Court must observe that Hari Shankar Jain is the Advocate for the present election petitioner. The Court gets the uncanny feeling that the lacunas observed by the Supreme Court in the election petition of Hari Shankar Jain has been incorporated by the counsel in the present election petition, which cannot be permitted. Personal knowledge of the counsel cannot be imported and made a ground of attack in an election petition making it as if it was the personal belief of the election petitioner. The Court is further of the opinion that a ground taken in an election petition which has been negated by the Court on an earlier occasion cannot be improved upon in an another election petition, nor such addition would satisfy the requirements of pleading material facts within the meaning of Section 83(1)(a) of the Representation of People Act, 1951 read with Order 7, Rule 11 of the Code of Civil Procedure.

50. The vires of Section 5(1)(c) of the Citizenship Act can be looked into for the purpose of trying an election petition on any one or more of the grounds enumerated in Section 100 of the Act and for the purpose of granting any one or more reliefs mentioned under Section 98 and 99 of the said Act. At the same time, the vires of a provision of an Act on its own cannot be challenged unless the grant of certificate under the said provision is also questioned. Since the certificate of

registration granted under Section 5(1)(c) of the Act has not been challenged, the Court is not inclined to answer hypothetical or academic questions testing the validity or vires of any law in an election petition. The Court gets support from a decision of the Supreme Court in ***Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Ltd. and another, 1983 (1) SCC 147*** where in the Supreme Court held held:-

"... We have serious reservations on the question whether it is open to a court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. We (Judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon."

51. Considering the aforesaid, the Court is of the opinion that the cause of action for challenging the validity or vires of an Act could only arise when the order of citizenship dated 30th April, 1983 is challenged. The Central Government issued an order on 30th April, 1983 registering respondent no.1 as a citizen of India under Section 5(1)(c) of the Citizenship Act. Such registration is still continuing and has not been cancelled, withdrawn or annulled till date. So long as the order issued under Section 5(1)(c) of the Citizenship Act stands, respondent no.1 continues to remain a citizen of India.

52. The petitioner admits that respondent no.1 has been registered as a citizen of India. It therefore, follows that once the respondent is held to be citizen of India, this Court on its own cannot hold an inquiry on the question of citizenship of a candidate unless the order granting citizenship to the respondent is challenged or there is a declaration issued from the Central Government under Section 9 of the Citizenship Act with regard to the loss of citizenship or under Section 10 of the Act with regard to deprivation of the citizenship. In the instant case, the grant of citizenship by Central Government to respondent no.1 under Section 5(1)(c) of the Citizenship Act has not been questioned. Further, there is no order of the Central Government under Section 9 or 10 of the Citizenship Act terminating the citizenship of respondent no.1. The Supreme Court in ***Bhagwati Prasad Dixit Ghorewala Vs. Rajeev Ghandi, 1986 Law Suit (SC) 143*** held that Section 9 of the Citizenship Act is a complete code as regard the termination of Indian citizenship. Sub-clause (d) of clause (1) of Article 102 of the Constitution provides that a person shall be disqualified for being chosen as, and for being, a member of either house of the parliament if he is not a citizen of India. The Supreme Court held that the policy under Section 9 of the Citizenship Act appears to be that the right of citizenship of the person, who is admittedly an Indian citizen should not be exposed to attack in all forums in the country but should be decided by one authority in accordance with the prescribed rules and that every other court or authority would have to act only on the basis of the decision of the prescribed authority in that behalf and on no other basis. That being the mandate of the law, the Supreme Court held:-

"even the High Court trying an election petition can declare an Indian citizen as having acquired the citizenship of a foreign State only on the basis of a declaration made by the Central Government. If such a declaration made by the Central Government is produced before a High Court trying an election petition the High Court has to give effect to it. If such a declaration is not forthcoming, the High Court should proceed on the ground that the candidate concerned has not ceased to be an Indian citizen. It cannot independently hold an enquiry into that question on its own."

53. In ***State of Madhya Pradesh Vs. Peer Mohd., AIR 1963 SC 645*** the Supreme Court held:

"If a dispute arises as to whether an Indian citizen has acquired the citizenship of another country, it has to be determined by such authority and in such manner and having regard to such rules of evidence as may be prescribed in that behalf. That is the effect of Section 9(2). It may be added that the rules prescribed in that behalf have made the Central Government or its delegate the appropriate authority to deal with the question and that means this particular question cannot be tried in Courts."

54. The petitioner is basically challenging the correctness of the grant of citizenship to respondent no.1 and her entitlement to be a registered as a itizen of India under Section 5(1)(c). Such question can only be considered and adjudicated upon provided the said grant is challenged before the Court. In the instant case, the order of the Central Government granting citizenship to respondent no.1 has not been challenged. So long as the certificate of citizenship issued under Section 5 is not challenged the presumption of the validity of the certificate continues to remain in existence in view of Section 114 of the Evidence Act. The Court will presume that the certificate was validly issued by the prescribed authority after satisfying itself that the said respondent no.1 was entitled for grant of registration in her favour. The presumption of a valid registration certificate would continue to exist so long it is not challenged.

55. In the light of the aforesaid, the Court finds that the declaration made by the Central Government under Section 5(1)(c) of the Citizenship Act in favour of respondent no.1 has not been challenged in this election petition and, consequently, the Court is not inclined to delve into the vires of the Citizenship Act and the Rules framed therein and answer academic questions.

56. The petitioner has made a feeble attempt that respondent no.1 could not become a citizen of India as she has not renounced the citizenship of her native country Italy till date. The petitioner asserted that respondent no.1 continues to be a citizen of Italy. Necessary assertion has been made in paragraph 11, 48, 49, 50 of the petition to this effect. In paragraph 51 of the petition, the petitioner has quoted Article 22 of the Constitution of Republic of Italy, which provides that *"no one may be deprived of his legal status, his citizenship, or his name for political reasons"*.

57. In the light of these assertions, it was contended that in view of the laws of Italy, respondent no.1 could not renounce the Italian citizenship and become a citizen of India nor could

she apply for a certificate of citizenship under Section 5(1)(c) of the Citizenship Act. The Court has perused the averments and the assertion made by the learned counsel on this aspect and is of the opinion that the assertions are bald allegations made without any basis and do not amount to pleading of material facts, which may warrant any inquiry into these allegations.

58. The Court finds that paragraph 11 and 48 are based on personal knowledge, whereas paragraph 49, 50 and 51 are based on legal advice. The very tenor of the pleadings discloses that the petitioner had no personal knowledge of various facts relating to respondent no.1 on this issue. The very fact that the pleadings have been verified on legal advice is a clear indication of the lack of knowledge of the petitioner on this aspect. All assertions have been made about Italian law without stating what is the source of such law. The basis for raising such pleadings have not been indicated. The assertions verified as true to my knowledge and based on legal advice is wholly unacceptable. Such assertions does not amount to disclosure of material facts. The pleading on this issue is apparently vague, lacks material facts and, therefore, must fail.

59. The petitioner contends that respondent No.1 has committed corrupt practice by making an appeal to vote on the ground of religion. Necessary allegations have been made in paragraphs 55 to 68 of the petition, details of which have already been narrated hereinabove. To recapitulate, the petitioner contends that as per television news channel broadcast dated 1.4.2014 a meeting took place between the respondent No.1 and Syed Ahmed Bukhari, Shahi Imam of Jama Masjid, New Delhi, wherein Syed Ahmed Bukhari claimed that respondent No.1 had requested him to endeavour and ensure that Muslim votes should not split in the upcoming Lok Sabha election. The petitioner further contended that, as per television news channel report dated 4.5.2014, Syed Ahmed Bukhari in a press conference declared his support to the Congress Party on the basis of the meeting held with respondent No.1 on 1.4.2014.

60. The learned Senior counsel for the respondent contended that necessary ingredients of "corrupt practice" as specified in Section 123(3) of the Act are lacking. Further, necessary material is also lacking and has not been specified, which is a mandatory requirement under Section 83 of the Act and, therefore, no cause of action arises for consideration. It was urged that as per Section 123 (3) of the Act, there are three ingredients which should be present before an assertion could be made that the respondent had indulged in corrupt practice, namely, that the respondent should be a candidate, the appeal should made in her religion and that the respondent authorized Syed Ahmed Bukhari to make an appeal to vote for her in the name of her religion. The learned Senior counsel contended that no such assertion has been made specifically in any of the paragraphs 55 to 68 of the petition. The learned senior counsel further contended that the appeal, if any, made by the respondent No.1 should be with regard to "her" religion, which in the instant case is missing. There is no such assertion in the election petition that the appeal made by respondent No.1 to Shahi Imam was in the name of "her" religion.

61. On the other hand, the learned counsel for the petitioner contended that the appeal made by Syed Ahmed Bukhari on 4.4.2014, as per the television news channel reports declaring his support to the Congress party, was by itself sufficient to implicate respondent No.1 of having

indulged in corrupt practice. The learned counsel further contended that on the question, whether the appeal to vote on the ground of religion, whether it is the religion of the candidate or the religion of the person professing to appeal on behalf of the candidate, has been referred to a larger Bench and, therefore, contended that the a triable case was made out and the petition should, therefore, be decided on merit rather than throwing out the election petition on the ground that no cause of action arises.

62. Having heard the learned counsel for the parties on this issue, the Court finds that Section 123(3) of the Act deals with "corrupt practice" on the ground of religion. For facility, Section 123(3) of the Act is extracted here under:

"(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:"

62(A). From a perusal of the aforesaid, the appeal to vote on the ground of "his" religion is important. Further, the appeal, if any, has to be made by a "candidate". In this regard, Section 79(b) of the Act defines "candidate" as under:-

"(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election"

63. The aforesaid definition makes it clear that a candidate is that person who has been nominated as a candidate at any election. The petitioner admits in paragraph 7 of the election petition that respondent No.1 filed her nomination papers on 2.4.2014. It, therefore, becomes clear that respondent No.1 became a candidate for the Lok Sabha election only on 2.4.2014. Prior to 2.4.2014 respondent No.1 was not a candidate for the election to any seat of the Lok Sabha.

64. In ***Kona Prabhakara Rao Vs. N. Sheshagiri Rao and another, 1982(1)SCC 442,*** allegations of corrupt practice was made to the effect that the candidate sought assistance from the Tahsildar in furthering his election prospects and in helping him to win the election. The Supreme Court held that there was absolutely no allegation in the pleadings to show that any time after having filed his nomination paper, the candidate made any effort to seek the assistance of the Tahsildar in helping him to win the election and, consequently, held that the election petitioner failed to prove the allegations of corrupt practice. Similarly in ***Mohan Rawale Vs. Damodar Tatyaba alias Dadasaheb and others, 1994 (2) SCC 392***, the Supreme Court held that the averments made in the election petition with regard to corrupt practice referring to the period prior to the candidate being nominated as a candidate for election could not amount to corrupt practice.

65. In the light of the aforesaid decisions, the Court finds that the assertions made by the petitioner revolves on the fact that respondent No.1 met Syed Ahmad Bukhari on 1.4.2015 and appealed to him to vote on the ground of religion. Such assertion cannot amount to corrupt practice, as per Section 123(3) of the Act, inasmuch as, respondent No.1 was not a candidate on 1.4.2014, as per Section 79(b) of the Act. The allegations made in the election petition could not amount to corrupt practice.

66. Section 123(3) of the Act further specifies that the appeal by a candidate must be to vote on the ground of "his" religion. This assertion has to be specifically asserted in the petition as per the provision of Section 83(1) of the Act, namely, that the material facts must be asserted in the election petition. The Court has perused the averments made in paragraphs 55 to 68 and finds that there is no specific assertion by the petitioner to the effect that the respondent appealed to Shahi Imam, Syed Ahmad Bukhari to vote on the ground of "her" religion. In paragraph 55 the petitioner contends that the returned candidate has committed corrupt practice, namely, "an appeal to vote on the ground of religion". This statement by itself is vague and insufficient. The petitioner has nowhere specified as to whose religion was the returned candidate professing, namely, whether it was the religion of the returned candidate or whether it was the religion of Syed Ahmad Bukhari. Paragraph 55 further makes it clear that Syed Ahmad Bukhari made an appeal to the Muslim voters to vote in favour of the returned candidate and in favour of her party, namely, the Indian National Congress. Thus, there is no assertion of appeal to vote in the name of the religion of respondent no.1.

67. In ***Dr. Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte and others 1996 (1) SCC 130,*** the Supreme Court held that the word "his" as specified in sub-section (3) of Section 123 of the Act is of importance and it means that the religion forming the basis of appeal to vote or refrain from voting for any person must be of that candidate for whom the appeal to vote or refrain from voting is made. The Supreme Court held-

"There can be no doubt that the word 'his' used in sub-section (3) must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word 'his' used therein can be construed. The expressions "the appeal ... to vote or refrain from voting for any person on the ground of his religion, ... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate" lead clearly to this conclusion. When the appeal is to vote on the ground of 'his' religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicial affected. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. There is no ambiguity in sub-section (3) and it clearly indicates

the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3)."

68. In ***Harmohinder Singh Pradhan Vs. Ranjeet Singh Talwandi and others 2005 (5) SCC 46,*** the Supreme Court held:

"12. In the case before us, the election petition nowhere mentions the religion of Respondent No1. There is no averment made in the election petition that the said appeal was made in the name of the religion of Respondent 1. It is not the case of the appellant in his election petition that there was any negative appeal made at any time by Respondent 1 or on his behalf, that is to say, an appeal to voters to refrain from voting for the appellant on the ground of his religion.

13. There is yet another reason why the averments made in the election petition are deficient. The appeals are said to have been made by certain religious leaders. A distinction has to be drawn between an appeal simpliciter to vote or to refrain from voting made by religious leaders which may benefit any particular candidate and an appeal to vote or to refrain from voting on the ground of religion emanating from religious leaders and attributable to the candidate within the meaning of Section 123(3). The former is not vulnerable while the latter is. All that the election petition alleges is that certain religious leaders, held in reverence by the voters, issued an appeal to vote in favour of Respondent 1. The appeals forming the gravamen of the charge of corrupt practice do not carry in them the element of an appeal to vote for any person on the ground of religion."

69. In view of the aforesaid decisions, it is clear that the appeal to vote on the ground of religion must be the religion of that candidate. The appeal is to be made on the basis of the religion of the candidate for whom votes are solicited. There is no such assertion to this effect in the election petition. In fact the assertion is, that the appeal was to garner Muslim votes. Admittedly the respondent is not a Muslim. Thus, on this ground, material facts are lacking.

70. In this regard, the learned counsel for the petitioner contended that the question of interpretation of Section 123(3) of the Act with regard to the appeal on the ground of the religion of the candidate or otherwise is engaging the attention of the Supreme Court and that the Supreme Court itself has referred it to the larger Bench vide ***Narain Singh Vs. Sunder Lal Patawa, 2003 (9) SCC 300*** and again in ***Abhiram Singh vs. C.D. Commachen (Dead) by Legal Representatives and others, 2014 (14) SCC 382***. The learned counsel consequently contended that an arguable case has been made out and that the petition should be admitted.

71. In this regard, the Court finds that the mere fact that the interpretation of Section 123(3) of the Act has been referred to a larger Bench, does not make the decisions of the Supreme Court in ***Dr. Ramesh's case (supra)*** and ***Harmohinder's case (supra)*** otiose. So long as the said decisions are not reversed, the said decisions are binding on this Court and would apply with equal force.

72. The allegation of corrupt practice is basically based on T.V. channel reports. This has been specifically asserted by the petitioner in paragraphs 56 and 57 of the election petition. In this regard, the

Court is of the opinion that a news report without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand secondary evidence as held by the Supreme Court in ***Samant N. Balakrishna Vs. George Fernandez and others, AIR 1969 SC 1201***. The Supreme Court held that 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 gets perverted or garbled. The Supreme Court held that such news items cannot by itself prove itself and can only be considered provided there is other evidence. This Court finds that the said decision is clearly applicable, inasmuch as, no proof has been submitted by the petitioner with regard to the source of information. Such news channel reports cannot be taken into consideration unless it is accompanied by the statement of the reporter who voiced the news report in the T.V. channels. In the absence of such statement and in the absence of any evidence being brought on record, the Court finds that necessary material was lacking in the election petition. In ***K.M. Mani Vs. P.J. Antony, 1979 (2) SCC 221*** the Supreme Court held that the speech made by a police officer exhorting the elections in an election meeting to support a candidate was not enough to constitute corrupt practice. The Supreme Court held that the transcripts of the alleged speech should have been made available.

73. In the light of the aforesaid, in order to constitute corrupt practice, it must be shown that the act was done during the election campaign between the date when the respondent became a candidate and the date of poll and that it was the act of the respondent or her agent or any other person with her consent to appeal to vote on the ground of her religion. Such ingredients are essential and are required to be pleaded in order to constitute a cause of action raising a triable issue. In the instant case, such ingredients are missing in the election petition. Material facts are lacking and, consequently, the Court finds that no cause of action arises on this issue.

74. In these circumstances, the Court finds that the pleadings in the election petition does not set out the material facts and, therefore, constitutes an incomplete cause of action. The application under Order 7, Rule 11 of the Code of Civil Procedure is allowed as a result of which the election petition is dismissed with costs. Since the application under Order 7, Rule 11 of the Code of Civil Procedure has been allowed it is not necessary for the Court to decide the application under Order 6, Rule 16 of the Code of Civil Procedure.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 11 Of 2015

U.P. State Industrial Development Corporation Ltd. (UPSIDC) ...Appellant
Versus
Commissioner of Income Tax-II, Kanpur ...Respondent

Counsel for Appellant:
Sri S.K. Garg, Sri Ashish Bansal

Counsel for Respondent:
C.S.C.

Income Tax -- Section 143(2) and Section 148 of the Income Tax Act, 1961 -- Notice Under Section 143(2) -- Mandatory Requirement -- Late Filing of Return -- Assessment Year 2003-2004 -- Appellant-Assessee (UPSIDC) filed return for Assessment Year 2003-2004 on 2.5.2005 showing income of Rs. 12,64,32,143/- -- since return was filed after the period prescribed under Section 139, the Assessing Authority treated the return as nonest and issued notice under Section 148 on 25.5.2007 -- before making assessment, no notice under Section 143(2) was issued -- Assessment Order was passed on 31.12.2008 -- the Income Tax Appellate Tribunal, Lucknow Bench 'A' in ITA No. 382/LKW/2011 vide judgment dated 24.7.2014 partly allowed the Assessee's appeal but negated the challenge to non-issue of notice under Section 143(2), holding that since the return was filed after expiry of the prescribed period, absence of such notice would not vitiate the assessment -- on appeal under Section 260-A, the substantial question of law pressed is: Whether the Tribunal was justified in holding that non-issue of notice under Section 143(2) would not vitiate assessment made by the Assessing Authority since the Assessee filed return under Section 148 after expiry of the period prescribed -- Held: the view of the Tribunal is erroneous -- Section 143(2) authorizes the Assessing Officer to complete assessment under Section 143(3) and the same applies to block assessment also under Section 158BC -- an omission on the part of the Assessing Officer to issue notice under Section 143(2) is not a mere procedural irregularity -- it is a jurisdictional error -- the notice under Section 143(2) is mandatory and an Assessing Officer cannot proceed to make assessment under Section 143(3) without issuing such notice, irrespective of whether the return was filed within time or beyond time or in response to notice under Section 148 -- the question whether return was filed within or beyond time prescribed under Section 139 or has been filed in response to notice under Section 148, is not relevant to determine whether the Assessing Officer can proceed to make assessment without issuing notice under Section 143(2). (Paras 4-21)

Income Tax -- Section 143(2) -- Jurisdictional Requirement -- Return Filed After Expiry of Time Under Section 139 -- Non-Issue of Section 143(2) Notice Cannot Be Condoned -- Held: even if an Assessing Authority treats the return filed as nonest on account of being filed after the expiry of the period prescribed under Section 139, and then proceeds under Section 148, after the return is filed in response to or acknowledged as response to notice under Section 148, the Assessing Officer is required to apply his mind to the contents of such return and issue a fresh notice under Section 143(2) before proceeding to make assessment -- the provision being mandatory, whatever may be the reason available to the Assessing Officer to repudiate the return filed by the Assessee, if it proceeds to make assessment, a notice under Section 143(2) is mandatory -- the Legislature has cast a duty on the Assessing Officer to apply his mind to the material on record and after being satisfied with regard to escaped liability, issue a notice specifying particulars of such claim. (Paras 15-21)

Income Tax Appeal Allowed -- Assessment Order Quashed -- Liberty to Reassess After Issuing Notice Under Section 143(2) -- Substantial question of law answered in favour of the Assessee-Appellant and against the Revenue -- Income Tax Appeal No. 11 of 2015 allowed -- impugned judgment and order dated 24.7.2014 passed by the Tribunal in ITA No. 382/LKW/2011 and the Assessment Order in respect of Assessment Year 2003-2004 hereby quashed -- however, this judgment shall not preclude the Assessing Authority from proceeding further in accordance with law with respect to assessment of the Assessee under Section 143(3)/148 for Assessment Year 2003-2004 after giving notice under Section 143(2) of the Income Tax Act, 1961. (Paras 22-23)

Case Law Discussed:

1. ACIT & Another v. Hotel Blue Moon, (2010) 321 ITR 362 (SC); (2010) 229 CTR 219
2. Commissioner of Income Tax v. Rajeev Sharma, (2011) 336 ITR 678 (Allahabad, Lucknow Bench)
3. Chand Bihari Agrawal v. ACIT, IT(SS)A No.05/PAT/2010 (Patna Bench Tribunal) - Distinguished
4. Hindalco Industries Ltd. v. Commissioner of Income Tax, Lucknow; ITA No.69 of 2006 (Allahabad), decided 25.7.2011
5. Director of Income-Tax v. Society for Worldwide Interbank Financial Telecommunication, (2010) 40 DTR (Del) 17
6. Allana Cold Storage Ltd. v. Income-Tax Officer and others, (2006) 287 ITR (Bom.)

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon'ble Kaushal Jayendra Thaker, J.)

1. Heard Shri Ashish Bansal learned counsel for appellant and learned Standing Counsel for respondent.

2. This is an appeal at the instance of Assessee preferred under section 260-A of Income Tax Act, 1961 (hereinafter referred to as "Act 1961"). Dispute relates to Assessment Year 2003-2004. Appeal has arisen from judgment and order dated 24.7.2014, passed by Income Tax Appellate Tribunal, Lucknow Bench "A' Lucknow (hereinafter referred to as 'Tribunal') in ITA No.382/LKW/2011 whereby the aforesaid appeal of Assessee has been partly allowed. Though, in the memo of this appeal, several substantial questions of law have been formulated by appellant but learned counsel for appellant at the outset stated that he propose to press only one substantial question of law relating to notice under section 143(2) of Act, 1961 since, if that question is decided in his favour, entire matter will be open to appellant to be raised before Assessing Authority.

3. With consent of learned counsel for parties, we proceed to hear this appeal finally on the following substantial question of law:

" Whether Tribunal was justified in holding that non issue of notice under section 143(2) would not vitiate assessment, made by Assessing Authority, since Assessee filed return under section 148 after expiry of the period prescribed in law. "

4. It is not a disputed fact that before making assessment in question, no notice under section 143(2) was issued to the appellant by Assessing Authority.

5. Brief facts necessary to understand the dispute in question and for effective adjudication of the issues raised in this appeal are stated as under.

6. Appellant filed return for Assessment Year 2003-2004 on 2.5.2005 showing an income of Rs.12,64,32,143/-.

7. Since return was filed after period prescribed for filing return under section 139 of Act 1961, Assessing Authority treated return as nonest and proceeded under section 148 by issuing notice under the said provision on 25.5.2007. However, before so proceeding, no notice under section 143(2) was issued to appellant.

8. Assessing Officer passed Assessment Order on 31.12.2008 whereagainst appellant preferred appeal under section 246-A of Act 1961 which was decided on 31.3.2011, where against Assessee and Revenue both preferred appeal before Tribunal, Assessee's appeal for Assessment Year 2003-2004 has been partly allowed but issue raised by appellant with regard to patent illegality in the entire assessment proceedings for want of notice under section 143(2) has been negated by Tribunal observing that absence of notice would not vitiate assessment since assessee filed return after expiry of the period prescribed. Tribunal following Patna Bench Tribunal's decision in ***Chand Bihari Agrawal versus ACIT in IT(SS)A No.05/PAT/2010*** held, return of income must be filed within the statutory time limit. If Assessee file return after expiry of time, the return would be treated as not filed in conformity with law and therefore, absence of notice under section 143(2) would be of no consequence. This is clear from paragraph-10 of impugned judgment of Tribunal, up for consideration before us.

9. Tribunal has further held that notice under section 148 was issued to appellant on 25.5.2007. Assessee did not file any return as per aforesaid notice and instead submitted reply that he has already filed return on 2.5.2005 and the same should be accepted as return filed in compliance to the notice under section 148. Thereafter, a notice under section 142(1) was issued on 14.11.2008. Another notice under section 142(1) was issued on 4.12.2008. Earlier notice dated 4.11.2008 remained un- complied but pursuant to notice dated 4.12.2008, Shri Rajesh Kanodia appeared before Assessing Authority on 11.12.2008. Neither, Assessee nor Revenue could give the date on which Assessee submitted reply to notice dated 25.5.2007 requesting Assessing Authority to treat return filed on 2.5.2005 as return in compliance to notice under section 148. In these circumstances, Tribunal treated the date of filing of said letter on 11.12.2008.

10. We find that the above view of Tribunal is erroneous. In ***Chand Bihari Agarwal (Supra)***, search and seizure operations were carried out by Department under section 132 of Act, 1961 at residential cum business premises of Assessee on 27.2.2003. A notice under 158BC of Act 1961 was issued on 9/10.12.2003 and served on Assessee on 10.12.2003 requiring him to file his block return within a month of service of said notice. No such block return was filed within the statutory period under section 158BC. Block return was filed on 22.11.2004 declaring undisclosed income. Assessing Officer completed assessment under section 158BC of Act 1961 on 24.2.2005 adding income whereagainst Assessee preferred appeal which was partly allowed. To the extent Assessee failed before Commissioner, he preferred further appeal before Tribunal. The questions formulated by Tribunal are:

"1. CIT(Appeal) has erred in rejecting contention of appellant that Assessment Order framed under section 158BC/158BB is wrong, illegal, without jurisdiction as well as void ab-initio for want of Notice u/s 143(2) which is a mandatory requirement under I.T Act, 1961 to be

served on appellant before passing order, if the A.O proceeds to assess undisclosed income. Reliance is placed on Hon'ble Supreme Court decision in case of ***Asstt.CIT & Anr.vs.Hotel Blue Moon reported in (2010) 229 CTR 219.***

2. For that, as a matter of fact and law Return u/s 158BC of Act 1961 was filed on 22.11.2004 and Assessment Order was passed on 24.02.2005. In between the period no Notice u/s 143(2) was issued and served upon appellant which was a mandatory requirement u/s 158BC(b) of I.T Act, 1961. Hon'ble S.C in the above case has held that omission on part of Assessing Authority to issue notice u/s 143(2) cannot be a mere procedural irregularity and the same is not curable. The matter has taken at rest."

11. Under section 158BC, in respect to search carried out on or after 1.1.1995, statutory time limit of filing block return was 45 days.

12. Tribunal in ***Chand Behari (Supra)*** read the judgment in ***ACIT & another versus Hotel Blue Moon (2010) 321 ITR 362 (SC)*** in the manner that notice under section 143 if not issued, it would not be fatal unless it is shown that block return was filed under section 158BC within statutory period prescribed therein.

13. In our view, this way of reading of judgment of Supreme Court in ***ACIT versus Hotel Blue Moon (Supra*)** by Tribunal is not correct. Therein, Court did not say, that a regular return under section 139 if not filed within time, Assessing Officer shall have jurisdiction to proceed to make assessment without issuing notice under section 143(2) of Act 1961. Once an assessment is filed within time or thereafter, it is always open to Assessing Officer to accept the same or to reject it for any valid reason. Assessment filed after expiry of time, can be rejected on the ground that it has been filed after expiry of statutory period, and is not acceptable but that itself would not give jurisdiction to Assessing Officer to proceed to make assessment either under section 143(3) or a block assessment under section 158BC unless a notice is issued under section 143(2). Court said that an omission on the part of Assessing Officer to issue notice under section 143(2) is not a mere procedural irregularity and improper. It is a jurisdictional error. In other words, notice under section 143(2) authorizes Assessing Officer to complete assessment under section 143(3) and same would apply in respect to block assessment also under section 158BC.

14. It is true that in ***Hotel Blue Moon(Supra),*** Court was considering applicability and effect of Section 143(2) in the context of Chapter XIV B of Act 1961 which includes Section 158BC but it has very categorically held that it is mandatory and omission on the part of Assessing Officer to issue notice under section 143(2) is incurable since it is not a mere procedural irregularity but a jurisdictional error.

15. Whatever may be the reason available to Assessing Officer to repudiates return filed by Assessee, but if it proceeds to make assessment, a notice under section 143(2) is mandatory. Some relevant observations from judgment in ***ACIT & another versus Hotel Blue Moon (Supra)*** may be reproduced as under:

"An analysis of this sub-section indicates that, after the return is filed, this clause enables the Assessing Officer to complete the assessment by following the procedure like issue of notice under section 143(2)/142 and complete the assessment under section 143(3). This section does not provide for accepting the return as provided under section 143(1)(a). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under section 144. Clause (b) of section 158BC by referring to section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, if an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, requirement of notice under section 143(2) cannot be dispensed with."

(emphasis added)

16. The view we have taken above, is fortified from some other authoritative pronouncements of this Court also. In ***Commissioner of Income Tax versus Rajeev Sharma (2011) 336 ITR 678 (Allahabad), Lucknow Bench***, this Court has held that provision contained in sub section (2) of Section 143 of Act 1961 is mandatory. It further says that Legislature in their wisdom by using the words, "reason to believe" had cast a duty on Assessing Officer to apply his mind to the material on record and after being satisfied with regard to escaped liability, shall serve notice specifying particulars of such claim.

17. In view of above, in absence of any notice issued under sub-section(2) of section 143, after receipt of fresh return, submitted by Assessee in response to notice under section 148, the entire procedure adopted for escaped assessment, shall not be valid.

18. In ***CIT versus Rajeev Sharma (Supra),*** Court also held that even if an assessment is treated to have been filed under section 148, in response to a notice issued there under, Assessing Officer shall not proceed to make assessment without giving notice under section 143(2) and this is evident from the observations made in Paragraph 30, 32 and 45 of judgment.

" 30. Notice under Section 148 of the Act for assessment year 1994-1995 was issued on 29.3.2001 whereas for the assessment year 1995-96, it was issued on 26.12.2000. In response to the notice, the assessee sent letter dated 7.5.2001 to drop the proceeding. Therefore, vide letter dated 18.12.2001, the Deputy Commissioner informed that proceeding may not be dropped and given last opportunity to file return. Along with letter dated 18.12.2001, notices under Section 143 (2) and 142 (1) were also sent. In consequence thereof, the assessee filed return on 7.2.2002 for

both the assessment years. After filing of return, the Assessing Officer should have applied mind and after considering the material on record on "reason to believe", notice under Section 143 (2) of the Act should have been issued afresh.

32. Since return was filed on 7.2.2002, in response to notice under Section 148 of the Act, earlier notice dated 29.03.2001 may not be treated as valid for the purpose of escaped assessment. The Legislature to their wisdom had categorically provided that after receipt of notice under Section 148 of the Act a fresh return may be filed and in consequence thereof, the Assessing Officer has to apply his mind to the contents of fresh return and then issue a notice under Section 143 (2) of the Act. The satisfaction under reason to believe, must be recorded by the Assessing Officer after applying mind to the contents of fresh return before issuing a notice under Section 143 (2) of the Act.

It is a settled law that taxing statute should be construed strictly without subtraction or addition of words, in the statutory provisions. Accordingly, the provisions contained in Section 148 of the Act with regard to escaped assessment, must be construed strictly with regard to procedure prescribed for escaped assessment.

45.In view of the above, the provision contained in Section 143 (2) of the Act is mandatory in nature and it shall be obligatory for the Assessing Officer to apply mind to the contents of the return filed in response to notice under Section 148 of the Act and record reasons and thereafter, issue notice under Section 143 (2) of the Act before proceeding to decide the controversy with regard to escaped assessment."

(emphasis added)

20. This decision in ***CIT versus Rajiv Sharma(Supra)*** has been followed in ITA No.69 of 2006 Hindalco Industries Ltd. Versus Commissioner of Income Tax, Lucknow decided on 25.7.2011 wherein Court has also relied on the decisions of Delhi Court in ***Director of Income-tax versus Society for Worldwide Interbank Financial Telecommunication (2010) 40 DTR (Del) 17*** and Bombay High Court in ***Allana Cold Storage Ltd.versus Income-tax Officer and other (2006) 287 ITR (Bom.)***

21. Therefore, question that return filed was within or beyond time prescribed under section 139 or has been filed after notice issued under section 148 or filed earlier after expiry of period under section 139 is not relevant to determine the question whether Assessing Officer can proceed to make assessment under section 143(3) without issuing notice under section 143(2). The provision being mandatory, Assessing Officer cannot proceed to make assessment without issuing notice under section 143(2) of Act, 1961.

22. In view of above, question formulated above is answered in favour of ***appellant*** and against Revenue.

23. Appeal is ***allowed***. Impugned order dated 24.7.2014 passed by Tribunal as also assessment order in respect to Assessment Year 2003-2004 are hereby quashed.

23. This judgment shall not preclude Assessing Authority from proceeding further in accordance with law with regard to assesssment of Assessee under section 143(3)/148 for Assessment Year 2003-2004, after giving notice under **section 143(2) of Act, 1961.**

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE KAUSHAL JAYENDRA THAKER, J.

Income Tax Appeal No.- 12 Of 2015
&
Income Tax Appeal No.- 13 Of 2015

U.P. State Industrial Development Corporation Ltd ...Appellant
Versus
Commissioner of Income Tax, Kanpur ...Respondent

Counsel for Appellant:
Sri S.K. Garg, Sri Ashish Bansal

Counsel for Respondent:
C.S.C. It

Income Tax -- Section 36(1)(v) and Section 37 of Income Tax Act, 1961 -- Group Gratuity Insurance Scheme -- Payment to LIC -- Deduction -- Approved Gratuity Fund -- Section 12AA(2) -- Deemed Approval by Efflux of Time -- Assessment Years 2005-06 and 2006-07 -- Assessee (UPSIDC) paid premiums to Life Insurance Corporation of India under a Group Gratuity Insurance Scheme for the benefit of its employees -- Assessing Officer disallowed deduction of Rs. 39,57,629/- (A.Y. 2005-06) and Rs. 46,16,743/- (A.Y. 2006-07) on the ground that the Group Gratuity Scheme was not approved by the Commissioner of Income Tax -- CIT (Appeals) upheld the disallowance and also enhanced the assessed income -- Income Tax Appellate Tribunal, Lucknow Bench partly allowed Assessee's appeal for A.Y. 2005-06 but dismissed for A.Y. 2006-07 -- on appeal under Section 260-A, substantial questions of law include: whether ITAT was justified in disallowing deduction of actual payment made to LIC on the ground that the scheme was not specifically approved by CIT though carried under general approval of the Central Government; and whether the payment was liable to be treated as payment made to an approved fund by reason of efflux of time -- Held: the Tribunal and authorities below committed manifest error in treating the fund as non-approved -- Assessee submitted an application for registration on 16.6.2011 -- no order was passed by the Commissioner within six months from the end of the month of receipt of the said application -- Section 12AA(2) of the Act automatically comes into operation and by operation of legal fiction, approval is deemed to have been granted -- the Assessee was entitled to claim deduction under Section 36(1)(v) on the

basis of deemed approval -- the subsequent order of rejection dated 25.6.2012 passed after more than one year from the date of application is of no legal consequence in view of deemed approval. (Paras 5-11)

Income Tax -- Section 37 of Income Tax Act, 1961 -- Actual Payment to LIC -- Section 40A(7) -- Gratuity -- Payment Not in Nature of Provision -- Deductibility of Actual Business Expenditure -- Held: it is admitted by the Revenue that the amount claimed to be paid by the Assessee under the Group Gratuity Insurance Scheme is the actual payment made to LIC and not a provision made by the Assessee for payment of gratuity -- Section 40A(7) which bars deduction of 'provision' for gratuity is not applicable to actual payments -- once the amount towards gratuity payable to employees has gone out of the hands of the Assessee having been deposited with LIC, it is a case where expenses have actually been incurred by the Assessee for the benefit of its employees which is connected with the purposes of business or profession -- if for any technical reason the deposit did not qualify for deduction under Section 36(1)(v), the actual expenditure incurred by the Assessee not in the nature of capital expenditure or personal expenses should have been allowed as business expenditure under Section 37 of the Act. (Paras 6-9)

Income Tax -- Section 80-IA of Income Tax Act, 1961 -- 5% Premium Collected on Industrial Sites -- Forfeiture of Earnest Money -- Deduction Under Section 80-IA -- Taxability of Premium -- Held: the addition of 5% of premium received on allotment of industrial sites to entrepreneurs is without basis -- the premium received is nothing but charges for allotment of developed industrial land and has no concept of profit or loss in terms of the nature of development activity undertaken by UPSIDC -- the assumption of 5% income on such premium is without any rationale -- there is no justification for presuming income of 5% on the total premium received -- since the nature of functioning of the Assessee as a public body for development of industries in the State has not been examined, such addition is not justified in law. (Paras 12-14)

Income Tax -- Section 80-IA -- Interest on Delayed Installments of Premium -- Eligible Business Income -- Nexus With Eligible Business Activity -- Held: the Tribunal completely erred in law with regard to interest received by the Assessee on delayed payment of installments of premium/lease rent -- CIT(Appeals) had recorded a finding of fact in para 10.3.5 that the interest earned by the Assessee on installments granted in respect of premium payable and other receipts may have some link with the business of the Assessee -- despite recording this finding the Tribunal without reversing it dismissed the Assessee's appeal -- such interest income is eligible for deduction under Section 80-IA as it has a direct nexus with the eligible business activity of the Assessee -- to hold that deduction under Section 80-IA is not admissible without reversing the CIT(Appeals) finding is per se contradictory and not in accordance with law. (Paras 13-15)

Both Income Tax Appeals Partly Allowed -- Matter Remanded to ITAT -- Impugned judgment and order dated 24.7.2014 passed by the Income Tax Appellate Tribunal, Lucknow Bench 'A' Lucknow in ITA No.384/LKW/2011 and ITA No. 540/LKW/2011 set aside -- Income Tax Appeal Nos. 12 and 13 of 2015 partly allowed -- matter remanded back to the Tribunal with directions to pass a fresh order on the aforesaid aspects in the light of the law discussed -- on the question of deduction under Section 36(1)(v), 5% premium addition and Section 80-IA deduction on interest income. (Para 16)

Case Law Discussed:
1. Society for the Promotion of Education Adventure Sport & Conservation of Environment v. Commissioner of Income Tax & others, (2008) 216 CTR (Alld.) 167

(Delivered by Hon'ble Sudhir Agarwal, J.
&

Hon'ble Kaushal Jayendra Thaker, J.)

1. These two appeals have been filed under Section 260A of Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961)' arising from judgment and order dated 24.7.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench 'A' Lucknow (hereinafter referred to as the "Tribunal") in Income Tax Appeal No.384/LKW/2011 and Income Tax Appeal No. 540/LKW/2011 with respect of Assessment Year 2006-07 and Assessment Year 2005-06 respectively.

2. Substantial questions of law arising in both the appeals in our view are as under :-

"(i) Whether the Tribunal is justified in disallowing deduction ***of actual payment made to Life Insurance Corporation of India under Group Gratuity Insurance Scheme****, on the ground that such scheme was not specifically approved by concerned Commissioner of Income Tax though carried under general approval of Central Government.*

(ii) Whether the ***payment made to LIC by way of premium on Insurance Policy under Group Gratuity Insurance Scheme*** *was liable to be treated as payment made to a fund which is deemed to have been approved by the CIT by the reason of efflux of time.*

(iii) Whether at an any rate actual payment made to the retiring employees, through the mechanism of Insurance Policy issued under Group Gratuity Insurance Scheme launched by Life Insurance Corporation of India should have been considered and allowed as deduction under Section 37 read with Section 43B of the Act ?"

(iv) Whether addition of amount being 5% of premium collected by Assessee and forfeiture of earnest money/ premium is vitiated due to non-consideration of principle governing accrual of income and other material / information placed on record.

(v) Whether the Tribunal was legally justified in upholding taxbility of 5% premium collected by Assessee in its hand without considering obligation / liabilities of overriding nature, attached to the receipts in question.

(vi) Whether the Tribunal was justified after holding premium as taxable and then not directing Assessing Officer to allow deduction under Section 80IA of Act, 1961 being the same as part of eligible profits.

(vii) Whether ITAT was legally correct in holding that interest on premium payable by the allottees of industrial sites as financed by the appellant as an accredited financial corporation did not form part of the income qualifying for exemption under Section 80IA of the Act?

3. Assessing Officer made addition / disallowance in respect of Assessment Years 2005-06 and 2006-07 as under:-

Assessment Year 2005-06 :-

Sl No.	Particulars	Amount (Rs.)	Reasons, in brief, for disallowance / additions
(A)	Payment made to LIC on a policy taken for the Group Gratuity Scheme	39,57,629/-	On the ground that the Group Gratuity Scheme was not approved by the Commissioner of Income Tax.
(B)	5% of Premium received during the year in relation to industrial sites allotted to entrepreneurs	5,16,27,653/-	The sum in question was represented income from purchase and sale of land and the Revenue's stand in this respect stood upheld both at the level of CIT (A) and ITAT
(C)	Short dis-allowance of deduction under Section 80 IA	1,54,09,286/-	On the ground that the profit declared by the appellant included receipts aggregating Rs.1,54,09,286/- which did not have direct nexus with the running and management of technical parks.

Assessment Year -2006-07 :-

Sl No.	Particulars	Amount (Rs.)	Reasons, in brief, for disallowance / additions
(A)	Payment made to LIC on a policy taken for the Group Gratuity Scheme	46,16,743/-	On the ground that the Group Gratuity Scheme was not approved by the Commissioner of Income Tax.
(B)	5% of Premium received during the year in relation to	5,12,92,142/-	The sum in question was represented income from purchase and sale of land and the Revenue's stand in this respect

	industrial sites allotted to entrepreneurs		stood upheld both at the level of CIT (A) and ITAT
(C)	Short dis-allowance of deduction under Section 80 IA	4,04,63,639/-	On the ground that the profit declared by the appellant included receipts aggregating Rs. 4,04,63,639/- which did not have direct nexus with the running and management of technical parks.

4. Assessee preferred an appeal where Commissioner of Income Tax (Appeals) (hereinafter referred to as "CIT (Appeals)') not only upheld dis-allowance but enhanced assessed income by taking a view that eligible profit for the purposes of computation of relief under Section 80IA deserved to be reduced by the amount of interest received on unpaid installments of premium from income disclosed by the Tronica City Industrial Model Town Loni, Ghaziabad and Greater Noida Export Promotion Industrial Park etc. with regard to Assessment Year 2006-07. Assessee and Revenue both filed appeals i.e. I.T.A. No. 384 of 2011 by Assessee and I.T.A. No. 398 of 2011 by Revenue. Similarly for Assessment Year 2005-06, Revenue filed I.T.A. No.560 of 2011 and Assessee filed I.T.A. No. 540 of 2011. Revenue's appeals for Assessment Years 2005-06 and 2006-07 have been dismissed while Assessee's appeals for Assessment Year 2005-06 is partly allowed but that of Assessment Year 2006-07 is dismissed.

5. With regard to dis-allowance of payment of Life Insurance Corporation of India (hereinafter referred to as 'LIC') under Group Gratuity Insurance Scheme the only reason followed by authorities below is that scheme was not approved by Commissioner of Income Tax (hereinafter refereed to as "CIT') and since it was covered by Section 36(1)(v), hence Section 37(1) cannot be applied. It has also been held that amount was paid directly to LIC and not to approved fund, therefore, deduction was not allowable.

6. It is argued that premium claimed as deduction was an actual payment and not provisional, therefore, Section 40A(7) was not applicable. Section 40A talks of expenses of payment not deductible and sub-section (1) declares that provisions of Section 40A shall have effect notwithstanding anything contrary contained in any other provision of Act, 1961 relating to computation of income under the head "profits and gains of business or profession". Sub-section (7) as available during the course of concerned relevant years reads as under : -

"(7) (a) Subject to the provisions of clause (b), no deduction shall be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason.

(b) Nothing in clause (a) shall apply in relation to any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year.

Explanation.-For the removal of doubts, it is hereby declared that where any provision made by the assessee for the payment of gratuity to his employees on their retirement or termination of their employment for any reason has been allowed as a deduction in computing the income of the assessee for any assessment year, any sum paid out of such provision by way of contribution towards an approved gratuity fund or by way of gratuity to any employee shall not be allowed as a deduction in computing the income of the assessee of the previous year in which the sum is so paid."

7. It is admitted by learned counsel appearing for Revenue that the amount claimed to be paid by Assessee under Group Gratuity Insurance Scheme is the actual payment made to LIC and not something which can be said to be a provision made by Assessee for payment of gratuity. Deduction towards gratuity fund is permitted under Section 36(1)(v) which reads as under : -

"any sum paid by the assessee as an employer by way of contribution towards ***an approved gratuity fund created by him for the exclusive benefit of his employees*** *under an irrevocable trust; "*

8. The term "approved gratuity" fund is defined in Section 2(v) as under :

"approved gratuity fund" means a gratuity fund which has been and continues to be approved by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in accordance with the rules contained in Part C of the Fourth Schedule;"

9. It is not in dispute that no gratuity fund constituted by Assessee has not been approved by Commissioner or Principal Commissioner till date but it is also proved that amount towards gratuity payable to employee has gone out of hands of Assessee having been deposited with LIC and, therefore, it is a case where expenses have actually been incurred by Assessee for benefit of its employees which is connected with the purposes of business or profession being carried by Assessee. If the terminology by itself is not relevant and if Revenue thinks that deposit made with LIC, on account of lack of approval by CIT, did not qualify for deduction under Section 36(v), even then expenditure incurred by Assessee, not in the nature of capital expenditure or personal expenses should have been allowed under Section 37. Moreover, review application with regard to the matter of approval was admittedly pending with Commissioner and if that be so Tribunal ought to have asked Commissioner to decide the same and thereafter this issue should have been decided, for the reason that in case review is allowed, approval shall relates back, in that event, technical reason for not attracting Section 36(v) would disappear.

10. However, from record we also find that Tribunal and other authorities have committed manifest error in treating the fund as non approved on the basis of order dated 25.6.2012 passed by Commissioner and disregarding specific requirement of law under Section 12AA(2) of Act, 1961. A perusal of order dated 25.6.2012 shows that application was submitted by Assessee for registration on 16.6.2011. No order was passed by Commissioner during six months from the end of month of receipt of said application. Section 12AA thus automatically comes into operation and therefore by operation of legal fiction, approval is deemed to have been granted. The view we have taken is fortified by judgment **in Society For the Promotion of Education Adventure Sport & Conservation of Environment Vs. Commissioner of Income Tax & others, (2008) 216 CTR(Alld) 167.** Therein also an application was submitted by Assessee on 24.6.2003 but no order was passed before expiry of six months from the end of month, in which, application was received. In the present case order has been passed after more than one year from the date, application was received. This Court held that non-consideration of registration application within time fixed by Section 12AA would result in deemed registration. In paras 17 and 18 the courts said as under :-

"17. Considering the pros and cons of the two view, we are of the opinion that by far the better interpretation would be to hold that the effect of non consideration of the application for registration within the time fixed by section 12AA(2) would be a deemed grant of registration. We do not find any good reason to make the assessee suffer merely because the IT Department is not able to keep it officers under check and control, so as to take timely decisions in such simple matters such as consideration of applications for registration even within the large six month period provided by s. 12AA(2) of the Act.

18. We accordingly direct the respondents, subject to any order which may be passed under s. 12AA(3), to treat the petitioner society as an institution duly approved and registered under s. 12AA and to recomputed its income by applying the provision of s. 11 of the Act. Accordingly, a formal certificate of approval will be issued forthwith to the petitioner by the respondent Nos. 2.

The writ petition is allowed to the above extent"

11. In this view of the matter, gratuity fund of Assessee stood deemed to have been registered and that being so subsequent order passed by CIT(Appeals) had no consequence or illegal effect. Hence, Assessee was entitled to claim deduction under Section 36(v). The view taken otherwise in impugned orders, therefore, is illegal, and contrary to law and observing to be set aside.

12. Coming to the question of 5% income in term of premium received during concerned assessment years and deduction under Section 80IA and applicability of provision. It is said that there is no justification for presuming income of 5% as total premium received by Assessee, for the reason that premium received is nothing but allotment of land to entrepreneur and facility of returning expenses incurred by Assessee for development of such industrial land and there is no

concept of profit or loss in such determination. Amount paid by allottees represents lease rent etc. and hence assumption of 5% income on such premium is without any basis.

13. Similarly for interest received by Assessee on delayed payment of installment of premium or lease rent etc, Tribunal has held that it is not income of eligible business for the purpose of computation of deduction under Section 80IA. We find that Tribunal has completely erred in law inasmuch as a finding of fact was recorded by CIT in para 10.3.5 that interest earned by Assessee on installments granted in respect of premium payable, and other income etc. receipts may have some link with the business of appellant and having said so, still it has reversed order of Assessing Authority to the extent, it has allowed deduction under Section 80IA on such 'interest' and Tribunal has erred in law in failing to appreciate this finding of Commissioner of Income Tax (Appeals) and without reversing the same, has dismissed Assessee's appeal.

14. In view thereof the questions formulated above are answered by observing that Assessee was entitled for deduction towards payment of group gratuity insurance paid to LIC by treating fund as any approved fund. 5% of premium collected by Assessee and forfeiture of earnest money/premium has been added illegally based on conjuncture and surmises. Since the nature of functioning of Assessee has not been examined looking to the public nature of its functioning for development of industries in the State, such addition, therefore, is not justified in law.

15. With regard to applicability of Section 80IA, without reversing findings of CIT(Appeals), that such interest received may have some link with the business of appellant and once that is so, to hold that deduction under Section 80IA is not admissible is per se contradictory and hence is not correct and in accordance with Law.

16. On the aforesaid aspects, impugned judgment of Tribunal dated 24.7.2014 is hereby set aside and the matter is remanded back. Appeal is partly allowed. Tribunal shall pass a fresh order on the aforesaid aspects in the light of law, discussed above.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE MANOJ MISRA, J.

Civil Revision No.- 14 Of 2015

Sam Higginbottom Institute of Agriculture Technology & Sciences ...Revisionist
Versus
M/S Acurite Contractors & Engineers ...Opposite Parties

Counsel for Revisionist:
Sri Amit Negi, Sri Ravi Kant (Sr. Counsel), Sri J. Nagar (Sr. Counsel), Sri Tarun Agrawal

Counsel for Opposite Parties:
Sri Rajesh Kumar Singh

Civil Procedure -- Order XXXVII Rule 3(6)(b) C.P.C. -- Summary Suit -- Conditional Leave to Defend -- Non-Compliance of Condition -- Right to Cross-Examine -- Defendant in a summary suit filed under Order XXXVII C.P.C. was granted conditional leave to defend on deposit of 50% of claimed amount and furnishing security for balance -- condition not fulfilled even within extended time granted by the Supreme Court -- defendant moved application seeking permission to cross-examine plaintiff's witness and address the court on legal points which was rejected by the trial court -- Held: in a summary suit under Order XXXVII C.P.C. where leave to defend is refused or is not applied for, or where the condition imposed for leave to defend is not fulfilled, the plaintiff becomes entitled to judgment forthwith under sub-rule (6) of Rule 3 of Order XXXVII -- consequently, the defendant has no right to cross-examine the plaintiff's witness in such a situation -- the words 'entitled to judgment forthwith' in sub-rule (6) of Rule 3 of Order XXXVII are not to be equated with 'entitled to a decree' in sub-rule (3) of Rule 2 -- the non-use of the word 'decree' does not dilute the entitlement of the plaintiff to obtain a decree in the given situation. (Paras 21-26)

Civil Procedure -- Order XXXVII C.P.C. -- Summary Suit -- Defendant's Right to Address Court on Legal Points -- Held: even where the defendant in a summary suit has no right to cross-examine the plaintiff's witness on non-fulfillment of condition of leave to defend, the defendant retains the right to address the court on legal points -- the court, while pronouncing judgment forthwith, is not absolved from its obligation to examine whether the plaint makes out a case entitling the plaintiff to a decree -- the court must be satisfied that the facts set out in the plaint, taken at their face value, justify the decree being granted -- consequently, the order of the court below rejecting the defendant's application in toto including the prayer to address the court on legal points was modified -- court directed to hear the defendant on legal points before pronouncing judgment. (Paras 27-31)

Civil Procedure -- Order XXXVII Rule 3(6) C.P.C. vs. Order XXXVII Rule 2(3) C.P.C. -- Distinction -- Held: sub-rule (3) of Rule 2 of Order XXXVII contemplates a situation where the defendant fails to enter an appearance despite service of summons and the allegations in the plaint shall be deemed admitted -- sub-rule (6) of Rule 3 of Order XXXVII operates at a later stage where the defendant has already entered appearance and has been served summons for judgment but has either failed to apply for leave, or whose leave has been refused or whose condition for leave has not been fulfilled -- in the latter situation there is no deemed admission and plaintiff is not entitled to a 'decree' as prayed for but only to 'judgment forthwith' which judgment must still be sustainable on the evidence brought on record -- the two provisions operate at different stages and on different facts. (Paras 23-24)

Civil Procedure -- Word 'Forthwith' -- Interpretation -- Summary Suit -- Held: the word 'forthwith' in Order XXXVII Rule 3(6)(b) C.P.C. does not mean 'immediately' or 'instantly' on the same day -- it should be understood as enabling and mandating the court to complete the proceeding with reasonable promptitude -- the court has discretion to fix a date to complete the proceeding in accordance with law -- it does not give license to the plaintiff to straightaway obtain a decree on the plaint allegations without leading evidence to prove the claim. (Paras 28-30)

Civil Revision Partly Allowed -- Impugned order dated 10.11.2014 passed by Civil Judge (Sr. Div.), Allahabad rejecting the defendant's application No. 51 Ga for cross-examination and addressing court on legal points upheld to the extent of disallowing cross-examination of plaintiff's witness -- however, defendant's right to address the court on legal points preserved -- court below directed to hear defendant on legal points before pronouncing judgment -- revision partly allowed. (Paras 31-32)

Case Law Discussed:

1. Mannu and another v. Tulsi, 1922 (20) All LJ 39
2. Sangram Singh v. Election Tribunal, AIR 1955 SC 425
3. Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993
4. M/s. Paradise Industrial Corporation v. M/s. Kiln Plastic Products, 1976 (1) SCC 91
5. Modula India v. Kamakshya Singh Deo, (1988) 4 SCC 619
6. Balraj Taneja and another v. Sunil Madan and another, (1999) 8 SCC 396
7. Abdul Wadood v. 14th Additional District Judge, Kanpur Nagar and others, 2002 (2) ARC 296
8. Bidya Deb Barma v. District Magistrate, Tripura, AIR 1969 SC 323

(Delivered by Hon'ble Manoj Misra, J.)

1. This is defendant's revision against an order dated 10.11.2014 passed by Civil Judge (Sr. Div.), Room No.14, Allahabad in Suit No. 1014 of 2012 (hereinafter referred to as the suit) by which application no. 51 Ga moved by the defendant-revisionist, under Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code), to allow the defendant to cross-examine the plaintiff's witness and argue the matter on legal points, has been rejected by the court below. The court below rejected the said application on the ground that the suit was a summary suit wherein the leave to defend was granted on a condition which the defendant failed to fulfill therefore the defendant was entitled to judgment forthwith, under Order XXXVII Rule 3 (6)(b) of the Code, and as such the defendant had no right to cross-examine the plaintiff's witnesses or to address the Court in defense.

2. The question that arise for adjudication in this case is that, whether in a summary suit, under Order XXXVII of the Code, where the defendant has been granted leave to defend on a condition and that condition has not been fulfilled, would the defendant still have a right to cross examine the plaintiff's witness or not.

3. Briefly stated the facts of the case are that the plaintiff-respondent was awarded construction works by the defendant/University. In respect of payment for the said works, according to the plaintiff, a Memorandum of Understanding dated 19.12.2006 was entered into between the plaintiff and the defendant wherein both parties agreed that the total value of the work executed by the plaintiff was of Rs.26,32,72,391/- and it was agreed that after deducting the payment already made to the plaintiff, the balance would be paid by the defendant to the plaintiff in three installments. The suit, under Order XXXVII of the Code, was instituted against the defendant-revisionist, claiming that after deducting the amount already paid by the defendant-University, as per Memorandum of Understanding dated 19.12.2006, the plaintiff was entitled to receive a sum of Rs. 4,69,00,751/- besides interest at the rate of 12% per annum with effect from 29.08.2009. In the suit, the defendant-revisionist entered an appearance and upon service of the summons for judgment, applied for leave to defend. The trial court, by its order dated 25.07.2013, granted unconditional leave to defend subject to filing of written statement by 29.08.2013. Pursuant to the order of the trial court, a written statement was filed. However, against the order dated 25.07.2013, the plaintiff filed Civil Revision No. 380 of 2013 before this Court. The said revision was partly allowed by order dated 23.09.2014 thereby making the leave to defend conditional on: (a) deposit of 50% of the total amount, as claimed by the plaintiff in the suit, in cash; and (b)

furnishing adequate security for the remaining half to the satisfaction of the court below, within six weeks from the date of the order passed by the revisional court. Against the order of this Court dated 23.09.2014, the defendant filed a Special Leave Petition before the Apex Court. The Special Leave Petition was dismissed by order dated 15.12.2014. However, the time for deposit of 50% of the total amount by cash as well for furnishing security of the remaining half was extended by another two weeks from the date of the order passed by the Apex Court. In the meantime, during the pendency of Special Leave Petition before the Apex Court, on 10.11.2014, vide application no. 51 Ga, the defendant sought cross-examination of the plaintiff's witness as also liberty to address the court on legal points, which was rejected by the impugned order by placing reliance on clause (b) of sub rule (6) of Rule 3 of Order XXXVII of the Code. It is not in dispute that even within the extended time granted by the Apex Court the condition imposed by this Court for granting leave to defend was not fulfilled by the defendant.

4. I have heard Sri Ravi Kant and Sri J. Nagar, learned Senior Counsels, assisted by Sri Amit Negi, for the revisionist; and Sri Rajesh Kumar Singh for the plaintiff-respondent.

5. Assailing the impugned order, on behalf of the defendant-revisionist it was submitted that the Court below has wrongly interpreted the provisions of Order XXXVII Rule 6 (b) of the Code by considering it to be at par with Order XXXVII Rule 2 (3). It was submitted that the deeming provision of Order XXXVII Rule 2 (3) of the Code, which provides that on failure of the defendant to enter an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree, would come into play only when the defendant fails to enter an appearance. But where the defendant had entered appearance, there would be no deemed admission and therefore the plaintiff would have to prove his case by ordinary mode and in such a case the evidence led on behalf of the plaintiff would have to be tested by cross examination because otherwise the provision would be violative of the principles of natural justice and as such ultra vires the Constitution of India. It was submitted that there is a marked difference in the language of sub rule (3) of Rule 2 with that of sub rule (6) of Rule 3, inasmuch as in sub rule (3) of Rule 2 it is provided that if the defendant fails to enter appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree whereas in sub rule (6) of Rule 3 the words used are that the plaintiff shall be entitled to judgment forthwith. Meaning thereby that where the defendant had entered appearance, even if the leave to defend is refused or where the condition imposed by the Court for leave to defend is not fulfilled, the plaintiff's case is not deemed admitted and therefore the plaintiff is not entitled to a decree, as prayed for, but is entitled to a judgment which has to be sustainable on the evidence brought on record and no evidence can be relied unless it is allowed to be tested by cross examination. It was submitted that Rule 7 of Order XXXVII specifically provide that the procedure in summary suits shall be same as the procedure in suits instituted in ordinary mode save to the extent provided by Order XXXVII of the Code which implies that the plaintiff would have to prove his case as in an ordinary suit and the consequence of refusal of leave would be nothing more than that that the suit would proceed without a defense as in a case where the suit proceeds ex parte or where the defense has been struck off. It was submitted that even where the suit proceeds ex parte against a defendant or where no written statement is filed or where the defense has been struck off, under the provisions of the Code, the consistent view of

this Court as well as the Apex Court had been that the plaintiff would still have to prove his case and the defendant would have a right to cross-examine the plaintiff's witness(es). In support of the above plea reliance was placed on the following decisions:- ***(i) 1922 (20) All LJ 39 : Mannu and another v. Tulsi; (ii) AIR 1955 SC 425 : Sangram Singh v. Election Tribunal; (iii) AIR 1964 SC 993 : Arjun Singh v. Mohindra Kumar and others; (v) AIR 1972 Patna 81 : Siai Sinha v. Shivadhari Sinha and others; (vi) AIR 1982 Jammu and Kashmir 93 : Chuni Lal Chowdhary v. Bank of Baroda and others; (vii) 1976 (1) SCC 91 : M/s. Paradise Industrial Corporation v. M/s. Kiln Plastic Products; (viii) (1988) 4 SCC 619 : Modula India v. Kamakshya Singh Deo;*** *and* ***(ix) 2002 (2) ARC 296 : Abdul Wadood v. 14th Additional District Judge, Kanpur Nagar and others***.

6. In addition to above, on behalf of the revisionist, it was submitted that the use of the word forthwith in sub rule (6) of Rule 3 of Order XXXVII of the Code would not mean that the Court in all situations has to decide the suit immediately, once the leave to defend is refused or the condition imposed for securing leave is not fulfilled. It was submitted that the word forthwith is not to be interpreted as "immediately" or "instantly". It should be understood as enabling as well as mandating the Court to complete the proceeding with reasonable promptitude. It was argued that where the Code enables a Court to pronounce judgment forthwith it would not mean that the judgment is to be on the same day. The Court always has discretion to fix a date to complete the proceeding in accordance with law. More so, it would not give license to the plaintiff not to substantiate his case and straight away obtain a decree on the plaint allegations. In support of the aforesaid submission, reliance was placed on the following decisions:- **(i) AIR 1969 SC 323 : Bidya Deb Barma v. District Magistrate, Tripura; (ii) 1993 Supp (3) SCC 754 : Naval Shanker Ishwarlal Dave and another v. State of Gujarat and others; (iii) 1995 Supp (4) SCC 275 : Rao Mahmood Ahmad Khan v. Ranbir Singh and others; (iv) AIR 1966 Ald 615 : Tripathi Sansnath v. Tripathi Bhagwat Nath and others; (v) AIR 1986 Ald 94 : Kuri lal Rungta v. Smt. Banarsi Das and others. Relying on decision of the apex court in the case of Balraj Taneja and Another v. Sunil Madan and another: (1999) 8 SCC 396**, it was submitted that even where the defendant has not filed a pleading though it is lawful for the Court to pronounce judgment on the basis of facts contained in the plaint, as under Order VIII, Rule 5(2) and Order VIII, Rule 10 of the Code, but the Court ought to be cautious and only on being satisfied that there is no fact which needs to be proved should pass a judgment and where the plaint itself indicates disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, the court must not pass judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy.

7. Per contra, the learned counsel for the plaintiff-respondent, defending the impugned order, submitted that Order XXXVII is applicable only to certain classes of suit. The primary object underlying summary procedure is to prevent unreasonable obstruction by the defendant who has no defense thereby assisting and securing speedy and expeditious disposal of cases. Summary procedure provided by the Code is aimed at providing certainty, security and continuity in business transactions and is a step in ensuring early disposal of commercial cases. Therefore the provisions of Order XXXVII are to be interpreted in such a manner which serves the object for which it exists in the Code. It has been submitted that for certain classes of suits Order XXXVII is a complete

code in itself. It not only lays down the manner in which a summary suit is to be instituted but also prescribes a format in which summons of the suit are to be issued to the defendant and further provides that the plaintiff shall, together with the summons, serve on the defendant a copy of the plaint and annexures thereto. It not only fixes a time by which the defendant has to enter an appearance upon service of summons but also provides for the consequences of non appearance. Once the defendant enters appearance, the plaintiff is required to serve summons for judgment on the defendant in the prescribed format duly supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defense to the suit whereupon the defendant is required to apply for leave to defend by disclosing such facts as may be deemed sufficient, either on affidavit or otherwise, to entitle him to defend. Thereafter, the Court has to apply its mind to the prayer seeking leave to defend and to pass appropriate order which may be: (a) unconditional leave to defend; or (b) conditional leave to defend; or (c) refusal of leave to defend. Provided that leave to defend is not to be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put up by the defendant is frivolous or vexatious. It was submitted that the object of granting conditional leave to defend is to wipe out frivolous and baseless pleas so that the object to provide summary procedure is not frustrated. It was submitted that the difference in the procedure of an ordinary suit and a summary suit is that in the former the defendant requires no leave of the Court to defend the suit and he is entitled to defend it as of right whereas in the latter the defendant is required to apply for leave to defend within ten days of service of the summons for judgment. It was submitted that in a summary suit the defendant has no right to defend unless leave is granted to him by the Court to defend. Therefore, where the defendant fails to obtain leave to defend or where the leave to defend has been granted conditionally and the defendant fails to fulfill the condition, the decree is almost automatic because it would be deemed that the defendant has no defense to offer. It was submitted that the authorities relied upon by the defendant-revisionist are in the context of an ordinary suit and would have no application to suits instituted under Order XXXVII. It was submitted that the use of words "entitled to judgment forthwith" as they occur in sub-rule (6) of Rule 3 of Order XXXVII are to be interpreted in the context of sub-rules (4) and (5) of Rule 3 of Order XXXVII which provides that when the defendant enters an appearance, the plaintiff would serve on the defendant a summons for judgment in Form No. 4A, supported by an affidavit verifying the cause of action and the amount claimed with a statement that in his belief there is no defense to the suit. It was submitted that summons for judgment in a summary suit is to be in Form No. 4 A, which puts the defendant on notice to attend the Court on a particular date on the hearing of an application of the plaintiff to obtain judgment in the suit against him for a specified sum of money and for interest and cost. Meaning thereby that where leave to defend, upon service of summons for judgment is refused or leave granted is conditional and the condition has not been fulfilled, then the plaintiff is entitled to judgment forthwith as contemplated in the summons for judgment served on the defendant. It was submitted that the words "judgment forthwith" is therefore to be understood in that context and they should not be interpreted so as to mean that the plaintiff's case has to be considered and determined as in an ordinary suit proceeding ex parte. It has been submitted on behalf of the plaintiff that since a special procedure has been provided by the Code for deciding a summary suit where the defendant either fails to enter appearance or fails to obtain leave to defend or fails to fulfill the condition, in a case where the

leave to defend has been granted conditionally, the general provisions of the Code of Civil Procedure which are, otherwise, applicable would be deemed excluded notwithstanding Rule 7 of Order XXXVII of the Code. It was submitted that since admittedly the leave to defend was granted conditionally and the condition was not fulfilled, the plaintiff was entitled to judgment forthwith as contemplated in the summons for judgment and the application of the defendant to cross-examine the plaintiff's witness is nothing but misconceived inasmuch as the defendant would be deemed to have admitted plaintiff's case.

8. I have given thoughtful consideration to the submissions of the learned counsel for the parties and perused the record.

9. Before proceeding to consider the rival submissions, it would be apposite to refer to the object which the provisions of Order XXXVII seek to achieve. The principle object for providing summary procedure in certain classes of suits was to prevent unreasonable obstruction by a defendant who had no real defense thereby assisting and securing speedy and expeditious disposal of cases. The procedure prescribed in Order XXXVII of the Code is a step in ensuring early disposal of commercial cases such as suits based on negotiable instruments or suits where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract; or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only. The fundamental difference in the procedure of an ordinary suit with that of a summary suit is that in an ordinary suit the defendant has inherent right to defend for which no leave is required whereas in a summary suit, the defendant has to enter an appearance within a specified period upon service of summons in a prescribed form and thereafter upon service of summons for judgment, which again is in a prescribed form, has to seek from the Court or the Judge leave to defend. A challenge was laid to the constitutionality of Order XXXVII on the ground that it violated the principles of natural justice and was arbitrary as well as discriminatory. The Calcutta High Court while upholding its validity in the case **of Ambalal Purusottamdas And Co. vs Jawarlal Purusottam Dave And Ors : AIR 1953 Calcutta 758** observed that Order XXXVII is based on a reasonable and justifiable classification; and that the procedure under Order XXXVII is neither against the principles of natural justice nor it is unreasonable within any constitutional prohibition.

10. To better understand the import of the provisions of Rules 1, 2 and 3 of Order XXXVII of the Code, it would be useful to examine the provisions as they existed prior to the amendment brought about by Act No.104 of 1976. Rules 1, 2 and 3 of Order XXXVII of the Code, as they existed prior to the amendment brought by Act No.104 of 1976, read as under:-

> *" **Rule 1-This order shall apply only to –***
>
> *(a) the High Court of Judicature of Fort William, Madras and Bombay;*

(b) any District Court or other Court specially empowers in this behalf by the State Government;

(c) (* *) and*

(d) any other court to which Sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied;

and (e) any court in the province of Agra exercising the powers of a summary case (inserted by High Court, Allahabad)

Rule 2- Institution of summary suits upon bills of exchange etc.-

(1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit, unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defense in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree---

(a) for the principal sum on the instrument and for interest calculated in accordance with provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the court may order under Section 34 of this Code; and

(c) for such sum for costs as may be prescribed:

Provided that, if the plaintiff claims more than such fixed sum for costs, the cost shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.

Rule 3-- Defendant showing defence on merits to have leave to appear

(1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

11. By Amending Act No.104 of 1976, with effect from 01.02.1977, Rules 1, 2 and 3 of Order XXXVII of the Code were substituted as under:-

***Rule 1. Courts and classes of suits to which the Order is to apply**.--(1) This Order shall apply to the following Courts, namely:--*

(a) High Courts, City Civil Courts and Courts of Small Causes; and

(b) other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:--

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,--

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Rule 2. Institution of summary suits.--*(1) A suit, to which this Order applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,--*

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:-- "(Under Order XXXVII of the Civil Procedure Code, 1908)."

(2) The summons of the suit shall be in Form 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.

Rule 3. Procedure for the appearance of defendant.--*(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.*

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,--

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

12. A perusal of the amended provisions of Rules 1, 2 and 3 would go to show that by virtue of amendment the list of courts to which, and the classes of suits in which, summary procedure was applicable was expanded. Apart from that the amendment provided for the sequence in which the defendant had to enter an appearance upon service of summons in From 4 and, thereafter to apply for leave to defend upon service of summons for judgment in Form 4-A. Because before the amendment the defendant had to obtain leave of the Judge to appear and to defend. Accordingly, under the amended provisions the sequence is that summons of the suit is issued first and when the defendant appears, the plaintiff is to serve on the defendant a summons for judgment. When summons for judgment is served, the defendant has to obtain leave of the Court to defend the suit. Prior to the amendment, there was no provision for service of summons for judgment though the summons of the suit were to be served in Form 4 whereas now the defendant is to be first served summons in Form 4 and, thereafter, when he enters appearance in response thereto, the plaintiff is required to serve on him the summons for judgment in Form 4 A, which has to be supported by an affidavit verifying the cause of action and the amount claimed with a statement that in his belief there is no defense to the suit. Upon service of the summons for judgment in Form 4 A, the defendant has a right to apply for leave to defend, at any time within ten

days from the date of service, supported by an affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, upon which, leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. Proviso 1 to sub-rule (5) of Rule 3 of Order XXXVII provides that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put up by the defendant is frivolous or vexatious. Proviso 2 of sub-rule (5) of Order XXXVII provides that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

13. At this stage, it would be useful to take notice of the format in which summons in a summary suit are to be served on the defendant. Form 4 in Appendix B of the Code provides the format in which summons in a summary suit are to be served. The Form 4 in Appendix B reads as under:-

"No.4

SUMMONS IN A-SUMMARY SUIT'

(Order XXXVII, Rule 2)

(Title)

To [Name, description and place of residence]

Whereas.....[Name, description and place of residence] ..... has instituted a suit against you under Order XXXVII of the Code of Civil Probedure, 1908, for Rs. ..... and interest, you are hereby summoned to cause an appearance to be entered for you, within ten days from the service hereof, in default whereof the plaintiff will be entitled, after the expiration of the said period of ten days, to obtain a decree for any sum not exceeding the sum of Rs..... . and the sum of Rs..... for the costs, together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you,.....the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to move the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

Given under my hand and the seal of the Court, this..... day of.....20.....

Judge."

14. From 4 A provides for the format in which the summons for judgment in a summary suit is to be served on the defendant. The same reads as under:-

"No. 4A

SUMMONS FOR JUDGMENT IN A-SUMMARY SUIT'

(Order XXXVII, rule 3)

(Title)

In the .....Court, at .....Suit No.. .....of 19..../20....

X.Y. Z. .....Plaintiff

versus

A. B. C. .....Defendant.

Upon reading the affidavit of the plaintiff the Court makes the following order, namely:-

Let all parties concerned attend the Court or Judge, as the case may be, on the day of .../20...,at O'clock in the forenoon on the hearing of the application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs..... and for interest and costs.

Dated .....the day of.....19...../20..."

15. Sub-rule (6) of Rule 3 of Order XXXVII provides that at the hearing of such summons for judgment, the plaintiff is entitled to judgment forthwith in the following eventualities: (a) where the defendant does not apply for leave to defend, or where such application has been made and is refused; or (b) where the defendant is permitted to defend as to the whole or any part of the claim upon furnishing such security as the Court or Judge may direct him to give within such time as may be fixed by the Court or Judge and the defendant has failed to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge.

16. On a conjoint reading of the provisions of sub rules (4), (5) and (6) of Rule 3 of Order XXXVII with Forms 4 and 4-A in Appendix B of the Code, it is clear that the judgment as contemplated by sub rule (6) of Rule 3 of Order XXXVII of the Code is the judgment for which

summons in Form 4-A has been served on the defendant. Meaning thereby that in a summary suit where the defendant has failed to obtain leave to defend or has failed to comply with the condition imposed, in a case, where leave to defend though has been granted but is subject to condition, the plaintiff is entitled to judgment, as contemplated in the summons for judgment, forthwith thereby obviating a long drawn trial as contemplated in an ordinary suit. The term forthwith, as it occurs in sub rule (6) of Rule 3 of Order XXXVII of the Code, is therefore to be interpreted accordingly and not as suggested by the learned counsel for the revisionist by referring to judgments rendered in ordinary suits as distinct from summary suits.

17. The difference in procedure of a summary suit with that of an ordinary suit up to the stage of hearing summons for judgment has been examined and considered by the Apex Court in the case of ***Indian Bank v. Maharashtra State Cooperative Marketing Federation Ltd. : (1998) 5 SCC 69.*** The question which arose before the Apex Court in that case was as to whether the bar to proceed with the trial of a subsequently instituted suit, as contemplated by Section 10 of the Code, was applicable to a summary suit instituted under Order XXXVII of the Code. In that case, a summary suit was instituted for obtaining a money decree by alleging that the amount had become recoverable under a Letter of Credit. Plaintiff took out summons for judgment and the defendant appeared before the Court and moved an application seeking stay of the summary suit on the ground that he had already instituted a suit against the plaintiff for recovery of a certain sum of money prior to the filing of the summary suit. The trial Judge, who heard summons for judgment, held that the concept of trial as contained in Section 10 of the Code is applicable only to regular/ ordinary suit and not to a summary suit instituted under Order XXXVII of the Code and, therefore, further proceedings under summary suit were not required to be stayed. The defendant filed an appeal. The appellate court held that the word 'trial' in Section 10 has not been used in a narrow sense and would mean entire proceeding after the defendant enters his appearance and, therefore, the appellate court held that Section 10 of the Code applies to a summary suit also. Aggrieved by the decision of the appellate court, the plaintiff of that suit filed appeal before the Apex Court. Before the Apex Court, it was argued that if section 10 was made applicable to summary suits also, the very object of making a separate provision for summary suits would be frustrated. While deciding the said case, the Apex Court in paragraph nos. 9 and 10 of its decision observed as follows:-

"9. ***The provision contained in Section 10 is a general provision applicable to all categories of cases. The provisions contained in Order 37 apply to certain classes of suits. One provides a bar against proceeding with the trial of a suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated****. This being the correct approach and as the question that has arisen for consideration in this appeal is whether the bar to proceed with the trial of subsequently instituted suit contained in Section 10 of the Code is applicable to a summary suit filed under Order 37 of the Code****, the words 'trial of any suit' will have to be construed in the context of the provisions of Order 37 of the Code. Rule 2 of Order 37 enables the plaintiff to institute a summary suit in certain cases. On such a suit being filed the defendant is required to be served with a copy of the plaint and summons in the prescribed form. Within 10 days of service the defendant has to enter***

an appearance. Within the prescribed time the defendant has to apply for leave to defend the suit and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to judgment forthwith. If the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith. Rule 7 of Order 37 provides that save as provided by that order the procedure in summary suits shall be the same as the procedure in suits instituted in the ordinary manner. Thus in classes of suits where adopting summary procedure for deciding them is permissible the defendant has to file an appearance within 10 days of the service of summons and apply for leave to defend the suit. If the defendant does not enter his appearance as required or fails to obtain leave the allegations in the plaint are deemed to be admitted and straightaway a decree can be passed in favour of the plaintiff. The stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave. The trial would really begin only after leave is granted to the defendant. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code.

10. Considering the objects of both the provisions, i.e., Section 10 and Order 37 wider interpretation of the word 'trial' is not called for. We are of the opinion that the word 'trial' in Section 10, in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. ***In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted." (Emphasis Supplied)***

18. From the observations of the Apex Court in the judgment of **Indian Bank's case (supra),** the following position emerges:

(a) Order XXXVII provides a special /summary procedure for certain classes of suits. Rule 2 thereof enables the plaintiff to institute a summary suit in certain cases. On such a suit being instituted the defendant is required to be served with a copy of the plaint and summons in the prescribed form. Within 10 days of service thereof the defendant has to enter an appearance. Thereafter the plaintiff has to serve on the defendant a summons for judgment in the prescribed form. Upon service thereof, within the prescribed time the defendant has to apply for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. If the defendant has not applied for leave to defend, or if such an application has been made and is refused, the plaintiff becomes entitled to judgment forthwith. Likewise where the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith.

(b) In a summary suit up to the stage of grant of leave there is a special procedure and therefore the concept of 'trial' as contemplated by Section 10 of the Code, in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with a summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted.

19. In the case of ***Ajay Bansal v. Anup Mehta and Ors.: (2007) 2 SCC 275***, the Apex Court observed that a decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided. It was observed that a decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving the execution of a promissory note by the defendant.

20. In the case of ***D. Shanalal And Others vs Bank Of Maharashtra : AIR 1989 Bom 150***, before a Division Bench of the Bombay High Court, a question arose whether in an appeal preferred by a defendant against a decree passed in a summary suit, the defendant, who had failed to comply with the conditions upon which the leave to defend was granted, could raise objection with regard to admissibility of the documents produced by the plaintiff in support of its claim. Holding that the defendant would not have a right to challenge the admissibility of the documents, the Division Bench observed as follows:-

"In our view, these submissions are no longer open to the Appellants to make. In the first place, these submissions really amount, to raising defences by the Appellants even after they had failed to comply with the conditional orders granting leave to defend. The question of proof of admissibility of documents in a contested suit could have been raised by a party against whom such documents are attempted to be brought on record and used. But in view of their failure to furnish the security the Defendants who had failed to obtain leave to contest must be deemed to have admitted the contents of the plaint filed by the Plaintiff. Secondly, the Plaintiff Bank had become entitled to a decree."

21. In ***A.B. And U. Communication Pvt. Ltd, Mumbai v. Jitu Shah : 2009 (79) AIC 832 (Bom. H.C.-A.B.),*** a question as has cropped up in the present case was specifically under consideration before the Bombay High Court. In that case, the plaintiff in a summary suit had served summons for judgment on the defendant. The defendant was granted leave to defend subject to deposit of a certain sum of money. The defendant did not comply with the condition imposed, upon which the plaintiff applied for judgment. The defendant claimed that even though his defense may not be considered but he would have right to cross-examine the plaintiff or his witness and that right cannot be shut off and, therefore, the defendant applied to the Court to direct the plaintiff to

put his witnesses in the box and allow the defendant to cross-examine them and then consider the matter on merits. Rejecting the defendant's contention, it was observed as follows:-

" It is required to be noted that when the Summons for Judgment is decided on merits and when the defendant is directed to deposit certain amount of money as a condition precedent and is ordered to file written statement subject to compliance of those directions, the Court wants that the defendant should comply with those terms and conditions. The provisions of Order XXXVII if considered in totality, it is clear that if the defendant fails to comply with the order passed in Summons for Judgement, it will be treated that the defendant has no defence and that situation will have to be equated with a situation where the averments in the plaint are deemed to have been admitted. In substance, if the defendant does not comply with the order passed at the stage of disposal of Summons for Judgment in Order XXXVII of C.P.C., it will be deemed that the defendant has no defence and that the case of the plaintiff is required to be decided on merits as a whole and no further proof as expected under the Evidence Act is required to be placed by the plaintiff in order to prove his case.

.....The stand taken by the defendants that the plaintiffs should be directed to put their witness in the box, permit the defendants to cross-examine them and then arrive at a final conclusion, cannot be accepted. In my view, once the defendants fail to comply with the terms to which they were put, the plaintiffs case will have to be decided on the basis of the plaint and the original documents by following the provisions of Order XXXVII, Rule 3 (6) (b), keeping in view the terminology "Plaintiff shall be entitled to judgment forthwith". It is in the circumstances, the stand taken by the defendants is required to be rejected."

22. Taking a conspectus of the provisions of Order XXXVII of the Code and the decisions noticed herein above, this Court is of the view that summary suits relate to certain classes of suits, for which there is a special procedure to be followed up to the stage of hearing the summons for judgment. In summary suits, the defendant is put to notice vide summons in Form 4 that the matter would be tried as a summary suit and he must therefore enter his appearance within a specified time otherwise the plaintiff would be entitled to a decree. Not only that he is also informed that the plaintiff will thereafter serve upon him a summons for judgment at the hearing of which he will be entitled to move the Court for leave to defend the suit. He is also informed that the leave to defend may be obtained if he satisfies the Court by affidavit or otherwise that there is a defense to the suit on the merits or that it is reasonable that he should be allowed to defend. Thereafter, when the defendant enters his appearance, he is served with a summons for judgment in the prescribed form (Form 4-A) which specifies that upon reading the affidavit of the plaintiff, the Court requires all parties concerned to attend the Court on a given date for hearing on the application of the plaintiff to obtain judgment in the suit against the defendant for a specified sum of money and for interest and cost. Upon receipt of such summons, within a specified period of time, the defendant has to apply for leave to defend by filing an affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend. Upon such prayer being made on behalf of the defendant, the Court may grant leave to defend unconditionally or upon such terms as may appear to the Court or Judge to be just. If the defendant does not apply for leave to defend, or if such application is

rejected, the plaintiff is entitled to judgment forthwith. It is only when the leave to defend is granted unconditionally or conditionally and the condition prescribed is fulfilled, the trial of the suit commences and the regular procedure as prescribed in the Code of Civil Procedure becomes applicable. Therefore, the Court or the Judge dealing with the summary suit, up to the stage of hearing the summons for judgment, can proceed to pass the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted. As, till the stage of grant of leave, a special procedure has been prescribed by the Code, the general provisions of the Code as applicable in an ordinary suit are not applicable to a summary suit up to that stage. The decisions which have been relied by the learned counsel for the defendant-revisionist so as to contend that the defendant cannot be deprived of his right to cross-examine the plaintiffs' witnesses even though he has not been given leave to defend, would not apply in the case of a summary suit, up to the stage of hearing the summons for judgment, having regard to the provisions of Order XXXVII, Rules 1, 2 and 3 of the Code. However, once leave to defend is granted, either unconditionally or conditionally and the condition is fulfilled, the plaintiff would lose his right to have a judgment forthwith, as contemplated by the summons for judgment, and, in that event, the suit would proceed as per the general provisions of the Code in view of Rule 7 of Order XXXVII of the Code; and, in such an event, the defendant would have right to cross examine the plaintiff's witness, if examined, even if the suit proceeds ex parte or without a defense as in an ordinary suit. But where the leave to defend is either rejected or granted conditionally and the condition is not fulfilled, the plaintiff is entitled to a judgment forthwith and in such a situation, he can obtain a decree forthwith as contemplated under Order XXXVII, Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving the same as has been observed by the Apex Court in the case of ***Ajay Bansal (supra).*** The decisions relied upon by the learned counsel for the revisionist are in the context of ordinary suits where no leave to defend is required and, therefore, in an ordinary suit, even where the suit proceeds ex parte or the defense is struck off, the defendant is not precluded from cross examining plaintiff's witness, whereas in a summary suit there is no inherent right to defend without the leave of the Court or the Judge. Accordingly, the authorities cited by the learned counsel for the revisionist are not of much help to the revisionist.

23. There is another reason in support of the view taken above which is that if right to cross examine the plaintiff witnesses is accepted without even grant of leave to defend then the very purpose of introducing summary procedure for certain classes of suits would stand frustrated, inasmuch as, as per the provisions, at the stage of hearing the summons for judgment the defendant has to satisfy the Court or the Judge by disclosing such facts, as may be deemed sufficient, to entitle him to defend and such application is not to be rejected unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put up by him is frivolous or vexatious. Therefore, once the leave to defend is refused or is deemed to be refused in case of non fulfillment of the condition where the leave to defend is conditional, the legislative intent is that it should be deemed that the defendant has either no defense or that the defense intended to be put up by him is frivolous or vexatious. Under the

circumstances providing him a right to cross examine the plaintiff's witness, when the plaintiff becomes entitled to judgment as contemplated by the summons, would be providing a right which the legislature intended to take away in a given situation.

24. The contention of the learned counsel for the revisionist that the phrase that "the plaintiff shall be entitled to judgment forthwith", used in sub-rule (6) of Rule 3 of Order XXXVII of the Code, when is compared with the phrase "entitled to a decree for any sum, not exceeding the sum mentioned in the summons," used in sub-rule (3) of Rule 2 of Order XXXVII, it would suggest that the legislative intent was not to provide to the plaintiff a right to obtain a decree straight away once the defendant enters an appearance, even if no leave to defend is granted, cannot be accepted. Because sub-rule (3) of Rule 2 of Order XXXVII of the Code contemplates a situation where the defendant fails to enter an appearance despite being served the summons of the suit in Form 4 whereas sub rule (6) of Rule 3 of Order XXXVII contemplates a stage later that is a stage where the defendant has already entered an appearance and has been served the summons for judgment in Form 4A and, thereafter, has either failed to apply for leave to defend or his prayer to grant leave to defend has been refused or the condition of such grant has not been fulfilled. In such an eventuality the judgment to which the plaintiff becomes entitled forthwith, under sub-rule (6) of Rule 3 of Order XXXVII of the Code, is the judgment for which the summons in Form No.4A has been served on the defendant. Accordingly, the non use of the word 'decree' in sub-rule (6) of Rule 3 of Order XXXVII of the Code would not dilute the entitlement of the plaintiff to have a decree in his favour in the given situation.

25. In view of the discussion made above, it is held that in a summary suit where leave to defend is refused or is not applied for, or where the condition to avail the leave to defend is not fulfilled where leave to defend has been granted conditionally, the plaintiff becomes entitled to judgment forthwith and, therefore, the defendant would have no right to cross examine the plaintiff's witness.

26. As, in the instant case, there is no dispute that leave to defend was granted conditionally and the condition was not fulfilled even within the time allowed by the Apex Court, therefore, the order passed by the court below rejecting the application of the defendant to seek cross-examination of the plaintiff's witness, by placing reliance on the provisions of Order XXXVII Rule 3 (6)(b) of the Code, cannot be said to suffer from any legal infirmity and to that extent the impugned order passed by the court below is entitled to be affirmed.

27. But, in the instant case, by application 51 Ga, the defendant- revisionist not only prayed for allowing him to cross-examine plaintiff's witness but also sought to address the court on legal points whereas by the order impugned the said application was rejected outright. Therefore the issue that arises for consideration is as to what extent a defendant in a summary suit, whose leave to defend has been refused or is deemed refused on non-

compliance of condition where leave has been granted conditionally, can address the court to defeat the plaintiff's case.

28. To determine the above issue what needs to be examined first is as to when a leave to defend is required by the defendant to contest the summary suit. A conspectus of the provisions of Rules 1, 2 and 3 of Order XXXVII of the Code would go to show that for a summary suit to be maintainable under Order XXXVII, the plaintiff has to aver and demonstrate that the suit as instituted by him falls within the classes of suits on which a summary suit can be brought and further that the said suit has been brought in accordance with provisions of the Code. Therefore if the plaintiff fails to demonstrate that the suit falls within the specified categories on which a summary suit can be instituted or that the requirement of the provisions for a valid institution of a summary suit has not been fulfilled, the requirement of seeking leave to defend would not arise. Hence, it is held that even in absence of leave to defend, the defendant can bring to the notice of the Court or the Judge before whom the suit has been instituted that the suit itself is not triable under Order XXXVII of the Code of Civil Procedure. But, while doing so, the defendant-revisionist, in absence of leave to defend, would not have a right to lay his defense though he would be entitled to address the Court on the aforesaid aspect on the basis of the case set up by the plaintiff himself. The view taken above, finds support from a decision of the Delhi High Court in the case of ***Sarla Devi and Ors. v. Daya Ram and Ors.: (1995) 57 DLT 126*.**

29. Accordingly, this Court is of the view that although the defendant-revisionist would have no right to cross-examine the plaintiff's witness but would have a right to address the Court and raise a question as to the jurisdiction of the Court to try the suit under Order XXXVII of the Code by pointing out non-applicability of Order XXXVII to the suit of the nature instituted against the defendant-revisionist.

30. For the reasons recorded above, the impugned order dated 10.11.2014 to the extent it rejects the defendant-revisionist's prayer made in the application 51 Ga to allow cross-examination of the plaintiff's witness is affirmed. However, the impugned order dated 10.11.2014 to the extent it rejects the prayer of the revisionist made in application 51 Ga to enable him to argue on legal points is set aside and the application 51 Ga is partly allowed only to the extent that it would be open to the defendant to raise a question as to the jurisdiction of the Court to try the suit under Order XXXVII of the Code by pointing out non-applicability of Order XXXVII of the Code to the suit of the nature instituted against the defendant. But, while doing so, the defendant-revisionist would not have a right to lay its defense.

31. It is made clear that this court has not expressed any opinion as to whether the suit is maintainable or not as a summary suit.

32. The revision stands **allowed** to the extent indicated above. Interim order, granted earlier, stands discharged. There shall be no order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.07.2016

BEFORE

THE HON'BLE RAJAN ROY, J.

Trade Tax Revision No.- 65 Of 2016

M/s Tata Motors Limited, Deva Road, Lucknow ...Revisionist
Versus
Commissioner, Commercial Tax, U.P., Lucknow ...Opposite Party

Counsel for Applicant/Revisionist:
Sri Mudit Agarwal, Ms. Nidhi Agarwal

Counsel for Opposite Party/State:
C.S.C.

Trade Tax -- VAT Act, 2008 -- Sections 55 and 57 -- Interim Relief -- Stay of Tax Recovery -- Parameters -- Application of Mind -- Cryptic/Unreasoned Orders -- Trade Tax Revision under Section 58 of the VAT Act, 2008 against the order dated 11.05.2016 passed by the Commercial Tax Tribunal, Lucknow in Appeal No. 160 of 2016 -- revisionist (Tata Motors) challenged the assessment order for the year 2012-13 involving disputed tax-liability of Rs. 32,96,62,950/- relating to stock transfer of 1749 chassis from Lucknow Plant to body builders -- First Appellate Authority stayed 70% of the disputed amount -- on second appeal, the Tribunal enhanced the stay to 90% -- both orders were passed without proper application of mind to the relevant parameters laid down by the Supreme Court -- the question of law: whether the impugned judgment of the Tribunal can be sustained in the light of the parameters laid down by the Supreme Court in Pennar Industries Ltd., Benara Valves Ltd., and Dunlop India Ltd. for considering interim relief matters -- Held: a bare perusal of both the interim orders shows complete disregard and non-application of mind to the parameters laid down by the Supreme Court and this Court -- merely observing that 'after considering the facts in totality' a certain percentage of tax shall remain stayed, without addressing the relevant parameters, does not satisfy the requirement of law -- passing of such cryptic orders is hereby deprecated -- the First Appellate Authority and the Tribunal are reminded that they have a constitutional and statutory obligation to follow the principles of law enunciated by the Supreme Court. (Paras 1-5)

Trade Tax -- Interim Relief -- Parameters to be Considered -- Prima Facie Case -- Balance of Convenience -- Irreparable Injury -- Public Interest -- Stay of Tax Liability -- Held: the principles governing grant of interim relief in tax matters are settled by the Supreme Court in a catena of decisions -- the following parameters must be addressed while deciding an application for stay of disputed tax liability: (i) prima facie case -- which must be a substantial question raised bona fide requiring investigation and a decision on merits -- mere establishment of a prima facie case is not sufficient; (ii) balance of convenience -- the court/tribunal must consider and compare the probable injury to either side; (iii) irreparable injury -- the injury must be a material one that cannot be adequately compensated in damages; (iv) public interest -- the public interest must not be jeopardized and institutional embarrassment must be avoided; (v) financial condition/hardship of the assessee -- relevant material showing dire financial condition such as Income Tax Returns must be placed on record -- in cases of indirect taxation where the burden has been passed on to the

consumer, any interim relief to the manufacturer/dealer should be granted only in exceptional circumstances -- the order must disclose due and proper application of mind to the factual scenario keeping in view all the above factors. (Paras 6-14)

Trade Tax -- Section 55(6) and Section 57(9) of VAT Act, 2008 -- Pre-deposit -- Stay Order Limited to 30 Days Unless Security Furnished -- Powers of Appellate Authority and Tribunal -- Held: under Section 55(6) of the VAT Act, 2008 the First Appellate Authority has the power to stay the realization of disputed tax, fee or penalty till disposal of appeal, subject to the condition that no stay shall remain in force after 30 days unless the appellant furnishes security to the satisfaction of the Assessing Authority -- under Section 57(9) of the VAT Act, 2008 the Tribunal has similar power to stay the operation of the order appealed against, subject to the condition that the appellant must make a pre-deposit of not less than one-third of the disputed amount in addition to the amount required to be deposited under Section 55(3) -- sub-section 10 of Section 57 further stipulates that no stay of recovery shall remain in force for more than 30 days unless adequate security is furnished -- these mandatory conditions must be complied with and the Tribunal/Appellate Authority must ensure compliance before granting or continuing a stay order. (Paras 3-4)

Trade Tax Revision Allowed in Part -- Matter Remanded to First Appellate Authority -- Interim Protection for 30 Days -- Impugned orders passed by the First Appellate Authority dated 11.05.2016 and by the learned Commercial Tax Tribunal dated 11.05.2016 in Appeal No. 160 of 2016 (year 2012-13) set aside -- Trade Tax Revision No. 65 of 2016 allowed in part -- matter remanded to the First Appellate Authority for considering the application for interim relief afresh keeping in mind the observations made hereinabove, and a decision thereon within a period of 30 days from the date of receipt of a certified copy of the order -- the First Appellate Authority shall also be at liberty to decide the appeal itself on merits within the aforesaid period -- no coercive action shall be taken against the revisionist for 30 days or till disposal of the interim relief application (Para 15)

Case Law Discussed:

1. Pennar Industries Ltd. v. State of Andhra Pradesh and others, (2009) 3 SCC 177
2. Ravi Gupta v. Commissioner of Sales Tax, Delhi and another, (2009) 5 SCC 208
3. Mool Chand Yadav and another v. Raz Buyland Sugar Company Ltd., Rampur and others, (1982) 3 SCC 484
4. Benara Valves Ltd. and others v. Commissioner of Central Excise and another, (2006) 13 SCC 347
5. Kishorsinh Ratansinh Jadeja v. Maruti Corporation and others, (2009) 11 SCC 229
6. Mahadeo Savlaram Shelke and others v. Pune Municipal Corporation and another, (1995) 3 SCC 33
7. Shiv Kumar Chadha v. Municipal Corporation of Delhi, (1993) 3 SCC 161
8. Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719
9. Assistant Collector of Central Excise v. Dunlop India Ltd. and others, (1985) 1 SCC 260
10. Sri Samarias Trading Company Pvt. Ltd. v. S. Samuel and others, (1985) 2 SCR 24
11. Titagarh Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433
12. Union of India v. Oswal Woolen Mills Ltd., (1984) 2 SCC 646
13. Siliguri Municipality v. Amlendu Das, (1981) 2 SCC 436
14. I.T.C. Ltd. v. Commissioner (Appeals) Custom & Central Excise, 2005 (184) E.L.T. 347 (Allahabad, D.B.)
15. Kribhco Shyam Fertilizers Ltd. v. Commissioner of Commercial Taxes, (2009) UPTC 626
16. M/s Honda Siel Cars India Ltd. v. The Commissioner, Commercial Taxes, U.P., Lucknow, (2010) UPTC 1152
17. Suresh Chandra Agarwal and sons, Muzaffarnagar v. The Commissioner Commercial Taxes, U.P. Lucknow, (2010) UPTC 1158
18. M/s Simla Gomti Pan Products v. Commissioner of Commercial Tax, U.P., Lucknow, 2015 SCC Online Alld. 5081
19. M/s Otis Elevators Company (India) Ltd. v. The Commissioner of Commercial Taxes, U.P. Lucknow, 2014 SCC Online Alld. 13691

20. M/s Tata Coffee Ltd. v. Commissioner of Trade Tax and another, 2002 UPTC 156
21. Writ Petition No. 2648 of 2012 (M/S), M/s A.P. Enterprises v. Commissioner of Commercial Tax, U.P. and others
22. Agraj Ispat Private Ltd. Abupura v. Commissioner, Commercial Taxes, U.P. Lucknow

(Delivered by Hon'ble Rajan Roy, J.)

1. Trade Tax Revision No. 65 of 2016 has been filed under Section 58 of the VAT Act, 2008 against the judgment and order dated 11.05.2016 passed by the learned Commercial Tax Tribunal, Lucknow in Appeal No. 160 of 2016.

2. The question of law involved in this revision is as under:-

Whether the impugned judgment of the tribunal can be sustained in the light of the parameteters laid down by the Supreme Court in a catena of decisions viz. (2009) 3 SCC 177; Pennar Industries Ltd. vs. State of Andhra Pradesh and others; (2006) 13 SCC 347; Benara Valves Ltd. And others vs. commissioner of Central Excise and Another; (1985) 1 SCC 260; Assistant Collelctor v. Dunlop India Ltd. & ors., etc. for considering interim relief matters ?

3. The contention of the revisionist in nut shell is that both the first appellate authority and the learned Tribunal have failed to apply their mind to the relevant parameters while considering the application for interim relief and have declined a complete stay on the disputed tax-liability mechanically. Learned counsel for the revisionist relied upon the following judicial pronouncements in support of his contention:-

(1) ***Pennal Industries Ltd. vs. State of Andhra Pradesh and others; (2009) 3 SCC 177***

(2) ***Ravi Gupta vs. commissioner of Sales Tax, Delhi and another; (2009) 5 SCC 208***

(3) ***Mool Chand Yadav and another vs Raz Buyland Sugar Company Ltd., Rampur and others; (1982) 3 SCC 484***

(4) ***Benara Valves Ltd. And others vs. Commissioner of Central Excise and another; (2006) 13 SCC 347***

(5) ***Kishorsinh Ratansinh Jadeja vs. Maruti Corporation and others; (2009) 11 SCC 229***

(6) ***Mahadeo Savlaram Shelke and others vs Pune Municipal Corporation and another; (1995) 3 SCC 33***

(7) ***Kribhco Shyam Fertilizers Ltd. Vs. Commissioner of Commercial Taxes; (2009) UPTC 626***

(8) ***M/s Honda Siel, Cards India Ltd. vs. the Commissioner, Commercial Taxes, U.P., Lucknow; (2010) UPTC 1152***

(9) ***Agraj Ispat Private Ltd. Abupura vs Commissioner, Commercial Taxes, U.P. Lucknow.***

(10) ***Suresh Chandra Agarwal and sons, Muzaffarnagar vs The Commissioner Commercial Taxes, U.P. Lucknow; (2010) UPTC 1158***

(11) ***M/s Simla Gomti Pan Products vs Commissioner of commercial Tax, U.P., Lucknow; 2015 SCC Online Alld. 5081***

(12) ***M/s Otis Elevators Company (India) Ltd. Vs The Commissioner of Commercial Taxes, U.P. Lucknow; 2014 SCC Online Alld. 13691***

(13) ***M/s Tata coffee Ltd. Vs Commissioner of Trade Tax and another; 2002 UPTC 156***

(14) ***Writ Petition No. 2648 of 2012 (MS) M/s A.P. Enterprises vs Commissioner of Commercial Tax, U.P. and others.***

4. Sri Sanjeev Shankhyadhar learned counsel appearing on behalf of the Tax-department relied upon the decision of the Supreme Court in the case of ***Assistant Collelctor v. Dunlop India Ltd. & ors reported in (1985) 1 SCC 260*** and asserted that the said pronouncement has not been adhered to.

5. The parameters which are required to be considered while deciding an application for interim relief, have been settled by the Supreme Court in a catena of decisions, yet this Court finds from the revisions which are filed before it including this revision that not only the first appellate authority but the learned Tribunal pass un-reasoned orders which do not disclose due and proper application of mind to the relevant parameters, ignoring the pronouncement of the Supreme Court and also those of this Court on the subject. It is indeed a deplorable state of affairs and it is high time that the learned Tribunal and the Appellate Authorities under various taxing statutes woke up to the constitutional and statutory obligations imposed upon them to follow the principles of law enunciated by the Supreme Court and by this Court while considering an application for stay of disputed tax liability.

6. Under VAT Tax Act, 2008 an appeal is provided against an order passed by the Assessing Authority which is referred to as the First Appellate Authority. Under sub section 3 of Section 55 of the VAT Act, 2008 there is a requirement of pre-deposit of the amount admitted by

the appellant in the tax returns filed by him or at any stage in any proceedings under this Act. In addition to aforesaid in sub section 6 of Section 55 of the VAT Act, 2008 the Appellate Authority has been vested with the power of staying the realization of disputed amount of tax, fee or penalty payable by the appellant till the disposal of the appeal, provided that-(i) where an order under appeal involves dispute about tax, fee or penalty, no stay order shall remain in force after thirty days from the date on which the same has been granted, if the appellant does not furnish security to the satisfaction of the assessing authority for payment of the amount, the realization whereof has been stayed within the aforesaid period of thirty days; (ii) no such application shall be entertained unless it is filed along with the memorandum of appeal under sub-section (1).

7. Against the order of the First Appellate Authority there is a provision for filing an appeal before the learned Tribunal under Section 57(4) of the VAT Tax Act, 2008. Under sub section 9 thereof the Tribunal is empowered to stay the operation of the order appealed against or the recovery of the disputed amount of any tax, fee or penalty payable, or refund of the amount due, or proceeding for re-assessment under the order appealed against till the disposal of the appeal on the application of the appellant moved along with memorandum of such appeal after giving the parties a reasonable opportunity of being heard subject to the conditions mentioned in the provisos to the said Section. There is also a requirement under proviso (a) of sub section 9 of Section 57 of pre-deposit of not less than one third of such disputed amount in addition to the amount required to be deposited under sub-section 3 of Section 55. Sub-section 10 thereof further stipulates that no such stay order which relates to stay of recovery of any tax, fee or penalty by the learned Tribunal shall remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the assessing authority concerned for the payment of the outstanding amount.

8. Against the assessment order for the year 2012-13 a First Appeal was filed by the revisionist under Section 55 of the VAT Act, 2008. The First Appellate Authority vide its order dated 11.05.2015 stayed the realization of 70% of the disputed amount being Rs.32,96,62,950/- with the condition that the businessman shall furnish security in respect of the stayed amount within thirty days to the satisfaction of the assessing authority. The said order reads as under:-

" यह स्थगन प्रार्थना पत्र श्री महेंद्र विक्रम सिंह ज्वा0 कमि0 (कारपो0 सेल) द्वितीय, वाडिज्य कर, लखनऊ द्वारा उ० प्र0 वैट अधिनियम की ९(२) के अंतर्गत दि० २८.०३.२०१६ को पारित कर निर्धारण के विरुद्ध दाखिल अपील के साथ प्रस्तुत किया गया है जिसमे विवादित धनराशि रु० ३२,९६,६२,९५०.०० है1

स्थगन प्रार्थना पत्र पर सुनवाई हेतु अपीलकर्ता की ओर से श्री जी0 एल० जोशी, अधिवक्ता/ राकेश गुप्ता अधिकृत प्रतिनिधि उपस्थित हुए बताया कि १७४९ चेसिस को लखनऊ प्लांट से बॉडी बिल्डर के यहाँ जाब्वॉर्क के लिए स्टॉक ट्रांसफर घोषित किया एवं १२ फार्म ऍफ़ भी दाखिल किये गए है1 यह बिंदु वर्ष २००९-१०, २०१०-११ में विवादित था. तथा इस बिंदु पर वाद को प्रथम अपीलीय आदेश द्वारा प्रतिप्रेषित किया गया है. धनराशि रु० १०.३५ करोड़ फार्म-ऍफ़ एवं फार्म-सी जमा करने के लिए समय कि मांग कि गई थी1 समस्त विवादित देय कर को अपील निस्तारण तक स्थगित रखने के लिए अनुरोध किया गया1

विभाग की ओर से डिप्टी कमिश्नर, खण्ड - १४ वाडिज्य कर, लखनऊ उपस्थित हुए और स्थगन का प्रबल विरोध किया.1

अतः समस्त तथ्यों पर विचारोपरांत विवादित देयकर रु0 ३२,९६,६२,९५०.०० (बतीश करोड़ छिन्नवेय लाख बहसठ हज़ार नौ सौ पचास मात्र) का ७०% (सत्तर प्रतिशत) अपील के निस्तारण तक स्थगित रखने के आदेश दिए जाते हैं. व्यापारी आदेश के ३० दिन के अंदर स्थगित धनराशि की जमानत कर निर्धारण अधिकारी के सन्तोषानुसर दाखिल करेंगे अन्यथा यह आदेश स्वतः निरस्त हो जायेगा. "

9. On a bare perusal of the interim order passed as aforesaid complete disregard and non application of mind to the parameters laid down by the Supreme Court and this Court in various decisions is writ large. Merely saying that "considering the facts in totality 70% of the disputed tax liability shall remain stayed" does not by any cannon of judicial discipline satisfy the requirement of adherence to the principles laid down by the Supreme Court and this Court on the subject.

10. When this order was challenged before the learned Tribunal it enhanced the interim protection to 90% of the disputed tax liability, however, again without any application of mind to the relevant factors, thereby, committing the same mistake which was committed by the First Appellate Authority. For convenience the order of the learned Tribunal passed on the same day i.e. 11.05.2016 is reproduced as under:-

"**निर्णय**

प्रश्नगत द्वितीय अपील अपीलकर्ता व्यापारी द्वारा प्रथम अपील स०-२७८ वर्ष १२-१३ के लिए एडिशनल कमिश्नर ग्रेड-२, (अपील) -४, वाडिज्य कर, लखनऊ द्वारा पारित प्रश्नगत वसूली स्थगन आदेश दिनांक ११.०५.२०१६ के विरुद्ध योजित क़ी गई है जिसमें उनके द्वारा विवादित धनराशि रु0 ३२,९६,६२,९५०/- के ७० प्रतिशत अंश क़ी वसूली प्रथम अपील के निर्णय तक स्थगित क़ी गई है 1

अपील क़ी सुनवाई के समय अपीलकर्ता क़ी ओर से उनके विद्वान अधिवक्ता उपस्थित होकर बताया कि १७४९ चेसिस को लखनऊ प्लांट से चेसिस पर बॉडी फेब्रिकेशन करने के लिए बॉडी बिल्डर के पास स्टॉक ट्रांसफर किया गया एवं जिसके सम्बन्ध में १२ फार्म - ऍफ़ भी दाखिल किये गए है1 धनराशि रु0 १०.३५ करोड़ के फार्म एवं फार्म सी जमा करने के लिए कर निर्धारण अधिकारी से समय कि भी मांग की गई1 समस्त विवादित कर को अपील निस्तारण तक स्थगित रखने के लिए अनुरोध किया गया1

राज्य का पक्ष प्रस्तुत करने के हेतु असिस्टेंट कमिश्नर एवं राज्य प्रतिनिधि उपस्थित हुए. अपीलकर्ता द्वारा प्रस्तुत अपील का उनके द्वारा प्रतिवाद किया गया1 यह कहा गया है कि प्रथम अपीलीय अधिकारी द्वारा किये गए स्थगन में हस्तछेप वांछित नहीं है1

मेरे द्वारा उभय पक्षों को सुना गया एवं पारित कर निर्धारण आदेश, प्रथम अपीलीय अधिकारी द्वारा पारित स्थगन आदेश, द्वितीय अपील आधार, दाखिल स्थगन प्रार्थना पत्र एवं शपथ पत्र और अपील कि सुनवाई के समय विद्वान अधिवक्ता तथा राज्य प्रतिनिधि द्वारा प्रस्तुत तर्कों का परिशीलन किया गया1 प्रथम अपील स्तर पर विवादित बिंदु का निस्तारण प्रथम अपीलीय अधिकारी द्वारा किया जाना है, अतः वाद के गुण दोष के सम्बन्ध में अधिकरण स्तर से कोई टिपणी किया जाना वांछित/उचित नहीं है1 अपीलकर्ता विवादित कर को अदा कर सकने में असमर्थ है. अतः समस्त परिस्थितियों एवं तथ्यों पर सम्यक रूप से विचार करने के उपरांत मैं यह उचित समझता हूँ कि प्रथम अपील के लंबन काल तक सम्पूर्ण विवादित धनराशि रु0 ३२,९६,६२,९५०/- (रु. बत्तीस करोड़ छिन्नवेय लाख बहसठ हज़ार नौ सौ पचास मात्र) के ९०(नब्बे) प्रतिशत अंश की वसूली का स्थगन अपीलकर्ता द्वारा कर निर्धारण अधिकारी के समक्ष समुचित प्रतिभूति प्रस्तुत करने पर, प्रथम अपील के निस्तारण तक किया जाना न्याय सांगत है1

फलतः प्रश्नगत द्वितीय अपील आंशिक रूप में स्वीकार किये जाने योग्य है1

आदेश

अपीलकर्ता व्यापारी द्वारा प्रस्तुत प्रश्नगत द्वितीय अपील स. १६०/१६, वर्ष १२-१३ आंशिक रूप में स्वीकार की जाती है तथा विवादित राशि के रु0 ३२,९६,६२,९५०/- के ९० (नब्बे) प्रतिशत अंश की वसूली प्रथम अपील के निस्तारण तक इस प्रतिबन्ध के साथ स्थगित की जाती है1 कि स्थगित धनराशि कि जमानत अपीलकर्ता सम्बंधित कर निर्धारण अधिकारी के सन्तोषानुसर उनके समक्ष नियमानुसार दाखिल करें अन्यथा स्थगन आदेश स्वतः निष्प्रभावी हो जायेगा1 "

11. A bare perusal of the order passed by the learned Tribunal shows that it has merely made a cryptic observation that it has heard the parties and perused the impugned interim order passed by the First Appellate Authority, grounds of the second appeal, the application for interim relief and the affidavit in support thereof, thereafter it has stated that the merits of the First Appeal are to be decided by the First Appellate Authority, therefore, it would not be appropriate for it to comment on the merits of the case and after mechanical reference to two decisions one of the high Court and other of Supreme Court in Pennar Industries Ltd (supra) and mechanically stating that after considering the totality of the facts and circumstances it finds it appropriate and justified to stay the realization of the disputed tax-liability to the extent of 90%, and merely on the basis of this cryptic recital it has passed the order accepting the appeal partly, thereby impliedly setting aside the impugned order passed by the First Appellate Authority.

12. Such cryptic recitals both by the First Appellate Authority and the learned Tribunal do not satisfy the requirement of law. The passing of such orders in such a manner are hereby deprecated.

13. For the convenience of the learned Tribunal and the First Appellate Authority the legal position in this regard is being reiterated in the solemn hope that in future they shall adhere to the same strictly.

14. The principles which are to be kept in mind while considering the application for interim relief/temporary injunction have been settled by the Supreme Court in various decisions. Reference may be made in this regard to the judgment of the Supreme Court in the case of ***Shiv Kumar Chadha v. Municipal Corporation of Delhi reported in (1993) 3 SCC*** **161.** This was a judgment rendered by a Bench of three Hon'ble Judges, wherein, in paragraph 30 their Lordships observed as under:-

".....[A] party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles--ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him."

15. In the case of ***Dalpat Kumar v. Prahlad Singh reported in (1992) 1 SCC 719***, a Bench of two Hon'ble Judges observed in paragraph 6 as under:-

"..... "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by men's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice.

".....the court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if junction is refused."

16. The aforesaid decisions were considered and followed by the Supreme Court in a subsequent decision in the case of ***Mahadeo Savlaram Shelke and others vs. Pune Municipal Corporation*** and ***another, reported in (1995) 3 SCC 33****, wherein it observed that in* ***Dalpat Kumar (supra)*** the Supreme Court held that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity intended to meet myriad situation presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The Court would be circumspect before granting the injunction and look to the conduct of the party the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. The Court also opined that "prima facie case" is a substantial question raised bona fide, which needs investigation and a decision on merits i.e. a triable issue. Satisfaction that there is a 'prima facie' case by itself is not sufficient to grant injunction. The concept of "irreparable injury" was considered in ***Dalpat Kumar (supra*****)** the Supreme Court opined that it does not mean that there must be no physical possibility of repairing the injury but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. While considering the concept of "balance of convenience" which is required to be in favour of granting injunction, the court opined that while granting or refusing to grant injunction, the court should exercise sound judicial discretion and find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing compelling possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status-quo, an injunction would be issued. Thus, it opined that a court has to exercise its sound judicial discretion in granting or refusing the relief of ad-interim injunction pending the suit.

17. The aforesaid observations were made in the context of refusal or grant of temporary injunction in a suit under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 but the principles enunciated therein have been applied to matters relating to grant or refuse to grant interim relief in proceedings other than suits also and there is no dispute in this regard. These

observations of the Supreme Court should have been kept in mind by the Tribunal and the First Appellate Authority while passing the impugned order.

18. A Bench of three Hon'ble Judges of the Supreme Court in the case of ***Assistant Collector of Central Excise vs. Dunlop India Ltd. And others reported in (1905) 1 SCC*** **260**, also reiterated the aforesaid principles with reference to the earlier decisions rendered in **Sri Samarias Trading Company Pvt. Ltd. v. S. Samuel and others** reported in **(1985) 2 SCR 24**, **Titagarh Paper Mills Co. Ltd. v. State of Orissa** reported in ***(19983) 2 SCC 433, Union of India v. Oswal Woolen Mills Ltd.*** reported in ***(1984) 2 SCC 646 and Siliguri Municipality vs. Amlendu Das*** reported in ***(1981) 2 SCC 436.***

19. In the case of ***Siliguri Municipality (supra)*** the Calcutta High court had passed orders restraining the Siliguri Municipality from recovering a graduated consolidated rate on the annual value of buildings in terms of the amended provisions of the Bengal Municipal Act, which compelled the Supreme Court to observe that it was dismayed at the tendency of the some of the High Courts to grant interlocutory order on mere asking. Normally the High Court should no, as a rule, in proceedings under Article 226 grant any stay of recovery of tax save under very exceptional circumstances.

20. In the case of ***Dunlop India Ltd.,(supra)*** the court deprecated the practice of granting interim order which particularly gives the principal relief sought in the petition for no better reason than that a prima facie case has been made out without being concerned about 'balance of convenience', the 'public interest' and a host of other relevant considerations. The court further observed that there are of-course cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bonafide with due regard to the public interest, ***a court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the court alleging prejudice, inconvenience or harm and that a prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for***. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. ***It wondered why in the case indirect taxation where the burden has already been passed on to the consumer, any interim relief should at all be given to the manufacturer, dealer and the like! It also referred to its own observation in Siliguri case(supra) that "the Court has therefore to strike a delicate balance after considering the pros and cons of the matter lest larger public interest is not jeopardized and institutional embarrassment is eschewed"***. The court further went on to observe as under:-

"Even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by High Court. There was no question of any balance of convenience being in favour of the respondent-company. The balance of convenience was certainly in favour of the Government of India. Governments are not run on mere Bank Guarantees. We notice that very often some courts act as if furnishing a Bank Guarantee would meet the ends of justice. No governmental business or for that matter no business of any kind can be run on mere Bank Guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest".

21. ***In Benara Valves Ltd (supra)*** which was a case arising out of Central Excise Act, 1944 specially relating to Section 35-F thereof again the question was with respect to parameters to be kept in mind while granting or refusing to grant stay of realization of disputed tax-liability. The Supreme Court observed that in such matters though discretion is available, the same has to be exercised judicially. After referring to earlier decision in the case of ***Siliguri (supra), Samarias Trading Co.(P) Ltd. (Supra) and Dunlop India Ltd***. it observed that it is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Thus, the Supreme Court clarified the matter regarding prima-facie case, thus in a given case if the issue involved has already been adjudicated then it would be a very strong prima facie case in favour of the assessee and subjecting the assessee to tax-liability even in such cases would fall within the ambit of the observations made by the Supreme Court in ***Benara Valves Ltd (supra)*** as aforesaid. It is not out of place to refer a Division Bench of this Court in the case of ***I.T.C. Ltd. vs. Commissioner (Appeals) Custom & Central Excise*** reported in ***2005 (184) E.L.T. 347*** wherein a similar view has been taken.

22. In ***Benara Valves Ltd. (supra)*** the Supreme Court observed that ***"petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved."*** It also observed in paragraph 9 of the judgment that ***"it has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Dunlop India cases without analysing factual scenario involved in a particular case.***

23. In nut shell the Sumnum Bonum of the decision is due and proper application of mind to the factual scenario involved in the case keeping in mind the principle of prima facie case, balance of convenience, irreparable injury and other relevant factors discussed hereinabove. The

order should disclose such application of mind. Cryptic observations as have been made in the present case, which have been noted in the earlier part of the judgment, do not satisfy these requirements. The passing of interim order in such a manner is highly objectionable.

24. In ***Benara Valves Ltd. (supra)*** though, the Supreme Court was considering the language used in Section 35-F of the Central Excise Act wherein the word 'undue hardship to such person' and 'safeguard the interests of the Revenue' had been used but the observations made by it regarding 'undue hardship' should be kept in mind in other tax matters also. It opined that in Indian condition the expression 'undue hardship' is normally related to economic hardship. 'Undue hardship' means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. 'Undue hardship' is caused when the hardship is not warranted by the circumstances. For a hardship to be 'undue' it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of requirement itself, and the benefit which the applicant would derive from compliance with it.

25. The interest of Revenue is also required to be taken into consideration.

26. Financial condition/hardship is an important consideration but then the businessmen, dealer etc. has to place relevant material in this regard showing dire financial condition. Income-tax Return are relevant material in this regard.

27. Thus, the discretion vested in the learned Tribunal and First Appellate Authority in matters of interim relief under a Taxing Statute such as the one under consideration is to be exercised judicially and it should be guided by the principles of law enunciated by precedents as aforesaid and not in dis-regard thereof as has been done in the present case.

28. Learned counsel for the revisionist has also relied upon the judgment of the Supreme court in the case of **Mool Chand Yadav (supra).** On a bare perusal of the same this Court does not find the contention based thereon that in every case where an appeal is filed under Section 55 and is admitted a complete stay of tax-liability should necessarily be ordered automatically, as acceptable. The said judgment does not lay down any such principle of law of universal application even to an appeal under a taxing statute. The decision in such case is also to be taken with judicious.

29. In view the above the impugned judgments and orders passed by the learned Tribunal are hereby set aside. Normally this Court would have remanded the matter to the learned Tribunal to decide the same afresh but considering the fact that the orders of First Appellate Authority which were challenged in the Appeal before the learned Tribunal and stands merged in the orders passed by it which are impugned herein, which have now been set aside, also suffer from the same defect, it would be a futile exercise, accordingly, this Court remands the matters to the First Appellate Authority for considering the applications for interim relief afresh keeping in mind the observations made hereinabove and a decision thereon within a period of thirty days from the date of receipt of a certified copy of the order. It shall also be open to the First Appellate Authority to decide the appeal itself on merits within the aforesaid period. In order to facilitate the disposal of the

applications for interim relief it is provided that for a period of thirty days or till disposal of interim relief applications, no coercive action shall be taken against the revisionist.

30. The revision is allowed in part.

31. Let a copy of this order be sent by the Senior Registrar of this Court to the Chairman, Commercial Tax Tribunal who in turn shall circulate it amongst the members and a copy be also sent to the Head of Trade Tax Department, Government of U.P.

32. A copy of this judgment shall also be kept on record of T.T.R. No. 56 of 2016.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2026

BEFORE

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

Criminal Revision Defective No.- 111 Of 2006

Pawan Agarwal **...Revisionist**
Versus
Bhoole Ram & Ors. **...Opposite parties**

Counsel for the Revisionist:
Pankaj Bharti

Counsel for the Opposite parties:
AGA Ram Shiromani Yadav

Instant Criminal Revision was preferred against the judgement and order dated 20.5.2005 passed by Special Judge/Additional Sessions Judge, Muzaffar Nagar, acquitting the opposite parties nos.1 and 2, Bhoole Ram and Dharmpal in S.T. No.429 of 2004, State Vs. Bhoole Ram and others, under Sections 147, 148, 307/149, 323/149, 325/149, 506 I.P.C., Police Station Khatauli, District Muzaffar Nagar.

The Submission and perused the record particularly certified copy of judgement, as brought on record by the revisionist, as per the prosecution version, it is reflected that the incident occurred on 2.11.2001 at around 9 a.m. in the morning, when the first informant Pawan Agarwal was getting done some construction work on Jamuna Bihar plot when the two accused persons Bhoole Ram and Dharmpal came on the plot and threatened the labourers working on the plot and after this, they went back. They also threatened that they will see him (informant) in future and after a short while around 9.30 a.m., the aforesaid two persons being accompanied by 3-4 unknown persons arrived on the spot. Bhoole Ram was possessing tabal and Dharmpal was possessing pistol and the others were possessing 'lathi' and 'danda'. They all started assaulting the complainant side. In the meanwhile, Dharmpal with intention to kill fired from his pistol but the target was somehow missed and the first informant saved himself. In the meanwhile, the first informant also fired in the air for self defence. Devdutt Sharma and Yogendra arrived on the spot and saw the incident. The first informant Pawan Agarwal sustained bone fracture injury. The report was lodged at the police station and

thereafter- the injured first informant was medically examined at PHC Khatauli the very same day at 11.30 a.m. The matter was investigated into and charge sheet was submitted against the aforesaid accused persons under the aforesaid sections of Indian Penal Code.

In a number of cases it is well established that in case of findings of acquittal, if the Appellate/Higher Court comes to record findings that the findings so recorded is grounded on material on record and the view so taken by the trial court, is the natural outcome of the material on record then the findings arrived at need not be interfered with by the higher Court. Even in cases where two views are possible then the view so taken by the trial court,if found to be supported by material on record then the same is not to be interfered with by the Appellate or higher Court, as the case may be.

This being so, there is no cogent reason to disturb the finding of acquittal recorded by the trial court in this case. Consequently, this revision lacks force and is dismissed accordingly.

Held: Para-

Case Law discussed:

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

1. Heard Sri Pankaj Bharti, learned counsel for the revisionist and learned AGA.

2. Instant Criminal Revision was preferred against the judgement and order dated 20.5.2005 passed by Special Judge/Additional Sessions Judge, Muzaffar Nagar, acquitting the opposite parties nos.1 and 2, Bhoole Ram and Dharmpal in S.T. No.429 of 2004, State Vs. Bhoole Ram and others, under Sections 147, 148, 307/149, 323/149, 325/149, 506 I.P.C., Police Station Khatauli, District Muzaffar Nagar.

3. Precisely, contention has been raised before this Court that initially in this case, cross cases were registered from both the sides and both sides had sustained injuries on their person but the learned trial Judge without appreciating real facts and circumstances of the case, vis a vis the testimony on record miserably failed to record correct finding regarding conviction of respondent nos.1 and 2, Bhoole Ram and Dharmpal.

4. Contention has been raised on behalf of the informant-revisionist that on bare perusal of the testimony on record, it is profusely reflected that the verdict of acquittal passed by the Specialj Judge/Additional Sessions Judge, Muzaffar Nagar is based on conjectures and surmises and the same is not based on material existing on record. In this way, finding of acquittal recorded by the trial court is not sustainable in the eyes of law. Admittedly, the fact of injury caused on Pawan Agarwal (P.W.1), the complainant, was elaborated and detailed by the Doctor M.S. Faujdar (P.W.5) in his injury report (Exhibit Ka-7). However, the court below took the same casually and interpreted it in favour of the accused persons and thereby recorded erroneous finding of acquittal in favour of opposite parties no.1 and 2, Bhoole Ram and Dharmpal, which finding need not be sustained and deserves to be set-aside by this Court and revision be allowed.

5. Per contra, Sri Ram Shiromani Yadav, learned AGA vehemently opposed the aforesaid argument on ground that bare perusal of entire testimony on record, as reflected from the judgement itself, shows that the appreciation and finding of testimony on record vis a vis circumstances of the case has been comprehensively dealt with by the learned trial court and natural conclusion of acquittal has followed. The prosecution witnesses were found to be highly interested and their testimony was highly improbable and in this way contradiction appearing in the ocular testimony is substantial and material. In this view of the matter, it cannot be said that the finding of acquittal returned by the trial court is tainted, perverse or erroneous.

6. Considered the above submission and also perused the record particularly certified copy of judgement, as brought on record by the revisionist, as per the prosecution version, it is reflected that the incident occurred on 2.11.2001 at around 9 a.m. in the morning, when the first informant Pawan Agarwal was getting done some construction work on Jamuna Bihar plot when the two accused persons Bhoole Ram and Dharmpal came on the plot and threatened the labourers working on the plot and after this, they went back. They also threatened that they will see him (informant) in future and after a short while around 9.30 a.m., the aforesaid two persons being accompanied by 3-4 unknown persons arrived on the spot. Bhoole Ram was possessing tabal and Dharmpal was possessing pistol and the others were possessing 'lathi' and 'danda'. They all started assaulting the complainant side. In the meanwhile, Dharmpal with intention to kill fired from his pistol but the target was somehow missed and the first informant saved himself. In the meanwhile, the first informant also fired in the air for self defence. Devdutt Sharma and Yogendra arrived on the spot and saw the incident. The first informant Pawan Agarwal sustained bone fracture injury.The report was lodged at the police station and thereafter- the injured first informant was medically examined at PHC Khatauli the very same day at 11.30 a.m. The matter was investigated into and charge sheet was submitted against the aforesaid accused persons under the aforesaid sections of Indian Penal Code.

7. The charges were read over and explained to the accused persons, who denied the charges and opted for trial.

8. In turn, the prosecution was asked to adduce its testimony. The prosecution in all produced five witnesses. P.W.1 Pawan Agarwal is the first informant. P.W.2 is Devdutt Kumar. The aforesaid two prosecution witnesses are eye-witnesses of fact. P.W.3 is Asarpal, who has proved the relevant Chik FIR and the GD entry regarding the crime in question. P.W.4 is Investigating Officer Ram Sharan Das, who conducted the investigation and submitted the charge sheet against the accused persons. P.W.5 is Dr. M.S. Faujdar, who medically examined P.W.1 Pawan Agarwal. Thereafter evidence for the prosecution was closed and the case was posted for final argument.

9. After hearing both the sides, learned trial Judge found the incident not proved and the testimony not reliable and in totality rejected the claim of the first informant and acquitted the accused persons of the aforesaid charges under the aforesaid sections of Indian Penal Code.

10. Consequently, this revision.

11. At the very outset, it can be observed that in this case, the place of incident is said to be the 'plot' existing in Jamuna Bihar where some construction work was going on and in the meanwhile, accused persons arrived on the spot with threat to stop the work immediately. Thereafter accused person left the place of occurrence and came back after a short while and then they assaulted the first informant. On bare perusal of the medical report, as reflected from the judgement, shows that as many as ten injuries were caused on the person of the injured.

12. Injury no.1 was said to be on the left side of the head 12.5 cm above left ear measuring 4.5 cm x 4 cm x 0.5 cm. Injury No.2 is abrasion with contusion measuring 2.1 cm on the left side of the face just 1.5 cm below mouth. Injury no.3 was on the left side of chest in the form of abraded contusion. Similarly, rest of the injuries have also been mentioned in the judgement.

13. It is noteworthy that P.W.5 Dr. M.S. Faujdar has opined that all the injuries are simple in nature. It is also gathered that the injury nos.3 and 10 were directed to be referred for X-ray examination, however, no X-ray examination report or plate is available on record. This injury report has been proved by doctor witness P.W.5 M.S. Faujdar, as Exhibit Ka-7 before the trial court.

14. Obviously, both the eye-witness account i.e P.W.1 Pawan Agarwal and P.W.2 Devdutt Kumar have not been believed by the learned trial Judge on ground that both are highly interested and partisan witnesses and against both these witnesses criminal case has already been registered under Sections 147, 148, 307 IPC at police station Khatauli, District Muzaffar Nagar. Certain papers have also been filed by the defence before the trial court, per list 38 Kha and 39 Kha, wherein timing of the incident was stated to be 8 a.m., the very same day morning on which the first informant got his report lodged at police station Khatauli, District Muzaffar Nagar. This first information report by the P.W.1 Pawan Agarwal was lodged at the police station at 11.05 a.m. on 2.11.2001, whereas the first information report by the accused persons of this case against the first informant was lodged prior in time at 10.30 a.m. at the same police station. Not only this, the medical examination of accused Bhoole Ram was also conducted at 11.00 a.m. the very same day. A number of injuries were recorded on his person. But injuries on accused persons have not been properly explained by the prosecution and this aspect was taken note of by the court below also and the court below had reasonable ground to believe and construe impact of non-explanation of injuries on the person of the accused side. Further, injury on Bhoole Ram was stated to be serious in nature, whereas the injuries on the person of the first informant side was found to be simple in nature. Thus, it is obvious that in the version of incident on the accused side the incident of assault had already taken place around 8 a.m. on 2.11.2001 regarding which, the report was lodged by the first informant of this case wherein he stated that injuries caused on his person have been caused at or around 9.30 a.m. the very same day. The explanation sought to be given in respect of injuries on the accused persons by the testimony of prosecution witness Devdutt was found to be without any base and without any support from the facts and circumstances of the case, as held by the trial court. Trial court has gone to the extent of observing under facts and circumstances of the case that

the prosecution witness Devdutt is highly interested and partisan and wholly unreliable witness. His testimony is contradictory in material particulars regarding the narration of the incident, as given to the Investigating Officer and deposed before the trial court.

15. Even P.W.4 Investigating Officer Ram Shiromani has proved these contradictions and there is no whisper in the statement of this prosecution witness that he got recorded any statement regarding firing been done on the spot by anyone. Therefore, hollowness of prosecution case is deeply rooted in material contradictions appearing in the testimony of the prosecution witnesses.

16. Lastly but not the least, this being Revisional Court cannot re-appreciate factual finding given by the trial court and this Court is basically concerned with apparent illegality and perversity of the finding so recorded and appearing in judgement. In a number of cases it is well established that in case of findings of acquittal, if the Appellate/Higher Court comes to record findings that the findings so recorded is grounded on material on record and the view so taken by the trial court, is the natural outcome of the material on record then the findings arrived at need not be interfered with by the higher Court. Even in cases where two views are possible then the view so taken by the trial court,if found to be supported by material on record then the same is not to be interfered with by the Appellate or higher Court, as the case may be.

17. This being so, there is no cogent reason to disturb the finding of acquittal recorded by the trial court in this case. Consequently, this revision lacks force and is **dismissed** accordingly.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 119 Of 2016
&
Connected With Other Cases

Hindustan Coca Cola Beverage Pvt. Ltd. ...Revisionist

Versus

The Commissioner, Commercial Taxes ...Opposite Party

Counsel for the Revisionist:
Rahul Agarwal

Counsel for the Opposite Party:
C.S.C.

VAT ACT, 2008 — Sections 48(1), 48(5), 54(14) — Rule 44 — Seizure of goods — Penalty — Discrepancy in "batch number" and "date of manufacture" — Whether sufficient to infer intention to evade tax — Held, No.

Headnote:

Discrepancy between the "batch number"/"date of manufacture" mentioned in tax invoices and the goods loaded in the vehicle does not constitute violation of the provisions of the U.P. VAT Act or the Rules framed thereunder, as Rule 44 does not mandate disclosure of batch number or date of manufacture in tax invoices.

For imposition of penalty under Section 48(5), existence of **intention to evade payment of tax** is a sine qua non. The expression "with intention to evade payment of tax" qualifies all contingencies mentioned in Section 48(5). In absence of material establishing such intent, penalty cannot be sustained.

Where goods were duly recorded in the Books of Account, carried uniform rate of tax, and no undervaluation or suppression was established, mere discrepancy in batch numbers attributable to clerical or loading errors does not justify levy of penalty.

Judgment in M/s Jagatjit Industries Ltd. v. State of U.P. distinguished — It related to seizure proceedings under Article 226 and not imposition of penalty; further, IMFL cases involved statutory requirement of batch number under Excise law, unlike VAT Act.

Followed:

Commissioner of Trade Tax v. Central Distillery & Breweries Ltd.

M/s Great Glen Distilleries & Wineries Ltd. v. Commissioner of Sales Tax

Sir Shadi Lal Enterprises Ltd. v. Trade Tax Tribunal

Result:

Revision Allowed.

Orders of the Assessing Authority dated 31.07.2009, First Appellate Authority dated 19.08.2013 and Tribunal dated 15.01.2016 set aside.

Revisionist entitled to refund of penalty amount deposited.

(Delivered by Hon'ble Yashwant Varma, J.)

1. This batch of commercial tax revisions lays challenge to the order of the Tribunal dated 15 January 2016 upholding the imposition of penalty upon the revisionist-assessee. The proceedings themselves pertain to Assessment Year 2009-10 and relate to a seizure of goods being dispatched by the revisionist and a consequential levy of penalty under Section 48(5) of the U.P. VAT Act, 20081. Since common questions of law arose from these revisions, they with the consent of parties were heard together and are being disposed of by this judgment.

2. The facts leading upto the passing of the impugned order fall within a narrow compass. The revisionist is engaged in the manufacture of soft drinks, fruit juices and other aerated beverages. It is registered both under the VAT Act as well as the Central Sales Tax Act, 1956. It was its case that during the peak summer months there is a heightened demand for soft drinks as a result of which the revisionist is compelled to engage additional contract labour on a temporary basis at its factory at Dasna, District Ghaziabad. This labour, the revisionist submits, is engaged for loading and dispatching of consignments to its various stockists and distributors situate across the States of U.P. and Uttarakhand. It was the case of the revisionist that the dispatches of soft drinks

were duly accounted for in the Books of Account and that all transactions stood duly reflected in the records maintained by it. During the course of oral submission, learned counsel for the revisionist pointed out that following international practices the tax invoices accompanying each consignment also carried the "date of manufacture" as well as the "batch number" of the soft drinks and beverages. As was contended before the authorities below and a submission which was reiterated before this Court, learned counsel for the revisionist pointed out that during the course of loading and dispatching of consignments, the additional labour inadvertently placed certain consignments and packages meant for a particular truck onto other trucks which upon seizure led to the Department claiming that there was a discrepancy in the "date of manufacture"/"batch number" details mentioned in the tax invoices when compared with the actual consignments loaded on the truck. It was these discrepancies which primarily led to the seizure of consignments and ultimately culminated in orders imposing penalty. The assessing authority not accepting the explanation furnished by the revisionist proceeded to levy penalty on the errant consignments constraining the revisionist to prefer appeals which came to be dismissed by the first appellate authority. Aggrieved by the decision of the first appellate authority the revisionist preferred Second Appeals before the Tribunal which dismissed as many as six appeals by a common judgment and order dated 15 January 2016.

3. To view the facts in a clearer perspective, the details of the revisions, details of the second appeals, the value of consignments, the amount of penalty imposed and moneys deposited, may be viewed from the following chart: -

	CTR No.	Second Appeal No.	Order of the Tribunal	A Y	Consi. amount	Penalty amount	Amount Deposit	Amount Stayed	Remarks
.1.	119/2016	438/2013	15/01/2016	2009-10	239113	42810	42810		Penalty @25% on 139283/- &@8% on 99830/-
2	120/2016	437/2013	15/01/16	2009-10	1,08,486/-	27,122/-	27,122/-		Penalty @ 25% on 1,08,486/-
3	1121/2016	448/2013	15/01/16	2010-11	1,75,000/-	70,000/-	70,000/-		Penalty @ 40% on 1,75,000/-
4	122/2016	446/2013	15/01/16	2010-11	93,000/-	37,200/-	37,200/-		Penalty @ 40% on 93,000/-
5	123/2016	440/2013	15/01/16	2009-10	1,86,000/-	46,500/-	46,500/-		Penalty @ 25% on 1,86,000/-
6	125/2016	445/2013	15/01/16	2009-10	2,00,000/-	80,000/-	80,000/-		Penalty @ 8% on 15,000/-
7	126/2016	441/2013	15/01/16	2009-10	1,35,210/-	6,926/-	26,926/-		Penalty @ 25% on 26,926/- & 8% on 40,450
8	27/2016	442/2013	15/01/16	2009-10	96,600/-	24,150/-	24,150/-		Penalty @ 25% on 96,000/-
		439/2013	15/01/16	2009-10	1,86,000/-	46,500/-	46,500/-		Penalty @

9	**28/2016**								**25% on 1,86,000/-**
010	**29/2016**	**440/2013**	**15/01/16**	**2009-10**	**1,30,000/-**	**52,000/-**	**32,500/-**	**19,500/-**	**Penalty @ 40% on 1,30,000/-**

4. Learned counsel for the revisionist referring to the provisions of the VAT Act has contended that there existed no circumstance, which warranted the imposition of penalty upon the revisionist. He submitted that no provision of the VAT Act or the Rules framed thereunder required or obliged the revisionist to disclose the "date of manufacture" or the "batch number" of the soft drinks. He submitted that a discrepancy in the details falling under the aforementioned two heads did not justify the imposition of penalty. It was his submission that the articles in question were duly recorded and reflected in the Books of Account and carried a uniform rate of tax. It was submitted that there was no intention to evade payment of tax and therefore also the order of the assessing authority as affirmed by the Tribunal as well as the first appellate authority were rendered unsustainable. Learned counsel submitted that the authorities below have clearly erred in seeking to justify the imposition of penalty by placing reliance upon the judgment rendered by this Court in **M/S. Jagatjit Industries Ltd., Ghaziabad Vs. State of U.P. And Other2**. Seeking to distinguish the judgment rendered in Jagatjit, learned counsel submitted that the same came to be rendered upon a writ petition challenging an order of seizure. The Court, he submitted, was not considering the issue of imposition of penalty at all. Elaborating his submissions, learned counsel contended that admittedly the power of seizure is exercised on a prima facie satisfaction whereas in the case of imposition of penalty, it must be found that the omission on the part of the assessee is aimed at evasion of tax. Further, it was submitted that in **Jagatjit**, the Court was considering the seizure of a consignment of Indian made foreign liquor (IMFL), which in terms of the provisions of the U.P. Excise Act had to necessarily carry "batch numbers". It was submitted that in the case of I.M.F.L., the mention and disclosure of "batch numbers" was directly connected to the payment of excise duty whereas there was no corresponding link between the mentioning of "batch number" with the payment of tax under the VAT Act. The distinguishing features and backdrop in which Jagatjit came to be decided, in the submission of the learned counsel for the revisionist, was duly noted by a learned Single Judge of this Court in Commissioner of Trade Tax Vs. Central Distillery And Breweries Ltd., Meerut3 which had proceeded to hold that a discrepancy in "batch numbers" would not justify a seizure of goods. Learned counsel further submitted that the imposition of penalty merely on an allegation of a discrepancy in the "batch numbers" did not find favour with this Court and referred to the judgments rendered in **M/S. Great Glen Distilleries And Wineries Ltd., Varanasi Vs. Commissioner of Sales Tax[4]** as well as **Sir Shadi Lal Enterprises Ltd., Shamli Vs. The Trade Tax Tribunal, Muzaffarnagar Bench, Muzaffarnagar & Others5**. Learned counsel further referred to a more recent judgement rendered by a learned Single Judge of this Court in Nokia India Pvt. Ltd.[6].

5. Learned counsel then lastly drew the attention of the Court to a judgment rendered by the Tribunal inter partes on 9 May 2012 wherein an imposition of penalty in identical circumstances was set aside by the Tribunal while recording that neither the VAT Act nor the Rules framed thereunder required a disclosure of "batch numbers" and consequentially held that penalty

had been wrongly imposed. He submitted that apart from the fact that the said judgment rendered by the Tribunal related to Assessment Year 2010-11, there was no distinguishing feature which may have justifiably weighed with the Tribunal to take a discordant view and uphold the levy of penalty in the facts of the present case.

6. Learned Standing Counsel refuting the above submissions contended that the assessing authority had proceeded to hold that apart from the two discrepancies mentioned above, some of the invoices had also not been pre-authenticated as was mandatorily required under the provisions of the Rules. He submitted that the assessing authority had recorded a categorical finding that the action of the revisionist was clearly aimed at evasion of tax and that the consignment of goods without a proper recordal in the Books of Accounts was clear and apparent. It was his submission that irrespective of the reasons assigned by the Tribunal, in light of the conclusion so recorded by the assessing authority, the imposition of penalty was clearly justified. It is these rival submissions which now fall for consideration.

7. Before proceeding ahead, a note on the order of the Tribunal and the reasons which weighed with it to sustain the imposition of penalty may be apposite. The Tribunal has noted that the explanation proffered by the revisionist attributing the discrepancies to the inadvertent mistakes of the additional labour loading the consignments was not worthy of credence. The Tribunal arrived at this conclusion holding that at the time of loading of the consignments, clerical staff is also present and that tax invoices are generated only after the goods have been loaded. The second reason which weighed with the Tribunal in refusing to accept the explanation proferred by the revisionist was that this discrepancy had occurred on more than one occasion. It held that the repetitive character of the discrepancies was an indicator of the fact that the stock register was not being maintained in accordance with the provisions of the Act. It then referred to the statutory requirement of the mention of "date of manufacturer" and "batch number" in terms of the provisions of the Food Safety Standards Act, 20067. It accordingly proceeded to hold that the discrepancy in the "batch numbers" and the resultant loading of consignments in different vehicles clearly established that the stock register was not properly being maintained by the revisionist. Ultimately placing reliance upon the law laid down in Jagatjit, the Tribunal proceeded to uphold the orders passed by the assessing uthority as well as the first appellate authority.

8. Section 48 of the VAT Act confers a power upon an authorized officer to seize goods in circumstances enumerated in sub section (1). The same reads as under:

" **Section 48. Power to seize goods.---**

(1) An officer authorised under sub-section (1) of section 45 shall have the powers to seize any goods –

i. which are found in a dealer's place of business, vehicle, vessel or any other building or place; or

ii. which, such officer has reason to believe to belong to the dealer and which are found in any place of business, vehicle, vessel or any other building or place, but are not account for by the dealer in his accounts, registers or other documents maintained in the ordinary course of his business.

iii. which are found in any place of business, vehicle, vessel or any other building or place, and such goods are accompanied by any tax invoice or sale invoice or any other document pertaining to value of goods, as the case may be, containing value of goods undervalued to the extent more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the said transaction had taken place, with intention to evade payment of tax."

9. The power to impose penalty stands enshrined in sub section (5) which reads as follows:

"(5) If such authority, after taking into consideration the explanation, if any, of the dealer or, as the case may be, the person in charge and after giving him an opportunity of being heard, is satisfied that the said goods were omitted from being shown in the accounts, registers and other documents referred to in sub-section (1) or not traced to any bonafide dealer or not properly accounted for by any dealer or the documents issued by a bonafide dealer with respect to the accompanying goods contained wrong particulars or the goods are undervalued to the extent of more than fifty percent of the value of goods prevalent at the relevant time in the local market area where the said transaction had taken place, with intention to evade payment of tax, it shall pass an order imposing a penalty not exceeding forty per cent of the value of such goods, as he deems fit."

10. Section 54 which stands enshrined in Chapter VIII of the VAT Act enumerates the circumstances in which penalty would be imposed and also prescribes the amount of penalty which may be levied. Undisputedly, it is Item (14) which is relevant for our present purposes and the same is in the following terms:

14	Where the dealer or any other person, as the case may be,- i. (i) imports or attempts to import or abets the import of any goods, in contravention of the provisions under section 50 or section 51 with a view to evading payment of tax on sale of- (a) such goods; or (b) goods manufactured, processed of packed by using such goods; or i. (ii) transports, attempts to transport any taxable goods in contravention of any provisions of this Act;	40% of value of goods

11. The requirements of tax invoices are set forth in Rule 44 reads as follows:

"**Rule 44. Requirements of tax invoice, sale invoice, bill, cash memo and purchase invoice**.-(1) Every tax invoice referred to in sub-section (1) of section 22 shall contain name and complete address of the selling dealer, name and address of its branch or depot from where goods are sold, Taxpayer's identification Number of selling dealer, tax invoice serial No., date of issue, signature of the person authenticating tax invoice, name and address of the purchaser, Taxpayer-s identification Number of purchaser, if any, description of goods, quantity or measure of goods, value of goods, other charges, if any, amount of discount, if any, rate of tax, amount of tax charged, total amount of tax invoice and signature of person issuing tax invoice."

12. Undisputedly, the levy of penalty is liable to be tested on the strength of the provisions engrafted in sub sections (1) and (5) of section 48. A deconstruction of sub section (1) would indicate that an assesse faces the specter of seizure in the following circumstances: -

(a) where the officer has reason to believe that goods belonging to the dealer,

(b) are not accounted for by the dealer in his accounts, registers or other documents.

13. In terms of sub section (5) the authority proceeds to levy penalty upon being satisfied that-

(a) the goods were omitted from being shown in the accounts; or

(b) the goods are not traceable to any bona fide dealer; or

(c) the goods are not properly accounted for by any dealer; or

(d) the documents issued by any dealer contained wrong particulars;

or

(e) the goods are undervalued to the extent of fifty percent of the value of the goods prevalent at the relevant time in the local market.

14. Rule 44 mandates that the following particulars must find mention in a tax invoice: -

(a) name and complete address of the seller dealer

(b) name and address of the branch or depot from where goods were sold

(c) Taxpayers Identification Number (TIN) of the selling dealer

(d) Tax invoice number and date of issue

(e) Signature of the person authenticating the tax invoice

(f) name and address of the purchasing dealer

(g) TIN number of the purchasing dealer

(h) a description of the goods

(i) quantity or measure of the goods

(j) value of the goods

(k) rate of tax

(l) amount of tax charged

(m) total amount of tax invoice

(n) signature of the person issuing the tax invoice.

15. As would be more than evident, Rule 44 nowhere requires the disclosure of the batch number or date of manufacture of the goods in question. The description of the goods would be soft drinks/aerated drinks. The requirement of mention of a batch number and date of manufacture are statutory requirements placed by and under a separate statute. One must also not loose sight of the fact that it is not the case of the respondents that the commodities loaded by the revisionist did not carry a batch number or date of manufacture. There case simply is that the batch numbers/date of manufacture did not in some cases tally with the goods actually loaded upon a particular vehicle. In the opinion of this Court, when sections 48 and 54 speak of *"wrong particulars"* in a document or a transportation of goods *"in contravention of any provision of this Act"*, it must necessarily relate to an omission or wrong mention of a particular mandated to be disclosed and mentioned under the provisions of the VAT Act or the Rules framed thereunder. Since the only omissions which triggered the impugned proceedings was an alleged discrepancy in the date of manufacture/batch number, the Court is of the opinion that this was not a case where it could be justifiably held that the goods were being transported in violation of the provisions of the VAT Act or the Rules. This more so when it is borne in mind that it is not the case of the respondents that the goods did not carry a date of manufacture/batch number and the only allegation was of a discrepancy/disconnect between the particulars finding mention in the tax invoice and the actual goods found on a vehicle.

16. The Court at this stage must also note a submission advanced by the learned standing counsel to the effect that some tax invoices had also not been pre-authenticated as required under the provisions of Rule 44, a fact which finds mention in the order of the assessing authority. As is

evident from the order of the Tribunal, the Court finds that this omission, as is noted therein was only in respect of two invoices. As rightly contended by the learned counsel for the revisionist, this could not have justified an imposition of penalty on the value of the entire consignment. More importantly, this factor has not weighed with the Tribunal while it proceeded to uphold and affirm the orders of the assessing authority and the first appellate authority.

17. Having dealt with the peripheral issue, which was more technical in character, the Court now proceeds to deal with the primary issue which pivots around the provisions of section 48 (5).

18. A close reading of sub section (5) establishes that while it sets out the circumstances in which penalty may be imposed [clauses (a) to (e) as extracted and deconstructed above] all the clauses are qualified and circumscribed by the words "with intention to evade payment of tax". The phrase "with intention to evade payment of tax" flows and attaches to each of the circumstance which attracts a levy of penalty under sub section (5). The Court however finds that the Tribunal has nowhere recorded its conclusion that the act of the revisionist was with an intent to evade payment of tax. As would be evident from a reading of sub section (5) the act or omission of the assesse must necessarily be aimed at intent to evade tax. Every bona fide mistake or accidental slip/omission is not intended by the statute to justify the imposition of a penalty.

19. A reading of the orders impugned would establish that no material or evidence was referred to or relied upon which may have even remotely established intent to evade payment of tax. The charge in this regard against the revisionist also does not find legs to stand on when one bears in mind the fact that all the articles of a particular consignment would bear the same rate of tax irrespective of the date of manufacture or batch number. Insofar as the recitals in the order of the assessing authority in this respect is concerned, suffice it to state that a close reading of his order establishes that it only reproduces the statutory requirements for a levy of penalty without referring to any material which may have justified a levy of penalty. More fundamentally, the Court finds that it was the categorical case of the revisionist that all the goods were duly accounted for in its Books of Account. The respondents do not rest their orders on any material or evidence, which may have dispelled this assertion. The Court further notes that the Tribunal while coming to the conclusion that the stock register was not properly maintained does not rely upon any evidence or particulars at all. The said conclusion is purely conjectural and based entirely upon the two discrepancies referred to above.

20. The other aspect which cannot be lost sight of by this Court is the order of the Tribunal itself made in respect of similar proceedings relating to Assessment Year 2010-11. While it is true that the principles of res judicata may not ipso facto apply to tax adjudications, at the same time issues which have been decided principally inter partes cannot be ignored. If the same discrepancies were found in Assessment Year 2010-11 to be insufficient to justify an imposition of penalty in that year, the Court finds no reason why the same principle would not apply to Assessment Year 2009-10. At least the assessing authority, the first appellate authority and the

Tribunal do not record any finding as to why the said decision was not applicable or for that matter distinguishable.

21. The last issue which then remains is whether **Jagatjit** is an authority for the proposition that a discrepancy in batch numbers was a circumstance relevant for imposition of penalty. The Tribunal has proceeded on the basis that Jagatjit does lay down this law. It is trite to note that a judgment is not to be read as Euclid's theorems. One of the primary rules of interpretation of judgments and which has been repeatedly so recognised is that the endeavor to understand the law declared in a judgment must be made bearing in mind the factual backdrop in which it came to be rendered. The true essence of a judgment must be extracted and understood bearing in mind the facts against which it came to be rendered. This principle itself is based on the Latin maxim "Secundum Subjectam Materiam. It is this basic principle which, in the opinion of this Court, has been completely lost sight of by the Tribunal.

22. **Jagatjit** came to be rendered by a learned Judge of the Court upon a difference of opinion between two learned Judges constituting a Bench of the Court. The issue in **Jagatjit** was whether the Court while exercising its powers under Article 226 of the Constitution should interfere with an order of seizure of goods. This is evident from the following extracts of the judgment:-

"11. The question, therefore, for consideration is whether on the facts of the case any ground for interference by this Court was made out in exercise of its jurisdiction under Article 226 of the Constitution of India.

29. In the result, I respectfully agree with the view that on the facts and circumstances of the case this Court should decline to invoke its extraordinary jurisdiction under Article 226 of the Constitution of India and the writ petition is dismissed. I regret my inability to subscribe to the view that the writ petition should be allowed and or the entire proceedings beginning with show-cause notice and terminating in the impugned orders of seizure and the order demanding security to the extent of Rs. 3,708 were liable to be quashed."

23. The second aspect of the case as noted above and which needs to be underlined is that **Jagatjit** was dealing with a case of seizure and not imposition of penalty. In fact the learned Judge in Jagatjit itself noted the distinction between the power to seize and levy penalty in the following terms: -

"21. .....The test for imposition of penalty is more stringent than at the stage when the order directing the seizure of goods in terms of sub-section (1) or (1-A) of Section 13-A may be passed on a prima facie belief based on direct or circumstantial evidence that the goods are not accounted for by the dealer or they are not traced to a bona fide dealer or it was doubtful that the goods are accounted for by any dealer."

24. The more fundamental distinction of **Jagatjit** is the facet of a statutory requirement of a batch number being mentioned on IMFL under the U.P. Excise Act and the absence of any such similar requirement under the VAT Act or the Rules. As noted above, no such requirement stands placed upon the revisionist under the VAT Act. In fact the authorities themselves noted that the requirement of mentioning the date of manufacture and batch number was one which stood imposed by virtue of the provisions of a separate statute.

25. In view of the above, this Court is of the firm view that Jagatjit is not an authority for the proposition that a wrong mention of/discrepancy in the batch number or date of manufacture would warrant the imposition of penalty under the VAT Act.

26. Additionally the Court finds that Jagatjit was duly noted and distinguished in **Central Distillery**. The learned Judge held:

"4. It is admitted that the goods were accompanied by the documents referred to above and the only ground of seizure was that the batch numbers of the goods were different. It has been held by this Court in Lipton India Ltd. v. Commissioner of Sales Tax, 1993 U.P.T.C. 368 and M/s. Great Glen Distilleries & Wineries v. Commissioner of Sales Tax 1995 U.P.T.C. 699 that the seizure of goods was not justified in cases where there is merely a difference of batch number of the goods. The learned Standing Counsel placed reliance on M/s. Jagatjit Industries Ltd. v. State of U.P., 1997 U.P.T.C. 1011 in which the question was whether on the facts of that case the High Court should exercised its jurisdiction under Article 226 of the Constitution of India for quashing the notices of seizure. It was held that the necessary facts have to be found by the authorities under the Act and, therefore, the High Court should not interfere under Article 226 of the Constitution of India. The view taken by this Court in the aforesaid cases has neither been considered nor a different view taken. Therefore the aforesaid judgments are applicable to the facts of the present case in which the dealer preferred by appeal to the Tribunal in terms of Section 10(2) of the Act and the Tribunal has recorded a finding of fact that the goods were duly recorded in the books of account of the dealer. This finding is not open to challenge in the present revision petition."

27. The issue as to whether a discrepancy in the batch number would be sufficient to warrant the imposition of a penalty, as the learned Judge noted, had been negatived in **Great Glen** and other judgments. This is what the learned Judge observed in **Great Glen:** -

"7. .....The difference in the batch number mentioned in the excise export permit was of no consequence whatsoever. Firstly that was not a document required under Rule 83(4) and secondly the batch number did not in any manner make the goods different from what they were mentioned to be in the other documents. Rule 83 (4) of the Sales Tax Rules and Section 28-A have to be read keeping in view the purpose for which they have been incorporated in the Sales Tax Act and the Rules. The purpose is to ensure proper recovery of sales tax. The batch number of a product has no relevance whatsoever, so far as sales tax is concerned. The goods being carried were cases of Ritz whisky and what was material was the number of cases and the bottles and the value thereof. The difference in batch number did not effect these things and the contention of the learned Standing Counsel that the difference in the batch did make the goods different is thoroughly unacceptable."

28. **Great Glen,** it may be noted, was rendered prior in point of time to **Jagatjit** and itself followed an earlier judgment of the Court rendered in **Lipton India Ltd. Vs. Commissioner of Sales Tax8**. Neither of these judgments were noticed or referred to in **Jagatjit**.

29. Having dwelt upon Jagatjit and the distinguishing backdrop in which the same came to be rendered, the Court lastly takes note of what was held in **Shadi Lal Enterprises** where the learned Judge held:-

"6. Batch number is only mentioned in only in Bill No. 25. In other papers accompanying the disputed consignment Batch number is not mentioned. There is no finding of the Tribunal that the goods despatched through the consignment in question there was omission, as shown in the accounts, registers and other documents. Penalty under these circumstances, could be imposed only when a categorical finding is recorded to this effect. There is nothing to show that the Tribunal examined the matter with reference to these stipulations. It is undisputed that if goods are shown in the accounts, registers and other documents, no penalty could be imposed. Consequently, the penalty imposed by the Tribunal must be held to be illegal on the face of it, and it has to be quashed."

30. For all the aforesaid reasons, the Court has no hesitation to hold that the imposition of penalty upon the assessee on account of a discrepancy in the batch numbers and date of manufacture was clearly unjustified and unwarranted in the facts and circumstances of the case. The orders of the assessing authority, the first appellate authority as also that of the Tribunal sustaining the levy of penalty upon the revisionist, therefore cannot be sustained.

31. Accordingly this revision shall stand **allowed**. The order of the assessing authority dated 31 July 2009, the order of the first appellate authority dated 19 August 2013 and that of the Tribunal dated 15 January 2016 are hereby set aside. The revisionist shall be entitled to the refund of the amounts deposited towards penalty. This claim of the revisionist shall be processed by the assessing authority in accordance with the provisions of the VAT Act expeditiously.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2022

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 160 Of 2006

M/S Maiden Industries **...Applicant**

Versus

The Commissioner Of Trade Tax, U.P. Lucknow **...Respondents**

Counsel for the Applicant:
Ashok Kumar

Counsel for the Respondents:
S.C.

The short and interesting issue involved in this revision is as to whether the tax which the assessee has paid on the purchase of raw material and packing material which is ultimately used in the manufacture and packing of goods is liable to be adjusted in full from the ultimate tax liability which a dealer may stand faced with or is it liable to be adjusted only to the extent of the taxable turnover.

This Court finds the action of the assessing authority in reducing the set off which was claimed by the revisionist to be unsustainable. The answer is thus entered in favour of the assessee and against the Department.

This revision stands allowed. The assessee shall be entitled to all consequential reliefs as permissible in law.

Held: Para-

Case Law discussed:
Supreme Court in Commissioner of Sales Tax Vs. Bharat Petroleum Corporation Ltd,
Anglo-French Textiles Co. Ltd. V. CIT [(1954) 25 ITR 27: AIR 1954 SC 198]; Tata Iron & Steel Co. V. State of Bihar [AIR 1963 SC 577 :1963 Supp (1) SCR 199 :(1963) 48 ITR 123],
CIT v. Best & Co. [(1966) 60 ITR 11: AIR 1966 SC 1325 :(1966) 2 SCR 480]

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard the learned counsel for the revisionist and Sri B.K. Pandey, learned standing counsel for the respondent.

2. The short and interesting issue involved in this revision is as to whether the tax which the assessee has paid on the purchase of raw material and packing material which is ultimately used in the manufacture and packing of goods is liable to be adjusted in full from the ultimate tax liability which a dealer may stand faced with or is it liable to be adjusted only to the extent of the taxable turnover.

3. The issue itself arises on account of the fact that the revisionist in this case had paid a tax of Rs.5,72,182/- on raw material which was admittedly used in the manufacture and packing of goods. The case of the revisionist was that he had effected sales approximating to Rs.2.05 crores on which he became liable to pay tax of Rs. 3.41 lacs in that year. Admittedly the revisionist had also effected sales of Rs.61,56,650/- to certain units which enjoyed exemption from payment of tax by virtue of the provisions of Section 3-B of the U.P. Trade Act 1948. What the assessing authority has proceeded to do however is that while setting off the tax which had been pre-paid by the assessee on the raw material, it has reduced the set off amount to Rs.4,21,406/- against what the assessee originally paid namely Rs.5,72,182/-. The reasoning adopted by the assessing authority was that on sales of Rs.61,56,650/-, the assessee had not levied or collected any tax. This because, these sales were made in favour of entities which were exempt from tax by virtue of section 3-B. He has accordingly proportionately reduced the benefit of the tax paid by the dealer on raw

material and restricted its offset to the taxable turnover only. It is the correctness of this action of the assessing authority which falls for consideration.

4. Admittedly the set off of taxes paid on raw material and packing material stands covered by the provisions of Section 4-BB of the U.P. Trade Tax Act 1948. The said provision reads as under:

"Where tax has been paid on the purchases or sale of raw material or packing material inside the State and such raw material or packing material has been used in manufacture or packing of such goods as are notified by the State Government in this behalf and such goods are sold in the State or in the course of inter-state trade or commerce, the amount of tax paid on the purchase or sale of the raw material or packing material, subject to such conditions and restrictions as may be specified in the said notification, be deducted from the tax payable on the sale of such goods-

(a) inside the State to the extent the tax has been paid on the purchase or sale of raw material or packing material from which the goods sold inside the State were manufactured or packed.

(b) In the course of inter-state trade or commerce, to the extent the tax has been paid on the purchase or sale of raw material or packing material, from which the goods sold in the course of inter-state trade or commerce were manufactured or packed.

Provided that the amount of tax to be deducted under clause (a) or clause (b) shall not exceed the amount of tax payable separately under this Act or the Central Sales Tax Act, 1956."

5. Learned counsel for the revisionist has contended that section 4-BB does not envisage or mandate a proportionate reduction of the set off amount. It is his submission that the entire amount of tax which has been paid on raw material or packing material as the case may be was liable to be set off against the tax liability of the revisionist. He has, in aid of his submission, also placed reliance upon the judgment rendered by the Supreme Court in **Commissioner of Sales Tax Vs. Bharat Petroleum Corporation Ltd.**[1]

6. The learned standing counsel on the other hand has submitted that the set-off which was claimed by the assessee is directly connected with the tax payable on the sale of goods. He submits that the tax paid on raw or packing material to the extent used and utilized in the manufacture and sale of goods to tax exempted entities must necessarily be proportionately reduced. He submits therefore that to the extent that the raw material may have been used in the manufacture of goods valued at Rs.61,56,650/- there has to necessarily be a reduction in the total set off claimed by the assessee.

7. The submission advanced by the learned standing counsel cannot be accepted for more than one reason. While it is true that the language of Section 4-BB does enjoin the set-off of the tax

paid on purchase and sale of raw material from the tax payable on the sale of such goods, the section, as the learned counsel for the revisionist has rightly contended, does not make any distinction between tax exempted sales and sales on which taxes have been levied and collected. From the plain and unambiguous language of Section 4-BB, this Court finds no indication that set off which is claimed by the assessee is liable to be reduced and restricted only to such sales which have suffered or have been subjected to tax. The set off which is claimed is of all taxes that have been paid on the purchase of raw material. The set off is not restricted in any manner to only those sales upon which tax has been levied or collected. This becomes further evident from the language of sub clause (a) which while specifying the extent of set off relates it to solely to the tax paid on the packing or raw material "from which the goods sold within the State were manufactured and packed". Here also the emphasis of the legislative author as is evident is upon two factors only (a) the pre-paid tax on raw or packing material and (b)their utilisation in the manufacture and packing of goods sold in the State. The words "tax payable on the sale of such goods" as used in the substantive part of 4BB firstly cannot be read in isolation. Secondly, they stand duly explained by sub clause (a) which follows.

8. In order to appreciate the dictum laid down by the Supreme Court in **Bharat Petroleum,** it would first be apposite to consider what was actually urged from the side of the revenue therein. This is how the Supreme Court recorded the submission: -

"14. Shri Dholakia, learned counsel for the State of Maharashtra, submits that the issue in these appeals is a very simple one. Rules 41 and 41-A are intended to give relief to a dealer in respect of purchase of goods which are used in the manufacture of taxable goods for sale, the clear idea being that where the manufactured goods will also be liable to sales tax in the hands of the manufacturer there should be a relief of the taxes paid by him on the goods purchased by him for use in such manufacture, so as to avoid double taxation. In the Bharat Petroleum case [The words "or export" were inserted by a notification dated August 31, 1970] , the manufactured goods viz., pure kerosene were neither sold by the respondent so as to attract sales tax in his hands nor, indeed, liable to sales tax at all for the first three months. .....Even assuming that the sulphuric acid or cotton purchased can be said to have been used for the manufacture of two commodities (viz. kerosene and acid sludge in the one case and cloth and cotton waste in the other), the set-off under the rules relied upon should be split up proportionately and allowed only to a proportionate extent, the proportion being decided on the basis of the respective turnovers of the taxable and non-taxable goods. He submits that though the rules do not specifically provide for such a bifurcation, an apportionment of such nature is almost invariably implicit in a tax law and is also consonant with the object and purpose of the rules....."

9. Ultimately it held as under: -

17. Turning now to the main question, we are inclined to agree with respondents' counsel that they are entitled to a set-off of the entire tax paid by them on the purchases of sulphuric acid and cotton respectively. The only condition under the rule is that the goods purchased on payment of tax should have been used in the manufacture of taxable goods for sale.

Their concurrent user for the manufacture of another item of goods which may or may not be taxable is immaterial though we may point out that in the Bharat Petroleum case, the kerosene was also taxable for nine months in the year and in the case of Phulgaon Cotton Mills, yarn was also manufactured and it was subject to tax. Sri Dholakia contends for an implicit principle of apportionment on the basis of turnovers of various items of goods manufactured and restriction of the quantum of set-off to a proportion based on the turnover of taxable goods to the total turnover. He cited certain decisions under the Income Tax and Sales Tax Acts in support of this contention: Anglo-French Textiles Co. Ltd. v. CIT [(1954) 25 ITR 27 : AIR 1954 SC 198] ; Tata Iron & Steel Co. v. State of Bihar [AIR 1963 SC 577 : 1963 Supp (1) SCR 199 : (1963) 48 ITR 123] and CIT v. Best & Co. [(1966) 60 ITR 11 : AIR 1966 SC 1325 : (1966) 2 SCR 480] We do not think these cases are of assistance..... The rules do not require that the purchased goods must have been used only for the manufacture of taxable goods for sale. In this situation, it is not possible to cut down the quantum of relief clearly outlined in the rule on the basis of some general principle claimed to underlie the provision. As Sri Bobde rightly pointed out, the basis for the relief provided is not very clear cut. Various reliefs have been provided in a group of rules which come in for application in various situations. The relief may be based on the principle that the manufactured product is taxed either in the hands of the same assessee or in someone else's hands, or that the manufactured goods are exported which may yield no tax but earn foreign exchange, or even that the purchases are utilised for manufacture of goods in the State thus contributing to the industrial development of the State. It is, therefore difficult to read into the provision a quantitative correlation of the goods resulting in a taxable turnover and the purchases of raw materials on which tax has been paid. In this background, the straightforward answer to the question raised lies in the literal interpretation of the language of the rules without straining to discover some doubtful principle for denying relief." (emphasis supplied)

10. Applying the ratio of Bharat Petroleum to the facts of the present case and the language of section 4BB, this Court finds the clear absence of a "*quantitative correlation*" to the total tax paid on the raw or packing material and their utilisation in the manufacture of taxable goods.

11. Secondly this Court notes that the tax free sales effected by the revisionist was not of its own accord. These were sales effected in favor of units which had been granted exemption from payment of tax under section 4B. Surely the benefit of tax already paid by the revisionist could not be denied adjustment based upon the liability or otherwise of another dealer.

12. Thirdly, the Court notes that the revisionist has effected a sale of goods to entities within the State. However since these enjoyed exemption under Section 4-B, no tax was collected on these sales. The mere fact that tax has not been collected, does not detract from the position that a sale of goods took place.

13. Lastly, the Court notes that the section itself provided a facility of set off of tax already paid by a dealer in respect of input goods. It was therefore in the nature of a beneficial provision. It must, therefore, be accorded an interpretation which is in favour of the assessee.

14. For the aforesaid reasons, this Court finds the action of the assessing authority in reducing the set off which was claimed by the revisionist to be unsustainable. The answer is thus entered in favour of the assessee and against the Department.

15. This revision stands **allowed**. The assessee shall be entitled to all consequential reliefs as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Transfer Application (Civil) No.- 226 Of 2016

Amit Pachauri ...**Applicant**
Versus
Smt. Ram Beti & Ors. ...**Opposite Parties**

Counsel for the Applicant:
Sri Veer Bhagat Singh Kushwaha**,** Sri Vijay Prakash Singh Kushwaha

PROCEDURE:
Application under **Section 24 of the Code of Civil Procedure, 1908** seeking transfer of *Civil Appeal No. 18 of 2015 (Smt. Ram Beti & Ors. v. Amit Pachauri & Ors.)* pending before the Court of Additional District Judge, Court No. 3, Etah, to another competent court within the district.
The office objected to the maintainability of the transfer application on the ground that a similar application under Section 24 C.P.C. had earlier been rejected by the District Judge, Etah, relying upon **1998 (1) ARC 305, Jagdish Kumar v. District Judge, Badaun & Ors.**

CASE LAW DISCUSSED:
Jagdish Kumar v. District Judge, Badaun & Ors., 1998 (1) ARC 305

HELD
Section 24 C.P.C. — Transfer of Cases — Concurrent Jurisdiction of High Court and District Judge — Maintainability.
Section 24 C.P.C. confers **concurrent jurisdiction** upon the High Court and the District Judge to transfer suits, appeals or proceedings pending before courts subordinate to them.
The jurisdiction of one is **not to the exclusion of the other**.
If an application under Section 24 C.P.C. fails before the District Judge, the party is not barred from approaching the High Court under the same provision.
An order passed under Section 24 C.P.C. is **neither appealable nor revisable**, though it may be examined under Article 227 of the Constitution.
The decision in *Jagdish Kumar* does not prohibit filing of a fresh application before the High Court after rejection by the District Judge; rather, it affirms the concurrent jurisdiction.

Therefore, the transfer application before the High Court is **maintainable**, notwithstanding dismissal of a similar application by the District Judge.**On Merits:**
Mere pendency of appeal without progress is not a ground for transfer.
Filing of transfer application does not create a presumption of bias against the Presiding Officer.
In absence of specific allegations of prejudice or partiality, no case for transfer is made out.

RESULT:
Objection of the office regarding maintainability **overruled**.
Transfer Application held **maintainable**.
On merits, the Transfer Application **dismissed**.
Registry directed to send copy of the order to the Stamp Reporting Section for future guidance.

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

1. Heard Sri V.B. Singh Kushwaha, learned counsel for the petitioner-applicant.

2. The petitioner-applicant has filed this application under Section 24 C.P.C. for transfer of Civil Appeal No.18 of 2015, Smt. Ram Beti and others Vs. Amit Pachauri and others pending in the Court of Additional District Judge, Court No.3, Etah to some other court of competent jurisdiction within the district itself.

3. The office has reported that the transfer application is not maintainable in view of ***1998(1) ARC 305 Jagdish Kumar Vs. District Judge, Badaun and others.***

4. The aforesaid objection has been raised probably for the reason that the petitioner-applicant had earlier filed an application under Section 24 C.P.C. before the District Judge, Etah and the same was rejected.

5. Section 24 C.P.C. lays down the general power of transfer and withdrawal of the cases and inter alia provides that the High Court or the District Judge may at any stage transfer any suit, appeal or other proceeding pending before any court subordinate to it for trial or disposal to any court subordinate to it and competent to try or dispose of the same.

6. A plain reading of the aforesaid provision reveals that it confers concurrent power of transfer of cases upon the High Court and the District Judge.

7. The above decision in ***Jagdish Kumar (supra)*** lays down that an order passed under Section 24 C.P.C. is neither appealable or revisable. It may, however, be subjected to test, if necessary, under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. The jurisdiction conferred under Section 24 C.P.C. is concurrent. The aforesaid jurisdiction can not be interpreted to mean that the jurisdiction of one court is to the exclusion of the other. If the application under Section 24 C.P.C. fails before the District Judge the party may approach the High Court in exercise of concurrent jurisdiction under the same provision and once the High Court passes an order, the order of the District Judge would stand overruled by

implication but this will not be the situation where the party is unsuccessful before the High Court to enable him to go before the District Judge.

8. The legal conclusions of ***Jagdish Kumar (supra)*** in short are as under:

(1) The High Court and the District Judge has concurrent jurisdiction to transfer cases under Section 24 C.P.C.;

(2) The aforesaid jurisdiction conferred upon the two courts is not to the exclusion of the other:

(3) If the application under Section 24 C.P.C. fails before the District Judge, the party has an option to move to the High Court under Section 24 C.P.C. itself but if the party is unsuccessful in the High Court it cannot move a fresh application before the District Judge; and

(4) The order passed under Section 24 C.P.C. is neither appealable nor revisable. It may be subjected to test, if necessary, under Article 227 of the Constitution of India.

9. The aforesaid decision nowhere lays down that once a party has approached the District Judge under Section 24 C.P.C. it cannot file a fresh application before the High Court, rather it specifically lays down that the jurisdiction conferrned under Section 24 C.P.C. is concurrent and that a party filing an application under Section 24 before the District Judge may approach the High Court under the same provision.

10. In view of the aforesaid facts and circumstances, there is no bar in moving an application under Section 24 C.P.C. before the High Court for transfer of a case by the same party after lossing in getting it transferred by the District Judge.

11. The petitioner-applicant is not challenging the order of the District Judge rejecting application under Section 24 C.P.C.

12. Accordingly, the objection raised by the office in this regard stands overruled and the transfer application is held to be maintainable notwithstanding that a similar transfer application had been dismissed by the District Judge.

13. Heard learned counsel for the petitioner-applicant on merits of the matter.

14. The petitioner-applicant wants transfer of appeal only for the reason that it had remained pending for long before the appellate court with no progress. It appears that the appeal could not be heard on merit as all the parties were not duly represented. The parties are now represented and the matter can be heard. Therefore, there is no justification for transferring the appeal to another court.

15. Learned counsel for the petitioner-applicant submits that since he had applied for transfer of the proceedings, the Presiding Officer of the court concerned would adopt a partisan approach and act prejudicially against him.

16. The submission has no substance as in the course of litigation such situations do arise but the judicial officers always rise to the occasion and decide the matter on merits in accordance with law notwithstanding the filing of application for transfer of the case from their court. Moreover, the petitioner-applicant has not levelled any allegation against the Presiding Officer for getting the case transferred. Therefore, there is no question of any of partisan approach by the court concerned.

17. The transfer application, as such, is devoid of merit and is dismissed.

18. The Registry is directed to send a copy of this order to the Stamp Reporting Section for future guidance in submitting reports on transfer applications filed under Section 24 C.P.C.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 248 Of 1977

Kishan Chand & Ors. **...Appellants**
Versus
Mitthan Lal & Ors. **...Respondents**

Counsel for Appellants:
A.N. Bhargava

Counsel for Respondents:
S.M.H. Zaidi, Bharat Ji Agarwal, Neeraj Agarwal, S.M. Haider

1. Succession Act – Probate/Letters of Administration – Will – Suspicious Circumstances – Duty of Propounder – Failure to Explain Change of Earlier Registered Will – Effect.
Where a testator had executed a registered Will (Ex. 2) approximately eight months prior to the execution of the disputed Will (Ex. 3) in favour of both his cousin brothers — the father of the appellants and the contesting respondent — and the disputed unregistered Will sought to supersede the earlier registered Will entirely in favour of the appellants to the exclusion of the contesting respondent, it was incumbent upon the propounders of the later Will to explain the circumstances which led the testator to execute such a Will. In the present case, while the disputed Will attributed the exclusion of the appellants' father to his mental illness and incapacity, it contained no explanation whatsoever for the disinheritance of the contesting respondent who had been a beneficiary under the prior registered Will. Held: The failure of the propounders to furnish any explanation for such a radical departure from the earlier Will gives rise to suspicious circumstances

surrounding the execution of the disputed Will, which the appellants completely failed to remove. The application for Letters of Administration was rightly dismissed.

2. Succession Act – Will – Attesting Witnesses – Independence and Impartiality – Witnesses Closely Related to Propounders – Requirement of Strict Scrutiny.
The evidence of attesting witnesses to a Will is required to be subjected to strict scrutiny where it is established that such witnesses were not independent or impartial but were closely associated with the propounders of the Will. In the present case, the first attesting witness (A.W. 1) was found to be residing with the principal appellant, used to sit and occasionally handle customers at the appellant's photographer's shop, and had been actively participating in the proceedings of the case (PAIRVI) even before issues were framed by the court. The second attesting witness (A.W. 2) admitted a close association with A.W. 1. Held: The attesting witnesses being closely related to each other and to the appellants, their testimonies lacked the character of independent and impartial attestation required in law, and their evidence was rightly subjected to strict scrutiny by the court below.

3. Succession Act – Will – Typed Will – Non-Disclosure of Origin – Who Got the Will Typed and Delivered – Suspicious Circumstance – Will Not Deposited by Testator.
Where a disputed Will is a typed document and there is no evidence on record as to who caused it to be typed or who delivered it to the testator, such unexplained mystery of origin constitutes a material suspicious circumstance. It further adds to the suspicion when the Will was not deposited by the testator himself but was deposited with the District Judge by the first attesting witness, who had also taken an active part in the preparation of the Will. In the present case, A.W. 1 merely admitted that he had approached an advocate for a draft of the Will some 10-15 days earlier, but who got it typed and who handed it over to the testator remained entirely unexplained. Held: These circumstances cumulatively reinforced the suspicious character surrounding the execution of the disputed Will and the propounders failed to satisfactorily account for them.

4. Evidence Act, 1872 – Expert Evidence – Handwriting Expert – Disputed Signatures on Will – Comparison with Admitted Signatures – Imitation Forgery – Corroborative of Suspicious Circumstances.
Where a handwriting expert, upon comparison of the disputed signatures of the testator on the contested Will (Ex. 3) with his admitted signatures on an earlier registered Will (Ex. 2), opined that the disputed signatures were imitation forgery and that the writer of the admitted and disputed signatures were different persons, such expert evidence constitutes a significant circumstance corroborating the suspicious character of the disputed Will. In the present case, the report of the handwriting expert (O.P.W. 2, Ex. A-2) went unchallenged in any material particular. Held: The expert's opinion, read along with the other suspicious circumstances surrounding the execution and attestation of the disputed Will, further reinforced the conclusion that the disputed Will (Ex. 3) was not the genuine last Will and testament of the testator.

5. Civil Procedure – First Appeal – Scope of Examination – Appellate Court to Re-Appreciate Evidence – No Infirmity Found in Findings of Court Below.
In a First Appeal, the Appellate Court is required to re-appreciate the evidence on record and satisfy itself independently as to the correctness of the findings recorded by the court below. Where, upon such re-appreciation of the oral and documentary evidence, the Appellate Court finds no infirmity, illegality, or manifest error of law or fact in the findings of the trial court, and where the propounders of the Will have completely failed to remove the suspicious circumstances surrounding the execution and attestation of the disputed Will, the appeal deserves to be dismissed. Held: The court below did not commit any error of law or fact in deciding Issue No. 1 against the appellants. The impugned judgment and decree dismissing the application for Letters of Administration was affirmed and the appeal dismissed.

Result: Appeal dismissed. The judgment and decree dated 06.05.1977 passed by the First Additional District Judge, Mathura in Misc. Case No. 76 of 1973 dismissing the application for Letters of Administration in respect of the disputed Will dated 14.01.1970 (Ex. 3) affirmed.

Cases Referred:
1. Rani Purnima Debi & Another v. Kumar Khagendra Narayan Deb & Another, AIR 1962 SC 567 – Applied.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Santosh Kumar Tiwari, learned counsel for the appellants.

2. No one appears on behalf of the respondents even in the revised call.

3. This First Appeal has been filed challenging the judgment and decree dated 6.5.1977 passed by the Court of First Additional District Judge, Mathura in Misc. case No.76 of 1973 between present appellants and Mitthan Lal Mehrotra and four others.

4. The case was proceeded ex parte against the opposite party nos.1 to 4, inasmuch as they did not appear. The contesting opposite party is the opposite party no.5, Sri Panna Lal Mehrotra.

5. Sri Santosh Kumar Tiwari submits that the Will Ex. 3 dated 14.1.1970 of Sri Chiranji Lal in favour of the appellants was proved and, therefore, the court below has committed a manifest error of law and facts to decline to grant Letters of Administration and to hold that the said Will in favour of the appellants was surrounded by suspicious circumstances and was not a valid Will. He further submits that the impugned judgment is wholly illegal and, therefore, deserves to be set aside.

6. I have carefully considered the submissions of learned counsel for the appellants.

7. Briefly stated the facts of the present case are that undisputedly, father of the appellants, namely, Sri Chhunnoo Lal and the opposite party No.5, Sri Panna Lal were cousin brothers of the testator, Sri Chiranji Lal. They were living with him since their childhood and Sri Chiranji Lal had supported them from the very beginning. According to the opposite party No.5 a Will dated 5.1.1969 (Ex. 1) was executed in his favour by Sri Chiranji Lal. Subsequently another Will dated 6.5.1969 was executed in favour of the objector Panna Lal (opposite party no.5) and the father of the present appellants Sri Chhunnoo Lal. According to the appellants a Will dated 14.1.1970 was thereafter executed in favour of the appellants by the aforesaid Sri Chiranji Lal and was deposited with the District Judge, Mathura on 16.4.1970.

8. Sri Chiranji Lal died on 11.9.1971 at the age of about 90 years. Thereafter, the Will was opened by the order of the District Judge, Mathura and it was registered by the Sub Registrar Mathura on 22.1.1973.

9. The miscellaneous case no.76 of 1973 was filed by the present appellants for Letters of Administration in respect of the Will dated 14.1.1970 said to be executed by Sri Chiranji Lal in their favour. The attesting witnesses of the Will were Sri Jai Kishan Dixit and Sri Kunj Bihari Asthana (A.W.-1 and AW-2 respectively). The case was dismissed with costs by the impugned judgment dated 6.5.1977.

10. Aggrieved with this judgment, the appellants have filed the present First Appeal.

11. The dispute in the present appeal is with regard to Ex.3 Will dated 14.1.1970. The Court below framed four issues out of which issue no. 3 was not pressed. Therefore, the court below decided issue nos. 1, 2 and 3. Before this Court learned counsel for the appellants has pressed this appeal only against the findings recorded by the court below on issue no.1. Under the circumstances, this Court is considering the following question in this appeal:

"Whether Sri Chiranji Lal duly executed a Will on 14.1.1970 in favour of the appellants"?

13. Before the Court below the appellants produced attesting witnesses, namely, Sri Jai Kishan Dixit (A.W.-1), Sri Kunj Bihari Asthana (A.W.-2) and Sri Sohan Lal (appellant no.4), who were also cross examined. The court below, on an application 66 C moved on behalf of the opposite party No.5 on 5.7.1975 noted the fact that Sri Jai Kishan Dixit (A.W.-1), who was attesting witness of the said Will, was present in the court alongwith counsel of the appellants when even issues were not framed in the case upto that time. For this reason it was contended that the aforesaid attesting witness was doing PAIRVI of the case.

14. The A.W.- 2 admitted that he and Sri Kishan Chand both were clerks in the Veterinary College, Mathura. He knows Sri Jai Kishan Dixit (A.W.1) for about 10 or 15 years as Sri Jai Kishan Dixit had been taking contract in the Veterinary College. He had admitted his close relation with Sri Jai Kishan Dixit (A.W. 1). In his cross objection A.W. 1 admitted that he has been residing with the appellant, Sri Kishan Chand and others and that it was only occasionally he lived with his son. He also admitted that he used to sit on the photographer's shop of the appellant Sri Kishan Chand, and also some times handled the customers at that shop.

15. On these facts the court below came to the conclusion that the attesting witnesses of the Will in question (Ex. 3) were very close to each other and also close to the appellants and, therefore, their evidence requires strict scrutiny. The appellant no.4, Sri Sohan Lal (A.W.-3) in his cross examination admitted that his father, Sri Chhunnoo Lal and his uncle Sri Panna Lal used to look after and serve the testator Sri Chiranji Lal who died on 11.9.1971. However, subsequently, he stated that Sri Panna Lal had stopped looking after and serving Sri Chiranji Lal from about 2 or 4 years before the death of Sri Chiranji Lal. When Sri Sohan Lal (A.W.-3) was asked to explain as to why Sri Panna Lal stopped to serve Sri Chiranji Lal he stated that relation had become strained but he could not disclose any material cause for that.

16. Nothing was mentioned by the appellants that what led Sri Chiranji Lal to execute the unregistered Will in favour of the appellants in the year 1970 superseding the registered Will Ex.2 in favour of their father and uncle Sri Panna Lal. In the Will Ex.3 it was mentioned by the testator that Sri Chhunnoo Lal (father of the appellants) remained ill and he suffered very occasionally mental diseases and, therefore, he was incapable to look after the property and business, but nothing was mentioned about the opposite party no.5 for disinheriting him in whose favour the previous registered Will Ex.2 was executed. Thus the appellants who were propounders of the Will, had completely failed to explain the circumstances which led the testator to change his previous registered Will Ex.2 and to execute an unregistered Will Ex.3 in their favour.

17. The Ex.3 Will is a typed will. No evidence was brought on record as to who got it typed and handed over to the testator. In his evidence A.W.1 had only admitted to the extent that he had gone to Sri Rakhal Das, Advocate about 10 or 15 days before for a copy of the draft Will prepared by him. Thus it is not known that who got the Will typed and who delivered it to the testator.

18. The Will Ex.3 was not admitted by the opposite party No.5. In his objection he stated that to the best of his knowledge and conviction this Will did not bear the signature of the deceased Sri Chiranji Lal. Alternatively, he stated in his objection that if any signatures were obtained which he denied the same must had been obtained by fraud or misrepresentation. Thus the signatures of the Sri Chiranji Lal on disputed Will was denied by the objector, opposite party No.5.

19. The opposite party no.5 filed a report of Sri Salek Chand Verma (O.P. W.2) hand writing expert which was marked as Ex.A-2. He compared the disputed signatures of Sri Chiranji Lal on the disputed Will Ex.3 with the admitted signatures of Sri Chiranji Lal on the Will Ex.2. He deposed that the signatures of the Will Ex.3 were immitation forgery and that the writer of the admitted signatures on Ex.2 and the disputed signature on Ex.3 are of different persons.

20 .The court below, on consideration of various evidences; came to the conclusion that Sri Chiranji Lal was about 90 years old a weak man who mostly remained on the cot on the date of the Will Ex.3 but it was not established that he was not in sound disposing state of mind at that time. However, the Court below considered the suspicious surrounding circumstances in the light of the law laid down by Hon'ble Supreme Court in the case of **Rani Purnima Debi and another Vs. Kumar Khagendra Narayan Deb and another, A.I.R. 1962, SC 567(para 5**) and certain other judgments and proceeded to examine the question as to whether the Will Ex.3 was surrounded by suspicious circumstances? On this point it was noted by the court below that the attesting witnesses of the disputed Will were very close to each other and also close to the appellants. They were not independent and impartial witnesses. The appellants had failed to explain the circumstances which necessitated Sri Chiranji Lal to execute the disputed Will in favour of the petitioner when the testator had bequeathed about 8 months back his property to both of his cousin brothers, namely, the father of the appellants and the opposite party no.5, by a registered Will (Ex.2) in which the names of the appellants and also the sons of opposite party no.5 were mentioned but their names were struck off from the said Will by the testator himself at the time of registration. This being so

the appellants could not prove that the relations of Sri Chiranji Lal and the opposite party No.5 had become strained. It remained mystery that who got typed the disputed Will and handed over it to the testator. The Will was not deposited by the testator himself. It was deposited by Sri Jai Kishan (A.W. 1) who used to live with the appellant and took active part in getting the Will prepared. Considering all these evidences on record, I do not find any infirmity in the findings recorded by the court below. The appellants have completely failed to remove the suspicious circumstances which surrounded execution and attestation of the disputed Will.

21. In view of the aforesaid this Court is of the view that the court below has not committed any error of law or facts to decide the issue no.1 against the appellants.

22. In view of the above discussion, I do not find any illegality in the impugned judgment.

23. In result, the appeal fails and is hereby dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE HARSH KUMAR, J.

Criminal Appeal No.- 264 Of 1983

Kedar Nath **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
V.S. Singh, Adhya Gupta, D. Singh, M. Islam

Counsel for Respondent:
A.G.A

Indian Penal Code, 1860 — Ss. 302 & 307 — Murder and Attempt to Murder — Ocular Evidence — Corroboration by Medical Evidence — Injured First Informant as Natural Eye Witness — Two independent eye witnesses accompanying him — Consistent and trustworthy testimonies — Conviction upheld — The accused-appellant was convicted by the trial court under Sections 302 and 307 IPC for causing the death of Prem Chandra and causing grievous injuries to first informant Suresh Chandra Singh by stabbing them with a knife. The first informant (P.W.1), being an injured witness, is a natural eye witness of the occurrence. His statement was fully corroborated by the medical evidence on record as well as by two other independent eye witnesses, Kamlesh (P.W.2) and Awadh Bihari (P.W.4), who were accompanying him at the time of occurrence, and with whom the accused-appellant had no enmity. The evidence of P.W.1, P.W.2 and P.W.4 was consistent with regard to the place and manner of occurrence. The argument that no injuries were found on the palms of the injured or deceased — which would naturally occur

during defence against an attack — was repelled on the ground that the accused-appellant had attacked the first informant suddenly from behind leaving no opportunity for resistance or defence. Held: The prosecution established its case beyond reasonable doubt through consistent, trustworthy and cogent ocular and medical evidence; conviction under Sections 302 and 307 IPC affirmed.

Indian Penal Code, 1860 — S. 302 — Medical Evidence — Same weapon causing injuries of different size — Inference — Difference in size of punctured wounds on two persons does not necessarily indicate use of different weapons — Force, angle and attempt of victim to escape may account for variation — Both the first informant and the deceased Prem Chandra sustained punctured wounds which, though varying in size, were stated by the Medical Officer (P.W.3) to have possibly been caused by one and the same weapon. Held: Merely because there is some difference in the size of punctured wounds on the two persons, it cannot be inferred that different weapons were used to cause the respective injuries. It is quite natural and possible that at the time of causing injuries with the same weapon, the size of wounds may differ on account of variation in the force applied, the angle of attack, and the attempt of the injured person to escape.

Criminal Trial — Motive — Ocular Evidence — Motive loses importance when offence established by direct evidence — Prosecution required only to give probable cause — Failure to prove motive not fatal if charge otherwise proved — The accused-appellant contended that the alleged dispute over playing of cards 4-5 days prior to the occurrence was insufficient to constitute a motive for committing the alleged acts. Held: In a case based on direct ocular evidence, motive loses its importance. The prosecution is required only to give a probable cause behind the motive and is not required to prove it conclusively. Even if the prosecution fails to establish motive, the offence proved by cogent ocular evidence cannot be ignored and no benefit can be given to the accused for want of motive. It is equally improbable that an event held to be insufficient to form motive for the crime could be a ground for falsely implicating the accused — the argument that a past dispute was sufficient for false implication but insufficient for motive is self-contradictory.

Criminal Trial — False Implication — Improbability — No reason for first informant or parents of deceased to leave real culprit and implicate innocent person — Argument of false implication based on surmises and conjectures rejected — The defence contended that the occurrence had taken place during a gambling session and that after compromise, the accused-appellant was falsely implicated by the villagers in connivance with the police. Held: There can be no reason for the first informant or the parents of a young deceased to leave the real culprit and falsely implicate an innocent person, particularly in a case of murder of a 20-year-old boy. There may be cases of false implication of a person along with the real culprit, but a case of falsely implicating a person in place of the real culprit altogether, is highly improbable. Furthermore, in matters of false implication, other independent witnesses of the occurrence would never come forward to corroborate and support such a false prosecution version. The argument being based on highly improbable circumstances and surmises on conjectures, cannot be a ground to give benefit of doubt to the accused-appellant. Relied upon: Gangadhar Behra v. State of Orissa, (2002) 8 SCC 381.

Criminal Trial — Defence Witnesses — Photographer and Advocate — Private visit to spot without court's direction or authority — Maps and photographs not put to prosecution witnesses in cross-examination — No evidenciary value — Rightly discarded — The accused-appellant produced D.W.1, a photographer, and D.W.2, an advocate, who allegedly visited the place of occurrence on the instructions of the defence counsel and prepared photographs and a map to contradict the site plan prepared by the Investigating Officer. Neither any application was moved by the accused before the trial court for such an inspection, nor any direction or order was obtained from the trial court authorising such a visit. The visit was made after the prosecution evidence was already closed and the documents so prepared were never put to any prosecution witness in cross-examination, depriving them of any opportunity to deny or explain the alleged discrepancies. Neither D.W.1 nor D.W.2 was an expert or held any qualification in survey or

photography for forensic purposes. Held: The reports, maps, photographs and statements of D.W.1 and D.W.2 have no evidenciary value, are not admissible in evidence, and were rightly discarded by the trial court.

Criminal Trial — Investigation — Lapses by Investigating Officer — Not fatal to prosecution — Benefit of investigative lapses cannot accrue to accused — Settled principle — The accused-appellant raised several contentions regarding discrepancies in the investigation, including alleged errors in the site plan, non-examination of Ram Charan (from whose shop PRASAD was to be purchased), and alleged ante-timing/ante-dating of the F.I.R. Held: Lapses or carelessness on the part of the Investigating Officer in preparing the inquest report or site plan, or non-examination of a witness not present at the scene of occurrence, do not adversely affect the prosecution case if the same is otherwise proved by consistent and trustworthy evidence. Any omission on the part of the I.O. cannot go against the prosecution; to hold otherwise would amount to placing a premium upon such omissions. Relied upon: Mangu v. State of U.P., 2003 (4) ACC 335; V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588.

Criminal Trial — Benefit of Doubt — Reasonable Doubt — Not every suspicion or minor discrepancy — Must be fair doubt based on reason and common sense — Exaggerated devotion to benefit of doubt must not destroy social defence — In order to acquit an accused by giving benefit of doubt, there must be some reasonable doubt based on reason and common sense; not every suspicion, minor discrepancy or imaginary doubt can be made a basis for acquittal. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion so as to destroy social defence. Proof beyond reasonable doubt is a guideline, not a fetish. The prosecution is not required to meet every hypothesis put forward by the accused. Trivial discrepancies which do not materially affect the prosecution case cannot affect the credibility of witnesses who are otherwise trustworthy. Relied upon: Gangadhar Behra v. State of Orissa, (2002) 8 SCC 381; G. Parshwanath v. State of Karnataka, 2010 (4) Crimes 41 (SC); Krishna Mochi v. State of Bihar, (2002) 6 SCC 81; Leela Ram v. State of Haryana, (1999) 9 SCC 525; Indra Pal Singh v. State of U.P., 2009 (1) ALJ 666 (SC).

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(Delivered by Hon'ble Harsh Kumar, J.)

1. This appeal under section 374(2) Cr.P.C. has been filed by sole accused/convict against the impugned judgment and order dated 20.12.1982 passed by IIIrd Additional Sessions Judge, Banda in S.T. No.347 of 1981, whereby the appellant was convicted for the offences under sections 307 and 302 IPC and was sentenced with life imprisonment under section 302 IPC and 7 years rigorous imprisonment under section 307 IPC.

2. The brief facts relating to the appeal are that on 31.7.1981, on written report submitted by Suresh Chandra Singh, the F.I.R. was lodged at case crime no.171 of 1981 in P.S. Karvi, District Banda at 7:15 p.m. on 31.7.1981, under section 307 IPC against one named accused Keddi. The averments made in F.I.R. in brief are as under:-

"I Suresh Chandra Singh, Kamlesh, Ram Singh, Awadh Bihari and Prem on return from Chitrakoot, were on way to their villages at about 6:45 p.m., were purchasing PRASAD from the shop of Ram Charan near Pechghar Temple; that in the meantime accused Keddi resident of Shankar Bazaar, Karvi came from behind and stabbed me in back and on left side of abdomen, and when Prem proceeded for his rescue, the accused also gave 2-3 knife blows to him; that the applicant fell unconscious and was brought by rickshaw puller Bhaiyya Lal to police station; that

there were some hot talks between the applicant and accused Keddi about 3-4 days ago at the time of playing cards, on account of which he made an attempt on the life of applicant."

3. Upon lodging of F.I.R., investigation was started, the first informant Suresh Chandra Singh was medically examined, his dying declaration was recorded and considering his serious condition, he was referred to Allahabad for further treatment. The blood stained and simple mud was collected from the spot and upon receiving the information of death of Prem due to incised wounds caused by accused, section 302 IPC was added. The postmortem of body of Prem was conducted, statements of witnesses were recorded and upon collecting evidence with the completion of investigation, charge sheet was submitted against sole accused under sections 302 and 307 IPC.

4. The case was committed to sessions, where charges under section 307 IPC for causing injuries to first informant Suresh Chandra and under section 302 IPC for causing death of Prem, were framed. In order to prove its case, prosecution produced first informant Suresh Chandra Singh as P.W.1, eye witness Kamlesh Kumar as P.W.2, Medical Officer Dr. S.D.S. Chauhan, who conducted the post mortem of Prem and prepared injury report of first informant upon his medical examination, as P.W.3, another eye witness Awadh Bihari as P.W.4, Naib Tehsildar V.N. Chaudhary, who recorded dying declaration of first informant as P.W.5, Investigating Officer D.S. Verma as P.W.6, constable Chandrika Prasad, who took the dead body of Prem for post mortem as P.W.7 and constable Jai Prakash, who prepared chik F.I.R. and made entry in general diary as P.W.8.

5. After the prosecution evidence, the statement of sole accused Kedar Nath @ Keddi was recorded under section 313 Cr.P.C. and produced two witnesses in defence evidence, (1) Madho Ram Chandra Marathe, the photographer, as D.W.1 and (2) Sri Akhtar Siddiqui Advocate as D.W.2.

6. After completion of defence evidences, learned Additional Sessions Judge heard the penal lawyer for the State and learned counsel for the accused and upon analysing the evidence on record and evidence, the argument advanced before him came to the conclusion that the prosecution has fully established the charges under sections 302 and 307 IPC against the accused and holding him guilty of the two offences, convicted him under sections 302 and 307 IPC and sentenced with life imprisonment under section 302 IPC and 7 years rigorous imprisonment under section 307 IPC. No fine was imposed on the accused/appellant by the trial court. Feeling aggrieved with the impugned judgment and order of conviction and sentence, the sole accused/convict has preferred this appeal.

7. Heard Sri R.K. Vaishya, learned counsel for the appellant and Sri. Rajeev Gupta and Sri S.N. Tripathi, learned A.G.A. for the State.

8. Learned counsel for the appellant argued that the appellant has been falsely implicated; that the impugned judgment and order of conviction are bad on fact and law; that the learned

Additional Sessions Judge acted wrongly and illegally in relying on the untrustworthy testimonies of prosecution witnesses; that the learned Additional Sessions Judge acted wrongly and illegally in discarding the reliable and trustworthy evidence produced by defence witnesses; that there are several contradictions in the prosecution evidence; that the medical evidence on record suggests that injuries of first informant Suresh Chandra Singh and those of deceased Prem, could have been sustained by different knives; that the prosecution has failed to prove that appellant had any motive to make attempt on the life of first informant or cause death of Prem; that no independent witnesses of the spot has been produced by the prosecution while there were several houses and shops around the alleged place of occurrence; that for non-production of natural and independent witnesses, adverse inference is to be drawn against the prosecution; that there are several discrepancies in the investigation, which shows that F.I.R. has been lodged at a subsequent time and has been ante dated and ante timed; that the site plan of the place of occurrence is not correct; that the dying declaration of first informant has no evidenciary value, as the first informant is alive; that there are material contradictions in the statements of witnesses, which make their testimonies untrustworthy; that the prosecution story that first informant and his associates were going to purchase 'PRASAD' from the shop of Ram Charan, is absolutely wrong and highly improbable; that the first informant and his associates, who allegedly visited Chitrakoot and completed Parikrama of "Kamadgiri" (taken a round of Kamadgiri) did not purchase PRASAD from there and were going to purchase PRASAD from the shop of Ram Charan after returning from Chitrakoot and before leaving to their villages; that prosecution story to above effect has been, concocted, in order to falsely implicate the appellant; that it appears that the first informant and his associates were gambling with playing cards and during gambling, over some dispute in heat of passion/sudden provocation, the injuries were caused to deceased and first informant by each other and after deciding the dispute amicably, just to explain their injuries and death of Prem to the police, since a third person was required, so the appellant with whom the first informant had inimical terms since school times and on account of party bandi, has been falsely implicated; that it appears that villagers of village Kashai got the matter compromised between the persons sustained injuries and falsely roped the appellant in collusion with police; that the learned trial court failed to bring out the real culprits by not deeply appreciating the evidence on record the suggestions put by defence as well as the circumstances of the case; that the lodging of F.I.R. within half an hour of the occurrence, is highly improbable and creates dbout, while the distance between the place of occurrence and police station is around 3 kms; that Ram Charan from whose shop the PRASAD was allegedly being purchased, has not been examined by the I.O., which shows that the investigation is tainted; that the admitted fact of hot talks between the appellant and the first informant about 4-5 days ago, upon objection of appellant over gambling by first informant and his associates near the temple, may be a root cause for false implication, but may not be sufficient cause or motive for committing alleged incident; that the prosecution has failed to prove the charges against the appellant beyond reasonable doubt by any reliable and cogent evidence; that the learned trial court acted wrongly in not relying on the defence witnesses from whose evidence it was proved that the occurrence in question did not take place at the above place or in the manner mentioned in F.I.R.; that the sentence imposed is too severe; that by setting aside the judgment and order of conviction and sentence, the appeal is liable to be allowed and the appellant is liable to be acquitted of the charges framed against him.

9. Per contra, learned AGA contends that the prosecution has proved its case to the hilt beyond any reasonable doubt; that in this appeal, the correctness of prosecution case has been questioned by the accused-appellant on various baseless and flimsy grounds; that the F.I.R. of the incident has been lodged promptly naming the sole accused therein and it is absolutely wrong to say that the F.I.R. is ante timed or ante dated; that it is settled principle of law that due to latches if any on the part of Investigating Officer, the prosecution case, may not be adversely affected; that the alleged discrepancies as pointed out by the accused-appellant do not exist at all and minor discrepancies, if any, do neither give benefit to the accused-appellant nor adversely affect the prosecution case; that the prosecution has proved the motive of appellant behind the crime; that since it is a case of direct evidence in which the first informant as well as two other eye witnesses have been produced and there are no contradiction in their statements, so the prosecution evidence cannot be be seen with an eye of suspicion; that it is wrong to say that different weapons or knives were used for causing injuries to first informant and the deceased Prem and no such inference can be drawn from the statement of P.W.3 Medical Officer, who has only stated that the injuries of first informant Suresh Chandra and deceased Prem Chandra, may be sustained by two different weapons, particularly while he has specifically stated that injuries of deceased Prem Chandra and injured Suresh Chandra Singh (first informant), may have been sustained from one and the same weapon; that the appeal has been filed with absolutely wrong and baseless allegations; that the judgment and order of conviction and sentence has been passed on detailed discussion and analysis of evidence on record as well as legal position; that the defence evidence produced by accused-appellant is meaningless and is neither reliable nor admissible in evidence, and has been rightly discarded; that there is no illegality or incorrectness in the impugned judgment and order; that adequate sentence has been imposed by trial court keeping pity on accused-appellant and punishing him with life imprisonment instead of capital punishment; that the appeal is liable to be dismissed and the impugned judgment and order, are liable to be affirmed.

10. Upon hearing learned counsel for the parties and perusal of record, we find that the learned trial court in the impugned judgment and order of conviction and sentence has discussed and analyzed the prosecution evidences in detail and has dealt with each and every minor and major point raised in the arguments by the learned counsel for the accused. It is noteworthy that the first informant as well as the deceased both sustained two punctured wounds, which are alleged to have been caused by the accused-appellant with the knife in his hand. As per prosecution case, at the time of occurrence, when first informant Suresh Chandra Singh, along with Kamlesh, Ram Singh, Awadh Bihari and Prem, was going to purchase PRASAD from the shop of Ram Charan, near Pechghar Temple, all of a sudden, the accused-appellant came from behind, gave two knife blows to him in his back and left side of abdomen, and when Prem proceeded for rescue of first informant, he also gave 2-3 knife blows to him.

11. As per medical evidence on record, as has been proved by P.W.3 Dr. S.D.S. Chauhan, after medical examination of the first informant, prepared injury report, and also conducted post mortem of Prem Chandra and prepared post mortem report. Following injuries were found on the person of injured/first informant Suresh Chandra Singh and deceased, respectively:-

Injuries as per injury report of Suresh Chandra Singh

1. Punctured wound with sharp margin 1-1/2 cm x ½ cm x depth uncertain on about mid line of back vertically about middle. Observation. Pointed sharp edged.

2. Punctured wound with sharp margin 1 cm x 1/3 cm x depth uncertain on Lt. internal side of abdomen obliquely 26 cms below Lt. axilla. Observation, pointed sharp edged wounds bleeded on touch. Duration fresh (within ¼ day).

Injuries of deceased as per Post mortem report of Prem Chandra

1. Punctured wound with sharp margins 2 ½ cm x ¾ cm x chest cavity horizontally 7-1/2 cm below supra-eternal notch. Depth of wound directed back and downward.

2. Punctured wound with sharp margin. 3 cm x 1cm x chest cavity horizontally on Lt. Shouldering blade lower part 5 cms Lt. to mid line of back.

12. According to the post mortem report conducted on 1.8.1981 at 12:30 p.m., the death of 20 years old Prem Chandra took place about 3/4th of a day before the time of post mortem, due to shock and hemorrhage as a result of ante mortem injuries. According to the injury report of first informant, which was prepared upon medical examination at 7:30 p.m. on 31.7.1981 upon examination on reference from the police station, his injuries were found fresh, which could have been sustained at about 6:45 p.m. on 31.7.1981.

13. From above description of injuries in the injury report of first informant and post mortem report of Prem Chandra deceased, merely due to some difference in size of punctured wounds, it may not be inferred that different weapons would have been used in causing injuries to the two persons. It is quite natural and possible that at the time of causing of injuries with the same weapon, due to difference of force and angle as well as the attempt of injured to escape, the size of injuries with the same weapon may differ. Since, the Medical Officer has specifically stated that the injuries of both, could have been sustained by one and the same weapon, in view of the unambiguous evidence on record that injuries with the knife in his hand were firstly caused to the first informant thereafter to Prem Chandra, when he came for his rescue and there is no reason at all to unnecessarily doubt the prosecution case, in order to search a ground to give benefit of doubt to the accused-applicant.

14. It is pertinent to mention that P.W.1 is the first informant and being injured witness, is a natural eye witness of the occurrence and his statement is totally corroborated by the medical evidence on record as well as by the statements of two other eye witnesses Kamlesh and Awadh Bihari, who were accompanying him at the time of occurrence. The argument that neither the first informant nor the deceased nor anybody else sustained injuries on their palms so the prosecution case may not be accepted because naturally at the time of attack, the injured uses his hands in defence for avoiding injuries and gets his palms injured. This argument has no force, because as per

prosecution case when the first informant and his associates were going towards shop of Ram Charan for purchasing PRASAD, the accused-appellant suddenly came from behind, stabbed him in back and immediately thereafter on left side of abdomen and when Prem Chandra came for his rescue, he was also stabbed repeatedly on his chest, resulting in his death and so in these circumstances, it could not have been possible either for the injured or for the deceased, to first get their hands/palms injured, before sustaining the injuries on their back, side or on the chest. Otherwise also, there is no rule that first injury will be caused on palm and, thereafter, on other parts of the body. It is also pertinent to mention that in this case, first informant had no opportunity to make any resistance or defence. Otherwise also in the set of circumstances, every person reacts differently in his own manner and even if the person attacked tries his best to avoid injuries by putting his hands, the culprit escaping the hand causes injuries on the intended part of body. The evidence of P.W.1, P.W.2 and P.W.4 all eye witnesses is consistent with regard to place and manner of occurrence and is fully corroborated with medical and other evidence on record, which establishes the prosecution case to the hilt beyond reasonable doubt.

15. As far as the motive is concerned, since it is a case based on ocular evidence, the motive looses its importance. Moreover, the motive lies in the mind and heart of the offender/accused and the prosecution may only give a probable cause behind the motive and even in case the prosecution fails to establish motive, if the offence is proved by the prosecution evidence, the same cannot be ignored and no benefit can be given to accused for want of motive. The contention of accused-appellant that the alleged dispute which took place 4-5 days before the occurrence over playing of cards, was not so serious so as to form sufficient motive to cause incident however he has been falsely implicated due to above reason, is self contradictory. In the incident, in which hot-talks allegedly taken place between the first informant and accused-appellant, 4-5 days before the occurrence, possibility of accused-appellant having been hurt deep in heart by the abusive words allegedly uttered by first informant, may not be ruled out. Sometimes words uttered by mouth hurt the heart more piercingly than the physical injury and in such cases person having been hurt deep in heart with those words, may go to any extent. In any case, if the incident occurred 4-5 days before in occurrence, was not sufficient to form motive for committing the crime the question, the same may also not be sufficient for falsely implicating the accused-appellant. There is no evidence on record about the alleged old enmity of school times, between first informant and the accused-appellant and if it may be reason behind alleged false implication, the same may also be the reason behind the motive of accused-appellant to commit the incident in question. In any case since the case is based on ocular evidence the motive has lost its importance.

16. The contention of accused-appellant that the F.I.R. is anti-timed and anti-dated has no legs and there is no evidence on record to doubt the correctness of F.I.R. lodged promptly with naming the sole accused-appellant. There are no discrepancies with regard to preparation of inquest report or site plan and even if there is any omission by the I.O., the same does not adversely affect the prosecution case.

17. It is settled principle of law as has been laid down by this Court in the case of **Mangu Vs. State of U.P. 2003 (4) ACC 335**, held that

"lapse or carelessness on the part of I.O. in preparing inquest report could not be a ground to hold that F.I.R. was not in existence till the inquest report was prepared".

18. Similarly the Apex Court in the case of **V.K. Mishra Vs. State of Uttarakhand (2015) 9 SCC 588** held that

"Any omission on the part of I.O. cannot go against the prosecution. Interest of justice demands that such acts or omission of I.O. should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omission."

19. As far as the evidence of D.W.1 and D.W.2, having not been relied by the trial court, it is pertinent to mention that D.W.1 is a photographer, who is alleged to have taken several photographs of the place of occurrence from different angles in order to belie the site plan of the place of occurrence prepared by I.O. as well as the prosecution version. The D.W.2 is an advocate, who allegedly visited the place of occurrence and prepared a map in order to establish as above. The above two witnesses are alleged to have visited the spot at the instructions of learned counsel for the accused-appellant. Undisputedly neither any application for above purpose was moved by accused-appellant nor any direction was ever obtained from or given by the Trial Court (Additional Sessions Judge) concerned in this regard, and so the above evidence has no worth and is not admissible in evidence. It is pertinent to mention that neither D.W.1 and D.W.2 are qualified for the purposes, and none of them is expert or holds any degree or diploma in this field, except that D.W.2 is stated to have worked as General Commissioner and (upon being appointed by the court concerned in civil suits), has prepared maps and submitted reports in few civil cases. Admittedly he is neither a Survey Commissioner nor has been appointed survey commissioner in any civil suit nor has prepared any survey map or survey report in other cases nor in respect of the place of occurrence in question. The alleged private visit made by the two witnesses at the instance of accused-appellant upon instructions of his counsel, is also not alleged to have been made after informing the prosecution or in presence of first informant or the Government counsel/penal lawyer, as representative of prosecution. If the above reports of photographer or advocate were filed by defence in order to dispute the place or occurrence or to belie the prosecution case, the accused could have moved an application to the Trial Court (Additional Sessions Judge) concerned for appointment of some Senior Survey, Advocate Commissioner for visiting the spot in presence of both parties and submitting report after preparing a survey map of the place of occurrence. In appropriate cases, even Presiding Officer of the trial court concerned, may himself visit the place of occurrence, in order to ascertain the correctness of facts, if so required. The accused-appellant is neither alleged to have moved any such application before the Trial Court (Additional Sessions Judge) nor any such application is alleged to have been rejected by the Trial Court.

20. It is pertinent to mention that the prosecution evidence commenced on 1.5.1982 with the statement of P.W.1 and concluded on 21.7.1982 with examination of P.W.8. However, no cross was made by any of the eye witnesses P.W.1, P.W.2 or P.W.4 or with I.O. P.W.6 regarding the alleged distances as well as alleged discrepancies with regard to spot position as were found by D.W.1 & D.W.2. It is also noteworthy that D.W.1 and D.W.2 allegedly visited the spot on

1.8.1982, 8.8.1982 and 25.8.1982 after a long wait until only after completion of prosecution evidence is closed. The maps and report as well as negatives and positive photographs filed by D.W.1 & D.W.2 have no evidenciary value as these documents were neither put to prosecution witnesses in cross-examination nor they had any opportunity to deny or explain the alleged discrepancies. Since, no cross-examination was made from the prosecution witnesses with regard to alleged differences of distances from one spot to the other, as shown in above reports of D.W.1 and D.W.2, without any direction, authority or order of the Trial Court (Additional Sessions Judge), the above reports are neither relevant nor admissible in evidence nor may be considered for discarding the consistent and trustworthy evidence of prosecution. In the circumstances mentioned above, no reliance can be placed on above reports and statements of defence witnesses D.W.1 & D.W.2.

21. The P.W.2 & P.W.4 are independent witnesses, are neither alleged to be interested witnesses of first informant, nor alleged to be on inimical terms with accused-appellant. The accused-appellant has not stated any enmity with the prosecution witnesses no.2 and 4 Kamlesh and Awadh Bihari, who were accompanying the injured/first informant and are most natural eye witnesses of the occurrence. They have fully corroborated the first informant P.W.1 Suresh Chandra Singh, and there is no contradiction or discrepancies in their statements so as to disbelieve their testimonies, in absence of any enmity with the accused-appellant, particularly when they are not alleged to be interested witness.

22. In the case of **Leela Ram vs. State of Haryana (1999) 9 SCC 525**, the Apex Court held that

"the evidenciary value of testimony of son and brother-in-law of deceased in absence of any other factor to discredit the said witnesses, can not be rejected merely on the ground that they were interested witnesses and at the same time, the testimony of local Sarpanch witnessing the occurrence was also liable to be treated reliable, as of an independent witness and the fact that brother of accused was his rival candidate at the election, held to be too feeble a ground to doubt or discard his evidence"

23. dismissing the appeal of convict, and upholding the judgment of High Court, wherein High Court setting aside acquittal had passed conviction order,the Apex Court further held that

"the ocular account given by relative witness does not by itself loose its evidenciary value unless some other factor is brought on record to discredit the creditworthiness of the witness" and that "Trivial discrepancies cannot affect the credibility of the evidence of the witness if it is otherwise acceptable".

24. In the case **of Gangadhar Behra vs. State of Orissa (2002) 8 SCC 381**, it was held by the Apex Court that

"relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against innocent person.

Foundation has to be laid if plea of false implication is made. However, Court has to adopt careful approach and analyze the evidence to find out whether it is cogent and credible".

25. It is settled principle of law that testimony of partisan or interested witness cannot be discarded outright, rather it should be examined with more care and caution.

26. In the case **of Indra Pal Singh Vs. State of Uttar Pradesh 2009 (1)Allahabad Law Journal 666 SC** the Apex Court upholding the order of High Court converting into conviction, the order of acquittal passed by Additional Sessions Judge, held that

"minor inconsistencies appearing in statements of two eye witnesses which are of very trivial nature must not be given undue importance and acquittal of the accused on such insignificant contradictions, is not proper"

27. In **Krishna Mochi vs. State of Bihar reported in (2002) 6 SCC 81** the 3 Judges Bench of Apex Court has held

"that in Criminal Trial a prosecutor is faced so many odds. Court shall not loose sight of the realities of life and can not afford to take an unrealistic approach of values in public life.

Some discrepancy is inevitable - but a discrepancy existing in a prosecution case should not weigh with the Court so long it does not materially effect the case.

Duty of Courts is not only to see that no innocent man is punished but also to ensure that no person committing an offence should go scot free."

28. The argument of learned counsel for the appellant that the incident appears to have taken place during gambling between the deceased, first informant and others of village Kashai during which they stabbed each other and upon compromise by the villagers in order to explain the injuries of first informant and deceased, a third person i.e. accused-appellant was falsely implicated, also has no force. Firstly, because there can be no reason with first informant or parents of deceased Prem Chandra for leaving the real culprit and falsely implicate the other innocent person. It is also pertinent to mention that there was no relationship between the first informant, injured and the deceased Prem Chandra, who was just 20 years old young boy. Even in case of simple injuries nobody is expected to leave the real culprit and falsely implicate the other and in a case of murder of young boy, there can be no possibility of leaving the real culprit and falsely implicating another innocent person, by the parents and family members of the deceased upon getting information about sudden death of their young son due to stab injuries, no parents or their family members may ever enter into a compromise, so as to leave the real culprit and falsely implicate the other person particularly when the alleged culprit is not alleged to be their family member. There may be cases of false implication of a person alongwith real culprit but there cannot be a case of falsely implicating a person leaving the real culprit altogether.

29. In any case, in matters of false implication of a person, in place of real culprit, the other witnesses of occurrence would never come forward to corroborate and support, such false prosecution version. The argument so raised by learned counsel for the accused-appellant at appellate stage has no force being based on highly improbable circumstances and surmises on conjectures which may not be made a ground to give benefit of doubt to the accused-appellant.

30. It has been held by Apex court in the case **of Gangadhar Behra Vs. State of Orissa (2002) 8 SCC 381** that

"It is more often than not that a relation would not conceal actual culprit and make allegations against innocent person."

31. It is pertinent to mention that non-production of Ram Charan from whose shop the first informant and others were going to purchase PRASAD, does not adversely affect the prosecution case, because as per prosecution evidence at the time of occurrence, the first informant and others were going towards shop of Ram Charan for purchasing PRASAD and the occurrence is not alleged to have taken place at his shop at the time of purchasing PRASAD. Similarly, there is nothing unnatural in purchasing the PRASAD from Pechghar after return from Chitrakoot as quality of sweets near temples may rarely be good and sometime people prefer to purchase PRASAD from the shop of their choice, for distributing amongst their nears and dears.

32. It is settled principle of law that "in order to acquit the accused by giving him benefit of doubt, there must be some reasonable doubt, and every suspicion on the basis of minor discrepancies, if any, or minor points raised by the accused may not be made basis to acquit the accused."

33. In the case of **Gangadhar Behra (supra)** it has been further laid down by the Apex Court that

"there should be reasonable doubt for acquitting an accused and acquittal on the basis of a imaginary doubt should not be allowed."

"Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law."

"Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. Proof beyond reasonable doubt is a guideline, not a fetish. "

34. Similarly, in the case of **G. Parshwanath vs State Of Karnataka reported in 2010 (4) Crimes 41 SC** the Apex Court has held that

"every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating judge."

"In a case based on circumstantial evidence if the chain of circumstances is complete - it cannot be said that in absence of motive, the other proved circumstances are of no consequence."

35. In view of the facts and circumstances of the case, the prosecution has succeeded in proving its case to the hilt and bringing home the charges against accused-appellant by consistent, trustworthy and cogent evidence, beyond any reasonable doubt and the accused-appellant has been rightly convicted. We are of the considered opinion that the prosecution has proved its case to the hilt beyond any shadow of doubt and the learned trial court has not committed any mistake in making proper and correct appreciation of evidence on record. We find that neither there is any illegality, irregularity or incorrectness in the impugned judgment and order of conviction nor the sentence imposed is too severe, rather appropriate sentences have been rightly imposed. The appeal has got no force and is liable to be dismissed.

36. Accordingly the appeal filed by accused-appellant is **dismissed** and conviction and sentences are affirmed. All the interim orders, including order granting bail to appellant or staying operation of impugned order of conviction, if any, or otherwise stand discharged.

37. The appellant is on bail pending appeal. His personal bonds and surety bonds are cancelled and sureties are discharged. He is directed to surrender before the trial Court forthwith to serve out of remaining term of sentences imposed upon him by trial Court and if he fails to surrender as directed, the trial Court shall take necessary coercive actions against him for ascertaining compliance of order of conviction and sentence.

38. Let the lower court record be transmitted to court below forthwith alongwith a copy of judgment, with a direction that it shall take immediate steps for arrest of appellant for serving the remaining term of sentence.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 296 Of 1983

Munna **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:

Pankaj Kumar, Ashutosh, Jitendra Singh, R.S. Tomar, Rahul Chaturvedi

Counsel for Respondent:
Govt. Advocate

Murder — Ocular Evidence — Eyewitness Testimony — Related and Interested Witnesses — Minor Discrepancies — Omission in FIR — Bicycle not mentioned — Comparison of Ocular and Medical Evidence — Hostile Witness — Partial Reliance — Defence Witnesses — Credibility — Chance Witness — Prior Enmity — Motive — Section 302, Indian Penal Code, 1860 — Appeal Dismissed — Conviction Affirmed.

1. Ocular evidence — Eyewitness account — Credibility of testimony — Consistent and natural deposition — High quality evidence — Conviction sustainable: Where the testimony of the eyewitnesses is natural, consistent with normal human conduct, and is corroborated in its essential particulars by the other oral and documentary evidence on record, it constitutes high quality evidence on which a conviction under Section 302 IPC can be safely sustained. In the present case, the testimony of PW-2 Babboo (son of the deceased), who was following his father on bicycle and witnessed the shooting, was found to be natural and trustworthy. It was corroborated by PW-3 Shahid Khan who was present at the scene, by PW-13 (Investigating Officer), and even in material part by the hostile witness PW-11 Afsar. Minor discrepancies in the depositions of eyewitnesses which do not affect the core of the prosecution case do not render such testimony unreliable. Held, conviction affirmed.

2. Omission in FIR — Non-mention of bicycle used by informant — Not a material omission — FIR not an encyclopaedia — No adverse inference: An FIR is not expected to be an encyclopaedia of all the facts and circumstances of the case. Where the informant, while lodging the FIR shortly after the incident, stated that he was following his father but did not specifically mention that he was doing so on a bicycle, such an omission cannot be treated as a material improvement of his statement made subsequently during his deposition before the court. The FIR is required to set out the gist of the first version of the incident. Where the addition of the detail of a bicycle is a natural and innocuous elaboration that does not alter the substance of the version given in the FIR, no adverse inference can be drawn against the prosecution on account of such omission. Held, non-mention of bicycle in the FIR is not detrimental to the prosecution story.

3. Related and interested witnesses — Testimony not to be discarded solely on account of relationship with deceased or informant — Trustworthy evidence of related witnesses can sustain conviction: Relationship of a witness with the deceased or the informant is not by itself a sufficient ground to discard an otherwise credible and trustworthy testimony. The mere fact that a witness is related to the informant does not render his testimony unreliable if the substance of his deposition is natural, consistent, and withstands scrutiny. The courts have consistently held that evidence of related witnesses, if found reliable, can form the basis of conviction. Reliance placed on: State of U.P. versus Anil Singh, 1988 (Supp) SCC 686. In the present case, even if PW-3 Shahid Khan is the cousin of PW-2 Babboo, his testimony was found natural and trustworthy and was rightly relied upon by the trial court.

4. Minor discrepancies — Witnesses not expected to depose with mathematical precision — Omission of minute details does not discredit testimony — Principles restated: Ordinarily, witnesses cannot be expected to possess a photographic memory or to recall and reproduce minute details of an incident with mathematical precision. Minor discrepancies in their depositions, particularly those relating to peripheral details, do not demolish the credibility of otherwise trustworthy witnesses. The power of observation and description differs from person to person. The exact time of an incident or the duration of an occurrence is usually estimated by guess-work. Where the core of the prosecution case is consistent and credible, minor inconsistencies in peripheral details should not be given undue weight. The prosecution is

required to prove its case beyond all reasonable doubt — but not beyond any shadow of doubt, which could be fanciful. Relied upon: Bharwada Bhoginbhai Hirjibhai versus State of Gujarat, (1983) Cri 728 (SC).

5. Comparison of ocular and medical evidence — Not to be done mechanically — Minor inconsistency in description of injury — Core of oral evidence consistent with medical evidence — Ocular testimony not to be discarded: The comparison of ocular testimony with medical evidence should not be done in a mechanical manner. Where the core of the oral testimony is not contrary to the medical evidence and where the oral testimony is otherwise completely convincing, minor inconsistencies in the description of the injury or the manner in which it was inflicted do not render the ocular evidence untrustworthy. In the instant case, the argument that the shooting took place from a distance of 3-4 steps which is inconsistent with the absence of blackening and tattooing on the body of the deceased was rejected, as such inconsistency did not affect the core of the oral evidence. Relied upon: G.S. Walia versus State of Punjab and others, (1998) 5 SCC 150; State of U.P. versus Premi and others, 2003 Cri.L.J. 1554.

6. Hostile witness — Testimony not obliterated from record — Court may rely on that part of testimony of hostile witness which is found credible and reliable — Partial reliance permissible: The testimony of a witness who turns hostile is not automatically erased from the record. The court retains the power to sift the testimony of a hostile witness and to rely upon such part of it as is found to be reliable and credible. In the present case, PW-11 Afsar, though turning hostile during his examination-in-chief, had given a statement to the Investigating Officer under Section 161 Cr.P.C. disclosing that he had witnessed the accused firing upon the deceased, and he admitted the veracity of that statement during cross-examination when it was put to him with prior permission of the court. Further, his description of the position of the corpse and the presence of prosecution witnesses at the spot unwittingly buttressed the prosecution case. The court accordingly partially relied on his testimony.

7. Chance witness — Concept inapplicable in small towns — Witnesses who were in the natural course of their occupation at the place of occurrence — Presence explained: The concept of a chance witness, i.e., one whose presence at the scene of crime requires a specific explanation, has limited application in the context of small towns and closely-knit communities where people are generally known to each other and move in proximity to the place of occurrence in the natural course of their daily lives and occupations. In the present case, PW-2 Babboo was following his father at the time of the incident for attending his own place of work; his tea stall was barely 200 steps from the place of occurrence; the deceased and the informant resided at a short distance from the place of occurrence. PW-3 Shahid Khan was on his way to work in the vicinity. Judicial notice was taken of the fact that Rampur is a small town. In these circumstances, neither PW-2 nor PW-3 can be characterised as a chance witness.

8. Motive — Prior enmity — Incident at tea stall on previous night — Deceased's intervention causing insult to accused before companions — Motive for murder established: Where the prosecution establishes a clear and proximate motive for the commission of murder, it strengthens an otherwise cogent prosecution case. In the present case, on the evening prior to the murder, the accused along with 4-5 companions had gone to the tea stall of the informant and demanded tea; on being refused, he was admonished by the deceased in the presence of his companions; this caused the accused to feel insulted and he made a specific threat to both the deceased and the informant before leaving. The murder took place the very next morning at about 8:30 a.m. This sequence of events clearly establishes the motive of the accused and is consistent with the prosecution story of pre-meditated murder arising from prior enmity.

9. Defence witnesses — Poor quality of evidence — Conflicting versions among defence witnesses — Attempt to manufacture evidence — Not relied upon: Where defence witnesses give conflicting versions inter se regarding material facts, such as the time of opening of shops in the area or the date of departure to Pakistan, their testimony does not inspire confidence and cannot be relied upon to

dislodge a well-established prosecution case. In the present case, DW-1 and DW-2 gave conflicting times for the opening of shops, and DW-2 initially stated he had gone to Pakistan on 20.08.1982 (i.e., prior to the incident of 23.08.1982) and then changed his version, indicating that his testimony was fabricated. Both defence witnesses claimed to have received information about the murder before the time alleged by the prosecution without disclosing the source of such information. Their testimonies indicated a palpable attempt to manufacture evidence. Held, defence evidence not credible.

RESULT:
Criminal Appeal dismissed. Judgment and order dated 05.02.1983 passed by the then Sessions Judge, Rampur in Sessions Trial No. 154 of 1982 (State versus Munna) arising out of Case Crime No. 287 of 1982, under Section 302 IPC, Police Station Ganj, District Rampur, convicting and sentencing the appellant to life imprisonment, affirmed. Trial court directed to get the appellant arrested and lodge him in jail to serve out the remaining period of sentence.

(Delivered by Hon'ble Bharat Bhushan, J.)

1. This criminal appeal is directed against the judgment and order dated 5.2.1983 passed by then Sessions Judge, Rampur in Sessions Trial No. 154 of 1982 (State versus Munna) arising out of Case crime no. 287 of 1982, Police Station Ganj, District Rampur whereby appellant was held guilty of offence under section 302 Indian Penal Code (in short, IPC) and sentenced to imprisonment for life.

2. Brief facts of the case are that deceased Amanat Khan used to ply rickshaw. His son Babboo (PW-2) had a tea stall (hotel) at Bilaspur Gate at the time of occurrence. It is alleged that on 22.8.1982 at about 9:00pm informant Babboo son of deceased Amanat Khan was on the brink of closing his tea stall and had already cooled the furnace (bhatti). Suddenly, appellant Munna arrived at the tea stall accompanied with 4-5 companions and asked Babboo to serve tea. Babboo expressed his inability because of cooling of furnace. But Munna continued to insist. His father Amanat Khan, a rickshaw puller was sitting on his rickshaw at the tea stall. He also intervened by scolding Munna whereupon irate Munna feeling insulted in front of his friends, threatened both Amanat Khan as well as informant Babboo and left with his companions.

3. It is alleged that on next day i.e. on 23.8.1982 at about 8:30am in the morning both deceased Amanat Khan and his son informant Babboo left home at the same time for attending their respective occupations. Deceased Amanat Khan was plying his rickshaw and informant Babboo was following him on bicycle though bicycle is not mentioned in the First Information Report (in short, FIR). As soon as they reached at tri-junction (Tiraha) of Mohalla Sarai Jahangir, appellant Munna son of Asad Khan surfaced from the lane of Sarai Jahagir and opened fire upon Amanat Khan deceased resulting in his almost instantaneous death. Part of body of deceased fell down on the road but his one leg got entangled in the rickshaw frame.

4. This incident occurred sometime at 8:30am. Police Station was one kilometer away from the place of occurrence. Report was lodged within 45 minutes. Police arrived immediately and investigation ensued. Postmortem was conducted on the same day at about 4:00pm in the evening. Following injuries were found on the person of deceased :-

"Multiple fire arm wound of entry ¼ cm x ¼ cm x few chest cavity and few muscle deep in an area of 30cm x 15 cm on the right side back just below right scapular region extending to right axillary line. There was no blackening, no tattooing and no charring present. The margins were found inverted."

5. Investigating Officer D.S.Malik (PW-13) recorded the statement of various witnesses including Babboo immediately in the aftermath of incident. Samples of blood stained concrete and simple concrete of road were taken. A search for appellant Munna was initiated on the same day i.e. on 23.8.1982 but he was not found. It is pertinent to point out that appellant Munna surrendered of his own directly in the court on 24.8.1982 and was sent to jail. On 27.8.1982, his statement was recorded inside the jail by the Investigating Officer and thereafter charge sheet (Ex Ka 14) was submitted against him in the court.

6. Trial Judge charged him under section 302 IPC. He denied the charge and claimed trial. The trial was conducted wherein statements of as many as 13 witnesses on behalf of prosecution were recorded. The statement of accused-appellant was recorded under section 313 Cr.P.C. The statement of two witnesses namely, Haji Babban (DW-1) and Dulahjan (DW-2) were recorded in defence. Trial court concluded that despite the existence of some minor discrepancies, there was sufficient evidence on record to hold that appellant was guilty of the offence under section 302 IPC. He was accordingly held guilty under section 302 IPC and sentenced to life imprisonment vide impugned judgment and order dated 5.2.1983.

7. Heard Sri Rajrishi Gupta, Advocate, holding brief of Sri Dilip Kumar, learned Advocate for appellant and Sri Syed Murtuza Ali, learned Additional Government Advocate (in short, AGA) on behalf of State.

8. Learned counsel for the appellant has submitted that there was not a single scratch on the person of deceased Amanat Khan despite his fall from Rickshaw on the road. Ex Ka-8 the memorandum of custody of Rickshaw does not indicate that part of body of deceased Amanat Khan was found entangled in the frame of Rickshaw. He also claimed that Rickshaw was not stained with blood despite the fact that as per prosecution story deceased Amanat Khan was peddling rickshaw at the time of murder. He argued, that prosecution claim, that informant Babboo (PW-2) was following his father on bicycle is not borne out of the evidence. Learned counsel for the appellant has also submitted that there are several discrepancies in the prosecution evidence which belies the presence of witnesses on the spot. He has further submitted that some witnesses are related to informant Babboo, therefore, their evidence should not be believed. Learned counsel has stressed that time of incident is not established. According to him incident occurred very early in morning and some unknown person had killed deceased Amanat Khan. Subsequently, appellant has been falsely implicated on account of previous enmity.

9. Per contra, Sri Syed Ali Murtuza, learned Additional Government Advocate has submitted that incident occurred at 8:30am and a report was lodge at 9:15am i.e. within 45 minute of incident. Every important detail is available in the FIR. Such details were not required to be

mentioned in the FIR. Sri Ali has also submitted that minor discrepancies indicated by defence do not demolish the credibility of the witnesses. Considering the fact that investigation commenced quickly, there was no occasion and opportunity for any person to manufacture the evidence or to concoct the prosecution case. He has also submitted that according to prosecution, one leg of deceased Amanat Khan was ensnared in the frame of rickshaw yet it did not cause any injury to person of deceased. He would submit that this argument is based on presumption that mere fall of body of deceased Amanat Khan on the road would necessitate injury on his person.

10. If we visualize the incident, it would be apparent that as soon as Munna Khan came out of lane of Sarai Jahagir, he opened fire upon Amanat Khan. Deceased Amanat Khan died instantaneously and his body fell down from rickshaw but it did not completely fell from rickshaw rather it merely touched the ground because one leg of deceased Amanat Khan got stuck in the frame of rickshaw. The instantaneous death and awkward fall of deceased Amanat Khan prevented any injury on the person of deceased other than fire arm injury. The evidence indicates is that as soon as deceased Amanat Khan saw Munna, armed with fire arm, he tried to step off the rickshaw but Munna shot him immediately. This evidence would also explain the absence of blood on rickshaw. The blood was indeed found on the road but as Amanat Khan was getting off the rickshaw after seeing armed Munna probably rickshaw was spared the stain of blood.

11. The prosecution case is primarily based on highly credible testimony of PW-2 Babboo. Informant Babboo has given two stories. One story discloses that the acrimony of previous night wherein it is alleged that Munna came to his tea stall at the time of its closure. Some persons were sitting inside the hotel. Babboo was winding up his work. He had already cooled furnace (Bhatti). His father deceased Amanat Khan was waiting for him outside the tea stall. Accused-appellant Munna came there along with 4-5 persons and asked him to serve tea. Babboo pleaded with them saying that his furnace had already cooled, therefore, it is not possible for him to prepare tea. This enraged Munna who felt insulted. He again insisted to serve him and his friend tea. Amanat Khan also intervened and admonished Munna. This further inflamed appellant. This incident was seen by some other witnesses as well. PW-3 Shahid Khan and PW-4 Zahid have also reinforced the story of previous night given by PW-2 Babboo though they have been denounced by defence as related and interested witnesses. We are afraid that this alone can not be a ground for discarding the otherwise trustworthy testimony of both the witnesses. They have not given any evidence regarding murder of deceased. PW-3 Shahid Khan is probably cousin of PW-2 Babboo but PW-4 Zahid is a rickshaw puller and was present at the tea stall of Babboo Khan for imbibing his tea. It is obvious that this tea stall was not meant for elite classes. The tea stall was primarily meant for ordinary persons, therefore, it was natural for rickshaw pullers to frequent such place. Deceased Amanat Khan was also a rickshaw puller. His presence was also natural as he was waiting for his son. Next day, deceased Amanat Khan was shot and killed by appellant Munna in the morning.

12. Second part of story has also been given by Babboo who was following his father. He has testified that his father was assassinated in his presence by appellant Munna. Learned counsel has disputed this fact saying that PW-2 Babboo has improved upon his earlier story during course of evidence. FIR simply says that he was following his father in the morning but during the course

of his testimony, added that he was following his father on bicycle. We are afraid, this can not be described as improvement. Father and son left together for their respective works. The father was peddling rickshaw and son was following him on bicycle. There was no necessity to mention this fact in the FIR. The FIR is not supposed to be encyclopedia. He has explained that he did not accompany his father on rickshaw for the simple reason that he owned a bicycle and therefore, left on bicycle and his father left on rickshaw for earning money. It was not possible for the father to take his son. It is pertinent to point out that city of Rampur is a small place even today. This incident occurred 34 years back and at that time Rampur was very quiet and small place. Judicial notice of this fact can be taken. PW-2 Babboo has testified that place of occurrence was 400 steps from his residence while tea stall was merely 200 steps from the place of occurrence. One can very easily understand that residence of deceased and informant was at short distance from tea stall. Therefore, informant used bicycle for such a small distance. We believe that non-mentioning of bicycle in the FIR is not detrimental to prosecution story at all. The evidence of PW-2 Babboo Khan is of high quality. It is natural, trustworthy and consistent with normal human conduct. Minor discrepancies indicated by learned counsel for appellant have not adversely affected the quality testimony. It merely shows that this witness has not been tutored.

13. PW-3 Shahid has also testified regarding incident. His testimony is also natural and trustworthy. The minor discrepancies indicated by learned counsel for the appellant are certainly not detrimental to prosecution story. People do not see incident of murder routinely in their every day life. It is always not possible to give minute details of the incident with mathematical precision. Where the bullet hit deceased Amanat Khan is a question, ordinarily meant for doctor, who conducted autopsy. PW-3 Shahid Khan has testified that appellant fired shot which hit the deceased on his waist. He has also stated that appellant Munna opened fire from the distance of 3-4 steps. Learned counsel for appellant has submitted that this story is not consistent with the medical report because medical report discloses that there was no blackening and tattoo on the person of deceased. We can not countenance this attempt to compare ocular evidence with medical evidence in mechanical manner. If core of ocular testimony is not contrary to the medical evidence, then minor inconsistencies in description can not be taken into consideration especially if ocular testimony is completely convincing. In the instant case, oral evidence of eyewitnesses is highly credible and trustworthy.

14. **In G.S. Walia versus State of Punjab and others (1998) 5 SCC 150,** the Apex Court has held that the comparison of medial evidence with ocular testimony should not be done in mechanical manner. In the aforesaid case, some injuries caused by sharp edged weapon was found by doctor but in ocular testimony there was no mention of sharp edged weapon yet the Apex Court refused to reject the testimony of oral witnesses.

15. This view was again reiterated by Apex Court in **State of U.P. versus Premi and others 2003 Cri.L.J. 1554.** In this case, medical opinion stated that margins of injuries were soft and probably caused by sharp edged weapon while the prosecution story said that injuries were caused by butt of revolver. This stated discrepancy was argued before the Apex Court but Apex Court rejected this minor discrepancy and affirmed the sentence against the accused persons. It is

the present case too, the ocular evidence is completely trustworthy. Core of medical evidence is also consistent with oral evidence. We do not accept the contention of learned counsel on this score.

16. Learned counsel for the appellant has also drawn the attention of this Court towards testimony of PW-11 Afsar which has not supported prosecution version. Perusal of this testimony reveals that it does not help the appellant at all. The hostile testimony of any witness does not get automatically effaced from the face of record. The court is empowered to rely on the part of testimony of such witness, if found reliable and credible. The gist of testimony of PW-11 Afsar has in fact supported prosecution story. The incident occurred sometime at about 8:30am. According to this witness when he reached the place of occurrence, he found corpse of Amanat Khan. His description of position of body of Amanat Khan is absolutely consistent with the prosecution story. He says that leg of deceased Amanat Khan was stuck in rickshaw and part of body was lying on the road. He has also admitted the presence of PW-2 Babboo, Wahid and PW-3 Shahid at the place of occurrence. The only discordant note is when he says that he did not see any body killing Amanat Khan and that Babboo, Wahid and Shahid reached the place of occurrence after him and none of them had actually seen the occurrence. A careful perusal of testimony of PW-11 Afsar would reveal that this witness is won over by Munna. During investigation, he stated that he had witnessed Munna Khan firing a shot on deceased Amanat Khan and that PW-2 Babboo was following his father; and that he also made an attempt to catch the accused but failed. This part of statement recorded under section 161 Cr.P.C. was quoted to him during cross examination by prosecution with the prior permission of the court. He admitted the veracity of this statement and conceded that he did give this statement to Investigating Officer. Thereafter he again changed his version during cross examination by defence counsel. He has changed his testimony far to often to place any reliance upon him. But one thing is clear that he has unwittingly buttressed the case of prosecution. It is trite law that testimony of hostile witness is not obliterated from the face of record.

17. Learned counsel for the appellant has also argued that position of the body of deceased Amanat Khan has not been explained by witnesses. We do not agree with the learned counsel for appellant on this score also. We believe that testimony of PW-2 Babboo, PW-4 Shahid along with evidence of PW-13 D.S.Malik are sufficient to reveal the exact position of the corpse of deceased. PW-13 D.S. Mulik has submitted that body of deceased was partly stuck in his rickshaw and partly lying on the road (ground). The same story was given by PW-2 Babboo and PW-3 Shahid. Learned counsel for the appellant has drawn attention of this Court towards the memorandum of custody (Supurdginama) of rickshaw (Ex Ka-8) wherein this fact has not been mentioned. We believe that Ex Ka -8 was prepared for limited purpose. Rickshaw was found at the place of occurrence. This rickshaw was handed over to Babboo Khan son of deceased Amanat Khan after executing required documentation. This memorandum of custody of rickshaw has been proved as Ex.Ka-8. This document was not prepared for showing the exact position of dead body of deceased Amanat Khan. This paper was prepared for limited purpose of officially handing over rickshaw to the son of deceased. Any attempt to read more into it, is not justified.

18. Learned counsel for the appellant has also argued that both PW-2 Babboo Khan and PW-3 Shahid Khan are chance witnesses. We are afraid, this argument is not sustainable for the simple reason that at small place like Rampur, especially 34 years back, ordinarily no one could be deemed to be chance witness. In such a small place most of the people are aware of others, especially neighbours or people belonging to same social group. In any case, Babboo and his deceased father had left their residence simultaneously for their respective occupations. The tea stall of Babboo Khan was not at great distance. His departure with his father was quite natural. Similarly evidence of PW-3 Shahid Khan also discloses that he is not chance witness. He was going from Bilaspur Gate to Chirimaran tri-junction. He has stated that he was going for work at Bilaspur Gate and that he also found two acquaintance there. One of them, Tahir Husain (PW-5) later on scribed the FIR dictated by Babboo Khan. PW-5 Tahir Husain has also reiterated that he reached the place of occurrence at 8:35am. Learned counsel for the appellant has claimed that this incident occurred very early in the morning and prosecution has deliberately shown it to have occurred at 8:30am. Police Station is at a distance of one kilometer from the place of occurrence. Learned counsel for the appellant has argued that nearby shopkeepers open their shops at about 7:00am but even the defence witness DW-2 Dulahjan has debunked this claim by saying that shops in the area open at 8:00am. Both defence witnesses have given conflicting version about time of opening of the shops in the area. There is nothing on record to demonstrate that the murder took place at 5:00am. There was no occasion for deceased Amanat Khan to go at the place of occurrence at 5:00am in the morning. The occurrence did not take place at a secluded place. Even if incident had occurred very early in the morning, somebody would have noticed it, especially in the light of the fact that Police Station is not far off.

19. We have carefully examined all the record. The evidence given by defence witnesses is not credible. The incident occurred on 23.8.1982. One of the witness,namely, DW-2 Dulahjan initially stated that he had gone to Pakistan on 20.8.1982. If he was in Pakistan on the date of incident, there was no occasion for him to witness the incident. Later on, he changed his version and said that he left for Pakistan on 28th of Moharrum. In fact, both the defence witnesses were not present at the place of occurrence. Both claim that they received information of murder of Amanat Khan when they reached their shops, alluding thereby that stated murder took place prior to the time shown by prosecution. Prosecution says the murder took place at 8:30am but both the defence witnesses say murder took place prior to 7:45am and 8:00am. Both the defence witnesses were not present at the time of incident. They have not disclosed from whom they received information of death of Amanat Khan. The quality of their evidence is poor. We are afraid, it is not possible to rely on their story. Their testimonies indicate an effort to manufacture evidence.

20. We have gone through the entire evidence. The fact that some of the witnesses are related is not sufficient ground for disbelieving their testimonies. Their trustworthy evidence can be taken into consideration for convicting the accused. **(State of U.P. versus Anil Singh 1988 (Supp) S.C.C. 686)**.

21. Learned counsel for the appellant has repeatedly stated that there are some discrepancies in the prosecution version. In the FIR, it is not mentioned as to how the body of the

deceased was found. He has argued that cycle allegedly used by son of deceased is not mentioned in the FIR. These are minor discrepancies. We believe that testimony of the witnesses can not be rejected on account of minor discrepancies only. Ordinarily witnesses are not be expected to give minute details of incident. The power of observation and description differs from person to person. In regard to exact time of an incident, or duration of an occurrence, people usually make estimate by guess-work and one cannot expect witnesses to give precise or reliable estimate in such matters. It depends on the time sense of individuals which varies from person to person. The Apex Court in **Bharwada Bhoginbhai Hirjibhai versus State of Gujarat (1983) (Cri) 728,** has held thus:-

"We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another. (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of

the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

22. In the light of the aforesaid discussion, it is evident that ordinarily witnesses are not expected to depose with mathematical precision. They are expected to give reasonable description of the incident already occurred. Prosecution is also expected to prove its case beyond all reasonable doubt. We can not expect prosecution to establish its case beyond any shadow of doubt, for the simple reason that people can have fanciful doubts regarding anything, in any manner, and at any stage.

23. In view of the aforesaid discussion, the appeal fails and is according dismissed. The judgment and order passed dated 5.2.1983 passed by then Sessions Judge, Rampur in Sessions Trial No. 154 of 1982 (State versus Munna) arising out of Case crime no. 287 of 1982, Police Station Ganj, District Rampur whereby appellant was convicted under section 302 IPC is affirmed. The trial court is directed to get the appellant arrested and lodge him to jail to serve out the remaining period of sentence.

24. Let this judgment be certified to the court concerned through the Sessions Judge, Rampur within two weeks for compliance. Thereafter concerned court shall report compliance within 30 days.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No.- 317 Of 2016

C/M, Lalit Krishna Women Institute of Higher Education, Inderpur, Ballia & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for Petitioners:
Sri Rajeev Misra, Sri Prashant Kumar Tripathi

Counsel for Respondents:
C.S.C., Sri Vivek Verma

Education Law -- University Examination -- Mass Copying -- Flying Squad Report -- Competence of Flying Squad -- Comparison of Answer Scripts -- Inference of Mass Copying -- Lalit Krishna Women Institute of Higher Education, Inderpur, Ballia, an institution affiliated to Mahatma Gandhi Kashi Vidyapeeth, Varanasi was made an examination centre for UG courses for the academic session 2014-15 -- on 07.05.2015 the flying squad visited during the Mathematics (Second) Paper examination of B.Sc. 1st year and

found answers to questions 1 and 8(a) & (b) to be identical in almost all answer scripts -- the Examination Committee on 03.06.2015 imposed: (a) fine of Rs. 3 lacs; (b) debarment from being an examination centre for three years; and (c) cancellation of entire result of students who appeared in the first meeting on 07.05.2015 -- Vice Chancellor by order dated 21.12.2015 reaffirmed these penalties after fresh hearing in compliance with the earlier order of this Court in Writ-C No. 59461 of 2015 -- petitioners challenged this order contending that the flying squad was not competent to compare answer scripts and infer mass copying; that the examination had concluded at 10:30 a.m. and the answer bundles were sealed before the flying squad arrived; and that additional letters were obtained from flying squad members after conclusion of hearing without confronting petitioners -- Held: the flying squad reached at 10:45 a.m. -- the original report of the flying squad does not mention that students were found writing their answer scripts -- additional letters obtained from flying squad members clarifying that examination was continuing at 10:45 a.m. were obtained after the hearing before the Vice Chancellor concluded on 16.11.2015 -- such additional material could not be relied upon without confronting the petitioners with the same -- the charge of mass copying on account of continuation of examination beyond prescribed time cannot be upheld. (Paras 7-13)

Education Law -- Flying Squad -- Guidelines of University -- Mass Copying -- Identical Answers -- Competence to Compare Answer Scripts -- Expert Report -- Held: the guidelines framed by the University for the flying squad in Clauses 6(a) to (e) and Clause 7 enumerate the specific circumstances in which the flying squad was empowered to recommend mass copying -- the guidelines do not expressly empower the flying squad to compare answer scripts and infer mass copying solely on the basis of such comparison -- however, mere absence of such power does not render the report a waste paper -- the members of the flying squad being faculty members of the University have sufficient competence to arrive at a prima facie, though not conclusive, conclusion that answers to certain questions were given in identical fashion by most of the students -- since the members of the flying squad were not experts in the field of Mathematics, the proper course for the University was to get an inquiry conducted by an expert body or to obtain a specific report from the examiner evaluating the answer scripts, before finally concluding that mass copying had taken place -- a report of an expert evaluating the answer scripts from another University would also rule out the element of bias. (Paras 14-19)

Education Law -- Expert Report on Answer Scripts -- Dr. Satya Dev Singh -- Re-Examination -- Identification of Defaulting Students -- Punishment -- Cancellation of Entire Result -- Held: during pendency of the writ petition, this Court directed the University to produce original answer scripts -- the University had them evaluated by Dr. Satya Dev Singh, Principal, D.A.V. College affiliated to Banaras Hindu Vishwavidyalaya (an expert in Mathematics) -- he evaluated 98 answer scripts and found that answers to question Nos. 1(a) and (d) and 8(b) are substantially the same in most scripts -- even the mistakes committed by the students are similar -- the expert report fortifies that mass copying may have taken place -- however, the petitioner institution was not given an opportunity to file objections against the expert report of Dr. Satya Dev Singh -- in interests of justice, the Vice Chancellor must pass a fresh order after considering the entire material on record including the expert report and objections to be filed by the petitioner institution -- cancellation of entire result of all students without identifying those who actually indulged in mass copying would be unjust to meritorious students -- result of students not found guilty should be declared -- University undertook before the Court to hold a re-examination of all students in the paper if it is unable to segregate students who cheated from those who did not. (Paras 20-27)

Writ Petition Disposed of With Directions -- Writ petition challenging the order dated 21.12.2015 of the Vice Chancellor, Mahatma Gandhi Kashi Vidyapeeth, Varanasi, reaffirming penalties of fine of Rs. 3 lacs, debarment from examination centre for three years, and cancellation of result of students, disposed of with the following directions: (a) petitioner institution shall file objections against the report of Dr. Satya Dev Singh dated 28.03.2016 within two weeks before the Registrar; (b) Vice Chancellor to pass fresh order considering entire material including the expert report and the objections; (c) if mass copying is established and individual

guilty students are identified, only their result shall be cancelled and result of remaining students declared as per Examination Committee resolution dated 06.07.2015 without precondition; (d) if guilty students cannot be separated, University to hold re-examination of all students as per undertaking given before Court; (e) holding of re-examination without prejudice to action against the institution itself if mass copying is established. (Paras 28-29)

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

1. Lalit Krishna Women Institute of Higher Education, Inderpur, Ballia1 is an educational institution affiliated to Mahatma Gandhi Kashi Vidyapeeth, Varanasi2 (the fourth respondent). It was made an examination centre by the University for conducting annual examination of Undergraduate courses during the academic session 2014-15. On 7.5.2015, the flying squad visited the institution in the first meeting, when Mathematics (Second) Paper examination of B.Sc. 1st Year was being held. It was followed by a report of the flying squad stating that at 10.45 a.m. when it reached the institution and compared the answer scripts, it found answers of almost all the students to question no.1 and 8 (a) & (b) to be identical. The report of the flying squad was placed before the Examination Committee, which after considering the same in its meeting held on 3.6.2015, concluded that mass copying had taken place in the institution. It, therefore, imposed (a) a fine of Rs.3 lacs; (b) debarred the institution from being made examination centre for next three years and (c) cancelled the entire result of the students who had appeared in the examination held in the first meeting on 7.5.2015. In case the fine is not deposited within three months, proceeding would be initiated for cancellation of the affiliation of the institution. The decision of the Examination Committee was communicated by the Registrar by order dated 13.6.2015.

2. The Institution through its committee of management challenged the communication of the decision of the Examination Committee by the Registrar by filing writ petition3, which was disposed of by this Court by judgment and order dated 30.6.2015 in terms of the judgment passed in Writ-C No.35627 of 2015 (C/M Sri Neelam Devi Maha Vidyalaya through its Manager Vs. State of U.P. and others). The said writ petition was filed by another educational institution aggrieved by the same decision of the Examination Committee. The writ petition aforesaid was disposed of by this Court by directing the University to provide post decisional hearing to the management and during that period the decision impugned was kept in abeyance.

3. In compliance of the order passed by this Court, the petitioner institution was made available the tabulation chart pertaining to the students of the institution. The result of Mathematics Second Paper of B.Sc. 1st Year was placed under UFM (Unfair Means) category. In compliance of the order of this Court dated 30.6.2015, the Registrar of the University issued a notice dated 14.7.2015 requiring the Principal of the institution to remain present for hearing on 22.7.2015 at 3.00 p.m. alongwith all relevant records before the Vice Chancellor. The petitioner committee appeared before the Vice Chancellor on the assigned date and time and submitted its written objections, in which request was made to cancel the decision of the Examination Committee imposing fine of Rs.3 lacs, restore the status of the educational institution as an examination centre and to declare the entire result of the examination in question. The Vice Chancellor passed an order on 1.10.2015, whereby he reaffirmed the decision of the Examination Committee dated 3.6.2015

holding the petitioner institution guilty of the charge of mass copying. While reaffirming the decision of the Examination Committee, the Vice Chancellor placed reliance on the report of the flying squad and the decision of the Examination Committee.

4. The order of the Vice Chancellor dated 1.10.2015 was once again subject matter of challenge at the instance of the petitioners by taking recourse to the writ jurisdiction4 of this Court. Therein, the main grievance of the petitioners was that the report of the flying squad and the Examination Committee on which reliance was placed by the Vice Chancellor had not been supplied to the petitioners and thus there had been violation of principles of natural justice. This Court on the basis of the statement made by learned counsel appearing on behalf of the University that the University is prepared to afford a fresh hearing to the petitioners after supplying the report of the flying squad and the Examination Committee, quashed the order dated 1.10.2015 and directed for a fresh order being passed after supplying the above mentioned documents to the petitioners.

5. Pursuant to the order of this Court dated 27.10.20155, the University vide letter dated 7.11.2015 supplied the copy of the report of flying squad and decision of the Examination Committee to the petitioners and called upon it to remain present for hearing on 16.11.2015 alongwith the records. The petitioners appeared before the Vice Chancellor on 16.11.2015 and submitted their written objection, wherein a specific plea was taken that the exam concluded at 10:30 a.m. and thereafter the answer scripts were also sealed and at this stage the flying squad reached and insisted for looking into the answer scripts which was objected to by the Centre Superintendent on the ground that it would breach the confidentiality of the examination. The petitioners in their objections also alleged that the flying squad asked for illegal gratification, and threatened it of dire consequences in case its demand is not met. It was pleaded that there was no evidence of mass copying nor any report to the said effect, thus, the allegation of mass copying is unfounded. While the matter remained pending, the petitioner institution by letter dated 17.12.2015 made a request to the Vice Chancellor to declare the result of the students of the petitioner institution. Ultimately, the Vice Chancellor by the impugned order dated 21.12.2015 has concluded that mass copying had taken place while the examination of Mathematics II paper of B.Sc. Ist year was conducted in the petitioner institution. The Vice Chancellor has accordingly reaffirmed the imposition of various penalties by the Examination Committee. It has been held that such decision is necessary to ensure purity of the examination and the maintenance of the educational standard. Aggrieved thereby, the instant writ petition has been filed by the committee of management of the institution.

6. The issues that fall for consideration are (i) whether the University was right in concluding that mass copying had taken place in the petitioner institution?; and (ii) whether the punishment imposed by the University in the facts and circumstances of the instant case is justified or not ?

7. The Vice Chancellor has inferred mass copying having taken place on account of two factors. The Vice Chancellor placing reliance on the report of the flying squad which mentions that

it made a comparison of the answer scripts of the students at 10:45 a.m. had concluded that the examination was going on even beyond the prescribed time i.e., 10:30 a.m. and this, in his opinion, amounts to mass copying being contrary to the Rules of the University. The second factor which weighed with the Vice Chancellor in concluding that mass copying had taken place is again the report of the flying squad, which mentions that answers to question no.1 and 8 (a) & (b) of almost all the students, on being compared, were found to be identical.

8. In respect of first factor, it is contended by learned counsel for the petitioners that the examination of Mathematics Second Paper of B.Sc. 1st year held on 7.5.2015 was over at 10:30 a.m., the time prescribed by the University. The answer scripts after being collected were made into a bundle, which had been sealed. At this stage, the flying squad arrived and insisted for inspection of the answer scripts, which was objected to by the Examination Superintendent. This annoyed the members of the flying squad and they insisted for inspecting the answer scripts. According to the petitioners, they also asked for illegal gratification, failing which they threatened the institution of dire consequences. It is submitted that even in the report of the flying squad, there is no mention that at the time they arrived in the institution, the examination was being held. It is submitted that in such circumstances, the Vice Chancellor was not justified in imputing the charge of mass copying on the ground that the examination had continued beyond the prescribed time.

9. On the other hand, learned counsel for the University tried to support the charge of mass copying on the ground that the examination had continued beyond the prescribed time by referring to Clause 7 of the guidelines framed by the University, whereunder the flying squad was to make recommendation of mass copying against the examination centre where exams were found to have continued beyond the prescribed time. He further placed reliance on certain letters obtained from the members of the flying squad while the matter was pending before the Vice Chancellor in pursuance of the direction given by this Court in its judgment and order dated 27.10.2015 in Writ-C No.59461 of 2015, in which it is stated that it found the examination continuing at 10 : 45 a.m., when it visited the institution. It is submitted that in view of the aforesaid clarification issued by the members of the flying squad, it is amply clear that the examination had continued beyond the prescribed time and thus, the Vice Chancellor was justified in concluding that mass copying had taken place.

10. The University had framed guidelines, on the basis of which the flying squad was to ascertain as to whether mass copying had taken place or not. Clause 7 thereof specifically provides that in case the students were found writing the answer book before or after the prescribed time, it shall be inferred that mass copying had taken place at such centre. Thus, it cannot be gainsaid that in case the students were found writing the answer scripts at 10:45 a.m. which is beyond 10:30 a.m. by which the examinations were supposed to be over, the charge of mass copying would stand established. However, the question for consideration is whether there was any material before the Vice Chancellor on basis of which such inference could have been drawn. The relevant part of the report of the flying squad dated 7.5.2015 mentions as under:-

अभ्युक्ति 10:45 ए०एम० पर जब उड़ाका दल पहुँचा तो उ० पु० के मिलान पर प्रश्न सं० 1 तथा ४ (ए), बी के उत्तर लगभग सभी छात्राओं के एक समान पाये गये।

11. It is clear from the report of the flying squad that it reached the petitioner institution at 10:45 a.m. which is after the prescribed time for the examination being over. The report of the flying squad nowhere mentions that at 10:45 a.m. when it reached the examination centre, the students were found writing the answer book. On the other hand, the specific case of the petitioners in their written objections submitted before the Vice Chancellor on 16.11.2015 was that the examination was over at 10:30 a.m. and even the bundles had been sealed when the flying squad arrived and insisted for looking into the answer scripts. It seems that in order to meet the specific stand taken by the petitioner institution in this regard in its written objection dated 16.11.2015, the Registrar by letter dated 12.12.2015 addressed to Dr. Santosh Kumar Gupta and Dr. Virendra Pratap Singh, the members of the flying squad, obtained their response. The members of the flying squad in their undated letter submitted to the Registrar stated that "the flying squad as per its duty schedule, reached the said college on 7.5.2015 at 10:45 a.m. and was surprised to find that the examination was continuing flouting the examination and University Rules". As noted above, in the report submitted by the flying squad on the date of inspection, there is no indication that the examination was continuing at the time they arrived at the examination centre. On the contrary, as noted above, the specific case of the petitioners was that since the examination was over at 10:30 a.m. and thus, the flying squad was not justified in comparing the answer scripts after getting the bundle unsealed and in submitting the report in question. Concededly, the aforesaid letters were obtained from the members of the flying squad after the hearing before the Vice Chancellor concluded on 16.11.2015. In case the University had obtained such additional material after conclusion of the hearing, the petitioners should have been confronted with such material, before placing reliance upon the same. However, the same having not been done, in the opinion of the Court, the conclusion drawn by the Vice Chancellor placing reliance on the aforesaid letters cannot be sustained.

12. Irrespective of what has been held above, there is yet another aspect of the matter which needs to be taken note of. The report of the flying squad dated 7.5.2015 was the sole basis for holding the petitioner institution guilty of mass copying. The report of the flying squad, as noted above, only mentions that on inspection, it found certain answers had been given in identical fashion by most of the students. At that time there was no allegation that the charge of mass copying is being imputed on the petitioners on the ground that examination had continued beyond the prescribed time. Even after the matter was remitted back to the Vice Chancellor by this Court vide its order dated 30.6.2015 and following which the Vice Chancellor passed fresh order dated 1.10.2015, there was not even a suggestion that the examination had infact continued beyond 10:30 a.m. In case the answer scripts were being written beyond the prescribed time and the directions to the flying squad issued by the University specifically provides that in case the examination had continued beyond the prescribed time, the same itself is sufficient to infer mass copying, there does not appear any reason why such fact was not mentioned in the report submitted by the flying squad on that date itself.

13. In view of the foregoing discussion, this Court is unable to uphold the charge of mass copying on the ground that the examination had continued beyond the prescribed time.

14. The other consideration on which charge of mass copying is found to be established is, as noted above, the report of the flying squad mentioning that on comparison of the answer scripts of the students, the answers to question no.1 and 8 (a) & (b) had been found to be given in an identical manner by most of the students. It is contended by learned counsel for the petitioners that firstly, the examination being over at 10:30 a.m., the flying squad was not empowered to get the answer scripts unsealed and carry out comparison of the answer scripts. Further, the flying squad was not competent to carry out comparison of answers and especially when none of its members were from the faculty of Mathematics. It is submitted that at best the flying squad could have made a recommendation for an enquiry being made by an expert body. It is urged that it is only the examiner evaluating the answer scripts who could infer mass copying on the ground that answers have been given in identical manner by most of the students and such power is not vested in the flying squad. It is submitted that there is no such report of the Examination Controller in respect of the petitioner institution and thus, the charge of mass copying is wholly unfounded. It is pointed out that the Examination Controller, on the basis of the report of the examiner, had made recommendation of mass copying only in respect of three institutions, which does not include the petitioner institution. In respect of these institutions, the Examination Committee by other part of its resolution of the same date had resolved to levy a fine of Rs.3 lacs and other punishments. It is thus sought to be submitted that had there been similarity in the answers given by the students, the Examination Controller/Examiner would have submitted report of mass copying against the petitioner institution but there being no such report, it cannot be concluded that any mass copying had taken place.

15. On the other hand, learned counsel for the respondent University submitted that although the members of the flying squad were not expert in the field of maths but being seasoned academicians, they were competent enough to ascertain whether or not the answers had been given in identical manner by most of the students. It is submitted that the Examination Committee, which is an expert body, had duly considered the report of the flying squad and had thereafter taken the impugned decision. It is urged that under the guidelines framed by the University, the recommendation made by the flying squad in respect of mass copying is final and conclusive and was thus rightly acted upon by the Examination Committee. The said fact has been duly noted by the Vice Chancellor in the impugned order and no exception can be taken to the same.

16. The guidelines framed by the University on the basis of which the flying squad is to make recommendation for taking action in case of mass copying has been brought on record as Annexure-26 to the writ petition. Clause 6 (a) to (e) contains the guidelines for determining whether mass copying had taken place or not, which are as under:-

(a) उड़ाका दल के सदस्य परीक्षा कक्ष में यदि सामूहिक रूप से नकल कराये जाने अर्थात ब्लैक बोर्ड से लिखवाने अथवा पुस्तक से बोल कर लिखाने की स्थिति से अवगत हैं तो सामूहिक नकल की जाँच की संस्तुति करेंगें।

(b) एक परीक्षा कक्ष में अधिकाश परीक्षार्थी नकल सामग्री से नकल करते अथवा अपने पास नकल सामग्री (मुदित अथवा हस्ततिखित अथवा इण्टरनेट अथवा इलेक्ट्रानिक गैजेट से उपलब्ध) रखे हुए अथवा नकल करते पकड़े जाएँ तो ऐसी स्थिति में भी समूह में नकल करने / सामूहिक नकल की संस्तुति की जाएगी।

(c) समूह में नकल का तात्पर्य होगा कि परीक्षार्थी नकल से सम्बन्धित उपर्युक्त वर्णित सामग्री स्खे हुए अथवा इस्तेमाल करते हुए अथवा फेंकते हुए देखा गया हो।

(d) सामूहिक नकल का आशय बिन्दु संसख्या-06 (a एवं b) में उल्लिखित विवरण के अनुसार होगा।

(e) उहाका दल के पहुँचने पर यदि परीक्षा केन्द्र का मुख्य गेट बन्द रहता है और शीघ्र खोला नहीं जाता है तथा अन्दर जाने पर नकल सामग्री पर परीक्षा कक्ष के बाहर फंकी हुई पायी जाती है अथवा परीक्स कंन्द्र के किसी कर्मवारी द्वारा उसे जल्दी-जल्दी इकट्ठा किया जा रहा हो तो ऐसी स्थिति में सामूहिक नकल की संस्तुति की जायगी। यदि नंट का ताला ताकाल नहीं खोला जाता है तो उड़ाका दल ताला तोडने हेतु अधिकृत होगे।

17. A perusal of Clause (a) reveals that in case the flying squad is having knowledge of the examinees having written their answers on basis of the material provided to them on the blackboard or by dictation from a book, they were to make recommendation for holding an enquiry into the charge of mass copying. On the other hand, in case the flying squad itself finds the examinees writing the answer script from unauthorised material or by access from internet or electronic gadgets, it had been invested with the power to make recommendation of mass copying. Clause (c) states that cheating in group shall be inferred when the examinees were found keeping unauthorised material with them or using the same or found throwing it. Similarly, when the main gate of the examination centre is found closed and resistance is offered to the flying squad to enter the examination centre, the flying squad was to infer mass copying having taken place. Apart from it, Clause 7 (discussed in earlier part of the judgment) stipulates that in case examinees are found taking the examination before or after the prescribed time, it shall be concluded that mass copying had taken place. Under Clause 8, in case the answer scripts are seized from a place outside the examination centre, it shall be inferred that mass copying had taken place.

18. A perusal of the guidelines issued to the flying squad reveals that where the flying squad itself finds the examinees writing the answer script by employing unauthorised means as in Clause 6 (b), (c) and in cases where resistance is offered to the entry of the flying squad (Clause [e]) and under Clause 7 and 8 it has been invested with the power to make recommendation of mass copying having taken place. Since under all these contingencies the offending act takes place in the presence of the flying squad, it had been invested with the power to directly make a recommendation of mass copying having taken place. However, under Clause (a) where the flying squad had only derived knowledge of certain offending act having taken place, which if proved may lead to an inference of mass copying, it was obliged to make a recommendation to hold an enquiry in that regard.

19. The guidelines framed by the University does not empower the flying squad to compare the answer sheet of the students or to infer mass copying having taken place on basis of such comparison even where none of the above discussed clauses are attracted. However, in the opinion

of the Court, that itself is not sufficient to hold that the report which was submitted by the flying squad was beyond its competence and is to be discarded as a waste paper. Concededly, the members of the flying squad were the faculty members of the University. This Court can easily assume that they are highly qualified though in subjects other than maths. They had enough competence to arrive atleast at a prima facie conclusion, if not conclusive, that the answers given to certain questions by most of the candidates are identical. In the impugned order it is admitted that the members of the flying squad are not expert in the field of maths but the Vice Chancellor has held that they had sufficient competence to recommend action being taken based on inference that answers to certain questions were given in identical manner by most of the students. The guidelines framed by the University are not exhaustive nor could be, as there may be large number of modes by which mass copying could take place which could not be visualised or comprehended at the time of framing of the guidelines. Thus, this Court has no hesitation in holding that although the flying squad was not invested with the power to make a comparison of the answer sheets of various students but once it had carried out such an exercise and submitted a report, it should have been given due credence. However, at the same time, since the members of the flying squad were not experts in the field of maths and therefore, the proper course for the University was to get an enquiry conducted on the basis of the report of the flying squad or to obtain a specific report in that regard from the examiner evaluting the answer scripts.

20. During the pendency of the writ petition, this Court directed the University to produce the original answer scripts of the students who had appeared in the examination at the petitioner institution. On 10.3.2016, the following order was passed:-

"In pursuance of the order of this Court dated 26.2.2016, the original record has been produced by the University before this Court which includes the answer script of the students, who had appeared in the examination at the petitioners' institution.

According to the report of the Flying Squad, answers to question no.1 and question no.8 (a) and (b) were found to be identical.

It is vehemently submitted before this Court that Flying Squad was not competent to come to the conclusion that answers were given in an identical fashion by all the students. Such conclusion can only be arrived at by the examiner examining the answer scripts.

From few of the copies, which were shown by Sri Vivek Verma, learned counsel appearing on behalf of the University, it also does not appear that answers to questions no.1 and 8 were identically given atleast by the students whose copies have been shown to the Court. Even the marks awarded to them are different.

Sri Ravi Kant, learned senior counsel assisted by Sri Vivek Verma appearing on behalf of the University submitted that in order to ensure that no student becomes victim of the charge of mass copying, without such charge being firmly established, the University proposes to get the copies examined by an expert body and place its report before this Court within 10 days.

In view of such statement, the matter is adjourned for 10 days.

In case the University is getting the copies examined by an expert body, it is desirable that the examiner should be an expert in the field and should be from some other University, so as to rule out the element of bias.

Put up in the additional cause list on 29.3.2016.

The original record produced before this Court is returned to Sri Vivek Verma for being transmitted to the University for taking required action."

21. The University, on the basis of the statement made by it before this Court, got the copies of the students who had taken examination at the petitioner institution on 7.5.2015 evaluated by Dr. Satya Dev Singh, Principal of D.A.V. College, affiliated to Banaras Hindu Vishwavidyalaya, Banaras. Concededly, he is an expert in the field of maths. The report given by Dr. Satya Dev Singh, after evaluating the answer scripts, submitted before this Court in a sealed cover, was opened in Court. He evaluated 98 answer scripts and found that answers to question nos. 1 (a) and (d) and 8 (b) given by the students are substantially the same. It is found that except student bearing roll number 69015040160 who had not attempted question 1 (a) at all and the student having roll number 69015040214 who has answered it correctly by following the correct procedure, the remaining students had answered question 1 (a) incorrectly. Even the mistakes committed by them were found to be identical. It has been noted that the value of ∑ was /⌜n+1=∫0∞e-t tn+1-1dt, whereas all students have attempted the question by mentioning the value of ∑ as ∫0∞e-t tn-mdt. Similarly, in respect of question 1 (d) candidates with roll numbers 69015040214, 40036, 35 and 40131 had solved it correctly and candidate with roll number 40107 had not attempted the said question, all other students had solved it wrongly. Among those whose answers are incorrect, except 9 students, all students had committed identical mistakes and also arrived at the same wrong conclusion ∞, whereas the correct answer was 1. Similarly, in respect of question 8 (b) except 12 students, all remaining students had followed the same incorrect procedure and had arrived at the same wrong answer. In the said question the value of y was f (x), whereas all students had answered by mentioning the value of y as f (t). Accordingly, the expert has inferred that most of the students having given wrong answer to questions 1 (a), 1 (d) and 8 (b) by following the same wrong procedure, the charge of mass copying stands established. He has further concluded that the knowledge of the students in maths was found to be insignificant judging them by B.Sc. standard.

22. Once the report of the expert has come on record before this Court, it cannot shut its eye or ignore the report altogether. From the report of the expert it is evident that most of the students have not only answered question 1 (a), 1 (d) and 8 (b) incorrectly but the answers had been solved by employing wrong value of the constant. While solving a question of mathematics correctly, there are fair chances that many of the students may follow the same steps and procedure. However, it is not possible that most of the students would arrive at the same incorrect answer and that too by following the same incorrect procedure.

23. It is the prime responsibility of the University to ensure purity of the examination so as to preserve the sanctity of the examinations. Holding of the examination without unauthorised means being employed by the students at the examination is the prime responsibility of the University. It is necessary for maintenance of standards of education and also to ensure that the meritorious students take stride over less deserving. In case unauthorised means are employed by an examinee during the examination, the final result would fail to assess the level of understanding of students as well as the interse merit amongst the examinees. Thus, the very object for which the examination is conducted shall stand defeated. This Court, in the face of the report of the expert which has been placed on record, is therefore unable to accept the contention of the petitioners that the charge of mass copying levelled against the institution is wholly bogus. However, at the same time, this Court desist from drawing any final conclusion on the basis of such report which has been produced before this Court for the first time without the petitioner institution being given an opportunity to have its say on the same. For such purpose, this Court considers it desirable to remit the matter back to the Vice Chancellor for providing an opportunity to the petitioner institution to submit its objection, if any, against the report of the expert Dr. Satya Dev Singh dated 28.3.2016, and to pass fresh order after considering the objection.

24. The other aspect of the matter which still requires to be considered is as to whether the University was justified in imposing the penalties in the fact situation obtaining above. It is not disputed before this Court that in case charge of mass copying stands established, as per the guidelines laid down by the University to deal with such cases, the Examination Committee would be justified in imposing penalty of Rs.3 lacs and in debarring the institution from being designated as an examination centre for next three years. However, the other punishment imposed by the Examination Committee namely, cancellation of the entire result of all the students requires a consideration. It is clear from the stand taken in the writ petition that the result of all students who had appeared in the exam at the petitioner institution in Maths II Paper of B.Sc. 1st Year was alone placed under UFM category and not in other papers. In cases of mass copying, it is difficult to identify the students who had indulged in mass copying from those who had not employed such means. It is for the said reason that the University has provided for cancellation of result of all the students in the concerned subject. However, as a result of cancellation of the examination in the concerned subject, even those students who may not have indulged in mass copying also suffer. Even in the instant case, from the report of Dr. Satya Dev Singh, it transpires that atleast one student with roll number 69015040214 had answered the questions correctly by following the correct procedure. He has not written the answers in the manner identical to other students. Can such a student, who seems to be a very meritorious student, having answered even those questions correctly which almost all other students had answered incorrectly, should be made to suffer? The answer is an emphatic 'no'.

25. It is apposite to note that the Examination Committee being conscious of the said aspect had in a subsequent meeting dated 6.7.2015 resolved to declare the result of those students who had not indulged in mass copying after the institution deposits the first instalment of the penalty imposed. Under the same resolution, the penalty was permitted to be deposited in two instalments. This, in the opinion of the Court, will mitigate the hardship of those students who had

not indulged in mass copying. However, this Court does not find any justification for declaration of result of such students being made dependent on deposit of the first instalment of the penalty by the institution. The fate of such students cannot be made dependent on it. These students cannot be made to suffer merely because their examination centre was in the petitioner institution where other students had indulged in use of unfair means. It is noticeable that on the fateful day, the examinees taking examination at the petitioner institution were not only the students of the petitioner institution but also the students of one other institution viz. Ram Karan Maha Vidyalaya, Bhimpura, Ballia.

26. Ordinarily, these questions which touches upon the fate of the students are required to be considered only when the students approach this Court themselves or through the Principal of the institution, but since the order is a composite one, and learned counsel for the parties had addressed these issues also at length, therefore, this Court does not consider it proper to leave these issues unresolved. It is not clear from the pleadings whether the result of the remaining students had been declared by the University or not as per the decision of the Examination Committee dated 6.7.2015. Counsel for the University also could not explain as to how the University had or would identify those who had indulged in mass cheating from those who had not.

27. On a query made by the Court to learned counsel for the University as to how it proposes to mitigate the hardship of such meritorious student who cannot be held guilty of the charge of mass copying, learned counsel for the University, on the basis of instructions received, had made a statement before this Court on 17.5.2016 that the University undertakes to hold a re-examination of the students in the paper in which there was allegation of mass copying and that such examination would be held before holding of the next regular examination.

28. In view of the foregoing discussion and the statement of learned counsel for the University, this Court is of the opinion that interest of justice would be served in disposing of the writ petition with the following directions:-

(a) The petitioner institution shall have the opportunity to file objections, if any, against the report of Dr. Satya Dev Singh dated 28.3.2016 within two weeks from today before the Registrar of the University. The Vice Chancellor shall thereafter pass a fresh order, after taking into consideration the entire material on record including the report of Dr. Satya Dev Singh dated 28.3.2016 and the objections, if any, received from the petitioner institution. In case objections are not filed by the petitioner institution within the time stipulated above, it shall be open to the Vice Chancellor to pass order without granting any further time.

(b) In case the charge of mass copying is found to be established and the University is able to identify the student who had indulged in mass copying, only result of such examinees shall be cancelled. In respect of the remaining examinees, their result shall be declared forthwith, as per decision of the examination Committee dated 6.7.2015, but without any precondition.

(c) In case the University is unable to identify the students who had indulged in mass copying from those who had not indulged in mass copying, it shall be open to it to hold a re-examination of all the examinees as per the undertaking given before this Court.

(d) The holding of the re-examination of the examinees is without prejudice to any action which the University is competent to take against the institution in case the charge of mass copying is found to be established against it.

29. The writ petition stands disposed of with the aforesaid directions.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE V.K. SHUKLA, ACTING CHIEF JUSTICE
THE HON'BLE UMESH CHANDRA SRIVASTAVA, J.

Special Appeal Defective No.- 338 Of 2016
&
Special Appeal No.- 291 Of 2016

State Of U.P. & Ors. ...Appellants
Versus
Ashish Kumar Pandey & Ors. ...Respondents

Counsel for the Appellants:
Chandra Shekhar Singh

Counsel for the Respondents:
Seemant Singh, Dilip Kumar Kesharwani, Gaurav Singh, Kripa Shanker Singh, Rajeev Tripathi

Special Appeal—Advertisement dated 19.05.2011 – Sub-Inspector in Civil Police (SICP) – Platoon Commanders (PC) (PAC) – Horizontal reservation – Women – Ex-servicemen – Dependents of freedom fighter – Selected under the special/horizontal reservation would be adjusted in the category to which they belong – Women candidates would have to be adjusted in their respective category to which they belong – Horizontal reservations cut across the vertical reservations – Candidates shall be adjusted in the category to which they belong – Percentage would not exceed 50% reservation – Candidate selected under the women quota would be placed in appropriate category – Reserve category candidate cannot ask for placement against open category by claiming that they have higher merit – Both the Special Appeals are partly allowed.

Brief background of the case is that an advertisement dated 19.05.2011 was issued by Additional Secretary (Recruitment) U.P. Police Recruitment and Promotional Board U.P. (hereinafter in short called 'Board') for filling up post of Sub-Inspector in Civil Police (SICP) and Platoon Commanders (PC) in Provincial Armed Constabulary PC (PAC). In Writ Petition No.37599 of 2015 (Ashish Kumar Pandey and 24 others vs. State of U.P. and 29 others), the petitioners-opposite party claimed that they have applied pursuant to the aforementioned advertisement in question and succeeded at each stage of the proceedings but when the final

result has been declared by the Board on 25.06.2015, therein in spite of the fact that their names ought to have been there in the select list, on account of wrong application of the provisions of Horizontal Reservation, the merit list in question has been totally disturbed and the said action of the Board impelled the petitioners-opposite parties to be before this Court. On the presentation of the Writ Petition in question, this Court has proceeded to entertain the matter and thereafter after exchange of pleadings the writ petition in question has been allowed and thus giving cause to the State of U.P. as well as private opposite parties to prefer the Special Appeal as already mentioned above.(Para 4)

Shri P.S. Patwalia, learned Senior Advocate appearing with Shri Chandra Shekhar Singh, Additional Chief Standing Counsel as well as Shri U.P. Singh, learned Standing Counsel for State of U.P. submitted before this Court that the learned Single Judge, in the present case, has totally misdirected himself, at the point of time when he has proceeded to advert to the issues ignoring the bonafide action of State Respondents whereas women category candidates have been adjusted on the basis of their inter-se merit and open category is inclusive of all categories and in view of this, there has been no infirmity in the matter of selection, further the directions that have been so issued are impracticable to be complied with and lastly the Learned Single Judge without any foundation and basis, even without caring to the fact that private incumbents were not impleaded as party, has proceeded to award stricture and in view of this, award of stricture and awarding of cost is per-se bad. (Para 5)

Shri Anoop Trivedi, Advocate submitted with vehemence that only 261 Female candidates were declared selected, out of which 19 female candidates were selected in their respective category and as such remaining 242 women candidates were required to be accommodated by taking aid of horizontal reservation and the contingency that has emerged, in the present case, has rightly been addressed by keeping in view the object of providing horizontal reservation and to see and ensure that inter-se horizontal reservation candidates, merit is not breached and as such, opinion that has been formed by learned Single Judge is per-se bad and totally running counter to the rule of fair play. Attempt has also been made to demonstrate that directives issued by this Court if insisted upon to be complied with would lead to an anomalous situation.(Para 6)

Held:(Paras 35,37-41)

1. Appellants are labouring under misconception, inasmuch as, as far as the application of Horizontal Reservation is concerned, it has to be applied as per its spirit and then the consequence are required to be seen and on mere apprehension, the view point of learned Single Judge cannot be non suited.

2. Suffice is to mention that even without commenting on their conduct, the case in question could have been decided. It may be true that arguments advanced on behalf of State may not be finding favour of the Court but that does not ipso facto mean that same invites stricture, inasmuch as, the State has every right to defend its action and it is for the Courts to take a final call as to whether the stand taken is correct or incorrect.

3. In the facts of the present case what we find that strictures have been given to learned Advocate General and the Senior Officials of the State of U.P. whereas Superior Officials were not impleaded in person.

4. The law on the subject is clear that such strictures should be avoided. See Om Prakash Chautala vs. Kanwar Bhan 2014 (5) SCC 417, wherein following parameters have been laid down:

"12. At this juncture, it may be clearly stated that singularly on the basis of the aforesaid principle the disparaging remarks and directions, which are going to be referred to hereinafter, deserve to be annulled but we also think it seemly to advert to the facet whether the remarks were really necessary to render the decision by the learned single Judge and the finding recorded by the Division Bench that the observations are

based on the material on record and they do not cause any prejudice, are legally sustainable. As far as finding of the Division Bench is concerned that they are based on materials brought on record is absolutely unjustified in view of the following principles laid down in Mohammad Naim (supra): -

"It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct."

5. Consequently, in the present case it was not at all required to pass stricture and comment upon learned Advocate General and the State functionaries as they may be acting on the dictates of their political masters as observed by learned Single Judge and in view of this, the strictures made in the order dated 16.03.2016 against the Advocate General and other State Officers/Officials are quashed and will not form part of record. The other part of the order passed by learned Single Judge be complied with forthwith.With these, both the Special Appeals are **partly allowed**

Case Law discussed:-

1. Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217 (Paras 19, 26)
2. Anil Kumar Gupta vs. State of U.P., 1995 (5) SCC 173 (Para 20)
3. Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others, AIR 2007 SC 3127 (Para 22)
4. Public Service Commission Uttaranchal vs. Mamta Bisht & others, AIR 2010 SC 2613 (Para 23)
5. Om Prakash Chautala vs. Kanwar Bhan, (2014) 5 SCC 417 (Para 39)

(Delivered by Hon'ble V.K. Shukla, A.C.J.)

1. In the above metioned Special Appeal in question, as common question of law has been engaging the attention of this Court, the Special Appeal in question are being decided collectively and Special Appeal Defective No.338 of 2016 is being treated to be leading case.

Ref: Delay Condonation Application

2. For the reasons stated in affidavit filed in support of Delay Condonation Application, which constitutes sufficient cause, application is allowed. Delay of 14 days in filing the Special Appeal is condoned. Special Appeal is treated to have been filed well within time.

Ref: Special Appeal

3. Both these Special Appeals are directed against the judgement and order dated 16.03.2016 passed by learned Single Judge in Writ Petition No.37599 of 2015 (Ashish Kumar Pandey and 24 others vs. State of U.P. and 29 others) connected with other writ petitions, wherein the Learned Single Judge has proceeded to allow the Writ Petitions with the following directions:

The questions framed, consequently, is answered as follows:

(i) The candidates claiming horizontal reservation (women, exservicemen and dependent of freedom fighter) cannot be adjusted enmasse in the open category but would have to be adjusted against their respective social category i.e. OBC, SC and ST;

(ii) the posts remaining vacant due to the shortfall of women candidates cannot be carried forward to subsequent selection, in view of the specific prohibition in the government order dated 26 February 1999, however, in respect of the other class of candidates i.e. dependent of freedom fighters, ex-servicemen, vacant post shall have to be carried forward for two subsequent selections in terms of sub-section (5) of Section 3 of Act, 1993.

For the reasons and law stated hereinabove, the writ petition deserves to be allowed. The writ petition is, accordingly, allowed with the following directions:

(i) The select list of SICP and PC (PAC) prepared pursuant to the resultdated 25 June 2015 to the extent seeking to adjust/accommodating candidates under special category viz. women, ex-servicemen and dependents of freedom fighter in the open category is set aside and quashed;

(ii) all such special category candidates adjusted in open category shallbe shifted and adjusted in their respective social category i.e. OBC, SC to which they belong;

(iii) the candidates under special category belonging to open categoryshall be adjusted/accommodated in the open category;

(iv) all adjustment, directed hereinabove (ii & iii) shall be made frombottom of the list of each social category by replacing equal number of male candidates;

(v) upon adjustment/accommodation, as directed above (ii, iii & iv), theselection and consequential appointment of equal number of male candidates shall stand automatically cancelled/ terminated forthwith;

(vi) in the open category, 262 (340-78) unfulfilled quota of women candidates shall be filled by male candidates on merit, consequently, they shall be sent for training, and if already trained, appointment letter shall be issued;

(vii) in the OBC category 27 (200-173) unfulfilled quota of OBC women candidates, shall be filled by male candidates (OBC) on merit, consequently, they shall be sent for training and thereafter, appointment letter shall be issued;

(viii) In the SC category 145 (155-10) unfulfilled quota of SC women candidates shall be filled up by male candidates (SC) on merit as provided under (vi) and (vii);

(ix) candidates belonging to other special class viz. ex-servicemen anddependents of freedom fighter shall be adjusted in their respective social category in the manner directed hereinabove (ii), (iii), (iv), (v);

(x) the vacancies, if any, remaining vacant upon adjustment as directed above (ix) in respect of posts reserved for ex-servicemen and dependents of freedom fighter would be kept vacant and carried forward to subsequent selection, provided the Board would pass an order in terms of sub-section (5) of Section 3 of Act, 1993;

(xi) Board upon determination, as directed above (x) arrives at a conclusion that the posts advertised for ex-servicemen and dependents of freedom fighter is after two selections, in that eventuality, the vacant posts shall be filled up as directed hereinabove (iii to vii);

(xii) The adjustment/accommodation directed herein above shall bemade by (a) drawing the select list on merit of each category i.e. OC, OBC, and SC; (ii) drawing the list of special category candidates to be accommodated category wise. Both the lists and the order passed by the Board as directed at (x) shall be published/notified on the official website.

(xiii) The directions to be complied within three weeks from today."

4. Brief background of the case is that an advertisement dated 19.05.2011 was issued by Additional Secretary (Recruitment) U.P. Police Recruitment and Promotional Board U.P. (hereinafter in short called 'Board') for filling up post of Sub-Inspector in Civil Police (SICP) and Platoon Commanders (PC) in Provincial Armed Constabulary PC (PAC). In Writ Petition No.37599 of 2015 (Ashish Kumar Pandey and 24 others vs. State of U.P. and 29 others), the petitioners-opposite party claimed that they have applied pursuant to the aforementioned advertisement in question and succeeded at each stage of the proceedings but when the final result has been declared by the Board on 25.06.2015, therein in spite of the fact that their names ought to have been there in the select list, on account of wrong application of the provisions of Horizontal Reservation, the merit list in question has been totally disturbed and the said action of the Board impelled the petitioners-opposite parties to be before this Court. On the presentation of the Writ Petition in question, this Court has proceeded to entertain the matter and thereafter after exchange of pleadings the writ petition in question has been allowed and thus giving cause to the State of U.P. as well as private opposite parties to prefer the Special Appeal as already mentioned above.

5. Shri P.S. Patwalia, learned Senior Advocate appearing with Shri Chandra Shekhar Singh, Additional Chief Standing Counsel as well as Shri U.P. Singh, learned Standing Counsel for State of U.P. submitted before this Court that the learned Single Judge, in the present case, has totally misdirected himself, at the point of time when he has proceeded to advert to the issues ignoring the bonafide action of State Respondents whereas women category candidates have been adjusted on the basis of their inter-se merit and open category is inclusive of all categories and in view of this, there has been no infirmity in the matter of selection, further the directions that have been so issued are impracticable to be complied with and lastly the Learned Single Judge without

any foundation and basis, even without caring to the fact that private incumbents were not impleaded as party, has proceeded to award stricture and in view of this, award of stricture and awarding of cost is per-se bad.

6. Shri Anoop Trivedi, Advocate submitted with vehemence that only 261 Female candidates were declared selected, out of which 19 female candidates were selected in their respective category and as such remaining 242 women candidates were required to be accommodated by taking aid of horizontal reservation and the contingency that has emerged, in the present case, has rightly been addressed by keeping in view the object of providing horizontal reservation and to see and ensure that inter-se horizontal reservation candidates, merit is not breached and as such, opinion that has been formed by learned Single Judge is per-se bad and totally running counter to the rule of fair play. Attempt has also been made to demonstrate that directives issued by this Court if insisted upon to be complied with would lead to an anomalous situation.

7. The arguments in question have been countered by Shri G.K. Singh, Senior Advocate, Shri R.K. Ojha, Senior Advocate, Shri Seemant Singh, Advocate by submitting that in the present case contrary to the terms and conditions of the recruitment process, horizontal reservation has been adhered in a designed manner in order to extend benefit to a particular group, who were already stood benefited by means of adjustment made in their respective categories, and thus crossing the limit of 50% reservation provided for and horizontal reservation cannot be equated with vertical reservation and a candidate seeking selection in the horizontal reservation will have to go in their respective category and category here is clearly referable to the respective social group i.e. Scheduled Caste (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) and in the present case, the left over candidates from SC, ST and OBC has been sought to be accommodated in OC category, whereas same was not at all permissible in law and in view of this, the decision taken by the Learned Single Judge is rightful one and no interference is required to be made by this Court in the facts of present case.

8. Shri Pankaj Saksena, Advocate has been permitted to intervene and address the Court.

9. After respective arguments have been advanced, the factual situation that is so emerging, in the present case, is that advertisement in question has been issued by the Board and the total number of vacancies of SICP and PC (PAC) and the quota under vertical reservation worked out has been as follows:-

Sub-Inspector (Civil Police) (SICP)

Total number of vacancies	:	3698
General Category (OC)	:	1849 (50%)
O.B.C. Category	:	998 (27%)
Schedule Caste Category	:	777 (21%)
Schedule Tribe Category	:	74 (2%)

Plantoon Commander (P.A.C.) (PC PAC)

Total number of vacancies	:	312
General Category (OC)	:	156 (50%)
O.B.C. Category	:	84 (21%)
Schedule Caste Category	:	64 (21%)
Schedule Tribe Category	:	6 (2%)

10. An instruction booklet was also provided wherein the quota meant for Special/Horizontal Reservation has been provided for as follows:

Dependent of Freedom Fighter	:	2%
Ex-Servicemen	:	5%
Women	:	20%

11. Clause 3.3 of the instruction clearly provides for the candidate selected under the special/horizontal reservation would be adjusted in the category to which they belong. The clause is extracted:

"3.3 टिप्पणी:-

(1) यदि कोई अभ्यर्थी एक से अधिक श्रेणी मे आरक्षण का दिावा करता है तो उसे केवल एक ही आरक्षण का लाभ मिलेगा जो उसके लिए ज्यादा लाभकारी होगा

(2) क्षैतिज (हॉरिज़ॉन्टल) आरक्षण के अधीन चयनित अभ्यर्थी जिस श्रेणी के होंगे उसे उसी श्रेणी के प्रति समायोजित किया जायेगा"

12. The petitioners-opposite parties, who in their turn had responded pursuant to the Advertisement, as per the scheme that has been so quoted for selection, both for SICP and PC(PAC) were required to qualify (i) Physical Standard Test (ii) Preliminary Written Test (iii) Physical Efficiency Test (PET) (iv) Main Written Examination (v) Group Discussion.

13. Petitioners-opposite parties claim that they have undergone the examination in question but their names did not figure in the final merit list that was initially declared on 15.03.2015 but on account of judicial intervention by means of judgement dated 29.05.2015 passed in Writ Petition No.67782/2014 (Saket Kumar vs. State of U.P. and others), the list in question was revised and final result was declared on 26.06.2015. At this juncture, as already mention above, writ petition in question has been filed and same has been allowed.

14. In order to appreciate the respective arguments that have been so advanced, the relevant statutory provisions holding the field, that are necessary for adjudication of the matter, are being looked into.

15. The State Government in exercise of power conferred under Section 46 read with Section 2 of the Police Act, 1861, has framed the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008. Rule 6 thereof provides for reservation, inter alia, in terms of Act, 1993. Rule 6 and 29 are being extracted below:

"6. Reservation.- Reservation for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other Categories shall be in accordance with the Act and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended from time to time, and the orders of the Government in force at the time of the recruitment. The reservation of National/State level sportsmen shall be in accordance with the Government orders in force at the time of recruitment. It is further provided that physically handicapped persons will not be eligible for police services.

29. Savings.- Nothing in these rules shall affect reservations and other concessions required to be provided for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other special categories of persons in accordance with the orders of the Government issued from time to time in this regard."

16. The U.P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighter and Ex-Servicemen) Act, 1993 (U.P. Act 4 of 1993) provides for special horizontal reservation to three class of aspirants (i) physically handicapped persons (ii) dependants of freedom fighters (iii) ex-servicemen. The three classes have been defined in the Act, 1993. Section 3 provides the percentage of vacancies to be reserved for such class. Horizontal reservation is provided at the stage of direct recruitment. Sub section (3) would clarify that the reservations would be horizontal by making adjustment of such candidates in their respective category i.e. OC, OBC, SC, ST. Sub-clause (3) of Section 3 is extracted:-

"3.(1).....

(2).....

(3) The persons selected against the vacancies reserved under subsection (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to [Other Backward Classes of Citizens], category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed in that category by making necessary adjustments."

17. Act, 1993 does not provide reservation for women. The reservation for women candidates is provided in Government Order dated 26 February 1999, which is applicable on all posts under the State public services at the stage of direct recruitment. Said action of State Government is an affirmative State action in favour of women for providing them opportunity in

the field of public employment and such affirmative State action is clearly referable to Article 15(3) of the Constitution, object whereof is to strengthen and improve the status of women. The reservation is horizontal/special reservation reserving 20% of the vacancies for women candidates. The principle and methodology for women reservation was reiterated in the subsequent Government Order dated 9 January 2007, clarifying (i) women would mean women resident/domicile of Uttar Pradesh, (ii) 'public service' would mean service defined in Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994.

18. On conjoint reading of the Government Orders, the inevitable conclusion is as follows:

(i) reservation for women is horizontal/special in nature;

(ii) women candidates would have to be adjusted in their respectivecategory to which they belong;

(iii) women selected on merit would be counted against the numberof vacancies reserved for women;

(iv) there being no concept of carry forward of unfulfilled vacanciesfor future selection, therefore, shortfall of women candidates would have to be filled by that many male candidates.

19. However, in respect of other class of special reservation as provided for under U.P. Act No.4 of 1993 i.e. for dependent of freedom fighters, ex-servicemen and handicapped persons, on nonavailability of suitable candidates, unfulfilled vacancies would have to be carried forward for two subsequent selections. The principle of adjustment is, however, same i.e. the candidates shall be adjusted in the category to which they belong. Sub section (5) of Section 3 of Act, 1993 is extracted:

“(5) Where due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1) remains unfilled it shall be carried forward for further two selection years, whereafter it may be treated to be lapsed.

20. Before proceeding to consider the matter on merits, after considering the statutory provisions holding the field, what is true purport and meaning of horizontal reservation and in what way and manner it is different from vertical reservation has to be under understood keeping in view the consideration made by Apex Court from time to time. Apex court in the case of **Indra Sawhney vs. Union of India, 1992 Supp (3) SCC 217** has proceeded to explain the principles of horizontal reservation as follows:

"….all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal

reservations.' The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes ((under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under Cl. (1) of Art. 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Cl. (1) of Art. 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same."

21. In the State of U.P. various special provisions of reservation as contrasted from social reservation under Article 16 (4) of the Constitution of India have been made as already discussed in the earlier part of judgement. The method of implementing the special reservation which is horizontal in nature, cutting across vertical reservation has been subject matter of consideration before Apex Court once again in the case of ***Anil Kumar Gupta vs. State of U.P., 1995 (5) SCc 173***. Paragraphs 14 to 18 of the said judgment being relevant are quoted below:

"14. The question is which of the above interpretations is the correct one having regard to the language employed in the concerned notifications.

15. On a careful consideration of the revised notification of December 17 1994 and the aforementioned corrigendum issued by the Lucknow University, we are of the opinion that in view of the ambiguous language employed therein, it is not possible to give a definite answer to the question whether the horizontal reservations are overall reservations or compartmentalised reservations. We may explain these two expressions. Where the seats reserved for horizontal reservations are proportionately divided among the vertical (social) reservations and are not intertransferable, it would be a case of compartmentalised reservations. We may illustrate what we say: Take this very case; out of the total 746 seats, 112 seats (representing fifteen percent) should be filled by special reservation candidates; at the same time, the social reservation in favour of Other Backward Classes is 27% which means 201 seats for O.B.Cs.; if the 112 special reservation seats are also divided proportionately as between O.C.,O.B.C.,S.C. and S.T., 30 seats would be allocated to the O.B.C. category; in other words, thirty special category students can be accommodated in the O.B.C. category; but say only ten special reservation candidates belonging to O.B.C. are available, then these ten candidates will, of course, be allocated among O.B.C. Quota but the remaining twenty seats cannot be transferred to O.C. category (they will be available for O.B.C. candidates only) or for that matter, to any other category; this would be so whether requisite number of special reservation candidates (56 out of 373) are available in O.C. category or not; the special reservation would be a water tight compartment in each of the vertical reservation classes (O.C.,O.B.C.,S.C. and S.T.). As against this, what happens in the over-all reservation is that while allocating the special reservation students to their respective social reservation category, the over-all reservation in favour of special reservation categories has yet to be honoured. This means that in

the above illustration, the twenty remaining seats would be transferred to O.C. category which means that the number of special reservation candidates in O.C. category would be 56+20=76. Further, if no special reservation candidate belonging to S.C. and S.T. is available then the proportionate number of seats meant for special reservation candidates in S.C. and S.T. also get transferred to O.C. category. The result would be that 102 special reservation candidates have to be accommodated in the O.C. category to complete their quota of 112. The converse may also happen, which will prejudice the candidates in the reserved categories. It is, of course, obvious that the inter se quota between O.C., O.B.C., S.C. And S.T. will not be altered.

16. Now coming to the revised notification of December 17, 1994, it says that "horizontal reservation be granted in all medical colleges on total seats of all the courses....". These words are being interpreted in two different ways by the parties; one says it is over-all reservation while other says it is compartmentalized. Paragraph 2 says that the candidates selected under the aforesaid special categories "would be kept under the categories of Scheduled Castes/Scheduled Tribes/ Other Backward Classes/General to which they belong. For example, if a candidate dependent on a freedom fighter selected on the basis of reservation belongs to Scheduled Castes, he will be adjusted against the seat reserved for Scheduled Castes". This is sought to be read by the petitioners as affirming that it is a case of compartmentalized reservation. May be or may not be. It appears that while issuing the said notification, the Government was not conscious of the distinction between overall horizontal reservation and compartmentalized horizontal reservation. At any rate, it may not have had in its contemplation the situation like the one which has arisen now. This is probably the reason that this aspect has not been stated in clear terms.

17. It would have been better - and the respondents may note this for their future guidance - that while providing horizontal reservations, they should specify whether the horizontal reservation is a compartmental one or an overall one. As a matter of fact, it may not be totally correct to presume that the Uttar Pradesh Government was not aware of this distinction between "overall horizontal reservation", since it appears from the judgment in Swati Gupta that in the first notification issued by the Government of Uttar Pradesh on May 17, 1994, the thirty percent reservation for ladies was split up into each of the other reservations. For example, it was stated against backward classes that the percentage of reservation in their favour was twenty seven percent but at the same time it was stated that thirty percent of those seats were reserved for ladies. Against every vertical reservation, a similar provision was made, which meant that the said horizontal reservation in favour of ladies was to be a "compartmentalized horizontal reservation". We are of the opinion that in the interest of avoiding any complications and intractable problems, it would be better that in future the horizontal reservations are compartmentalized in the sense explained above. In other words, the notification inviting applications should itself state not only the percentage of horizontal reservation(s) but should also specify the number of seats reserved for them in each of the social reservation categories, viz., S.T., S.C., O.B.C. And O.C. If this is not done there is always a possibility of one or the other vertical reservation category suffering prejudice as has happened in this case. As pointed out herein above, 110 seats out of 112 seats meant for special reservations have been taken away from the O.C. Category alone - and none from

the O.B.C. or for that matter, from S.C. Or S.T. It can well happen the other way also in a given year.

18. Now, coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen percent special reservation seats to be filled up first and then take up the O.C. (merit) quota (followed by filling of O.B.C., S.C. And S.T. quotas). The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) Because the revised notification provided for a different method of filling the seats, it has contributed partly to the unfortunate situation where the entire special reservation quota has been allocated and adjusted almost exclusively against the O.C. Quota."

22. In the said judgment quoted above concept of horizontal reservation and compartmentalized reservation has been noticed in detail and it has been clearly ruled that in future horizontal reservation should be compartmentalized to avoid complication in future and if it is not done there is always possibility of one or other vertical reservation category suffering, as has happened in the case on hand.

23. Both these judgements have been dealt with by the Apex Court once again in the case of ***Rajesh Kumar Daria Vs. Rajasthan Public Service Commission and others reported in AIR, 2007 SC 3127*** and view taken has been that horizontal reservation is special reservation in consonance with the mandate of Article 15(3) of the Constitution of India wherein women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Relevant extract of the said judgment is as follows:

"4. Rule 9(3) of the Rajasthan Judicial Service Rules, 1955 ('Rules' for short) which is relevant, reads as follows :

"Reservation for women candidates shall be 20% categorywise in the direct recruitment. In the event of non-availability of the eligible and suitable women candidates in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year and the reservation treated as horizontal reservation, i.e. the reservation of women candidates shall be adjusted proportionately in the respective category to which the women candidate belongs."

5. Before examining whether the reservation provision relating to women, had been correctly applied, it will be advantageous to refer to the nature of horizontal reservation and the manner of its application. In Indra Sawhney v. Union of India (1992 Supp (3) SCC 217), the principle of horizontal reservation was explained thus (para 812) : 1992 AIR SCW 3682

". . . . .all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations.' The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes ((under Article 16(4)) may be called vertical reservations whereas reservations in favour of physically handicapped (under Cl. (1) of Art. 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Cl. (1) of Art. 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain the same."

A special provision for women made under Art. 15(3), in respect of employment, is a special reservation as contrasted from the social reservation under Art. 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by this Court in ***Anil Kumar Gupta v. State of U.P. (1995 (5) SCC 173)*** thus :

". . . . . .The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e. S.C., S.T. and B.C.; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen per cent. in favour of special categories, overall, may be satisfied or may not be satisfied.)

(Emphasis supplied)

We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which

9 posts are for women." We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts." Obviously, there is, and there can be, no reservation category of 'male' or 'men.'

7-8 The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Art. 16(4) are 'vertical reservations.' Special reservations in favour of physically handicapped, women etc., under Art. 16(1) or 15(3) are 'horizontal reservations.' Where a vertical reservation is made in favour of a backward class under Art. 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. (Vide Indira Sawhney (supra); R. K. Sabharwal v. State of Punjab (1995 (2) SCC 745); Union of India v. Virpal Singh Chauvan (1995 (6) SCC 684) and Ritesh R. Sah v. Dr. Y. L. Yamul (1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women.' If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two women candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. (But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC women' have been selected in excess of the prescribed internal quota of four.)

9. In this case, the number of candidates to be selectedunder general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 women candidates, which was equal to the quota for 'General Category Women.' There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl. Nos. 2, 3, 4, 5, 9, 19, 21, 25, 31, 35 and 41 of the Selection List) and another eleven (candidates at Sl. No. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 and 80 of the Selection List) included under reservation quota for 'General Category Women.' This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation.

10. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three women candidates. Thereafter, another five women were selected under the category of 'OBC - Women,' instead of adding only two which was the shorfall. Thus there were in all 8 women candidates, among the 24 OBC candidates found in the Selection List. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota for five for woman."

24. Said judgements have again been followed by Apex Court in the case of ***Public Service Commission Uttaranchal Vs. Mamta Bisht & others reported in AIR 2010 SC 2613***. Relevant paragraphs 13 and 14 are being extracted below:

"The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors. AIR 2007 SC 3127, wherein dealing with a similar issue this Court held as under:

"9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non- reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide Indra

Sawhney, R.K. Sabharwal v. State of Punjab, Union of India v. Virpal Singh Chauhan and Ritesh R. Sah v. Dr.Y.L. Yamul.) But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women." (Emphasis added)

14. In view of the above, it is evident that the judgement and order of the High Court is not in consonance with law laid down by this Court in Rajesh Kumar Daria (supra). The judgement and order impugned herein is liable to be set aside and all consequential orders become unenforceable and inconsequential." ”

25. On the parameters of the provisions quoted above and on the parameters of the judicial pronouncement of the Apex Court, it has to be seen, in the facts of the case, as to whether in the present case Learned Single Judge is right in arriving to the conclusion that Horizontal Reservation has not at all been correctly applied and thus a situation has been created where percentage of reservation has gone beyond the 50% limit provided for.

26. The answer to the issue will have to be traced within the parameters of the statutory provisions that holds the field and the guidelines that have been prescribed by the Apex Court and what we find, in the present case, is that special reservation for women has been provided for to the extent of 20%.

27. In the case of **Indra Sawhney (supra)** while dealing with reservation, Apex Court observed in paragraph 836 as follows:

“It cannot be ignored that the very idea of reservation implies selection of less meritorious person. At the same time, we must recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed”

28. Here against 20% of the post advertised representation of women has to be there and they are required to be offered appointment under special reservation category. The fact and figure that is emanating, in the present case, is that out of 3698 SICP posts, 20% is reserved for woman candidate i.e. 740 woman candidates, if available, and such women candidates are to be adjusted horizontally. In the selection made only 261 women candidates could make up of which 19 women (9 OC and 10 OBC) made it to the select list on merit. Remaining 242 women candidates, who

otherwise could not make place for themselves on merit, were required to be adjusted in their respective category.

29. Entire emphasis is on the fact that State has done no wrong by giving preference to the merit inter-se women category candidates, inasmuch as, biologically every women is the same and 20% reservation is required for women and in view of this, the women from any category could be adjusted in OC category and in view of this, the exercise that has been so undertaken by the Board cannot be said to be actuated with any malice rather intent was to see and ensure that merit was also given due weightage while giving preference to women under Horizontal Reservation.

30. The arguments that have been so advanced on behalf of State and also supported by private appellants is running totally counter to the scheme of things provided for, for the simple reason that as far as Horizontal Reservation is concerned, principal of application of the Horizontal Reservation is different and distinct from the principle of application as is applicable to Vertical Reservation. Special Reservation provided to women, ex-servicemen etc. are under Article 15(3) and 16(1) of the Constitution and are known as Horizontal Reservation. Horizontal Reservation cuts across Vertical Reservation and is commonly called interlocking reservation. The incumbents selected against Special reservation are required to be adjusted and adjustment exercise is to be undertaken by adjusting open completion (OC) category candidate in open category seat and likewise if incumbent belongs to OBC category, by making adjustment and similar would be the position vis-a-vis SC/ST category candidate also. Such adjustment, the fact of the matter is that even after application of horizontal reservation, the percentage in favour of OBC, SC, ST would remain the same and would not exceed 50% reservation which is maximum. The requirement is that the person/candidate selected under the women quota would be placed in appropriate category i.e. if the women belongs to SC/ST/OBC category, then she would be placed under that quota by making necessary adjustments, similarly, if she belongs to open category, she would be placed in the open category. Same set of procedure has to be adhered in the matter of application of other class of beneficiaries of Horizontal reservation.

31. The arguments that have been advanced on behalf of State and private appellant with all vehemence that women candidates irrespective of their social class i.e. SC/ST/OBC are entitled to make place for themselves in an open category on their inter-se merit clearly gives an impression to us that State of U.P and its agents/servants and even the private appellants are totally unaware of the distinction that has been time and again reiterated in between vertical reservation and horizontal reservation and the way and manner in which the provision has to be pressed and brought into play. Vertical Reservation gives due importance to merit, inasmuch as, 50% of the seat is meant to be filled up by way of merit and 50% of the seats are to be filled up on merit from amongst candidates and in case any candidate from OBC/SC/ST category, proceeds to make place for himself of herself on merit, then their selection would not be treated under OBC/SC/ST category, but such principles cannot be pressed into service while applying the principle of Horizontal Reservation, inasmuch that cuts across vertical reservation and the dominant consideration is to create balance that 50% reservation quota does not exceed and further rights of candidates are not defeated on merit.

32. While applying the principle of Horizontal Reservation, category has a role to play as at the point of time when Horizontal Reservation is to be pressed, then based on merit candidates in question are to be adjusted in their respective category and the male candidates, who are at the bottom of the list as per the merit, will have to make place for women candidate. A candidate, who has proceeded to make an application for the purposes of Horizontal Reservation under the OBC/SC/ST category, cannot be permitted to change his/her category, whereas in Vertical Reservation once your are selected, on merit, such a change is permissible by operation of law and in view of this, once such is the factual situation that is so emerging that all the candidates once they have specified their category in reference of Special Reservation, then they have to be adjusted in their respective categories and the reserve category candidate cannot ask for placement against open category by claiming that they have higher merit, inasmuch as, only in the matter of Vertical Reservation, merit has a role to play wherein the list is finalized but at the point of time when for providing Horizontal Reservation adjustment is to be made, then various adjustments is required to be done as per the formula that has been approved and ratified by the Apex Court that in the matter of horizontal reservation, adjustment would be made by making appropriate placement in appropriate categories. Apex Court was conscious of this fact, that such a provision may be subjected to misuse and accordingly, position was sought to be clarified by giving examples and then providing that if horizontal reservation is not satisfied, the requisite number of special reservation candidate has to be taken and accommodated/adjusted against their respective social reservation categories. Sub-section (3) of Section 3 of U.P. Act No.4 of 1993 provides for horizontal reservation to be applied accordingly, Application of horizontal reservation in this prescribed manner maintains the merit of special reservation quota candidate alongwith their representation in service, in view of this, the Learned Single Judge is absolutely right at the point of time when he has proceeded to criticise the State Government for taking such a stand and for adhering to a procedure that was not at all prescribed in law and thus crossing the limit of reservation of 50%, in view of this, the order passed by Learned Single Judge does not deserve interference on this aspect of the matter. The category wise social breakup of 261 women candidates is as under:

Open Category : 69+9 (selected on merit) =78;
OBC category : 163+10 (selected on merit)= 173
SC= 10
ST =Nil

33. In the open category, 78 women candidates were to be accommodated, 9 were already in the select list, therefore, 69 women candidates were required to be adjusted in the open category. Similarly, 173 women candidates belonging to the OBC category were available, of which 10 women candidates were selected on merit, therefore, 169 remaining women candidates were to be adjusted in OBC category by dislodging that many number of male candidates from bottom of the select list of OBC category. Similarly, 10 women belonging to SC category were to be adjusted under the SC category.

34. Such procedure ought to have been adhered to but for the reasons best known to State Appellant, they have left the known route specified by the orders of Apex Court in the judgement noted above and as understood in Government Order dated 17.12.1994, 25.02.1999 and 09.02.2007 and has chosen to adhere to such route that is no at all subscribed in the matter of application of horizontal reservation. The judgement in the case of ***Smt. Medha Shetty vs. State of Rajasthan, Civil Special Appeal (W) No.170 of 2013*** is not at all being approved of by us keeping in view the binding precedents of Apex Court qua the applicability of horizontal reservation and statutory provision and the Government Orders issued from time to time as already mentioned by the State. Directives issued by learned Single Judge are strictly in consonance with the parameters settled by Apex Court while dealing with adjustments to be made in the matter of horizontal reservation and the spirit of statutory provision and Government Order issued from time to time.

35. Much assertion has been made that it would be practically impossible to implement and give effect to the judgement.

36. Appellants are labouring under misconception, inasmuch as, as far as the application of Horizontal Reservation is concerned, it has to be applied as per its spirit and then the consequence are required to be seen and on mere apprehension, the view point of learned Single Judge cannot be non suited.

37. Lastly, coming to the issue of stricture that has been so passed against learned Advocate General and the higher officials of the State.

38. Suffice is to mention that even without commenting on their conduct, the case in question could have been decided. It may be true that arguments advanced on behalf of State may not be finding favour of the Court but that does not ipso facto mean that same invites stricture, inasmuch as, the State has every right to defend its action and it is for the Courts to take a final call as to whether the stand taken is correct or incorrect.

39. In the facts of the present case what we find that strictures have been given to learned Advocate General and the Senior Officials of the State of U.P. whereas Superior Officials were not impleaded in person.

40. The law on the subject is clear that such strictures should be avoided. See ***Om Prakash Chautala vs. Kanwar Bhan 2014 (5) SCC 417***, wherein following parameters have been laid down:

"12. At this juncture, it may be clearly stated that singularly on the basis of the aforesaid principle the disparaging remarks and directions, which are going to be referred to hereinafter, deserve to be annulled but we also think it seemly to advert to the facet whether the remarks were really necessary to render the decision by the learned single Judge and the finding recorded by the Division Bench that the observations are based on the material on record and they do not cause any prejudice, are legally sustainable. As far as finding of the Division Bench is

concerned that they are based on materials brought on record is absolutely unjustified in view of the following principles laid down in Mohammad Naim (supra): -

"It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct."

41. Consequently, in the present case it was not at all required to pass stricture and comment upon learned Advocate General and the State functionaries as they may be acting on the dictates of their political masters as observed by learned Single Judge and in view of this, the strictures made in the order dated 16.03.2016 against the Advocate General and other State Officers/Officials are quashed and will not form part of record. The other part of the order passed by learned Single Judge be complied with forthwith.

42.With these, both the Special Appeals are ***partly allowed.***

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 345 Of 2011

Pohari Saran Mishra **...Revisionist**

Versus

Commissioner, Commercial Tax, U.P. Lucknow **...Respondent**

Counsel for the Revisionist:
Piyush Agrawal

Counsel for the Respondent:
C.S.C.

U.P. Trade Tax Act, 1948 – 'Turnover' – Explanation II – Cost of freight – "when separately charged" – At the time of or before the delivery thereof – Expenses which a dealer incurs in order to complete the transaction of sale – Obligation to transport the goods – Transfer of property in the goods – Terms and conditions of the sale – Freight charges shown separately in an invoice or bill cannot be decisive – Freight was rightly included in the taxable turnover of the assessee – Question raised answered against the assessee and in favour of the revenue – Revision stands disposed of.

The short question which arises for determination in this revision is as to whether the freight charges which are stated to have been levied and recovered by the revisionist from the purchaser of goods was liable to be included in its taxable turnover. The answer to this question itself would turn upon the expression 'turnover' as defined under the U.P. Trade Tax 1948
which reads as under:
"2. (i) 'Turnover' means the aggregate amount for which goods are supplied or distributed by way of sale or are sold, by a dealer, either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration:
Explanation I. … Omitted...
ExplanationII. Subject to such conditions and restrictions,
if any, as may be prescribed in this behalf:
the amount for which goods are sold or purchased shallinclude the price of the packing material in which they are packed, and any sums charged for anything done by the dealer in respect of the goods sold, at the time of or before the delivery thereof, other than, cost of freight or delivery or cost of installation or the amount realized as trade tax on sale or purchase of goods, when such cost or amount is separately charged;
any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and
where for accommodating a particular customer, adealer obtains goods from another dealer and immediately disposes of the same without profit to the customer, the sales in respect of such goods shall be included in the turnover of the latter dealer alone;(Paras 2-3)

The rival submissions have primarily centered on clause (i) to Explanation II appended to the definition and which seeks to amplify and explain what items would stand included while determining the taxable turnover of an assessee.(Paras 4)

According to Sri Piyush Agarwal, learned counsel for the revisionist, the charge of freight in this case was levied separately and is therefore not liable to be included in the taxable turnover of the assessee. He lays stress uponthe express language employed by clause (i) to the effect that the cost of freight "when separately charged" is to be excluded from the taxable turnover.(Paras 5)

Held: (Paras 10-12)

1. Ultimately for the purposes of answering the issue what must be taken into consideration is the terms and conditions of the sale and the essential obligations attached to the bargain. The fact that freight or other like charges are shown separately in an invoice or bill cannot be decisive of the issue whether these charges are liable to be included in the taxable turnover or not. For the purposes of determining the issue much would turn upon the terms of the contract as well as the intention of the contracting parties. As noted above, the issue would have to be answered bearing in mind the essential attributes and obligations of the bargain and the expenses which the seller is liable to incur in order to achieve and complete the transfer of property in goods. If the above basic principles are kept in mind and are applied to the facts of the case, it becomes apparent that freight was rightly included in the taxable turnover of the assessee.

2. In the facts of the present case the Tribunal found that in terms of clause 10 of the contract, the supply was to be effected at the railway siding. In terms of clause 11, the responsibility and ownership of the stone ballast remained that of the supplying contractor. In terms of clause of 12 of the contract, the measurement of stone ballast was to be carried out and effected at the railway siding. A further condition stood imposed to the effect that in a case of the stone ballast being found within 60 days from the date of deposit as not being as per the quality prescribed the same would be liable to be removed by the supplying contractor. As the Tribunal records on the basis of the terms of the contract, the contract of sale was not complete till the ballast was transported to and measured at the railway siding. It records that the responsibility and ownership of the

ballast while in transit remained with the assessee. There was thus no transfer of property in goods at the time of they being put into transit. The freight charges were therefore charges which clearly came to be incurred by the revisionist in order to complete the bargain and a charge which was incurred "at the time of or before the delivery thereof" of the goods. The cost of freight which was incurred was not a special condition imposed by the purchaser thereof. The obligation to transport the goods was an essential element, an integral component of the transaction of sale.

3.For the aforesaid reasons, this court answers the question raised against the assessee and in favour of the revenue. The revision stands **disposed of** accordingly.

Case Law discussed:

1.India Meters Limited vs. State of Tamil Nadu, (2010) 9 SCC 423 (Para 7)

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Piyush Agrawal, learned counsel for the revisionist and the learned standing counsel.

2. The short question which arises for determination in this revision is as to whether the freight charges which are stated to have been levied and recovered by the revisionist from the purchaser of goods was liable to be included in its taxable turnover.

3. The answer to this question itself would turn upon the expression 'turnover' as defined under the U.P. Trade Tax 1948. which reads as under:

"2. (i) 'Turnover' means the aggregate amount for which goods are supplied or distributed by way of sale or are sold, by a dealer, either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration:

Explanation I. … Omitted...

ExplanationII. Subject to such conditions and restrictions,

if any, as may be prescribed in this behalf:

(i) the amount for which goods are sold or purchased shallinclude the price of the packing material in which they are packed, and any sums charged for anything done by the dealer in respect of the goods sold, at the time of or before the delivery thereof, other than, cost of freight or delivery or cost of installation or the amount realized as trade tax on sale or purchase of goods, when such cost or amount is separately charged;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and

(iii) where for accommodating a particular customer, adealer obtains goods from another dealer and immediately disposes of the same without profit to the customer, the sales in respect of such goods shall be included in the turnover of the latter dealer alone;

4. The rival submissions have primarily centered on clause (i) to Explanation II appended to the definition and which seeks to amplify and explain what items would stand included while determining the taxable turnover of an assessee.

5. According to Sri Piyush Agarwal, learned counsel for the revisionist, the charge of freight in this case was levied separately and is therefore not liable to be included in the taxable turnover of the assessee. He lays stress uponthe express language employed by clause (i) to the effect that the cost of freight "*when separately charged"* is to be excluded from the taxable turnover.

6. On the other hand, Sri B.K. Pandey, learned standing counsel has submitted that all costs which are incurred by the dealer prior to the sale achieving completion would be liable to be included in the taxable turnover of the assessee. He submits that the expression "when separately charged" would not be determinative and that the terms of the sale would have to be looked into in order to answer the issue whether freight charges are liable to be included in the taxable turnover of the assessee.

7. Both the learned counsels to buttress their rival submissions have placed reliance upon the judgment rendered by the Supreme Court in ***India Meters Limited Vs. State of Tamil Nadu*** *[* (2010) 9 SCC 423]. Their submissions have centered around what the Supreme Court observed in paragraphs 16, 17, 18 & 19 of the report and which for the sake of appreciation of the controversy is extracted hereinbelow:

16. It is no doubt true that Rule 6(c) of the Rules permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n) respectively of the Act.

"Turnover" is defined in the Act, inter alia, to mean "the aggregate amount for which goods are bought or sold or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n)".

17. "Sale" is defined in Section 2(n), inter alia, as meaning "every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration". The definition goes on to include a number of other transactions also within that definition of "sale". The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold,

which form part of the turnover, and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale".

18. When the transfer of the property or the goods is to be atthe place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".

19. The learned counsel for the State of Tamil Nadusubmitted that freight and insurance charges are included in the sale price of the goods. Even if freight and insurance charges are shown separately in the Bill and added to the price of the goods, the character of payment would remain the same. Since freight and insurance charges represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price to the purchaser. The amount of freight and insurance charges would be payable by the purchaser not under any statutory or other liability but as part of the consideration for the sale of the goods and would therefore, form part of the sale price."

8. Section 2 (i) of the 1948 Act defines 'turnover' to mean the aggregate amount for which goods are supplied or distributed by way of sale or are sold. Explanation II while delineating the various items which are liable to be included or excluded while computing taxable turnover in clause (i) provides that 'turnover' would mean the amount for which goods are sold or purchased including the price of packing material and any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof. While the first determinative factor is the price, packing material and *'any sums charged'* in respect of the goods, the second factor which the explanation bids us to bear in mind is evident from the use of the expression *'at the time of or before the delivery thereof*'. The latter part then refers to the cost of freight or delivery or cost of installation or the amount realized as trade tax on sale or purchase of goods, *"when such cost or amount is separately charged"*.

9. The issue, in the opinion of this Court, whether freight charges would be liable to be included in the taxable turnover would therefore have to be answered with reference to all expenses which a dealer does incur for effecting and completing the sale. This is evident from the use of the phrase *'at the time of or before the delivery thereof'.* This would indicate that all expenses that the dealer incurs in order to complete the transaction of sale and before the transfer of property in the goods takes place are liable to be included in the taxable turnover. As one reads the judgment in ***India Meters Ltd (supra)*** it is clear that construing the provisions of the Tamil Nadu Act it was held that the expenses incurred by the seller on freight from his place of manufacture to the place at which he is required under the contract to deliver would be liable to be treated as falling within the scope of the expression 'turnover'. The mere fact, the Supreme Court held, that the charges are shown separately would not detract from the above position if it is found that there was an obligation on the dealer to make the goods available at the place of sale.

10. The latter part of sub clause (i) which employs the words *"when such cost or amount is separately charged"* is dealing with and is liable to be restricted to those class of transactions where the obligation to transport the goods to the place of the purchaser is not an essential facet of the transaction of sale. It must necessarily be interpreted to apply to those cases where the transportation of the goods to the place of the purchaser is not an essential element for the transfer of property in the goods. In fact it relates to a stage, which is subsequent to the completion of sale. It must be interpreted to apply to charges, which in the nature of the contract is envisaged by both parties to be an expense or charge that is liable to be borne separately and apart from the actual price of the goods.

11. Ultimately for the purposes of answering the issue what must be taken into consideration is the terms and conditions of the sale and the essential obligations attached to the bargain. The fact that freight or other like charges are shown separately in an invoice or bill cannot be decisive of the issue whether these charges are liable to be included in the taxable turnover or not. For the purposes of determining the issue much would turn upon the terms of the contract as well as the intention of the contracting parties. As noted above, the issue would have to be answered bearing in mind the essential attributes and obligations of the bargain and the expenses which the seller is liable to incur in order to achieve and complete the transfer of property in goods. If the above basic principles are kept in mind and are applied to the facts of the case, it becomes apparent that freight was rightly included in the taxable turnover of the assessee.

12. In the facts of the present case the Tribunal found that in terms of clause 10 of the contract, the supply was to be effected at the railway siding. In terms of clause 11, the responsibility and ownership of the stone ballast remained that of the supplying contractor. In terms of clause of 12 of the contract, the measurement of stone ballast was to be carried out and effected at the railway siding. A further condition stood imposed to the effect that in a case of the stone ballast being found within 60 days from the date of deposit as not being as per the quality prescribed the same would be liable to be removed by the supplying contractor. As the Tribunal records on the basis of the terms of the contract, the contract of sale was not complete till the ballast was transported to and measured at the railway siding. It records that the responsibility and ownership of the ballast while in transit remained with the assessee. There was thus no transfer of property in goods at the time of they being put into transit. The freight charges were therefore charges which clearly came to be incurred by the revisionist in order to complete the bargain and a charge which was incurred *"at the time of or before the delivery thereof"* of the goods. The cost of freight which was incurred was not a special condition imposed by the purchaser thereof. The obligation to transport the goods was an essential element, an integral component of the transaction of sale.

13. For the aforesaid reasons, this court answers the question raised against the assessee and in favour of the revenue. The revision stands disposed of accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No.- 420 Of 1998

Nathu Singh & Anr. **...Appellants**
Versus
Srimati Rajvati & Ors. **...Respondents**

Counsel for the Appellants:
T.S. Dabas, Jagdish Pathak.

Counsel for the Respondents:
V.K. Goel, Ajay Rajendra, P.S. Gupta.

Civil Law—Second Appeal — Cancellation of sale-deed — Person of unsound mind — Next friend — Order XXXII Rule 15 C.P.C. — Presumption of soundness of mind — Specific plea — Admissible evidence — Nature and extent/degree/level — Fraud — Presumption — Agreement for sale — Income tax clearance — Registration — Mental Hospital Agra — OPD patient — Anxiety — Schizophrenia — Documentary evidence — Oral evidence — Burden of proof — Surmises and conjectures — Manifest error of law — Perversity — Substantial question of law — Void or voidable.

The brief facts relating to the case are that Sri Dharam Veer Singh filed Civil Suit No. 236 of 1985 in the Court of Civil Judge Moradabad on 12.4.1985 for obtaining a decree for cancellation of sale-deed dated 17.9.1984 which is alleged to have been presented for registration in the office of Sub-Registrar on 19.10.1984 and was registered on 21.12.1984.(Para 2)

In the suit was filed by Sri Dharm Veer Singh, through his next friend Lakhpat Singh, claiming himself (Dharam Veer Singh) to be a person of unsound mind, the allegations of plaint in brief are that, the plaintiff has 1/3rd share in the property plot Khasra Nos. 403, 422, 423 and 444 detailed at the foot of the plaint; that at the time of execution of impugned sale-deed, the plaintiff was not a person of sound mind, was not capable of understanding the contents of sale-deed and was not even able to understand as to why and on which papers he is putting his thumb impressions; that the impugned sale-deed was obtained in hurried and unnatural manner and was not read over or explained to the plaintiff; that the plaintiff did not receive any sale consideration and execution of saledeed for a sum of Rs. 50,000/- is without consideration; that the land in question was worth Rs. 1,50,000/- at the time of execution of alleged saledeed; that no permission to sell was obtained from the District Judge; that the plaintiff had no need to sell the property, over which the plaintiff and his family was totally dependent; that the impugned sale-deed has been obtained by playing fraud on the plaintiff without obtaining the consent of his wife and relatives.(Para 3)

The defendants contested the suit denying the allegations made in the plaint. The defendant No. 3 Gajendra Singh who is neither vender, nor vendee nor marginal witness to the sale deed in dispute and neither he has any concern nor any relief has been prayed against him and has been unnecessary impleaded by plaintiff, being son-in-law of his brother, and so has been arrayed as defendant-respondent no. 5 in the present second appeal(Para 4)

Held:(Paras-31-35)

It is pertinent to mention that since from the evidence on record the plaintiff Dharam Veer Singh or his next friend Lakhpat Singh have failed to prove that on the above relevant dates or period the plaintiff Dharam Veer Singh was a person of unsound mind so Sri Lakhpat Singh or anybody else had no right to act as his next friend or guardian and could not have instituted suit for and on his behalf.

The copy of sale deed dated 16.9.1971 executed by Smt. Ganga Devi in favour of defendant/appellant No. 1, paper No. 69/C on lower court record has absolutely no relevancy to the facts of the case and has no effect, on account of alleged clerical mistakes therein with respect to the plot number of land sold.

In view of discussions made above I have come to the conclusion that both the substantial question nos. 1 & 2 are liable to be decided in favour of defendant/appellants and against the plaintiff/respondents and are decided accordingly.

The judgment and decree passed by first appellant Court are, therefore, liable to be set aside and that which were passed by Trial Court in Civil Suit No. 236 of 1985 on 4.2.1991, are liable to be affirmed and restored and appeal is, liable to be allowed.

Accordingly, the appeal is allowed with costs throughout. The impugned judgment and decree dated 26.2.1998 passed by the Additional District Judge/Special Judge Moradabad, are set aside and the judgment and decree passed by 8th Additional Civil Judge, Moradabad in Civil Suit No. 236 of 1985 on 4.2.1991 are affirmed and restored. The suit of plaintiff-respondent stands **dismissed** with costs throughout.

Case Law discussed:

(Delivered by Hon'ble Harsh Kumar, J.)

1. The present second appeal has been filed by defendant Nos. 1 and 2 against the judgment and decree dated 16.2.1998 passed by Additional District Judge/Special Judge Moradabad in Civil Appeal No. 98of 1991 seeking the relief of setting aside the impugned judgment and decree passed by the first appellate Court and upholding the judgment and decree dated 4.2.1991 passed by the Trial Court in Civil Suit No. 236 of 1985 by which the plaintiff's suit for cancellation of sale-deed was dismissed with costs.

2. The brief facts relating to the case are that Sri Dharam Veer Singh filed Civil Suit No. 236 of 1985 in the Court of Civil Judge Moradabad on 12.4.1985 for obtaining a decree for cancellation of sale-deed dated 17.9.1984 which is alleged to have been presented for registration in the office of Sub-Registrar on 19.10.1984 and was registered on 21.12.1984.

3. In the suit was filed by Sri Dharm Veer Singh, through his next friend Lakhpat Singh, claiming himself (Dharam Veer Singh) to be a person of unsound mind, the allegations of plaint in brief are that, the plaintiff has 1/3rd share in the property plot Khasra Nos. 403, 422, 423 and 444 detailed at the foot of the plaint; that at the time of execution of impugned sale-deed, the plaintiff was not a person of sound mind, was not capable of understanding the contents of sale-deed and was not even able to understand as to why and on which papers he is putting his thumb

impressions; that the impugned sale-deed was obtained in hurried and unnatural manner and was not read over or explained to the plaintiff; that the plaintiff did not receive any sale consideration and execution of saledeed for a sum of Rs. 50,000/- is without consideration; that the land in question was worth Rs. 1,50,000/- at the time of execution of alleged saledeed; that no permission to sell was obtained from the District Judge; that the plaintiff had no need to sell the property, over which the plaintiff and his family was totally dependent; that the impugned sale-deed has been obtained by playing fraud on the plaintiff without obtaining the consent of his wife and relatives.

4. The defendants contested the suit denying the allegations made in the plaint. The defendant No. 3 Gajendra Singh who is neither vender, nor vendee nor marginal witness to the sale deed in dispute and neither he has any concern nor any relief has been prayed against him and has been unnecessary impleaded by plaintiff, being son-in-law of his brother, and so has been arrayed as defendant-respondent no. 5 in the present second appeal.

5. On parties pleadings the trial Court framed as many as eight issues, out of which issue nos. 1, 2, 3, 6 and 7 have been framed on legal pleas taken in written statement issue nos. 4 and 5 are issues of facts, while issue no. 8 relates to the relief if any to which plaintiff is entitled. Issue no. 4 is, "whether the plaintiff is a person of unsound mind and has a right to file suit through next friend" and issue No. 5 is "whether the sale-deed dated 17.9.1984 is illegal for the reasons mentioned in Para 6 of the plaint". The Trial Court after analysis of evidence on record, held that the plaintiff has failed to prove that he is a person of unsound mind and so Lakhpat Singh has no right to file suit on his behalf as his next friend, and on issue no. 5, it came to the conclusion that the plaintiff has not been and is not a person of unsound mind and the sale-deed has been executed by him after understanding the affairs and so the impugned sale-deed is not liable to be cancelled.

6. In view of the findings on issue no. 4 and 5 against the plaintiff and in favour of the defendants, the Trial Court dismissed the suit of plaintiff with costs.

7. Feeling aggrieved with the dismissal of the suit, the plaintiff filed Civil Appeal No. 98 of 1991 in the Court of District Judge, Moradabad which was decided by impugned judgment and decree passed by the Additional District Judge/special Judge Moradabad, wherein by setting aside the judgment and decree passed by Trial Court, the appeal was allowed with costs and suit for cancellation of sale -deed dated 17.9.1984, (presented for registration on 19.10.1984 and registered on 21.12.1984,) was cancelled. Feeling aggrieved the defendants (vendees) of sale-deed in question have preferred this appeal against the heirs and legal representatives of Sri Dharam Veer Singh who were substituted on his death pending first appeal.

8. This second appeal has been admitted on following two substantial questions of Law on 8.2.2012:-

"1. Whether the plaintiff Dharam Veer Singh had been able to prove by admissible evidence that on 19.10.1984 when the sale deed was executed and on 21.12.1984 when it was

registered, he was of unsound mind and the unsoundness of mind was of such level which rendered the deed executed by him to be void or voidable?

2. Whether Lakhpat Singh could act as next friend/guardian of Dharam Veer Singh and could file suit as such?"

9. The suit for cancellation of sale-deed has been filed by Lakhpat Singh as next friend of Dharm Veer Singh claiming him to be a person of unsound mind. It is disputed as to whether at the time of institution of suit the plaintiff Dharam Veer Singh was a person of unsound mind or not and undoubtedly, if Dharam Veer Singh was not a person of unsound mind, neither Lakhpat Singh nor anybody else could have acted as his next friend or guardian nor could have instituted suit for and on his behalf. However, as far as the competency of Lakhpat Singh, to work as next friend/guardian of Dharam Veer Singh and to file suit for and on his behalf, in case of his being a person of unsound mind is concerned, there may hardly be any dispute as to his competency on account of his being cousin brother, despite the fact that his wife was alive and was equally competent to act as his next friend .

10. Order XXXII of the Code of Civil Procedure contains provisions under various Rules, for suits by or against minors and persons of unsound mind. Relevant Rules, Rule 1,4 and 15 of Order XXXII of C.P.C. are the being reproduced as under:

"1. **Minor to sue by next firend-** Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

4. **Who may act as next friend or be appointed guardian for the suit-(1)** Any person who is of sound mind and has attained majority may act as next friend of a minor or as his grardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next freiend, a defendant, or, in the case of a grardian for the suit, a plaintiff. 15. **Rules 1 to 14 (Except rule 2A) to apply to persons of unsound mind.-** Rules 1 to 14 (Except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing of being sued."

11. From above provisions contained in Order XXXII Rule 15 C.P.C, it is crystal clear that in case of a person of unsound mind, the same procedure will be applicable, which is applicable in the cases of suits by or against minors. So for filing suit as next friend, 2 conditions are required to be fulfilled viz. (1) The plaintiff should be a minor or person or of unsound mind at the time of institution of suit and (2) The person acting as his next friend/guardian should be major and of sound mind, and should neither have any interest adverse to the interests of minor or person of unsound mind nor should be defendant in that suit.

12. The argument of defendant-appellant that since the real brother, nephews and wife of plaintiff Dharam Veer Singh were alive and could have aced as his next friend, so in their presence Lakhpat Singh/cousin (the son of Dharam Veer Singh's Bua) was not competent enough to file suit as his next friend for and on behalf of Dharam Veer Singh, has no force. It is not disputed that Lakhpat Singh is major and a person of sound mind. There is nothing on record to show that Lakhpat Singh had any interests adverse to the interests of plaintiff Dharam Veer Singh, or was defendant in this suit and so despite of the availability of some other close relatives or wife of plaintiff Dharam Veer Singh, who could also have been competent to act as his next friend, his distant cousin brother Lakhpat was equally competent to act as his next friend, subject to the only condition that if Dharm Veer was a person of unsound mind at the time of institution of suit and not otherwise. However, if it is proved from the evidence on record, that Dharam Veer Singh was not a person of unsound mind at the time of institution of suit, of course Lakhpat Singh, or anybody else may not have any right to file suit for and on his behalf and act as his next friend or guardian, irrespective of the fact that he suffered from alleged unsoundness of mind of any extent, at any prior or subsequent, point of time .

13. Under substantial question of law, framed as question No. 2, it is to be considered as to whether the plaintiff has been able to prove from any admissible evidence that on 17.1.1984, when the sale deed was executed on 19.10.1984 when it was presented for registration or even on 19.12.1984 when it was registered in books of Sub-Registrar office, in Bahi Ist, Zild 145 on page Nos. 7 and 8 at serial no 2661 on 21.12.1984, or during entire period mentioned above, the plaintiff was a person of unsound mind and the unsoundness of mind was of such degree/level which renders the sale-deed executed by him to be void or voidable.

14. The trial court holding that the plaintiff has failed to prove that he was a person of unsound mind at the time of execution of sale-deed, dismissed the suit, but in appeal under Section 96 of Code of Civil Procedure, the first appellate Court, setting aside the findings of Trial Court allowed the appeal and decreed the suit of plaintiff for cancellation of sale deed by impugned judgment and decree.

15. The perusal of the pleadings as well as material on lower Court records show that in this suit for cancellation of sale deed instituted on 12.4.1985, through next friend, there is no specific plea or allegation in the plaint as to from which date, time or period plaintiff Dharam Veer Singh is suffering from alleged unsoundness of mind and such unsoundness of mind if any continued upto which date, time or period and there is no iota of evidence to above effect. It has also not been specifically pleaded as to when and why he went with defendant no. 3, his brother's son- in-law, not vendee, (as alleged in para 5 of the plaint) and as to when he returned from the alleged place. In any case there is no evidence on record to show that he ever went to the place of defendant No. 3. It may not be disputed that under law there is presumption of soundness of mind of any person, unless and otherwise he is pleaded and proved to be of unsound mind. The person who claims to be suffering from unsoundness of mind, has to specifically plead and prove the specific period during which, he was suffering with unsoundness of mind as well as nature and extent/degree/level of such unsoundness of mind if any. Similarly unless the fraud is proved, there

will be presumption that no fraud was played, and there can be no presumption of fraud having been played.

16. The evidence on record show that impugned sale-deed was written on 17.9.1984, but for want of income tax clearance could not be registered the same day and so on that day a registered agreement for sale was executed between plaintiff Dharam Veer Singh and defendant-appellants with terms and conditions that, upon obtaining the income tax clearance by the vendor, sale-deed will be executed. It is not disputed that income tax clearance was obtained by plaintiff Dharam Veer singh on 1.10.1984 upon which the sale-deed was presented for registration by plaintiff Dharam Veer Singh on 19.10.1984, admitting its execution before the subregistrar and consequently the entries of sale-deed in dispute were registered /made in respective registers of Sub-Registrar's Office in due course of time on 21.12.1984. It is noteworthy that the validity of agreement for sale dated 17.9.1984 has not been challenged by plaintiff Dharam Veer Singh on the ground of unsoundness of mind or otherwise.

17. The plaintiff Dharam Veer Singh, through his alleged next friend Lakhpat Singh has produced himself as PW 1, Rajwati the wife of plaintiff as PW 2, Gopal Singh as PW 3, and Hira Singh as PW 4. In documentary evidence he has produced certain prescriptions regarding alleged treatment of Dharam Veer Singh, along with copy of application allegedly moved by wife of plaintiff on 7.9.1981 as well as copies of registered sale deeds executed by Smt. Ganga Devi, in favour of defendant-appellant No. 1 and Lal Singh. Plaintiff's paper No. 62/c , is a prescription dated 23.4.1986 of Mental Hospital, Agra of outdoor patient (OPD) in the name of Dharam Veer Singh, paper No. 63/A is the certificate issued by Senior Medical Superintendent Mental Hospital, Agra, certifying that Dharam Veer Singh was treated in his hospital as outdoor patient from 23.4.1986 to 25.4.1986 and 7.5.1986 to 31.5.1986, Paper no. 64/A is prescription of Dharam Veer Singh dated 8.12.1986, prescribing certain Ayurvedic medicines for anxiety at Government Ayurvedic Hospital, Rajunagla, Bareilly and paper No. 65/A is another prescription dated 3.11.1991 of Government Ayurvedic Hospital mentioning Dharam Veer Singh to be a suspected case of anxiety neuro and referring him to mental hospital Bareilly for expert treatment and diagnosis.

18. There is no whisper in statements of any of the plaintiff's witnesses and nothing on record to show that under the reference slip paper No. 65/A, plaintiff/Dharam Veer Singh was ever taken to mental hospital, Bareilly for treatment or diagnosis of suspected ailment if any, or was treated by any such expert medical officer for any period or point of time. There is no other document or oral evidence on record to prove that Dharam Veer Singh was suffering from alleged unsoundness of mind or even from the anxiety as was suspected in 65/A at any point of time.

19. In oral evidence PW 3 Gopal Singh LDC of Mental Hospital Agra has stated that according to opinion of doctors, Dharam Veer Singh was suffering from Schizophrenia, and he has filed two papers, the copy of OPD Register and FCT Register paper nos. 99 and 100/C per list 98/C.

20. Even if the above evidence of plaintiff on record is taken to be correct for the sake of arguments, at the most, plaintiff Dharam Veer Singh may be deemed to be suffering from some mental anxiety w.e.f 23.4.1986 to 8.12.1986 but was not suffering from unsoundness of mind of any degree at any point of time before or after 23.4.1986. It is pertinent to mention that all these papers have been obtained from 23.4.1986 to 8.12.1986, during pendency of suit, after more than one year from the institution of suit on 12.4.1985 and relate only to a limited period of 9 months. In view of the above evidence on record I am of the considered view that the plaintiff Dharma Veer Singh is not proved to be a person of unsound mind for any period or point of time, prior or subsequent to 23.4.1986 to 8.12.1986, or at the time of institution of suit on 12.4.1985 or prior to it at the time of execution of sale-deed of 17.9.1984 or at the time of its registration on 19.10.1984.

21. It is pertinent to mention that paper no. 77/C and 90/C on record of Court below are copies of the registered sale-deeds executed by above plaintiff Dharam Veer Singh on 16.5.1977 and 15.6.1983 respectively executions whereof is not disputed. It is also pertinent to mention that on 7.9.1981, Smt. Rajwati, wife of plaintiff Dharam Veer Singh allegedly sent an intimation by registered post through Sri G.D. Pandey, Advocate, paper No. 85/C to the Sub- Registrar, stating that her husband Dharam Veer Singh is a person of unsound mind and is missing since last 8-10 months and if somebody taking undue advantage of unsoundness of his mind, obtains sale deed in respect of his 1/3 share in 5 agricultural plot nos. 169, 403, 422,423, 444, she will suffer and so if somebody comes with the sale-deed, the same may not be registered. The disputed sale deed is not alleged to have been obtained by defendant/appellants during above period of 8-10 months of missing of plaintiff Dharam Veer Singh or within the proximity of one or two year from above period. On the other hand the Sale-deed 90/C dated 15.6.1983 has been executed by plaintiff Dharam Veer Singh in respect of his agricultural plot No. 169, which is one of the plot mentioned in intimation 85/C dated 7.9.1981, inspite of which the validity of above sale deed has not been challenged, on account of alleged unsoundness of mind or missing period. It also proves that after the alleged period of missing on 15.6.1983 at the time of execution of sale deed 90/C by him and thereafter he was a person so sound mind and continued to be so till his death and soundness of his mind on and after 15.6.1983 is admitted to plaintiff/respondents.

22. The first appeallate Court at page 4 of the certified copy of the impugned judgment on record has mentioned that the first question for consideration in this appeal is "Whether plaintiff Dharam Veer Singh was as person of unsound mind at the time of execution of sale-deed dated 17.9.1984". and has relying on the prescription paper Nos. 62, 63 C wherein, it has been certified that Dharam Veer Singh was treated as outdoor patient in mental hospital, Agra from 23.4.1986 to 25.4.1986 and 7.5.1986 to 31.5.1986, as well on statement of PW 3 Gopal Singh that in the opinion of doctors he was suffering from schizophrenia has decided the question affirmatively in favour of plaintiff. It has been further held by first appellate court that the objection of defendants that he was not suffering from schizophrenia, is not correct because the statement has been given by the witness after going through the relevant register. The first appellate court has also discarded the argument of defendants that the ailment of anxiety mentioned in the prescription may not be considered to be unsoundness of mind of any degree, in view of following statement of DW.4.

"Main Yah nahi kah raha hoon ki 64-ga nukshe me ullikhit davaon ka prayog mansik rogo ke liye nahi hoga, lekin mera kahna hai ki yah davayen usme gudkari nahi hongi."

23. The first appellate court has further held that since the wife of plaintiff Dharam Veer Singh in her statement on oath as PW 2, recorded on 17.9.1988 and 22.1.1991, has stated in first statement that he is a person of unsound mind since 5 years and in subsequent statement since 12-13 years, it appears that unsoundness of mind of Dharam Veer aggravated in 1981, when intimation to Sub-Registrar was sent by his wife and inspite of the fact that the validity of the sale-deed executed on 15.6.1983 by plaintiff Dharam Veer Singh in respect of his agricultural land No. 169 in favour of Nazir has not been challenged on account of unsoundness of his mind, the first appellate Court went on holding that the plaintiff Dharam Veer Singh was a person of unsound mind since 1981 and the possibility of getting the sale-deed dated 15.6.1983 executed in such condition, may not be ruled out.

24. It is also pertinent to mention that on page 7 of the judgment, the first appellant Court has observed that plaintiff Dharam Veer Singh was not produced by the defendant Nathu Singh before the Court, which is not only surprising and absurd but foolish also and is like putting the cart before the horse. Under any preposition of law the defendant may not be asked to produce the plaintiff Dharam Veer, in disprove the plaintiff's case, instead of drawing adverse inference against the plaintiff's next friend for not producing Dharam Veer Singh the first appellate court wrongly and illegally drawn adverse inference against the defendants. The observations of first appellate Court at the same page that DW.1 has not given any statement about the mental condition of Dharam Veer Singh also shows that the first appellate court acted wrongly illegally and with utmost perversity in shifting the burden of proof of plaintiff, on the defendant and the above findings being perverse appears to be based on some extraneous considerations, because of which the first appellate court was bent upon for presuming plaintiff Dharam Veer to be a person of unsound mind and further to cancel to sale deed in dispute with senseless findings and ignoring the basic principle of law that plaintiff has to stand on his own legs and may not take benefit of weakness if any in defence case.

25. The first appellate Court at page 8 has also stated that defendant No. 3 had taken plaintiff to his home on some pretext but there is no iota of evidence as to when and on what pretext he was allegedly taken by defendant No. 3. Moreover it is noteworthy that defendant No. 3 is son-inlaw of plaintiff's real brother and is neither vendee nor marginal witness nor scribe of sale deed in dispute nor there is any iota of evidence to show his connivance with defendant/appellants in any manner and for even in case of alleged fetching of Dharam Veer by defendant No. 3 at any point of time (which is not proved), the impugned sale deed may not be cancelled.

26. It is pertinent to mention that there is no whisper in the plaint that on which date or time the plaintiff Dharam Veer came to know about the execution and registration of impugned sale deed. The first appellate court has also went on holding that the sale-deed in dispute is without consideration. There is no evidence on record to prove that at the time of execution of sale-deed in question, the property sold was worth Rs. 1, 50,000/- or more than Rs. 50,000/- or to contradict the

presumption of correctness of the endorsement of Sub-Registrar about payment of consideration. It is pertinent to mention that after execution of sale-deed when it could not be registered for want of income tax clearance, an agreement for sale was executed between defendant/appellants and the plaintiff Dharam Veer Singh, and after obtaining income tax clearance from Income Tax office by Dharam Veer Singh the sale-deed was presented by him for registration before Sub-Registrar on 19.10.1984. It is also pertinent to mention that in the meantime, the plaintiff Dharam Veer Singh mischievously also obtained a loan from bank over the land in question, which proves his cleverness and cunningness and that he has never been a person of unsound mind, at any point of time, whatsoever and the entire story of unsoundness of his mind is not only false and incorrect but has been concocted to just avoid the sale deed in question.

27. The above findings so recorded by the first appellate Court are not only wrong, vague, absurd, illegal and based on surmises and conjectures but also suffer from manifest error of law and very high degree of perversity.

28. The above documentary evidence filed by the plaintiff Dharam Veer for proving him to be a person of unsound mind, does not make any whisper of about unsoundness of his mind for any point of time or during any period whatsoever or even during the period of his treatment from 23.4.1986 to 8.12.1986. In any of the above papers/prescriptions there is no mention of history of patient regarding any mental illness or anxiety. In prescription 62/C, there is only mention of certain medicines, in certificate 63/A there is only mention of treatment on certain dates as OPD patient, while prescription 64/A only mentions 'anxiety' & prescribing certain ayurvedic medecines " *Su Kupilu, Abhrak Bhasm, Prabal Mool Bhasm*, Arogya Wardahini vati etc.

29. Any of above papers do not speak that plaintiff Dharam Veer Singh was suffering from schizophrenia. Admittedly, Dharam Veer Singh was not hospitalized for any period of time or even for a single day for alleged treatment of Schizophrenia or any other kind of unsoundness of mind, which itself tells the story of false claim of alleged unsoundness of mind. The PW 3 who has stated that Dharam Veer Singh was suffering from schizophrenia, on basis of papers which have been filed by him as papers, copies of register No. 99/C, 100/C out of which paper No. 99/C consists only entries of patients including the name of Dharam Veer Singh as OPD patient on 23.4.1986 and paper No. 100/C states his treatment on particular dates, but none of these papers state of or carries any opinion by doctors that he was suffering from schizophrenia or any other type of unsoundness of mind at any point of time or for any period, whatsoever, and so the statement of PW 3 being not supported by any documentary evidence can not be relied. Surprisingly the first appellate court read something which is not even mentioned in any document on record. It is also pertinent to mention that since all these papers relate to only few days treatment as OPD patient, over the entire period from 23.4.1986 to 8.12.1986 and have been obtained during pendency of suit, at the most, it may be inferred that during pendency of suit plaintiff Dharam Veer Singh suffered from some mental anxiety for a total period of around 9 months. However, in view of above evidence, he may not be considered to be suffering from alleged unsoundness of mind for above period of 9 months or any period before or after it. Further in view of above evidence on record, on account of alleged 9 months treatment as OPD patient from April and December 1986 for mental anxiety, it is not

proved that one year before commencement of treatment, on 12.4.1985 at the time of institution of suit, or about 1½ years ago on 17.9.1984 or 19.10.1984 at the time of execution and registration of the disputed sale-deed, plaintiff Dharam Veer Singh was suffering from any kind or degree of unsoundness of mind whatsoever. Moreover since Dharam Veer Singh had executed a registered sale-deed on 15.6.1983 (10 months before disputed sale deed) in respect of his land holding No. 169 in favour of Nazir, the correctness and validity of which, has not been challenged, so it proved that admittedly plaintiff Dharam Veer Singh if at all was suffering from some mental anxiety in 1981 or so, he was not a person of unsound mind on 15.6.1983 and thereafter. The plaintiff has no right of pick and choose, between the two sale deeds for cancellation is case they were obtained from a person of unsound mind. Hence the findings of the first appellate Court in the impugned judgment that on account of sending the intimation by his wife to Sub-Registrar, he was suffering from unsoundness of mind since 1981, is absolutely wrong, illegal and perverse. The learned first appellate Court has acted wrongly in not considering that in order to prove plaintiff Dharam Veer Singh to be a person of unsound mind, entire evidence was prepared during pendency of suit which has no evidentiary value to prove him to be a person of unsound mind at the time of to institution of the suit or prior to it at the time of execution and registration of sale-deed in question.

30. In view of the discussions made above, I have come to the conclusion that the findings recorded by first appellate Court are vague, wrong, illegal, and not only suffer from manifest error of law but are also perverse to a great extent and emit bad smell. The plaintiff Dharam Veer Singh and his alleged next friend Lakhpat Singh have failed to prove by any admissible evidence on record that on 17.9.1984 at the time of execution of disputed sale-deed or on 19.10.2014 at the time of its presentation for registration before the Sub-Registrar or even on 21.12.1984 at the time of making of its entries in books of Sub-Registrar's office or even on 12.4.1985, at the time of institution of the suit, the plaintiff Dharam Veer Singh was suffering from unsoundness of mind of to any kind, degree or level, which may render the disputed sale-deed void or voidable. All the evidence produced by plaintiff Dharam Veer Singh in this regard, has been obtained/fabricated during the pendency of suit, which is inadmissible in evidence and even from above evidence, if accepted as such, for the sake of arguments, the plaintiff Dharam Veer Singh is not proved to have been suffering from schizophrenia or unsoundness of mind of any kind or degree for any point or period of time during aforementioned relevant dates and period or even for a period from 23.4.1986 to 8.12.1986.

31. It is pertinent to mention that since from the evidence on record the plaintiff Dharam Veer Singh or his next friend Lakhpat Singh have failed to prove that on the above relevant dates or period the plaintiff Dharam Veer Singh was a person of unsound mind so Sri Lakhpat Singh or anybody else had no right to act as his next friend or guardian and could not have instituted suit for and on his behalf.

32. The copy of sale deed dated 16.9.1971 executed by Smt. Ganga Devi in favour of defendant/appellant No. 1, paper No. 69/C on lower court record has absolutely no relevancy to the facts of the case and has no effect, on account of alleged clerical mistakes therein with respect to the plot number of land sold.

33. In view of discussions made above I have come to the conclusion that both the substantial question nos. 1 & 2 are liable to be decided in favour of defendant/appellants and against the plaintiff/respondents and are decided accordingly.

34. The judgment and decree passed by first appellant Court are, therefore, liable to be set aside and that which were passed by Trial Court in Civil Suit No. 236 of 1985 on 4.2.1991, are liable to be affirmed and restored and appeal is, liable to be allowed.

35. Accordingly, the appeal is allowed with costs throughout. The impugned judgment and decree dated 26.2.1998 passed by the Additional District Judge/Special Judge Moradabad, are set aside and the judgment and decree passed by 8th Additional Civil Judge, Moradabad in Civil Suit No. 236 of 1985 on 4.2.1991 are affirmed and restored. The suit of plaintiff-respondent stands dismissed with costs throughout.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE HARSH KUMAR, J.

First Appeal No.- 425 Of 2000

Suraj Prasad Keshari **...Appellant**
Versus
Pyare Mohan **...Respondent**

Counsel for the Appellant:
A.S. Rai, Alok Kumar Gupta, Vimlesh Kumar Rai

Counsel for the Respondent:
Sushila Singh, A.P. Srivastava, Subhra Singh

Civil law – First Appeal – Section 96 C.P.C. – Judgment and decree dated 24.02.2000 – Civil Suit No.131 of 1994 – Easementary right – Disputed Gali – Pakki Nali – Ventilators – Windows – Nabdan – Pipes – Flow of water – Light and air – Continuous – Peaceably – Without interruption – As of right – More than 20 years – Prescriptive right of easement – Declaration – Permanent prohibitory injunction – Written statement – No specific denial – Admission by Rule of pleadings – Advocate Commissioner report – Spot position – Dimensions – 8 feet wide Gali – 2 feet 3 inches wide Pakki Nali – Exclusive ownership – Public lane – Easementary right of way – Egress and ingress – Cleansing of Nali – White wash – Painting – Repairs – Findings on issue no.2 – Wrong – Illegal – Perverse – Appeal partly allowed – Findings set aside – Rest of judgment and decree confirmed.

The brief facts relating to the appeal are that plaintiff Pyare Mohan filed Civil Suit No.131 of 1994 on 17.10.1994 with the allegation that the house shown by letters ख, च, छ, ग in plaint map originaly belonged to Beni Ram and was inherited by Jwala Prasad, who executed a registered will on 13.11.1980 in favour of plaintiff and his brother; that the above house is triple storied house and several ventilators and windows on each story opens towards East in 8 feet wide lane (Gali); that in the western side of the Gali there is 2 feet 3 inch wide Pakki Nali in which the water of the house of plaintiff flows through Nabdan (drain) of his house as well as through pipes from roofs and floors of triple storied house; that the plaintiff and his predecessors have always been continuously peacefully and without any interruption, flowing water through the Nali & pipes and have been taking light and air through the windows and ventilators in eastern wall of their house, for more than 20 years, as of right, and have acquired prescriptive right of easment to flow the water through Nali & pipes and take the light and air through windows and ventilators; that on 14.10.1994, the defendant threatened of demolition of the Nali and raising of a wall on western side of Gali after dismelting the pipes and of closing the ventilators and windows of the house of plaintiff, so as to obstruct and interfere in exercise of his easmentary rights to flow the water and take light and air. (Para 2)

The defendant filed written statement denying the allegations of plaint and contended that no water of the house of plaintiff did ever flow from the Nali in question and that he has no right to flow the water in the Nali in dispute or to take light and air through the windows and ventilators towards Gali; that the Gali in question is in exclusive ownership and possession of the defendant and neither any Parnala/pipe nor any Nabdan (drain) nor any window or ventilator of the house of plaintiff opens or ever existed towards the Gali in question nor the plaintiff has any right to flow the water in, and take light and air from, the Gali in question; that across the Gali in question there is house of Satendra Kumar, which has been purchased by him from Smt. Fatima Bibi, Asgar Bibi etc. and in the sale deed of the house of Satendra Kumar, western boundary has been mentioned as 'the Gali of defendant'; that the dirty water of the house of plaintiff flows towards North in municipal drain; that the suit is legally not maintainable and is liable to be dismissed with costs. (Para 3)

HELD:(Paras 26-29)

1. We find force in the arguments so raised by the defendant appellant. There is no iota of evidence to suggest that the above Gali is a public lane or it was constructed by the Municipal Board. It is also noteworthy that the plaintiff has neither claimed any ownership rights over the Gali in question nor claimed it to be a common or public lane nor claimed any exit of his house nor any right or easmentary right of egress or ingress over the Gali in question. The plaintiff has specifically stated in plaint as well as in his statement on oath that the exit gate of his house is towards North and not towards East and he enters the Gali in question only at the time of getting the Pakki Nali cleansed or undertaking necessary works of repairs etc. The plaintiff's witnesses have also stated that the plaintiff has no exit of his house over the Gali in question. The finding of court below over issue no.2 that plaintiff has an easmentary right of egress and ingress to his house over and through the Gali in question is absolutely wrong and incorrect. Similarly, the findings of court below that since the plaintiff is exercising easmentary rights of taking light and air from and flowing water in and over, the Gali, so it may not be in exclusive ownership of defendant rather is a Public Lane, is also wrong, incorrect and perverse. The findings of court below that plaintiff has also acquired easmentary right of way egress and ingress over the Gali in question and that Gali in question is a Public Lane are wrong, illegal and perverse and are liable to be set-aside to above extent.

2. In view of the discussions made above, we are of the considered opinion that it is proved from the evidence on record that the disputed Gali is not a public lane rather is in the exclusive ownership of defendant-appellant over which the plaintiff-respondent has a prescriptive right of easement (i) to take light and air from the disputed Gali, through various windows and ventilators in his 100 years old triple storied house (ii) to flow the daily use and rainy water of various roofs and floors of his triple storied house through

Nabdan and various pipes in eastern wall of his house in the pakki Nali in the Gali in question and (iii) to pass through the Gali in question from time to time for the purposes of cleansing the Nali as well as undertaking necessary white wash, painting or repairs etc., if any, as and when required. However, the plaintiff-respondent has No exit door of his house over the Gali in question and has No easmentary right of way (of ingress and egress) over the Gali except for the purpose of cleansing of Nali and undertaking white wash, painting or repairing works etc. Since there is no prayer for declaration of easmentary right of way or injunction in respect thereof and no such relief has been granted in the impugned judgment and decree only the findings on issue no.2 which are wrong and illegal are liable to be set-aside. Therefore, the appeal is liable to be partly allowed and the findings given by trial court on issue no.2 regarding the easmentary right of way of the plaintiff over the Gali in question as well as with regard to Gali in question being 'Public Lane' are liable to be set-aside.

3. Accordingly, the appeal is **partly allowed**. The findings on issue no.2 regarding plaintiff's easmentary right of way over the Gali in question and its being 'Public Lane' are set-aside. However, the rest of the judgment and decree are found to be correct and there is no sufficient ground for interfering with or setting it aside any other findings or the impugned judgment and decree for which appeal has no merits and is liable to be dismissed with costs. The judgment and decree as well as the operative portion are confirmed, except the findings on issue no.2 mentioned above, with regard to right of way over the Gali and its being Public Lane. In all other respects the appeal is dismissed with costs. The plaint map shall form part of decree of this appeal.Let the record be sent to court below, at the earliest, after preparation of decree.

Case Law discussed:

1.Bhawani Das Vs. Kayastha Pathshala, 1977 Allahabad Law Journal (Para-15)
2.Jailuxmidevamma Vs. Janardhan, AIR 1959 AP 272 (Para-20)
3.Sarwan Singh Vs. State of Punjab, (2003) 1 SCC 240 (Para-21)

(Delivered by Hon'ble Harsh Kumar, J.)

1. This appeal under Section 96 of C.P.C. has been filed against the judgment and decree dated 24.2.2000 passed by Additional Civil Judge (S.D.), Bhadohi at Gyanpur (District Sant Ravidas Nagar) in Civil Suit No.131 of 1994, decreeing the suit with costs and passing a decree of declaration to the effect that plaintiff has an easmentary right over the disputed Gali in suit and for prohibitory permanent injunction for restraining the defendant from damaging or demolishing the Nali shown by letters ख, च, छ, ग in plaint map or obstructing the flow of water through the Nali as well as from closing the ventilators and windows and drain pipes or obstructing the use of air and light to the plaintiff's house through above windows and ventilators.

2. The brief facts relating to the appeal are that plaintiff Pyare Mohan filed Civil Suit No.131 of 1994 on 17.10.1994 with the allegation that the house shown by letters ख, च, छ, ग in plaint map originaly belonged to Beni Ram and was inherited by Jwala Prasad, who executed a registered will on 13.11.1980 in favour of plaintiff and his brother; that the above house is triple storied house and several ventilators and windows on each story opens towards East in 8 feet wide lane (Gali); that in the western side of the Gali there is 2 feet 3 inch wide Pakki Nali in which the water of the house of plaintiff flows through Nabdan (drain) of his house as well as through pipes from roofs and floors of triple storied house; that the plaintiff and his predecessors have always

been continuously peacefully and without any interruption, flowing water through the Nali & pipes and have been taking light and air through the windows and ventilators in eastern wall of their house, for more than 20 years, as of right, and have acquired prescriptive right of easment to flow the water through Nali & pipes and take the light and air through windows and ventilators; that on 14.10.1994, the defendant threatened of demolition of the Nali and raising of a wall on western side of Gali after dismelting the pipes and of closing the ventilators and windows of the house of plaintiff, so as to obstruct and interfere in exercise of his easmentary rights to flow the water and take light and air.

3. The defendant filed written statement denying the allegations of plaint and contended that no water of the house of plaintiff did ever flow from the Nali in question and that he has no right to flow the water in the Nali in dispute or to take light and air through the windows and ventilators towards Gali; that the Gali in question is in exclusive ownership and possession of the defendant and neither any Parnala/pipe nor any Nabdan (drain) nor any window or ventilator of the house of plaintiff opens or ever existed towards the Gali in question nor the plaintiff has any right to flow the water in, and take light and air from, the Gali in question; that across the Gali in question there is house of Satendra Kumar, which has been purchased by him from Smt. Fatima Bibi, Asgar Bibi etc. and in the sale deed of the house of Satendra Kumar, western boundary has been mentioned as 'the Gali of defendant'; that the dirty water of the house of plaintiff flows towards North in municipal drain; that the suit is legally not maintainable and is liable to be dismissed with costs.

4. Upon parties pleadings, learned trial court framed the following nine issues:-

(i) whether the plaintiff has easmentary right to flow drainwater of his house in the Pakki Nali shown by letters क, ख, च, छ in plaint map as mentioned in plaint?

(ii) whether plaintiff has an easmentary right of way overGali shown by letters ख, य, र, ग in plaint map as mentioned in plaint?

(iii) whether the plaintiff has an easmentary right to take lightand air from the Gali in East of his house through ventilators and windows and to flow water of his house through pipes and drain (Nabdan)?

(iv) whether the suit is barred by principles of estoppel andacquiescence?

(v) whether the suit is barred by provisions of Section 331 of U.P.Z.A. & L.R. Act?

(vi) whether the flow of water of plaintiff's house has alwaysbeen towards North and not towards East as alleged in written statement?

(vii) whether the suit is barred by provisions of Section 34 ofSpecific Relief Act?

(viii) to what relief, if any, is the plaintiff entitled?

(ix) whether the suit is barred by time?

5. After completion of evidence of both parties, learned trial court decided issue nos.1, 2 & 3 affirmatively in favour of plaintiff and issue no.4, 5, 6, 7 & 9 negatively against the defendant and consequently decreed the plaintiff's suit with costs for the reliefs prayed for.

6. Feeling aggrieved, the defendant has preferred this first appeal.

7. We have heard learned counsel for the parties and perused the record.

8. Learned counsel for the defendant-appellant contended that the impugned judgment and decree are bad on facts and law; that the plaintiff-respondent has no Nabdan (drain) of his house towards East in the Gali or in the Nali on western side of the Gali in question; that it is wrong to say that there are several windows or ventilators in the eastern wall of the triple storied house of the plaintiff or there are various pipes towards Gali from roofs and floors of second and third floor of the house of plaintiff; that the plaintiff did not acquire any prescriptive right of easment of taking light and air from Gali in question through the alleged windows and ventilators in the eastern wall of his house, or to flow the daily use as well as the rainy water of the house through the Nabdan (drain) as well as pipes in the Nali over the Gali in question; that the plaintiff has no easmentary right of way and has no right of egress and ingress, over the Gali in question; that it is absolutely wrong to say that the Gali in question is a public lane; that learned lower court has acted wrongly and illegally in holding that the windows and ventilators of plaintiff's house open in the eastern wall towards the Gali in question or any pipes or Nabdan exist in the eastern wall through which water flows in the Nali in the Gali in question or the plaintiff has acquired any easmentary right to take light and air from the Gali in question through above windows and ventilators or to flow the daily use and rainy water through the above pipes and Nabdan in the Nali in Gali in question; that it is proved from the evidence on record that the Gali in question exclusively belongs to the defendant-appellant and none else has any right or title over the same; that it is absolutely wrong to say that due to exercise of alleged rights of taking light and air through windows and ventilators from Gali in question or flowing water through Nabdan and pipes in the Nali in Gali in question, the plaintiff has acquired any prescriptive right of easement over the Gali in question or by such use, the Gali in question has come within the definition of public lane; that in East of the Gali in question there was a Khandhar of Basir which has been sold by his successors to Satendra Kumar and others and in the western boundary of the property of Basir so sold is mentioned as “Rasta 8 feet wide exclusively of Suraj Prasad Kesari thereafter house of Pyare Mohan”; that from the recitals of above sale deed also it is proved that the Gali in question exclusively belongs to defendantappellant; that learned lower court acted wrongly in relying on the report of Advocate Commissioner and the findings of court below that the Gali in question is public lane and plaintiff has an easmentary right of ingress and egress over the same are absolutely wrong, illegal and without jurisdiction; that the court below committed patent illegality in misreading the evidence on record as well as in discarding the testimony of D.W.-1 and D.W.-2; that the correct spot position

has been shown in the map of written statement; that the impugned judgment and decree are based on surmises and conjectures; that the impugned judgment and decree are liable to be set-aside and plaintiff's suit for declaration and injunction is liable to be dismissed with costs.

9. Per contra, the impugned judgment and decree were supported by the plaintiff-respondent contending that the defendant has failed to specifically deny the existence of windows, ventilators, pipes as well as Nabdan in eastern wall of plaintiff's house over the Gali and Nali in question and has also failed to deny the uninterrupted exercise of right to take light and air through the windows and ventilators from the Gali in question in East of his house and to flow daily use and rainy water of his triple storied house through Nabdan and pipes in the Nali in the Gali in question, as well as of acquiring such prescriptive right of easment of flowing the water and taking light and air by the plaintiff; that the Advocate Commissioner appointed by Court, after visiting spot, has submitted detailed report and map showing the existence of Nabdan (drain), pipes falling in the 2 feet 3 inches wide Pakki Nali on western side of 8 feet wide Gali adjoining the eastern wall of plaintiff's house as well as windows and ventilators which exist since times immemorial, in eastern wall of plaintiff's house towards the Gali in question; that the flimsy objections were raised by defendant, against the report of Advocate Commissioner which were not supported by any evidence on record; that the report of Advocate Commissioner was not set-aside by the court on flimsy objections of defendant; that the defendant could not dare to produce any evidence to show that the flow of water of plaintiff's house is towards North and no ventilators, windows Nabdan or pipes exist in eastern wall of plaintiff's house towards the Gali in question; that the defendantappellant could neither dare to file any private report of the spot nor could dare to apply for appointment of Advocate Commissioner or Court Amin for bringing the alleged correct spot position on record, if according to him the spot position shown by Commissioner Sri Phool Chand Pandey, Advocate in his report and map 23-C was not correct; that the plaintiff does not claim any opening or any door in eastern wall of his house, over the Gali in question and has not claimed any right of egress or ingress from the alleged eastern door, rather has specifically mentioned that exit (main door) of the plaintiff's house is towards North over municipal road; that the defendant-appellant has failed to make any defence of plaintiff's rights in his written statement and has also failed to produce any evidence to contradict the plaintiff's case and establish defence case; that the appeal has filed with absolutely wrong and baseless allegations and malafide intention to harm and harass the plaintiff-respondent and the same is liable to be dismissed with special costs.

10. Before considering the arguments, for ready reference the provisions of Sections 4 and 15 of the Indian Easement Act are being reproduced as under:-

"Section 4 "Easement" defined. *-An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.*

Dominant and servient heritages and owners. *-The land for the*

beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation. -In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon."

Section 15. Acquisition by prescription.- *Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,*

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

11. Upon hearing learned counsel for the parties and perusal of record, we find that the plaintiff has come with a specific case that the house in question is more than 100 years old which belonged to Beni Ram, the grand father of plaintiff and the ventilators, windows as well as pipes and Nabdan in the eastern wall of the triple storied house exist since the times of its construction by the predecessors of plaintiff. The plaintiff claims that the house in question came in the share of his cousin brother Jwala Prasad, who bequeathed it half and half in favour of plaintiff and his brother Radhey Shyam through registered will deed dated 13.11.1980 by which the eastern half share was bequeathed to plaintiff. The plaintiff's house as well as the Gali in question and surroundings the Ahata of Basir and defendant and western half share plaintiff's brother Radhey Shyam with details of existing windows, ventilators, pipes and Nabdan in eastern wall towards Gali in question have been clearly shown by plaintiff in the sketch map given at the foot of the plaint. In above map the plaintiff has also mentioned the various dimensions i.e. length and width of plaintiff's house, the Gali in question as well as 2 feet 3 inches wide Pakki Nali on western side of the Gali in question,

width and length of which is 8 feet East-West and 67 feet North-South. In paras 10 & 11 of the plaint, it has been specifically pleaded that the daily use and rainy water of the triple storied house use to flow through the various pipes and Nabdan in the Pakki Nali in the Gali in question since times immemorial from last 100 years, from the times of its construction and there are as many as 5 ventilators in the rooms on ground floor, 5 windows in the rooms on first floor and 5 windows and 10 ventilators in the rooms and Varandah over the second floor, in the eastern wall of the house since then through which light and air use to come. It has been specifically pleaded that the plaintiff has been taking light and air through above windows and ventilators and flowing water through above pipes and Nabdan continuously, peaceably, without any interruption and as of right since last 100 years (more than 20 years) and has acquired prescriptive right of easment to take light and air through above windows and ventilators and to flow water through Nabdan and pipes mentioned above. It has also been specifically pleaded that if the ventilators and windows are closed and light and air through them is obstructed or interrrupted and in case the flow of water through above pipes and Nabdan in the Pakki Nali in question is obstructed, the plaintiff's triple storied house in question will not remain habitable rather will get damaged and the exercise of above rights of easment is necessary for better enjoyment of house in question.

12. It is pertinent to note that the ownership of triple storied house of plaintiff and its being ancestral as well as 100 years old has not been disputed by the defendant. The correctness of plaint map and existence of various windows, ventilators, pipes and Nabdan in its eastern wall have also not been disputed in the detailed written statement in over six pages filed by the defendant. Moreover there is no specific denial to above facts as well as to the existence of windows etc. except only a evasive simple plea that no ventilators, windows, pipe or Nabdan exist in the eastern wall of plaintiff's house. The defendant has also pleaded that the rainy and daily use water of plaintiff's house flows towards North and not towards East, but in the detailed written statement, even the correctness of plaint map has not been disputed. By way of lengthy amendment as many as 8 paras and a sketch map have been added to the written statement subsequently, in another two pages and even by way of amendment except denying the correctness of plaint map, no specific denial of plaint allegations as to existence of windows etc. has been made. By amendment a plea has also been added to the effect that, the plaintiff wants to usurp the Gali in question and in the sale deed of the house of Basir in favour of Satendra Kumar, in western boundary disputed Gali has been mentioned as exclusive Gali of defendant.

13. It is noteworthy that the plaintiff neither claimed any rights of ownership, joint ownership nor rights of egress or ingress over the Gali in question, nor has claimed it to be a common or public Gali.

14. It is settled principle of law and admission by Rule of pleadings that any plea taken in plaint is not specifically denied by the defendant in his written statement, it will be deemed that the defendant has admitted that plea of plaintiff and plaintiff will not be required to prove it, because admitted facts do not require proof.

15. At the time of considering "Admission by Rule of Pleadings" in the case of **Bhawani Das Vs. Kayastha Pathshala, 1977 Allahabad Law Journal**, this Court held that

"Allegations made in plaint, if not controverted in written statement, the allegations so made in plaint need not be proved in view of provisions of section 56 of Indian Evidence Act."

16. It is pertinent to mention that at the time of filing of suit for declaration and permanent prohibitory injunction in respect of his easmentary rights for restraining the defendant from interfering in the peaceful exercise and enjoyment of above rights, the plaintiff also moved an application for issuance of the commission in the name of Advocate Commissioner who may visit the spot, serve the injunction order on defendant, prepare a map, note down the dimensions and prepare a map showing spot position. On plaintiff's application the trial court appointed Sri Phool Chand Pandey, Advocate as Advocate Commissioner, who has submitted his report with map 23-C showing therein the existing position of spot including windows, ventilators, pipes, and Nabdan in eastern wall of plaintiff's house, 2 feet 3 inches wide 67 feet long Pakki Nali along the western side of 8 feet wide 67 fee long Gali adjoining plaintiff's wall and verifying the correctness of plaint map as well as the pleadings regarding existence of windows, ventilators, pipes, Nabdan and Pakki Nali and slope (ढाल) of various roofs and floors of the house of plaintiff, towards East. Against the above report, though the defendant-appellant filed objections after a period of four years, but could neither dare to move an application for issuance of another commission for bringing the alleged correct position of the spot as has been claimed by him.

17. It is noteworthy that it is highly improbable rather impossible for a person like plaintiff or whomsoever he may be, to file a suit for declaration and injunction in respect of his 'Easmentary Rights' of taking light and air through windows and ventilators and flowing water through Nabdan and pipes in eastern wall of his house in the Nali and over the Gali in question without there being in existence any window, ventilator, pipes of Nabdan and slope towards East. No sane/prudent person may be expected to file such a suit with an ulterior motive to open above windows, ventilators, Nabdan and pipes subsequently in the garb of orders of the Court. It is not a case of defendant that a single window or ventilator was opened by the plaintiff in his eastern wall, in order to enjoy which, he would have filed suit without there being any window etc. in past and opened all these subsequently. It is not possible for a person to open as many as 10 windows and 15 ventilators in his 100 years old triple storied house, overnight just for claiming easmentary right on one fine morning. Similarly, the slope (Dhal) of different roofs and floors of triple storied 100 years old ancestral house may also not be changed overnight in order to claim right of flow of water over the defendant's lane by making new Nabdan and fixing new pipes by changing the slope from North to East. It is also noteworthy that by changing the slope from North to East and opening of windows ventilators in Eastern wall by making huge expenditures, no extra advantage is likely to be availed by plaintiff or any such person. It is also pertinent to mention that the plea taken in para 10 of the written statement of opening window in the upper story is also vague and is not supported by any evidence on record. Moreover neither it has been mentioned as to on which floor such window has been opened nor the number of window or windows, so opened has been mentioned

which means that a single window is alleged to have been opened, while there are as many as 10 windows in existence. It is also not the case of the defendant that by opening a new window apart from existing windows and ventilators, the plaintiff has enhanced the burden on servient heritage.

18. In order to prove his case, the plaintiff has produced himself as P.W.-1, Mustaquim as P.W.-2, Mohd. Haneef as P.W.-3, Advocate Commissioner Sri Phool Chand Pandey as P.W.-4 and Jawahar as P.W.-5. The evidence on record shows that the plaintiff has reiterated the allegations made in plaint in his statement on oath and his statement has been duly corroborated by his witnesses as well as Advocate Commissioner, who had visited the spot and submitted report and map of the spot position. The P.W.-2 has stated on oath that he is seeing the windows, ventilators, pipes, Nabdan and Nali since long and in case they are closed, the supply of light and air shall be closed and flow of water will be obstructed. Similar statement has been given by P.W.-3, who has stated to be seeing the above spot position since last 40-45 years and P.W.-5 has stated that he has been cleansing/scavenging the Pakki Nali in the Gali in question since last 30-35 years and prior to him, the work of cleansing of Nali in question was being done by his father. Apart from noting down and showing the spot position and windows, ventilators, pipes, Nabdan, Nali, Gali and houses etc. P.W.-4 the Advocate Commissioner has also shown the trees of Pakad and Jamun standing in the Gali in question and has also given the dimensions of Gali and Nali in question as well of the as house of plaintiff. It is pertinent to mention that the objections filed by defendant against the report of Advocate Commissioner are vague and self-contradictory, as in para 1 of the objections, it has been stated that Advocate Commissioner visited the spot on 18.10.1994 and filed report on 14.11.1994, while in contradiction to above in para 2 it has been stated that the Advocate Commissioner did not visit the spot. P.W.-4 has proved his report and nothing material has come in his cross examination to doubt the correctness of his report and spot position or to disbelieve him. It is noteworthy that P.W.-4 in his statement on oath in cross examination has also stated that *"water was flowing from the house of plaintiff in the Pakki Nali, when he visited the spot"* but the defendant could not even dare to put a suggestion before above witness or any of plaintiff's witnesses or even to the plaintiff himself, in cross examination that the windows, ventilators, Nabdan or pipes as mentioned in the plaint do not exist in eastern wall of plaintiff's triple storied house and the slope(ढाल) of house of plaintiff is towards North and not towards East, or that the windows, ventilators, pipes or Nabdan etc. exist in Northern wall of plaintiff's house.

19. Apart from the admission by rule of pleadings, it is also settled principle of law that if statement of a witness is disputed, on any point, and no question is made in cross-examination, the statement made in examination in chief shall be deemed to be admitted to the other party.

20. It has been held by Division Bench of High Court of Andhra Pradesh in the case of ***Jailuxmidevamma Vs. Janardhan, AIR 1959 AP 272 (b)*** that

"*If on anything in examination-in-chief, is disputed, but opponent avoids asking questions in cross, evidence in chief must be accepted unless of course there are inherent improbabilities."*

21. Similarly in the case of **Sarwan Singh Vs. State of Punjab (2003) 1 SCC 240**, the Apex Court held that

"opponent declining to avail himself of opportunity to put his case in cross examination-Evidence tendered on that issue ought to be accepted."

22. In view of above case laws since there are no inherent improbabilities with regard to existence of windows etc. in the eastern wall of plaintiff's triple storied house, the correctness of plaint allegation as well as of statements on oath may not be disputed and will be deemed to have been admitted/accepted by the defendant.

23. On the other hand, the defendant has produced himself as D.W.1 and Abdul Samar as D.W.-2 and in their statement on oath they have not dared to deny the existence of windows etc. in the eastern wall of plaintiff's multistoried house. He has also failed to reiterate the averments added by way of amendment in para 10 of the written statement, wherein it has been stated that the plaintiff has recently and unauthorisedly opened window in upper story of his house. The above factual plea of written statement since has neither been reiterated in his statement on oath by the defendant nor corroborated by his witness, nor is supported by any other evidence, so the same has no value and the above plea will be deemed to have been relinquished and will be treated as **"Not Proved"** by the defendant. The D.W.-2 has stated that his house is at a distance of 1 furlong from the plaintiff's house and he has not seen as to on which side the water of Nabdan of plaintiff's house flows. The above witness is alleged to be an interested witness and given evidence under pressure of defendant's wife Meera Gupta, who is Manager of the School in which his niece is getting education. Otherwise also he is a distant witness having no knowledge of the spot position and his evidence has no value.

24. From the evidence on record, we find that plaintiff has proved by reliable, cogent and consistent evidence that he has been taking light and air through the various windows and ventilators in various rooms and Varandahs in his 100 years old triple storied house and has been flowing daily use and rainy water of various roofs and floors of his triple storied house through Nabdan and various pipes fitted in the eastern wall of his house, in the 2 feet 3 inches wide pakki Nali in the Gali in question and has been getting the Nali cleaned and making necessary white wash, paint or repairs etc. of wall, windows and pipes and Nabdan from time to time by going in the Gali in question as and when required, and for such purposes he used to go and pass through the Gali in question peaceably, continuously uninterruptedly and as of right for the better enjoyment of his house, since last about 100 years from the times of his (fore-ancestors) and has acquired a prescriptive right of easement to take light and air to his triple storied house through above windows and ventilators from the Gali in question and to flow daily use and rainy water of the roofs and floors of his triple storied house through various pipes and Nabdan in the Pakki Nali in the Gali in question and to get the Nali cleansed or to get necessary white wash, paint or repairs etc. of windows, ventilators, pipes, Nabdan and Nali done and pass through the Gali for the purposes from time to time.

25. As far as the question of Gali in question being 'Public Lane', the learned lower court in his findings on issues no.1, 2, 3 & 6 has held that since the plaintiff is exercising easmentary rights of light, air and water as above, it shows that disputed Gali is not in exclusive ownership of defendant rather is a 'Public Lane'. The learned counsel for defendant-appellant contends that the Gali in question is proved to be under exclusive ownership of the defendant and by alleged exercise of easementary rights by the plaintiff, if any, the nature and ownership will not be changed and by alleged enjoyment of easmentary rights by plaintiff, the Gali may not become a 'Public Lane' under any imagination and so the findings to above effect are wrong and perverse and are liable to be set-aside.

26. We find force in the arguments so raised by the defendantappellant. There is no iota of evidence to suggest that the above Gali is a public lane or it was constructed by the Municipal Board. It is also noteworthy that the plaintiff has neither claimed any ownership rights over the Gali in question nor claimed it to be a common or public lane nor claimed any exit of his house nor any right or easmentary right of egress or ingress over the Gali in question. The plaintiff has specifically stated in plaint as well as in his statement on oath that the exit gate of his house is towards North and not towards East and he enters the Gali in question only at the time of getting the Pakki Nali cleansed or undertaking necessary works of repairs etc. The plaintiff's witnesses have also stated that the plaintiff has no exit of his house over the Gali in question. The finding of court below over issue no.2 that plaintiff has an easmentary right of egress and ingress to his house over and through the Gali in question is absolutely wrong and incorrect. Similarly, the findings of court below that since the plaintiff is exercising easmentary rights of taking light and air from and flowing water in and over, the Gali, so it may not be in exclusive ownership of defendant rather is a Public Lane, is also wrong, incorrect and perverse. The findings of court below that plaintiff has also acquired easmentary right of way egress and ingress over the Gali in question and that Gali in question is a Public Lane are wrong, illegal and perverse and are liable to be set-aside to above extent.

27. In view of the discussions made above, we are of the considered opinion that it is proved from the evidence on record that the disputed Gali is not a public lane rather is in the exclusive ownership of defendant-appellant over which the plaintiff-respondent has a prescriptive right of easement (i) to take light and air from the disputed Gali, through various windows and ventilators in his 100 years old triple storied house (ii) to flow the daily use and rainy water of various roofs and floors of his triple storied house through Nabdan and various pipes in eastern wall of his house in the pakki Nali in the Gali in question and (iii) to pass through the Gali in question from time to time for the purposes of cleansing the Nali as well as undertaking necessary white wash, painting or repairs etc., if any, as and when required. However, the plaintiff-respondent has No exit door of his house over the Gali in question and has No easmentary right of way (of ingress and egress) over the Gali except for the purpose of cleansing of Nali and undertaking white wash, painting or repairing works etc. Since there is no prayer for declaration of easmentary right of way or injunction in respect thereof and no such relief has been granted in the impugned judgment and decree only the findings on issue no.2 which are wrong and illegal are liable to be set-aside. Therefore, the appeal is liable to be partly allowed and the findings given by trial court on

issue no.2 regarding the easmentary right of way of the plaintiff over the Gali in question as well as with regard to Gali in question being 'Public Lane' are liable to be set-aside.

28. Accordingly, the appeal is partly allowed. The findings on issue no.2 regarding plaintiff's easmentary right of way over the Gali in question and its being 'Public Lane' are set-aside. However, the rest of the judgment and decree are found to be correct and there is no sufficient ground for interfering with or setting it aside any other findings or the impugned judgment and decree for which appeal has no merits and is liable to be dismissed with costs. The judgment and decree as well as the operative portion are confirmed, except the findings on issue no.2 mentioned above, with regard to right of way over the Gali and its being Public Lane. In all other respects the appeal is dismissed with costs. The plaint map shall form part of decree of this appeal.

29. Let the record be sent to court below, at the earliest, after preparation of decree.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Special Appeal No.- 439 Of 2016

Sant Raj **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Shivendu Ojha, Radha Kant Ojha (Senior Advocate R.K. Ojha assisted by Ashish Kumar)

Counsel for the Respondents:
C.S.C., Sandeep Kumar Rai

Headnote:
Intermediate Education — Officiating Principal — Inter-se Seniority between Promotee Lecturer and Direct Recruit — Dispute as to date of substantive promotion — Competent Authority to decide —
Where dispute arises between two teachers regarding **inter-se seniority**, affecting appointment on the post of **Officiating Principal under Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982**, the matter is to be determined at the first instance by the competent authority under the Regulations framed under the Intermediate Education Act.

The Committee of Management having referred the dispute to the District Inspector of Schools, and the matter involving determination of seniority, the appropriate authority to decide the controversy is the

Regional Joint Director of Education under Regulation 3, Chapter II of the Regulations framed under the Intermediate Education Act.

The Court held that:
The issue whether regular promotion of a teacher relates back to the date of ad-hoc promotion requires adjudication by the competent statutory authority.
Determination of inter-se seniority directly affects the right of appointment as officiating Principal.
In the interest of smooth administration of the institution and welfare of students, the dispute must be resolved expeditiously.

Accordingly, parties were directed to approach the Regional Joint Director of Education within two weeks. The authority was directed to decide the issue of seniority by a reasoned and speaking order within four weeks thereafter, after summoning the original records and without being influenced by observations of the learned Single Judge.

Status quo with regard to the post of Officiating Principal to be maintained for six weeks or until decision of the Regional Joint Director of Education.
Both the writ petition and the special appeal were disposed of with directions.

Case Law Discussed:
Santosh Kumar Dubey & Ors. v. State of U.P. & Ors., 2010 (1) ESC 341 (All)
Narendra Singh Solanki v. State of U.P. & Ors., 2010 (1) ESC 388 (All)
Sudama Singh v. Nath Saran Singh

Conclusion:
The Division Bench clarified that disputes relating to **inter-se seniority affecting officiating appointment under Section 18 of the Act** must be adjudicated by the competent statutory authority under the Regulations. The High Court, in exercise of appellate jurisdiction, refrained from deciding the seniority dispute on merits and instead ensured expeditious statutory adjudication, balancing institutional interest with legal propriety.

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri Ashish Kumar, for the petitioner-appellant and Sri J.B. Singh, learned counsel for the respondents.

2. This special appeal is directed against an order of the learned Single Judge dated 31.5.2016 wherein the learned Single Judge has refused to grant an interim order for the reason recorded therein. Parties before us agreed that instead of looking into the merits of the order of refusal to grant interim protection this Court may summon the records of the writ petition itself and decide the appeal as well as the writ petition. Accordingly the records of the writ petition have been summoned and examined by us. The relevant facts in brief of the matter are as follows:-

3. Janta Inter College, Madapar, Kusumi Bazar, Gorakhpur (herein after refereed as institution) is a recognized and aided Intermediate College. The provision of the Intermediate

Education Act and Regulations framed thereunder as also of the U.P. Secondary Education Service Selection Board Act, 1982 (hereinafter referred as Act) Rules and Regulation framed thereunder are fully applicable to the teachers of the said institution. The post of Principal in the institution fell vacant due to requirement of Sri Lal Bachan Gupta. Pending regular selection on the said post appointment is required to be made in accordance with Section 18 of the Act. Section 18 of the Act contemplates that the Senior most teacher who possess the prescribed qualification and is otherwise suitable may be appointed on the post of officiating Principal.

4. According to the petitioner Sri Sant Raj, he was appointed on 21.4.1976 as L.T. grade teacher in the institution. Two posts of lecturers had been created in the institution, one of which was required to be filled by promotion. It is the case of the petitioner that he possess all the essential qualifications for the post of lecturer of Economics and being the senior most teacher, he was entitled for regular promotion against the said vacancy which fell under the promotion quota. Since regular promotion is to take effect only on the recommendation of the Regional Level Committee, the Committee of Management decided to grant ad-hoc promotion to the petitioner on 19.5.1998. The ad-hoc promotion of the petitioner was approved by the District Inspector of Schools. It is not in dispute that the petitioner has been drawing salary as admissible to the post of lecturer since 19.5.1998.

5. According to the petitioner his regular promotion was later approved by Regional Level Committee vide order dated 25.10.2011 as per the resolution of its meeting held on 22.10.2011. According to Sri R.K. Ojha learned counsel for the appellant the regular promotion of the petitioner would relate back to the date on which he was offered ad-hoc appointment for all practical purposes including the issue of determination of inter-se seniority between the lecturers of the same institution. In support of this proposition, he has relied upon the judgments of this Court in the case **of Santosh Kumar Dubey and others Vs. State of U.P. and others reported in 2010 (1) ESC 341 (All) and Narendra Singh Solanki Vs. State of U.P. and others reported in 2010 (1) ESC 388 (All)**. Sri R.K. Ojha learned counsel also placed reliance upon the judgment of the Apex Court in the case **of Sudama Singh Versus Nath Saran Singh reported in 1988 (1) SCC 57.**

6. According to the petitioner Sri Sant Raj, if his seniority is counted from the date of his initial appointment on the post of lecturer he would be senior to respondent no.5 who has been directly appointed as lecturer only on 9.1.2009 on the recommendation of the U.P. Secondary Education Selection Board. We may record that there is no dispute with regard to the date of substantive appointment of respondent no.5.

7. According to the petitioner Sant Raj, the Committee of Management of the institution had published the seniority list in the year 2016-2017 wherein he was shown senior to respondent no.5. It is also stated that in the staff statement as well as in the attendance register of the institution, name of Sri Sant Raj, the petitioner was always placed above respondent no.5. It is, therefore, contended that by no stretch of imagination, respondent no.5 can have any claim in preference over the petitioner for appointment on the post of officiating Principal.

8. So far as the respondent no.5 is concerned, it is his case that the date of substantive appointment of Sant Raj would be the date on which the Regional Level Committee had decided to accord approval to his promotion, i.e. in the year 2011. According to respondent no.5 if the seniority of Sant Raj is determined from the said date he would not be entitled to be appointed as officiating Principal being Junior to respondent no. 5.

9. We find that there is a dispute between the petitioner and respondent no.5 with regard to their inter-se seniority, ultimately reflecting upon the right of appointment as officiating principal. The Committee of Management of the institution vide resolution dated 1.5.2016 found it fit and proper to refer the matter to the District Inspector of Schools.

10. The District Inspector of Schools under the order impugned in the writ petition dated 10.5.2016 has observed that the seniority list of the year 2016-17 appended with the resolution of the Committee of Management has not been signed by the respondent no.5. Further having regard to the orders of regular appointment of the petitioner Sri Sant Raj made under Section 14(6) of the U.P. Secondary Education Services Selection Board, Rules 1998 he is Junior to respondent no. 5, namely Bhagwat. He has, therefore, decided that the signatures of Sri Bhagwat, respondent no. 5 be attested as officiating Principal of the institution and the charge may be given to him accordingly.

11. Against this order the writ petition No. 26616 of 2016 was filed by Sant Raj. Placing reliance upon the judgment of **Santosh Kumar Dubey and Narendra Singh Solanki (supra)** the contended that the order of the District Inspector of Schools is a result of complete non-consideration of the relevant issues that is the date of substantive promotion of the petitioner would relate back to his initial date of ad-hoc appointment.

12. We have heard learned counsel for the parties and have examined the records of the appeal as well as the writ petition. Learned counsel for the parties would agree that in case of dispute relating to inter-se seniority of two teachers of the institution, the Committee of management/Authorized Controller is the competent authority to take a decision at the first instance. Ref: Regulation 3 (1)(e) of Chapter-II of the Regulation framed under the Intermediate Education Act. Any of the party aggrieved by the said decision, can approach the Regional Joint Director of Education **Regulation 3(b) of Chapter-II** of the resolutions framed under the Intermediate Education Act.

13. In the facts of the case normally we would have insisted upon the Committee of management to determine the dispute of seniority between petitioner and respondent no. 5 but we find that the Committee has already taken a decision to refer the dispute pertaining to the seniority and consequential appointment on the post of officiating Principal to the District Inspector of Schools.

14. It is agreed between the parties that the person who is found to be senior most amongst the petitioner-respondent no.5 would become entitled to be appointed as officiating Principal in view of Section 18 of the Act.

15. In our considered opinion, the appointment on the post of principal is essential for administration and smooth functioning of the educational institution. Looking to the interest of the students of the Institution, we feel that the controversy must be resolved at the earliest.

16. We, therefore, require both the parties to represent their claim pertaining to the seniority before the Regional Joint Director of Education within two weeks alongwith the certified copy of this order. The Regional Joint Director of Education is further directed to take an appropriate decision in the matter of inter-se seniority of petitioner Sant Raj and respondent no.5, preferably within a period of four weeks, thereafter, without being influenced by any of the observations made by the learned Single Judge in the order under challenge in Special Appeal. The Regional Joint Director of Education shall summon the original record from the committee of management of the institution as may be required and shall pass a reasoned and speaking order keeping in mind the law applicable.

17. For a period of six weeks from today, status quo with regard to the post of officiating Principal shall be maintained which shall thereafter abide by the order to be passed by the Regional Joint Director of Education.

18. With the aforesaid observations/directions both the writ petition and the special appeal are disposed off.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No.- 442 Of 1997

Union Of India **...Appellant**
Versus
Ram Narayan Prasad **...Respondent**

Counsel for the Appellant:
Tarun Varma.

Counsel for the Respondent:
K.C. Sinha, A.K. Rai, A.P. Tiwari, R.C. Tripathi, S.K. Dwivedi, S.N. Singh, S.S. Tripathi, Shashi Kant Rai, T.M. Khan

Civil Law—Second Appeal — Railway Protection Force — Unauthorised absence from duty — Departmental enquiry — Removal from service — Leave without pay — 'No work no pay' — Condoning the misconduct — Double jeopardy — Order XLI Rule 22 C.P.C. — Cross objections — Reasonable opportunity of defence — Principles of natural justice — Railway Protection Force Rules, 1959 — Penalty — Manifest error of law —

Perversity — Impugned judgement and decree set aside — Judgement and decree of trial court affirmed and restored — Suit dismissed — Appeal allowed.

The brief facts relating to the case as mentioned in plaint are, that plaintiff, a constable in Railway Protection Force, hereinafter mentioned as R.P.F., fell ill on 18.7.1975 whereafter he left for his home town and was under treatment in Deoria for a period from 5.11.75 to 5.6.76; that the plaintiff returned to his duty on 19.6.76 with medical certificate, upon which he was permitted to join on 23.6.76; that Departmental enquiry was initiated against the plaintiff, who was served with the charge sheet for dereliction in duties and unauthorized absence from duty for a period of 19.7.75 to 7.6.76 and on completion of enquiry was punished with the removal from service.(Para 2)

In Civil Suit filed by plaintiff/respondent a decree for declaration was sought with the prayer that "it be declared that order No.E/P.R.O.-1476 dated 15.1.1977 passed by Assistant Security Officer, the order of the Assistant Security Officer, Varanasi communicated vide A.S.O. Gorakhpur No.E.PRO-1476/633 dated 13/15.9.1978 and the order dated 24.6.81 passed by the Chief Security Officer, Gorakhpur are illegal, unconstitutional and against law rules and principles of natural justice and the same is not binding upon the plaintiff and he is continuing in service". The defendant/appellant filed a written statement denying the allegations made in plaint and pleaded that the suit is not maintainable and is liable to be dismissed with costs. (Para 3)

Held:(Paras 30-31)

1. In view of the discussions made above, I find that the impugned judgement and decree dated 6.1.1997 passed by IXth Additional Judge, Gorakhpur in Civil Appeal no. 78 of 1991 (Ram Narayan vs. Union of India) are wrong and illegal and are liable to be set aside and the judgement and decree dated 28.4.1986 passed by trial court, the Additional Civil Judge/J.S.C.C. Gorakhpur in Civil Suit No.214 of 1983 (Ram Narayan vs. Union of India) are liable to be affirmed and restored.

2. Accordingly, the Second Appeal No.442 of 1997 is **allowed** the impugned judgement and decree dated 6.1.1997 passed by IXth Additional Judge, Gorakhpur in Civil Appeal no. 78 of 1991 (Ram Narayan vs. Union of India) are set aside and Civil Appeal No.78/1991 stands dismissed, while the judgement and decree dated 28.4.1986 passed by trial court the Additional Civil Judge/J.S.C.C. Gorakhpur in Civil Suit No.214 of 1983 (Ram Narayan vs. Union of India) are affirmed and restored, and suit of plaintiff/respondent stands dismissed with costs.

Case Law discussed:-

1. Union of India vs. Rajendra Singh, AIR 1993 SC 205 — (Para-21)
2. Chennai Metropolitan Water Supply and Sewerage Board and others vs. T.T. Murali Babu, (2014) 4 SCC 108 — (Para-22)
3. State of U.P. vs. Madhav Prasad Sharma, (2011) 2 SCC 212 — (Para-25)
4. Poorvanchal Bank vs. Umesh Prasad Gupta, 2015 (4) ADJ 364 — (Para-26)
5. Krushnakant B. Parmar vs. Union of India and another, 2012 CJ (SC) 525 — (Para-27)

(Delivered by Hon'ble Harsh Kumar, J.)

1. This second appeal has been filed by the Union of India through General Manager, North Eastern Railway, Gorakhpur against the judgement and decree passed by IXth Addl. District

Judge, Gorakhpur in Civil Appeal No.78 of 1991, arising out of original suit no.214 of 1983 Ram Narayan Prasad versus Union of India.

2. The brief facts relating to the case as mentioned in plaint are, that plaintiff, a constable in Railway Protection Force, hereinafter mentioned as R.P.F., fell ill on 18.7.1975 whereafter he left for his home town and was under treatment in Deoria for a period from 5.11.75 to 5.6.76; that the plaintiff returned to his duty on 19.6.76 with medical certificate, upon which he was permitted to join on 23.6.76; that Departmental enquiry was initiated against the plaintiff, who was served with the charge sheet for dereliction in duties and unauthorized absence from duty for a period of 19.7.75 to 7.6.76 and on completion of enquiry was punished with the removal from service.

3. In Civil Suit filed by plaintiff/respondent a decree for declaration was sought with the prayer that "it be declared that order No.E/P.R.O.-1476 dated 15.1.1977 passed by Assistant Security Officer, the order of the Assistant Security Officer, Varanasi communicated vide A.S.O. Gorakhpur No.E.PRO-1476/633 dated 13/15.9.1978 and the order dated 24.6.81 passed by the Chief Security Officer, Gorakhpur are illegal, unconstitutional and against law rules and principles of natural justice and the same is not binding upon the plaintiff and he is continuing in service". The defendant/appellant filed a written statement denying the allegations made in plaint and pleaded that the suit is not maintainable and is liable to be dismissed with costs.

4. Upon parties pleadings, the trial court framed as many as 8 issues out of which issue No.3 was framed regarding maintainability of suit and issue No.1 was framed with regard to validity of orders dated 15.1.77, 13.9.78 and 24.6.81.

5. After recording the evidence of both the parties and analysing the evidence on record, the trial court upholding the validity of the above three orders dated dated 15.1.77, 13.9.78 and 24.6.1981 decided issue No.1 against the plaintiff and holding that the suit is not maintainable decided, the issue No.3 in favour of the defendant and dismissed the suit with costs.

6. Feeling aggrieved, the plaintiff filed Civil Appeal No.78 of 1991 under Section 96 of C.P.C. before the District Judge, Gorakhpur, which was transferred to and was decided by IXth Additional District Judge, Gorakhpur allowing the appeal and decreeing the suit. In the impugned judgement and decree the lower appellate court confirmed the findings of the trial court on all points except one and holding that the grant of leave without pay to the plaintiff/respondent by the defendant/appellant, amounts to condoning the alleged misconduct of plaintiff, (of his remaining absent from duty without notice) and so further punishment of removal from service, for the same misconduct, which was condoned is not permissible under law.

7. Feeling aggrieved, the defendant/appellant has come before this Court in Second Appeal challenging the above findings of First Appellate Court.

8. Following 3 substantial questions of law were framed in the appeal, question no.1 on 26.8.2014 and questions no.2 and 3 on

18.5.2016.

(1). Whether the unauthorised absence from duty of a enrolled number of Disciplined Armed Forces is amount to misconduct under the R.P.F. Act 1957 and punishment of removal is justified under Rule 156(b) III, of the R.P.R., Rules, 1987?

(2). Whether the plaintiff-respondent was not allowed pay for the unauthorised period of absence from 19.7.1975 to 7.6.1976 on the basis of principle of 'no work no pay', it was open for the lower appellate court to treat the same as sanctioned leave by the competent authority without pay? If so its effect?

(3). Whether the suit is hit by the provisions of Sections 14, 34 and 41 (h) of the Specific Relief Act? And whether the suit is maintainable in civil court?

9. The learned counsel for defendant/appellant contended that the salary for the period of unauthorised absence of plaintiff/ respondent was refused only on the principle of "no work no pay" and it may neither be treated as sanctioning of leave without pay for the period of unauthorised absence to the plaintiff/ respondent nor may amount to condoning his misconduct by his employer the defendant/appellant; that no cross-objections have been filed by the plaintiff/respondent in this Second Appeal U/OXLI R22 CPC; that the learned trial court has rightly held that plaintiff/ respondent remained absent from duty for a considerable period from 19.7.1975 to 7.6.1976 without even any information and his absence from duty was unauthorized, amounting to dereliction in duty; that upon joining of duty by him, disciplinary departmental enquiry was initiated against him, he was served with the charge sheet and on completion of enquiry proceedings was held guilty of misconduct and dereliction in duty in the departmental enquiry and consequently was rightly removed from service; that the above order of removal from service was upheld by the higher appellate authorities in the department and the decision of disciplinary authorities/employer, may not be challenged before the Civil Courts and may not be declared invalid, illegal or unconstitutional by Civil Courts; that even if the plaintiff/ respondent was aggrieved with the order of removal from service passed by the authority, he could have challenged the order by filing writ petition but he did not do so; that the plaintiff/ respondent was refused the pay/salary for the period of his unauthorised absence on the principle of "no work no pay" and it may not be treated as sanctioning of leave without pay for the period of unauthorised absence and condoning the misconduct of plaintiff/respondent; that the learned lower appellate court has acted wrongly in treating that the plaintiff/respondent was punished by granting leave without pay for the period of unauthorised absence and so he may not be punished any further; that the Railway Protection Force Rules 1959 do not provide any punishment for non-payment of pay for any specific period of absence and due to non-payment of salary for the period of absence of plaintiff/respondent, on the principle of 'no work no pay' he may not be treated to have been pardoned condoning his misconduct to have been duly punished for such misconduct; that it is settled principle of law that even upon sanctioning of leave without pay for the period of absence, the same cannot be treated to be condoning of the misconduct so as to bar initiation of disciplinary proceedings; that after refusal of salary for the period of absence on the principle of 'no work no

pay' the punishment order for removal from service, may not be held to be illegal on ground of double jeopardy.

10. Per contra, learned counsel for the respondents submitted that the plaintiff/respondent was granted leave without pay for the period of his absence during which he could not attend the duty because of his illness and several other circumstances beyond his control and the sanctioning of 'leave without pay' amounts to condoning of his alleged misconduct, that the plaintiff was duly punished by non-payment of salary for the period of absence, condoning his alleged misconduct; that after condoning his misconduct, no disciplinary enquiry could have been initiated against him and he could not have been punished with removal from service or otherwise; that the First Appellate Court has rightly decreed the suit; that the appeal has been filed with absolutely wrong and baseless allegations and is liable to be dismissed with costs.

11. Upon parties pleadings, the trial court which had framed issue no.1 to the effect that "whether orders dated 15.1.1977, 13/15.9.1978 and 24.6.1981 are wrong and illegal for the reasons given in the plaint", upon detailed discussions and analysis of evidence on record, held that *"the appointing authority of plaintiff/respondent, as per his appointment letter was Assistant Security Officer and he was competent to pass impugned order dated 15.1.1977 removing the plaintiff/respondent from service due to carelessness and dereliction in performance of his duties"*. It has been categorically found by the trial court that the plaintiff/ respondent remained absent from duty without notice for a period from 19.7.1975 to 7.6.1976 and he was given sufficient reasonable opportunity of defence in the disciplinary inquiry, cross examined the witnesses, and that the disciplinary proceedings were conducted in accordance with principles of natural justice after affording reasonable opportunity and due to sanctioning of the leave without pay for the period of absence to the plaintiff/ respondent, it may not be said that by sanctioning leave without pay for the relevant period, the misconduct of plaintiff/respondent was condoned and he was duly punished and could not have been punished with the removal from service. On above findings, the trial court dismissed the suit.

12. It is pertinent to mention that in Civil Appeal No.78 of 1991 before the District Judge, Gorakhpur filed by plaintiff/respondent, the Appellate Court has come to the conclusion that Assistant Security Officer was competent to remove the plaintiff/respondent from service and that he was given reasonable opportunity of defence in the departmental inquiry, and thus affirmed the findings given by the trial court. However, considering that since in the impugned order of removal from service dated 15.1.1977 passed by Assistant Security Officer, it has been stated that for the period of his absence from duty from 19.7.1975 to 7.6.1976 he is being granted leave without pay, it held that it will be deemed that the period of his absence was condoned and the wrong done by plaintiff/respondent was pardoned and so he may not be punished again and the impugned order of punishment removing him from service is not in accordance with law. For the above reasons the Appellate Court held that the charge of absence from duty without notice had become baseless and meaningless, when he was punished with sanction of leave without pay for above period. With this finding the appeal was allowed and setting aside the judgement and decree passed by the trial court, the suit of plaintiff/ respondent was decreed with costs.

13. On the first substantial question of law framed on 26.8.2014, parties counsel agreed that the case of plaintiff/ respondent is governed by the Railway Protection Force Rules, 1959 and since the 1987 Rules have come in force after passing of impugned orders in disciplinary enquiry, during the pendency of suit those 1987 Rules have no applicability to the case of plaintiff/ respondent. Parties counsel also agreed that substantial question of law No.1 framed on 26.8.2014 is defective and does not exist for consideration and the appeal is required to be disposed of only on two substantial questions of law framed on 18.5.2016, which are the only substantial questions of law involved in this second appeal under Section 100 of the Code of Civil Procedure.

14. It is pertinent to mention that though in the impugned judgement and decree the findings are against the plaintiff/respondent on all issues except on the point that since grant of leave without pay for the period amounts to condoning the misconduct so punishment for removal from service may not be imposed (which finding has been challenged by defendant/appellant). However in order to assail the correctness of the finding of trial court which were affirmed by the Appellate Court, regarding competency of Assistant Security Officer to pass the order and giving reasonable opportunity of hearing and defence, as well as his unauthorised absence from duty without notice, the plaintiff/respondent has opted not to file any cross objections, as required under Rule 22 of Order XLI of the Code of Civil Procedure.

15. The above provisions of Order XLI Rule 22 of the Code of Civil Procedure are being reproduced hereunder :-

"22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.-

(1) Any respondent, though he may not have appealed from any part of the decree, ***may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour;*** *and may also take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing or appearance the appeal, or within such further time as the Appellate Court may see fit to allow:*

Explanation: A respondent aggrieved by a finding of the court in the judgement on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent."

16. In absence of any such objections, the above findings of misconduct of plaintiff/ respondent in remaining unauthorisedly absent from duty for a period of about one year from 19.7.1975 to 7.6.1976, affording of reasonable opportunity of defence to him in departmental enquiry, in accordance of principles of natural justice, as well as competency of Assistant Security

Officer to pass order of punishment removing him from service may not be challenged by him and the concurrent findings of two courts below on this point may not be interfered by this Court in absence of any manifest error, or perversity and are liable to be affirmed.

17. In respect of the substantial question no.2, admittedly, the plaintiff/respondent was member of disciplined Armed Force and he remained absent from duty for a long period from 19.7.1975 to 7.6.1976, without any information and upon service of a charge sheet for his carelessness and dereliction in duty in disciplinary proceedings, upon being held guilty of above charges, the order for his removal from service was passed by appointing authority the Assistant Security Officer, on 15.1.1977. The learned counsel for plaintiff/respondent has emphasized that since for the period of absence, the plaintiff respondent was not given salary and was sanctioned leave without pay, first of all, the alleged misconduct amounts to have been condoned and pardoned, and secondly, since plaintiff/ respondent was punished with non-payment of salary for the above period, he may not be punished any further, and the punishment of his removal from service amounts is hit by principle of "double jeopardy", as imposition of two punishments for one and same wrong is not permissible under law.

18. Admittedly, Railway Protection Force Rules, 1959 were applicable in this case of plaintiff/respondent. Before proceeding further it will be expedient to reproduce the provisions of punishments, which may be imposed in case of any disciplinary enquiry under the Railway Protection Force Rules, 1959 as have been prescribed under Rule 41 and 42. Rules 41 and 42, which are relevant in the case of plaintiff/respondent, are as under :-

"41. Nature of penalties.- *The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a member of the Force, namely,*

(a) dismissal ;
(b) removal ;
(c) compulsory retirement ;
(d) reduction to a lower class or grade or to alower time-scale or to a lower stage in the time-scale of pay ;
(e) withholding of increment or promotion ;
(f) removal from any office of distinction ordeprivation of any special emolument :
(g) fine to any amount not exceeding 7 days' pay ;
(h) censure,

Explanation.- The following shall not amount to a penalty within the meaning of this rule-

(i) withholding of increment of a member of the Force for failure to pass a departmental examination in accordance with the rules, or orders governing the class or grade or rank or post or the terms of his appointment ;

(ii) stoppage of a member of the Force at theefficiency bar in a time scale on the ground of his unfitness to cross the bar ;

(iii) non-promotion, whether in a substantive orofficiating capacity of a member of the Force, after consideration of his case, to a class, grade, rank or post for promotion to which he is eligible ;

(iv) reversion to a lower class, grade, rank or post of a member of the Force officiating in a higher class, grade, rank or post on the ground that he is considered after trial, to be unsuitable for such higher class, grade, rank or post or on administrative grounds unconnected with his conduct ;

(v) reversion to his permanent service, grade orpost of a member of the Force appointed to the Force on probation during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing probation ;

(vi) replacement of the services of a member of the Force whose services have been borrowed from a State Government or an authority under the control of a State Government, at the disposal of the authority which had lent his services ; (vii) compulsory retirement of a member of the Force in accordance with the provisions relating to his superannuation or retirement ;

(viii) termination of services-

(a) of a member of the Force appointed onprobation, during or at the end of the period of probation, in accordance with the terms of his appointment or the rules and orders governing probation ; or

(b) of a member of the Force employedunder an agreement in accordance with the terms of such agreement ;

(c) of a member of the Force appointed in atemporary capacity or for a specified period on one month's notice or on tender of pay of one month in lieu of notice on the expiry of the period.

42. Petty punishments.- *Head Rakshaks, Senior Rakshaks and Rakshaks may also be punished with confinement to quarters for a term not exceeding 14 days with or without punishment drill, extra guard, fatigue or other duty."*

19. The above provisions clearly shows that withholding the salary for the period of absence, or granting leave without pay for the period, is not a punishment provided under Railway Protection Force Rules, 1959.

20. In the impugned judgment and decree the first Appellate Court relying on an unreported judgement dated 7.11.1992 of this Court in the case of **Union of India** vs. **Shiv Sharan,** in **Second Appeal No.316 of 1979,** held that, "by grant of leave without pay for the period of absence of the plaintiff it will be deemed that the misconduct of plaintiff was condoned and so giving him punishment of removal from service may not be lawful and correct."

21. The above judgement in Second Appeal no.316 of 1979 was not brought before me either of by the parties. However, the learned counsel for defendant/appellant argued that the above case law by single Judge has no applicability to the facts of the case and is not good law in view of the latest case laws delivered by the Apex Court.

22. In the case of **Union of India** vs. **Rajendra Singh, AIR 1993 SC 205** in the similar matter, reversing the decision of Allahabad High Court the Apex Court held that

"Under Railway Protection Force Rules, 1959 power of appointment does not rest merely with Chief Security Officer and since Rule 20 gives power of appointment to Assistant Security Officer also, the Rakshak appointed by Assistant Security Officer can be dismissed by him".

23. Similarly in the case of **Chennai Metropolitan Water Supply and Sewerage Board and others** vs. **T.T. Morali Babu,** (**2014) 4 SCC 108,** the Apex Court held that

"it is the duty of employee to maintain discipline, act with responsibility, perform duty with sincerity and serve institution with honesty and that the order of dismissal from service for unauthorized absence of employee for a long period, is not disproportionate to the gravity of misconduct."

24. The learned counsel for defendant/appellant has submitted that the salary for the period of unauthorized absence was refused on the principle of *'no work no pay'* and on this principle on sanctioning of leave without pay for the period, it may neither be considered as punishment imposed for dereliction in duty nor may be treated as condoning the absence or misconduct nor imposition of punishment for removal from service may be considered as imposition of double punishment for one and the same wrong, and the first Appellate Court has acted wrongly in holding that granting of leave without pay for the period of unauthorized absence, amounts to condoning the unauthorized absence as well as misconduct.

25. Rules 41 and Rule 42 of the Railway Protection Force Rules, 1959 applicable in the case of plaintiff/respondent, do not provide any penalty like, "granting leave without pay for the period of unauthorised absence" and since no such punishment is provided under rules, it may not be considered that the plaintiff/ respondent was firstly punished with "no pay" for the period the period of unauthorised absence, and secondly with removal from service, rather the 'leave without pay' was sanctioned only under principle of 'no work no pay' and not by way of penalty or punishment.

26. In case of **State of U.P.** vs. **Madhav Prasad Sharma, (2011) 2 SCC 212,** considering the question of double punishment in the matter of Misconduct – Absenteeism, the Apex Court held that

"In case of absence having been categorized as 'leave without pay', such categorization is not one of the punishments prescribed under Rules – and the denial of salary on ground of 'no work no pay' cannot be treated as a penalty. Holding the findings of single judge that delinquent employee was subjected to two punishments viz., leave without pay and termination of service for the same charge erroneous, it held that the doctrine of double jeopardy is inapplicable in such circumstances and denial of pay on the principle of 'no work no pay', is not a penalty."

27. In paragraphs 17, 18 and 19 of the above judgment the Apex Court held as under :-

"17. Doctrine of double jeopardy enshrined in Article 20(2) of the Constitution of India has no application in the event of there being only one punishment awarded to the respondent under the Rules on charges being proved during the course of disciplinary enquiry. The law laid down by this Court in the case of Union of India vs. Datta Linga Toshatwad (2005) 13 SCC 709 and Maan Singh vs. Union of India, (2003) 3 SCC 464 fully apply in the facts and circumstances of the present case.

18.In State of Punjab & others vs. Bakshish Singh, (1998) 8 SCC 222 this Court has dealt with a case wherein the trial court as well as the First Appellate Court and the High Court had taken the view that in case unauthorized absence from duty had been regularized by treating the period of absence as leave without pay, the charge of misconduct did not survive. However, without examining the correctness of the said legal proposition, this court allowed the appeal on other issues. As the said judgment gave an impression that this Court had laid down the law that once unauthorized absence has been regularized, the misconduct would not survive, the matter was referred to the larger bench in Maan Singh's case wherein this Court clarified that the earlier judgment in Bakshish Singh, did not affirm the said legal proposition and after following the judgment of this court in State of M.P. vs. Hari Har Gopal & Others, (1969) 3 SLR 274 (SC) disposed of the case clarifying that this court in Bakshish Singh dealt with only on the issue of remand by the High Court as well as by the Ist Appellate Court to the punishing authority for imposing the fresh punishment.

19. This Court held as under:

"Bakshish Singh's case is not an authority for the proposition that the order terminating the employment cannot be sustained inasmuch as in the later part of the same order the Disciplinary Authority also regularized unauthorized absence from duty by granting an employee leave without pay."

This Court further held that the law laid down by this court in Hari Har Gopal (supra) wherein it had been held that in absence of regularization of unauthorized absence it may not be possible for the employer to continue with the disciplinary proceedings as there would be break in service and thus, regularization of such absence even without pay is justified. It is so necessary to continue with the disciplinary proceedings."

28. In a latest pronouncement of a Division Bench of this Court in the case of **Poorvanchal Bank** vs. **Umesh Prasad Gupta, 2015 (4) ADJ 364** it was held that

*"loss of pay based on the principle of 'no work no pay' is an action quite separate and distinct from a disciplinary proceedings which may visit an employee and relying on the case law laid down by the Apex Court in the case of **Madhav Prasad Sharma** (supra) held that in any case, even if for the sake of arguments it is assumed that the appellant had been sanctioned leave without pay during the period of unauthorized absence, which is the subject matter of the present disciplinary proceedings, the same would neither absolve the respondent of the misconduct, nor would reduce the rigour of misconduct so as to justify interference with the order of disciplinary authority on the doctrine of double jeopardy."*

29. On the other hand, the learned counsel for plaintiff/respondent has relied on the decision of Apex Court in the case of **Krushnakant B Parmar** vs. **Union of India and another. 2012 CJ (SC) 525** wherein in paras 16, 17 and 18 it has been observed that

"only unauthorized absence from duty amounts to failure of devotion to duty or behaviour unbecoming of a government servant which cannot be decided without deciding the question whether the absence is willful or because of compelling circumstances and if it is a result of compelling circumstances it cannot be held to be willful".

30. The above case law has no application to the facts of case of the appeal in hand as the plaintiff/respondent has failed to show any such compelling circumstances to the disciplinary authority or before the two courts below, rather the disciplinary authorities as well as the two courts below have found that the plaintiff/ respondent remained unauthorisedly absent from duty without any reasonable cause or excuse or even notice, for a long period of about one year.

31. In view of the discussions made above, I am of the considered view that by granting leave without pay for the unauthorized period of absence of plaintiff/respondent for the period from 19.7.1975 to 7.6.1976 on the principle of 'no work no pay' neither any penalty or punishment was imposed on the plaintiff/ respondent nor his misconduct was condoned nor imposition of punishment of removal from service is hit by doctrine of double jeopardy or double punishment, for one and the same wrong. The findings of lower Appellate Court that sanction of leave without pay amounts to condoning the misconduct and holding imposition of punishment by the impugned order dated 15.1.1977, of removal of plaintiff/respondent from service, to be wrong and illegal, are absolutely wrong, erroneous, incorrect and against law. The above findings of appellate court suffers from manifest error of law and are perverse also and may not be permitted to stand, and are

liable to set aside. The substantial question of law no.2 and 3 are accordingly decided in favour of defendant/appellant and against the plaintiff/respondent. Since the substantial question of law no.1, is non-existent and no arguments were advanced on that question the same is decided in negative.

32. In view of the discussions made above, I find that the impugned judgement and decree dated 6.1.1997 passed by IXth Additional Judge, Gorakhpur in Civil Appeal no. 78 of 1991 (Ram Narayan vs. Union of India) are wrong and illegal and are liable to be set aside and the judgement and decree dated 28.4.1986 passed by trial court, the Additional Civil Judge/J.S.C.C. Gorakhpur in Civil Suit No.214 of 1983 (Ram Narayan vs. Union of India) are liable to be affirmed and restored.

33. Accordingly, the Second Appeal No.442 of 1997 is allowed the impugned judgement and decree dated 6.1.1997 passed by IXth Additional Judge, Gorakhpur in Civil Appeal no. 78 of 1991 (Ram Narayan vs. Union of India) are set aside and Civil Appeal No.78/1991 stands dismissed, while the judgement and decree dated 28.4.1986 passed by trial court the Additional Civil Judge/J.S.C.C. Gorakhpur in Civil Suit No.214 of 1983 (Ram Narayan vs. Union of India) are affirmed and restored, and suit of plaintiff/respondent stands dismissed with costs.

34. In the circumstances of the case the parties shall bear their own costs of the Appeal.

35. After preparation of decree the record be sent to trial court without any unnecessary delay.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 508 Of 1983

Bachchu & Ors. **...Appellants**
Versus
State of U.P. **...Respondent**

Counsel for the Appellants:
Anis Ahmad Khan, Mohd. Shabbir

Counsel for the Respondent:
A.G.A

Sole surviving appellant Bachchu has preferred this criminal appeal against the order dated 28.2.1983 passed by Vth Additional Sessions Judge, Hamirpur in S.T. No.221 of 1980 (State Vs. Bachchu & another) arising out of Crime No.55 of 1980, P.S. Khanna, District Hamirpur whereby Bachchu and deceased appellants Kariya and

Basira have been convicted under Section 302 I.P.C. read with Section 34 I.P.C. and 323 I.P.C. read with Section 34 I.P.C.

The judgment and order dated 28.2.1983 passed by Vth Additional Sessions Judge, Hamirpur in S.T. No.221 of 1980 (State Vs. Bachchu & another) arising out of Crime No.55 of 1980, P.S. Khanna, District Hamirpur does not require any interference. The criminal appeal is, accordingly, dismissed. Appellant Bachchu is on bail, his bail bonds are cencelled and he is directed to surrender in the court below to serve the remaining period of his sentence.

Held: Para-

Case Law discussed:
Ram Gopal Vs. State of Rajasthan (1998) 6 SCC 441;
Chapho @ Jakal Vs. State of Kerala (1998) 6 S.C.C. 602;
Nallamsetty Yanadaiah and others Vs. State of Andhra Pradesh 1993 Cri.L. J.
Vithal Pundalik Zendge Vs. State of Maharashtra (2009) (2) ACR 1497 (SC);
G.S. Walia Vs. State of Punjab and others (1998) 5 SCC 150;
State of U.P. Vs. Premi and others 2003 Cri.L. J. 1554;
Amar Singh Vs. Balwinder Singh and others, 2003 Cri. L.J. 1282;

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Sole surviving appellant Bachchu has preferred this criminal appeal against the order dated 28.2.1983 passed by Vth Additional Sessions Judge, Hamirpur in S.T. No.221 of 1980 (State Vs. Bachchu & another) arising out of Crime No.55 of 1980, P.S. Khanna, District Hamirpur whereby Bachchu and deceased appellants Kariya and Basira have been convicted under Section 302 I.P.C. read with Section 34 I.P.C. and 323 I.P.C. read with Section 34 I.P.C. and sentenced to life imprisonment, rigorous imprisonment for three months respectively and a fine of Rs.500/- with default stipulation.

2. The appeal filed on behalf of appellant no. 2 Kariya and appellant no. 3 Basira stands abated on account of their death.

3. The prosecution story in nutshell is that on 17.4.1980 informant Hayat Ahmad (P.W. 1), his deceased brother Safat, his sister Sabbo (injured) and his wife Smt. Jabbo (injured) (P.W. 2) were working in the barn (Khalihan). His brother-in-law, Usman (sister's husband) (P.W. 3) was also present in his own barn which was located adjacent to the barn of informant Hayat Ahmad. The barn (Khalihan) of accused persons namely, Bachchu and Kariya sons of Subhan is also adjacent to the barn of Usman and located towards its south.

4. Accused appellants Bachchu, Kariya and Basira entered into the barn of Usman probably for approaching their own barn located towards south. Accused Bachchu was armed with farsa (axe) , Kariya was armed with Barchi (spear) and Basira was armed with lathi. Usman (P.W. 3) asked them to withdraw. They started abusing Usman, brother-in-law of informant. Deceased Safat objected to such abuses and asked them not to commit encroachment in future.

5. All three accused got infuriated. They jumped towards the barn of Safat and assaulted him. Deceased Safat was given Lathi, Farsa (axe) and Barchi (spear) blows. Smt. Sabbo and Smt. Jabbo were also beaten with lathies when tried to rescue Safat Ahmad. P.W. 1, Hayat Ahmad saved himself by running towards the barn of Usman. They raised alarm, whereupon Gayasuddin, Ram Singh and Chunni etc. arrived on the spot and witnessed the incident. Injured Safat Ahmad sustained Barchi (spear) blows in his stomach and also sustained various injuries on the other part of the body. On arrival of the witnesses, accused persons ran away from the spot. The injured persons were taken by bullock cart to home. The informant Hayat Ahmad dictated F.I.R. to one Gulam Mohammad. The injured were then taken to police station Khanna where report was lodged (Ex. Ka 1). The condition of injured Safat Ahmad was deteriorating, so he was sent to district head quarter Hamirpur for treatment from where he was referred to Kanpur. Informant Hayat Ahmad took injured Safat in a bus to Kanpur where he was operated on the second day but succumbed to injuries, on third day. Autopsy was conducted. The criminal case earlier registered under Section 307 I.P.C. was converted into 304 I.P.C. The entire dispute was investigated and thereafter a charge sheet under Sections 304, 323 and 324 I.P.C. was submitted against accused persons Bachchu, Kariya and Basira. The Chief Judicial Magistrate committed the case to the court of Sessions Judge vide order dated 5.8.1980. The trial Judge framed charges against the appellants under Sections 302/34, 323/34 I.P.C. The accused persons denied all charges and claimed to be tried. During course of trial, testimony of as many as 8 witnesses was recorded by prosecution, namely, P.W. 1 Hayat Ahmad, P.W. 2 Smt. Jabbo (injured), wife of informant Hayat Ahmad, P.W. 3 Usman (eye witness), P.W. 4 Kamta Prasad (Head Constable), P.W. 5 Ram Bir Singh (constable), P.W. 6 Dr. R.S. Verma, P.W. 7 Sarman Singh (Sub Inspector) and P.W. 8 Dr. R.S. Kushwaha.

6. After recording statement of accused persons under Section 313 Cr.P.C., they were provided opportunity to adduce evidence in defence but accused persons did not enter into any defence either oral and documentary. Trial Judge found that there is sufficient evidence to establish the offence under Section 302/34 I.P.C. and 323/34 I.P.C., therefore, accused persons Bachchu, Kariya and Basira were convicted under aforesaid sections and sentenced to life imprisonment under Section 302/34 I.P.C. and sentence of three months under Section 323/34 I.P.C. and fine of Rs.500/- with default stipulation vide judgment and order dated 28.2.1983. This judgment is under challenge before this Court.

7. As stated earlier appellant no. 2 Kariya and appellant no. 3 Basira have died, therefore, this Court is only concerned with the appeal of appellant no.1 Bachchu. Appeal of appellants Kariya and Basira stands abated.

8. Heard Sri Mohd. Shabbir Ahmad, learned counsel for appellant no. 1 and Sri Saiyed Ali Murtaza, learned A.G.A. on behalf of State.

9. Learned counsel for appellant has submitted that there was no motive for appellant to attack the deceased Safat and that; incident occurred during the night and no one was present inside the barn (Khalihan) during night. After recovery of corpse of Safat Ahmad appellants have been implicated on account of previous enmity. Learned counsel for appellant has also submitted that

medical evidence is not consistent with the oral evidence. The testimony rendered by witnesses is full of contradictions creating doubt about their presence on the spot. Learned counsel for the appellant has also argued that all witnesses are related to each other and not a single independent witness has been produced despite their availability. It has also been submitted that the story discloses that both parties were busy in their post harvesting agricultural work in their respective barns (Khalihan) and there was no occasion for accused persons to assault deceased Safat and two women.

10. On the contrary, learned A.G.A. has submitted that testimony of witnesses cannot be discarded merely on the ground of inter-se relationship. The evidence of witnesses has to be weighed on the touch stone of credibility. If testimony of witness is trustworthy, it cannot be rejected merely on the ground of previous enmity with the accused persons or on account of their relationship with the deceased. It has also been submitted that deceased Safat Ahmad sustained several injuries on his persons which have been shown in the testimony of P.W. 8 Dr. R.S. Kushwaha. Dr. Kushwaha examined deceased Safat before his death at Hamirpur and found following injuries on his persons:

(1) Lacerated wound 5 cm x 5 cm. bone deep on the vertex 13 cm. above the occipital prominence.

(2) Incised wound 9 cm.x .5 cm.x skin deep on the outer side of upper arm 15 cm. above the right elbow.

(3) Incised wound 5 cm.x 1 cm.x skin deep on the outer side of right upper arm closed to injury no. 2.

(4) Penetrating injury 1 cm x.5 cmx4 cm. in right hypocondrium death and nature may be decided in operation theater under observation.

(5) Contusion 8 cm x 5 cm. on the left upper chest in between Ist and second inter castal space from external border towards side under observation.

(6) Contusion 5 cm. x 1 ½ cm. on the right supera scapular region from upper angle of scapula to down-wards.

(7) Contusion 11 cm x 2 cm on the left back from left shoulder to downwards.

(8) Abrasion 14 cm. x .1 cm on the front of chest from 5th right casto condral junction to downwards froward in a right hypoconduran.

11. Dr. R.C. Kushwaha also found following injuries on the person of Smt. Jabbo, wife of Hayat another injured:

(i) contusion 7 cm.x 2 cm. on the out side left thigh 3 cm. below Iliac

(ii) Contusion 9 cm. x 2 cm. on the out side of left thigh 9 cm. below Illiac Crez 6 cm. below injury no. 1.

12. The same Dr. R.C. Kushwaha has also examined another injured Smt. Sabbo and prepared his report as follows:-

(1) Contusion 7 cm. x 5 cm. x 5 cm. on the other side of left forearm 9 cm. below left elbow.

13. We have carefully scanned all available evidence on record. A bare perusal of this evidence would reveal that the barn of accused persons, deceased Safat and his sister's husband Usman are adjacent to each other. Site plan (Ex. Ka-10) also establishes this fact. The entry in the barn (Khalihan) of accused persons is from the side of east while the same entry in the barn of deceased Safat and his brother-in-law are from the west side. Apparently, the accused persons entered the barn of Usman using shortcut to enter their own barn located towards south. The evidence further reveals that both parties were on inimical terms. Subhan the father of accused Bachchu was convicted for the murder of Imammuddin, uncle of informant. The evidence would further reveal that bad blood continued to the next generation and there were several instances of litigation between the members of both families on various occasions. There is absolutely no doubt that both families were on inimical terms. In the background of this previous enmity, the entry of accused persons into the barn of Usman, brother-in-law of deceased Safat without his permission, was like red-flag to the other party. Usman obviously asked them not to enter in his barn. Accused persons started hurling abuses at Usman. Deceased Safat, brother-in-law of Usman objected to such abuses and asked them not to commit encroachment. This enraged the accused persons. They leaped into the barn of Safat and assaulted him. The deceased was given lathi, Farsa (axe) and Barchi (spear) blows. The evidence discloses that Bachchu was holding farsa (axe), late Kariya was using Barchi (spear) and late Basira was wielding Lathi. Women of the family Smt. Jabbo and Sabbo were also present in the barn (Khalihan) and were busy in applying mud on the floor. They tried to save Safat but they were also beaten by late accused Basira with lathies.

14. It is evident that oral testimonies given by P.W. 1 Hayat Ahmad (informant), P.W.2 Jabbo and P.W. 3 Usman are highly credible. Smt. Jabbo was in fact injured in the same incident though suffered minor injuries but was injured nevertheless. The presence of Usman is absolutely natural. In fact it was the entry of accused persons in the barn of Usman which begat the incident. The testimony of Hayat Ahmad, Jabbo and Usman are of high quality. Their evidence is natural, trustworthy and consistent with the normal human conduct. The argument that the testimony should be disbelieved merely because their inter-se relationship and their kinship with deceased is not sustainable. The testimony of witness is tested and analyzed on the touch stone of credibility. The witnesses cannot be disbelieved merely because they are related to each other. If incident has occurred in a place where the presence of family member is natural or the presence of other public witnesses is not easily possible then the otherwise trustworthy testimony of witness cannot be rejected merely on the ground of stated relationship.

15. The Hon. Apex Court in **Ram Gopal Vs. State of Rajasthan** (1998) 6 SCC 441 has held that relationship between the deceased and the witness is not a good ground for disbelieving the testimony of witnesses. In such cases even the absence of public witnesses would not necessarily have unfavourable affect on the otherwise reliable witnesses. In **Chapho @ Jakal Vs. State of Kerala** (1998) 6 S.C.C. 602, the Apex Court has held that even if public witnesses are present and yet not produced that alone cannot be a ground for rejecting the testimony of otherwise trustworthy witnesses. In the case of **Nallamsetty Yanadaiah and others Vs. State of Andhra Pradesh** 1993 Cri.L.J. 408, the Apex Court has ruled that the testimony of oral witnesses cannot be rejected merely on the ground of interestedness, though their testimony must be appraised carefully.

16. We have carefully examined all materials on record and believe that there was no occasion for P.W. 1 Hayat Ahmad, P.W. 2 Jabbo and P.W. 3 Usman to falsely implicate accused persons for the death of their relative and let go the real culprit. The story that Safat Ahmad died in the night has already been belied by the testimony of both doctors. P.W.8 Dr. R.S. Kushwaha initially examined the injuries of deceased and another injured. He has specifically opined that these injuries were probably caused on 17.4.1980 at about 9 am. The testimony of P.W. 6 Dr. R.S. Verma who conducted autopsy on the person of deceased Safat Ahmad also opined that the injuries sustained by deceased have been caused in the morning at 17.4.1980. The testimony of Dr. R.S. Verma also reinforces the prosecution story. We believe that there is no inconsistency between the ocular testimony and medical report. In any case, medical report should never be compared with oral testimony in mechanical fashion. The Apex Court in **Vithal Pundalik Zendge Vs. State of Maharashtra (**2009) (2) ACR 1497 (SC) has held that minor discrepancies in the statement of witnesses is not enough to reject the testimony of injured witnesses.

17. In **G.S. Walia Vs. State of Punjab and others (1998) 5 SCC 150**, the Apex Court has held that the comparison of medical evidence with ocular testimony should not be done in mechanical manner. In the aforesaid case, some injuries caused by sharp edged weapon was found by doctor but in ocular testimony there was no mention of sharp edged weapon yet the Apex Court refused to reject the testimony of oral witnesses.

18. This view was again reiterated by Apex Court in **State of U.P. Vs. Premi and others** 2003 Cri.L.J. 1554. In this case medical opinion stated that margins of injuries were soft and probably caused by sharp edged weapon while the prosecution story said that injuries were caused by butt of revolver. This stated discrepancy was argued before the Apex Court but Apex Court rejected this minor discrepancy and affirmed the sentence against the accused persons.

19. In the instant case, there is no significant discrepancy between oral testimony and medical report. Medical report prepared by Dr. R.S. Kushwaha (P.W. 8) talks of lacerated wounds, incised wounds and penetrated injuries. These injuries are naturally caused by sharp edged weapon and lathies. The penetrating wound was caused by spear. Evidence discloses that appellant Bachchu was holding Farsa (axe) at the time of attack while late accused Kariya and Basira were wielding Barchi (spear) and lathi respectively. The ocular evidence further discloses that Smt. Sabbo and

Smt. Jabbo were only attacked by lathi when they tried to intervene. Injuries, therefore, then caused on their persons were comparatively simple. This description of pain to the doctor does have some discrepancies especially in the testimony of Smt. Jabbo. There are some discrepancies between the injuries entered into the G.D (general Diary) of police station Khanna and the injury report prepared by medical officer. It is stated that G.D.(Ex. Ka-3) talks that Smt. Jabbo had disclosed pain on shoulder and joint of hips while the medical report says that there were contusions on the thigh. But this contradiction was rejected by the trial Judge on the ground that description of minor injuries especially of pain at various times may be different as Smt. Jabbo was not only illiterate woman but she described the existence of pain to the police personnel and thereafter to the doctor on a different times. It is possible that her shoulder might have been in pain at the time of her presence in police station but Dr. Kushwaha only recorded the contusions which were apparent to him. Smt. Jabbo might have not informed the doctor about the shoulder pain or the pain in the other part of her body or pain on other parts of her body might have been eased by the time she came into contact of doctor. Her anguish on the simultaneous death of close family member could have deadened her own misery. We believe that this so called discrepancy is not enough to reject the testimony of Smt. Jabbo. In any case, there is enough evidence on record to demonstrate the presence of informant Hayat Ahmad, Usman and Smt. Jabbo on the spot. The core of medical report is inconsistent with the oral testimony of all witnesses.

20. Learned counsel for appellant has also argued that place of occurrence is vague and therefore, testimony of witnesses cannot be believed. We are afraid that this argument of learned counsel for appellant is not sustainable. There are no discrepancies in the testimony of witnesses as regards to the place of occurrence. Site plan also reinforces the ocular testimony of witnesses. The evidence discloses that deceased Safat was busy in threshing of agricultural produce in his barn (Khalihan). It has been established that verbal altercation started in the barn of Usman but suddenly accused rushed towards the barn of Safat when Safat objected to their abuses and they assaulted Safat in his barn. Site plan (Ex. Ka 10) also reinforces the prosecution story in this regard. Learned counsel for appellant has raised another argument saying that blood stains were not found on the bullock cart and on the cloths of women who tried to embrace the deceased. The incident occurred in the barn where threshing had been going on vigorously, therefore, it is very much possible that the traces of blood were blown away while grain was being separated from the chaff. But blood stains were indeed found on the cot where the deceased Safat was put for some time. As far as the blood stains on Smt. Jabbo and Smt. Sabbo are concerned, there is no evidence on record to show that their injuries caused any blood stains. Apart from that there is no evidence that women of the family embraced the injured. In any case, cloths of the women were not taken into possession as stated by Investigating Officer in his testimony. Therefore, even if the cloths were stained with the blood, there is nothing on record to demonstrate that. Investigating Officer admittedly did not take the cloths of injured in his possession. The statement of the Investigating Officer discloses that he conducted the investigation in lackadaisical manner but that alone cannot be a ground to disbelieve the testimony of otherwise trustworthy witnesses. The Hon'ble Apex Court in Amar Singh Vs. Balwinder Singh and others, 2003 Cri. L.J. 1282 has held that every failure or omission of Investigating Officer cannot render prosecution case doubtful or unworthy of believe. The Hon'ble

Apex Court in its judgment Bishundeo Poddar and others Vs. State of Bihar, 2003 Cri.L.J.1558 has held:

"Be that as it may, the fate of the case does not depend on what the Investigating Officer or the prosecutor ought to have done and evidence ought to have been led. The fate depends on the evidence which is on record."

21. We have carefully examined all material on record and we believe that prosecution has been able to prove its case beyond all reasonable doubts despite the existence of minor discrepancies. We also believe that core of medical evidence is in-consonance with the oral testimony. The ocular testimony rendered by prosecution witnesses is highly credible. The presence of witnesses on the spot has been established. Considering all facts and circumstances we believe that prosecution has been able to bring home the guilt of accused by credible and trustworthy evidence.

22. The judgment and order dated 28.2.1983 passed by Vth Additional Sessions Judge, Hamirpur in S.T. No.221 of 1980 (State Vs. Bachchu & another) arising out of Crime No.55 of 1980, P.S. Khanna, District Hamirpur does not require any interference. The criminal appeal is, accordingly, **dismissed**. Appellant Bachchu is on bail, his bail bonds are cencelled and he is directed to surrender in the court below to serve the remaining period of his sentence. Let a copy of this order be sent to concerned Court through Sessions Judge, Hamirpur for compliance within ten days. The concerned court will thereafter report the compliance to this Court within a month.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Criminal Appeal No.- 525 Of 2009
&
Connected With Other Cases

Bhoora Khan @ Bhalu **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Imran Ullah, Manindra Pal Singh, Mukhtar Alam, Shyamal Narain

Counsel for the Respondent:
Govt. Advocate

Criminal Law –Criminal Appeal – Section 364A IPC – Abduction – Ransom – missing report dated 20.6.2006 – first information report dated 1.7.2006 – demand of Rs.40 lakhs – abducted victim – recovery of abducted victim – house of accused Shamshad – arrest on the spot – identification parade not conducted – not named in the first information report – identification for the first time before court – wrong identity of name – statement under Section 313 Cr.P.C. – incriminating evidence not put – recovery memo – site plan – material contradiction – no independent public witness – no recovery of looted articles – call details – electronic evidence – prosecution failed to prove beyond reasonable doubt – benefit of doubt – conviction set aside – acquitted.

These appeals have been preferred against the judgment and order dated 28.1.2009 passed by the Additional Sessions Judge/F.T.C. No.1, Aligarh passed in S.T.No.1083 of 2006 convicting the appellants under Section 364A IPC and sentencing them to undergo life imprisonment with fine of Rs.10,000/-(Para 1)

To appreciate the contentions raised by the learned counsel for the parties, it would be expedient to go through the facts of this case. Briefly stated, the prosecution case is that Dr. Shaista Mannan Wasanwala lodged a missing report of her husband Dr. Mannan Abdul Hussain Wasanwala on 20.6.2006 at about 22:50 hrs. at police station Civil Lines, Aligarh, stating that when her husband did not return home from his clinic at Venus Tower till 8:30 P.M. she tried to contact him on mobile but his mobile was found to be switched off and despite all possible efforts, his whereabouts could not be known. Again on 1.7.2006, she lodged a first information report at police station Civil Lines narrating the entire event of abduction of her husband Dr. Mannan Abdul Hussain Wasanwala referring to a call dated 24.6.2006 by some unknown person demanding Rs.40 lakhs ransom for release of her husband Dr. Mannan Abdul Hussain Wasanwala followed by such frequent calls with a threatening to eliminate her husband if the money was not tendered. Being panicked and awe-struck, she made all efforts to arrange the money but could not succeed. The report further referred to the last call dated 1.7.2006 from one Shaimuddin, who had threatened that her husband would be killed if the ransom money was not paid by tomorrow. On the basis of the first information report dated 1.7.2006 as well as the missing report dated 20.6.2006, a case was registered as Case Crime No.263 of 2006 under Section 364A IPC at Police station Civil Lines, Aligarh and special report of the incident was sent to the higher authorities. The police swung into action and the investigation proceeded and Rajesh Kumar Dwivedi, SHO Civil Lines, who was the Investigating Officer, recovered Dr. Mannan Abdul Hussain from the clutches of abductors the same day at about 9.30 P.M. Recovery memo was prepared on the spot and accused Shamshad, Alimuddin and Bhura Khan alias Bhalu were arrested on the spot. The police took them on remand and the other accused were arrested on the basis of confessional statement of the above accused. Dr. Mannan was medically examined, site plan was prepared, statements of arrested accused were recorded and they were medically examined, mobile call details of the accused were investigated. After completion of investigation, Investigating Officer submitted charge sheet against accused persons under Section 364A IPC and a separate charge sheet under Section 364A IPC, against absconding accused Lalu alias Uvesh and Chand Khan was also submitted before the court. The learned Chief Judicial Magistrate took cognizance on the charge sheet and committed the case to sessions court for trial of accused. Thereafter, charges were framed by the trial court against the accused under Sections 364A and 120B IPC. They denied charges and claimed trial.(Para 2)

On the other hand, learned Additional Government Advocate supported the judgment of the trial court and submitted that the order of conviction and sentence recorded by the court below needs no interference. The prosecution has fully established its case that the appellants abducted Dr. Mannan Abdul Hussain for ransom on 20.6.2006, threatened to kill Dr. Mannan if ransom of 40 lakhs was not paid by his wife. on phone frequently. It was also submitted that the prosecution has proved its case beyond reasonable doubt and the judgment of the court below is perfectly legal based on cogent reasons. The prosecution has also proved that on 1.7.2006 abducted victim Dr. Mannan was recovered from the clutches of the accused from the house of accused Shamshad by and the police arrested the accused appellants from the spot. Moreover, the factum of

abduction of Dr. Mannan and his recovery was not challenged by the defence side. It was lastly contended that the ingredients of the offence under Section 364A IPC are proved beyond reasonable doubt and the judgment and order of the court below requires no interference and the appeals filed by the appellants are liable to be dismissed.(Para 17)

Held :(Para 31,47-51)

1. Tested on the anvil and touchstone of the aforesaid principles, we find that there is substance (force) in the arguments of the learned counsel for the accused appellant Baseem Akhtar because admittedly, the accused Baseem Akhtar was not arrested on the spot where the recovery of the abducted victim Dr. Mannan Abdul Hussain is allegedly made by the prosecution. It is also an admitted fact that the name of accused Baseem Akhtar first came to light during investigation in the confessional statement of co-accused Shamshad and he was arrested on the execution of warrant 'B' at Delhi jail and transit remand was granted and he was finally taken into judicial custody on 11.8.2006 by the Chief Judicial Magistrate having jurisdiction whereas the occurrence is of 20.6.2006 and recovery of the abducted victim was of 1.7.2006. It is also the defence version that he was kept baparda. Inspite of this admitted fact identification parade was not conducted on the accused during investigation. The accused in his statement under Section 313 Cr.P.C. specifically stated that since he was not named in the first information report and arrest was made by the Delhi police on execution of warrant 'B', he moved an application on 18.6.2006 claiming identification which was not done. Perusal of record shows that for the first time during trial of the case, PW-3 abducted victim Dr. Mannan Abdul Hussain Wasanwala recognised Baseem Akhtar but with wrong identity of name. It is also relevant to mention that Dr. Mannan was abducted on 20.6.2006 and the police recovered him on 1.7.2006 and accused Baseem Akhtar was arrested by the Delhi police on the execution of warrant 'B' issued by the Magistrate having jurisdiction and was taken in judicial custody on 11.8.2006. While the statement of PW-3 Dr. Mannan Abdul Hussain was recorded on 30.7.2007 after lapse of considerable time from the date of the incident on 20.6.2006 and more so the accused was recognised by wrong name before the court. This itself is indicative of a fact that there is a serious omission (lapse) prejudicing the right of the accused charged for an offence under Section 364A IPC.

2. After the close scrutiny of the evidence tendered by the prosecution in this case and considering the peculiar facts and circumstances of this case, it can be safely concluded that abduction of Dr. Mannan Abdul Hussain Wasanwala is a proved fact but the prosecution has miserably failed to prove beyond reasonable doubt the presence and involvement of the appellants accused in the commission of the crime under Section 364A IPC.
3.Microscopic analysis of the entire case will transpire that in order to justify the encounter of accused Saimuddin, his close relatives have been falsely implicated in this case. Short reasons thereof are as follows:

No identification proceedings conducted on accused Baseem Akhtar after his arrest. More so, his identification for the first time before the trial court by PW-3 victim Dr. Mannan Abdul Hussain Wasanwala after a long lapse of more than one year found to be defective as the two accused were not identified by correct name.
Another peculiar feature of the case is that statement under Section 164 Cr.P.C. had not been recorded.
Mode and manner of recovery of the abducted victim and arrest of three accused persons on the spot are highly doubtful.
Recovery memo of the abductee was found to be doubtful.
No independent public witness of recovery of the abducted victim.
No recovery of looted articles nor recovery of Maruti Zen of the victim.
Material laches/lapse in preparation of the site plan.
Major contradiction/discrepancy/variation in the statements of the prosecution witnesses and lastly
chain of link evidence particularly that of electronic evidence is not proved.

4. Under the facts and circumstances as stated above, the evidence of the prosecution witnesses is neither cogent nor credible or trustworthy hence cannot be believed.

5. For the foregoing reasons, in our view the appeals filed by the appellants deserve to be allowed and are, accordingly, **allowed**. The judgment and order dated 28.1.2009 convicting and sentencing the accused appellants are set aside and the accused appellants are acquitted for the offence under Section 364A IPC. Accused appellants Baseem Akhtar @ Banti and Bhoora Khan @ Bhalu who are in jail be released, if not detained in any other case. Accused appellants Shamshad and Alimuddin who are on bail, their bail bonds are cancelled and sureties stand discharged. Compliance of the provisions of Section 437A Cr.P.C. be ensured.

6. Let a certified copy of the judgment and order be sent to the Chief Judicial Magistrate concerned for compliance report. The lower court records be returned for compliance.

Case Law discussed:

1. Vinod vs. State of Rajasthan (Para 20)
2. Akram Khan v. State of West Bengal (Para 21)
3. Vaidivelu v. State of Maharashtra AIR 1957 SC 614 (Para 24)
4. Musheer Khan alias Badshah Khan v. State of Madhya Pradesh 2010 (74) ACC 150 (Para 25)
5. Vijay Chinee v. State of Madhya Pradesh (2010) 6 SCJ 492 (Para 26)
6. Dana Yadav alias Dahu and others vs. State of Bihar 2002 SCC (Cri) 1698 (Para 32)
7. Sukhjit Singh vs. State of Punjab 2015 (1) SCC (Cri) 76 (Para 34)
8. Shaikh Maqsood v. State of Maharashtra (2009) 6 SCC 583 (Para 34)

(Delivered by Hon'ble Ravindra Nath Kakkar, J.)

1. These appeals have been preferred against the judgment and order dated 28.1.2009 passed by the Additional Sessions Judge/F.T.C. No.1, Aligarh passed in S.T.No.1083 of 2006 convicting the appellants under Section 364A IPC and sentencing them to undergo life imprisonment with fine of Rs.10,000/-.

2. To appreciate the contentions raised by the learned counsel for the parties, it would be expedient to go through the facts of this case. Briefly stated, the prosecution case is that Dr. Shaista Mannan Wasanwala lodged a missing report of her husband Dr. Mannan Abdul Hussain Wasanwala on 20.6.2006 at about 22:50 hrs. at police station Civil Lines, Aligarh, stating that when her husband did not return home from his clinic at Venus Tower till 8:30 P.M. she tried to contact him on mobile but his mobile was found to be switched off and despite all possible efforts, his whereabouts could not be known. Again on 1.7.2006, she lodged a first information report at police station Civil Lines narrating the entire event of abduction of her husband Dr. Mannan Abdul Hussain Wasanwala referring to a call dated 24.6.2006 by some unknown person demanding Rs.40 lakhs ransom for release of her husband Dr. Mannan Abdul Hussain Wasanwala followed by such frequent calls with a threatening to eliminate her husband if the money was not tendered. Being panicked and awe-struck, she made all efforts to arrange the money but could not succeed. The report further referred to the last call dated 1.7.2006 from one Shaimuddin, who had threatened that her husband would be killed if the ransom money was not paid by tomorrow. On the basis of the first information report dated 1.7.2006 as well as the missing report dated 20.6.2006, a case was

registered as Case Crime No.263 of 2006 under Section 364A IPC at Police station Civil Lines, Aligarh and special report of the incident was sent to the higher authorities. The police swung into action and the investigation proceeded and Rajesh Kumar Dwivedi, SHO Civil Lines, who was the Investigating Officer, recovered Dr. Mannan Abdul Hussain from the clutches of abductors the same day at about 9.30 P.M. Recovery memo was prepared on the spot and accused Shamshad, Alimuddin and Bhura Khan alias Bhalu were arrested on the spot. The police took them on remand and the other accused were arrested on the basis of confessional statement of the above accused. Dr. Mannan was medically examined, site plan was prepared, statements of arrested accused were recorded and they were medically examined, mobile call details of the accused were investigated. After completion of investigation, Investigating Officer submitted charge sheet against accused persons under Section 364A IPC and a separate charge sheet under Section 364A IPC, against absconding accused Lalu alias Uvesh and Chand Khan was also submitted before the court. The learned Chief Judicial Magistrate took cognizance on the charge sheet and committed the case to sessions court for trial of accused. Thereafter, charges were framed by the trial court against the accused under Sections 364A and 120B IPC. They denied charges and claimed trial.

3. The prosecution examined PW-1 constable Anil Kumar, PW-2 Dr. Shaista Mannan Wasanwala, PW-3 Dr. Mannan Abdul Hussain Wasanwala, PW-4 Sunil Kumar Tyagi, Inspector Special Task Force, PW-5 Yogendra Singh Bhati, SI, S.O.G. Team, PW-6 Rajesh Kumar Dwivedi, SHO Civil Lines and PW-7 Ram Pal Singh Inspector to prove the prosecution case. After the prosecution evidence was over, statements of the accused under Section 313 Cr.P.C. were recorded by the trial court.

4. DW-1 Mohd. Kesar Masood and DW-2 Dr. Salim Ahmad were examined as defence witnesses.

5. PW-1 Constable Anil Kumar proved the photo copy of GD entry of the missing report, exhibit Ka-1, which was given on 20.6.2006 at about 22.50 hrs. by Dr. Shaista Mannan Wasanwala, wife of abducted victim Dr. Mannan Abdul Hussain Wasanwala to the police station. This witness deposed that photo copy of the missing report was prepared from original missing report which was enclosed with original GD.

6. PW-2 Dr. Shaista Mannan Wasanwala proved the missing report paper no. exhibit Ka-2. She stated before the court that she had received first threat call on 24.6.2006 informing abduction of her husband Dr. Mannan Abdul Hussain Wasanwala (the victim) and demanding Rs.40 lakhs as ransom and she also made to talk with her husband on the same day. She stated in her oral testimony that prior to recovery of the victim on 1.7.2006, she had given a written report mentioning how her husband had been abducted on 20.6.2006 and Rs.40 lakhs was demanded for his ransom at Police Station Civil Lines. PW-2 has proved the written report as exhibit Ka-3.

7. PW-3 is the abducted victim Dr. Mannan Abdul Hussain Wasanwala whose testimony narrates entire incident, therefore, his evidence is most important, material and this witness can be said to be a star witness of the prosecution case. But his testimony requires to be tested with utmost

care and caution which we will deal with later on as the whole prosecution story revolves around his sole testimony. Exhibit ka-4 Supurduginama is proved by this witness by identifying his signatures.

8. PW-4 Sunil Kumar Tyagi, who is the Inspector in Special Task Force, U.P. Field Unit, Meerut in his statement before the Court stated about the formation of a joint police team comprising Deputy Superintendent of Police, Aligarh, Shri Indrajit Singh, District Police S.O.G. Inspector Shri Ashok Kumar and Shri Rajesh Kumar Dwivedi, Inspector, Police Station Civil Lines, Aligarh as members to trace the whereabouts of the abducted victim. PW-4 Sunil Kumar Tyagi further stated that on an information received on 1.7.2006 that the abducted victim was detained in the house of accused Shamshad situated at Mohalla Brahmanpuri, Qasba Atrauli and the ransom was being demanded by the gang of accused, he along with Sub-inspector Shakti Singh, Jitendra Kumar, Rajiv Dwivedi, Head Constable Yogesh, Munesh, Rakesh and Constable Jagdish, Rajendra, Sarvesh and Commando K.P.Singh and Driver Jaiveer, S.O.G.Inspector Ashok Kumar and Rajesh Kumar Dwivedi. P.S. Civil Lines, came to Atrauli and contacted Inspector Devendra Singh there. Further the entire police force was constituted into three teams one under the supervision of PW-4 Sunil Kumar Tyagi, the second under the supervision of Inspector Ashok Kumar, and the third team was under the supervision of Inspector Rajesh Kumar Dwivedi from where they jointly reached to the house of Shamshad at about 9:30 in the night and raided the house. On this two persons sitting on the roof of the house, opened fire upon the police party with an intention to kill and jumped from the roof and taking ride on the motorcycle standing nearby ran away from there. They were chased by the two police teams headed by Inspector Sunil Kumar and Inspector Ashok Kumar. Resisting the chase, accused sitting on the pillion of the motorcycle continuously fired at the police party and moving ahead they threw their motorcycle on the roadside and taking shelter of dugs and bushes, the accused persons started indiscriminate firing upon the police party. The police party also resorted to firing and warned them to surrender. After close of the firing between the accused and, the police, one accused was found to be injured and the other succeeded in fleeing away form the spot. This resulted into an encounter of the injured accused who was later on identified as Shaimuddin of Dibai by Constable Munesh and Rakesh. Thereafter, information of this incident was sent to the police station Atrauli. Empty cartridges found on the spot were collected and kept under seal and lateron on kept in the police station and Case Crime No.307 of 2006 was registered under Section 307 IPC at P.S. Atrauli.

9. PW-5 Yogendra Singh, the Sub-inspector S.O.G. Team is a witness of recovery of abducted victim Dr. Mannan from the house of accused Shamshad and also witness of the recovery of incriminating article from the arrested accused Shamshad, Bhura, Alimuddin on the spot. From the possession of accused Shamshad one countrymade pistol along with two live cartridges was recovered while from accused Bhura a Rampuri knife and from accused Alimuddin a key of the room where abducted victim Dr. Mannan had been detained was recovered. Recovery memo was prepared on the spot which was proved as Exhibit Ka-6.

10. PW-6 Rajesh Kumar Dwivedi who is the Investigating Officer supported the prosecution case in his oral testimony and proved the recovery memo as exhibit Ka-5. He also

proved the lock and key recovered from accused Alimuddin as Exhibits-2 and 3, call details of accused Shaimuddin with Parvez as exhibits 4 to 15, copy of G.D. containing interrogation of Parvez as Exhibit-7 and the site plan of the spot as Exhibit-Ka 6.

11. Inspector Ram Pal Singh, who is another Investigating officer has been examined as PW-7 by the prosecution. Ram Pal Singh in his evidence before the court stated that he conducted further investigation on 8.8.2006, he prepared and proved the site plan/spot memo regarding recovery of the abducted victim Dr. Mannan Abdul Hussain which is Exhibit-8 and after completion of investigation filed charge sheet which has been proved as Exhibit Ka-9.

12. After close of the prosecution evidence, statements of all the charged accused were recorded under Section 313 Cr.P.C. Accused Alimuddin stated in his evidence that he along with his brother Shaimuddin, and brother-in-law Shamshad was arrested on 30.6.2006 and on 2.7.2006 he came to know that his brother Shaimuddin was encountered by the police and they had been falsely charged. He also stated that there was no recovery of any incriminating article whatsoever from him. Accused Parvez in his statement under Section 313 Cr.P.C. that he was falsely implicated due to political enmity. He requested for his identification on 5.9.2006 which has not been done. Accused Bhura in his statement under Section 313 Cr.P.C. stated that on 1.7.2006 at about 1:00 O. Clock in the night, the police took him from his house and asked him to become a witness of the encounter of accused Shaimuddin which he refused and hence he had been falsely nabbed in this case. He also stated that there was no recovery of any incriminating material from his possession. Accused Baseem Akhtar in his statement under Section 313 Cr.P.C. stated that he was not named in the first information report, he was arrested by the Delhi police and was kept baparda but the Aligarh police falsely implicated him to show its good work. He also stated that though he moved an application on 18.6.2006 for his identification, but the same was not done. Accused Shamshad in his statement under Section 313 Cr.P.C. stated that he along with his brother-in-law Alimuddin and Saimuddin (Alimuddin's brother) was arrested from Alimuddin's house at Dibai on 30.6.2006 and on 2.7.2006 he came to know that Saimuddin was encountered by the police. He further stated that he has been falsely implicated in this case and nothing incriminating was recovered from his possession.

13. In support of defence case, DW-1 Mohd. Qaisar Masood and DW-2 Dr. Salim Ahmad have been examined. Dw-1 Mohd. Qaisar Masood who is the brother of accused Parvez stated that the police forcibly took Parvez from the house on 7.7.2006 with respect to which a telegram was sent to the Senior Superintendent of Police on the same day which is paper no.34 kha/2 followed by another telegram dated 8.7.2006 to the Senior Superintendent of Police. On 9.7.2006 he sent telegrams to the Chairman, Minority Commission and the Human Right Commission which are paper nos.34 kha/4 and 34 kha/5.

14. DW-2 Dr. Salim Ahmad who is known to accused Parvez stated that the police took Parvez from his house on 7.7.2006 due to political enmity.

15. After hearing learned counsel for the parties, the trial court found accused Baseem Akhtar, Alimuddin, Shamshad and Bhura guilty for the offence under Section 364A IPC and sentenced them to undergo life imprisonment and fine of Rs.10,000/- each and acquitted accused Parvez under Section 364A IPC and 120B IPC and being aggrieved by the judgment and order of the court below dated 28.1.2009, the present criminal appeal has been preferred.

16. Learned counsel for the appellant Baseem Akhtar contended that the impugned judgment and order is against the evidence on record, the appellant was falsely implicated in this case as he had nothing to do with the aforesaid crime in question. Learned counsel next submitted that no identification parade was conducted on the appellant and the prosecution miserably failed to prove the presence and involvement of the accused appellant at the place of the occurrence. It is next submitted that incriminating evidence against the appellant has not been put forth while recording statements under Section 313 Cr.P.C. Learned counsel for the other appellant made submissions that the impugned judgment is wholly illegal, arbitrary and unjustified, the appellant has been falsely implicated and the judgment and order passed by the court below is against the weight of evidence on record and is liable to be set aside.

17. On the other hand, learned Additional Government Advocate supported the judgment of the trial court and submitted that the order of conviction and sentence recorded by the court below needs no interference. The prosecution has fully established its case that the appellants abducted Dr. Mannan Abdul Hussain for ransom on 20.6.2006, threatened to kill Dr. Mannan if ransom of 40 lakhs was not paid by his wife. on phone frequently. It was also submitted that the prosecution has proved its case beyond reasonable doubt and the judgment of the court below is perfectly legal based on cogent reasons. The prosecution has also proved that on 1.7.2006 abducted victim Dr. Mannan was recovered from the clutches of the accused from the house of accused Shamshad by and the police arrested the accused appellants from the spot. Moreover, the factum of abduction of Dr. Mannan and his recovery was not challenged by the defence side. It was lastly contended that the ingredients of the offence under Section 364A IPC are proved beyond reasonable doubt and the judgment and order of the court below requires no interference and the appeals filed by the appellants are liable to be dismissed.

18, We have heard Shri Sudeep Harkauli and Shri N.I.Jafri learned counsel for the appellants and Shri Ashish Pandey, learned A.G.A. assisted by Ms. Manju Thakur for the State and have given our anxious and most thoughtful consideration to the rival submissions of both the parties and have also perused the impugned judgment and have gone through the evidence on record.

19. Before dealing with the pending appeals, it would be relevant to refer to the provisions of Section 364A IPC and the relevant proposition of law covering decision under these appeals. Section 364A is alluded below:

*"**364A. Kidnapping for ransom, etc.-**Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or*

hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organisation or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

20. In the case of **Vinod vs. State of Rajasthan, Manu/SC/70052008**, the Hon'ble Apex Court has held that to attract the provisions of Section 364A IPC what is required to be proved is:-

(i) that accused kidnapped or abducted a person.
(ii) kept him under detention after such kidnapping or abduction.
(iii) that kidnapping under this section was for ransom.

21. Similar view was expressed by the Hon'ble Apex Court in the case of **Akram Khan v. State of West Bengal Manu/SC 1470/2011.**

22. The word 'ransom' means as per Concise Oxford English Dictionary, 2002, p. 1186 'to hold some-one captive and demand payment for their release. Money paid to have a kidnapped person released. So the person abducted or kidnapped must be in the custody of the person at the time demand of ransom is made.

23. CJ Fletcher Moulten once observed that proof does not mean rigid mathematical formula that is impossible. Further proof must mean such evidence as would induce a reasonable man to come to a definite conclusion.

24. In **Vaidivelu v. State of Maharashtra AIR 1957 SC 614** the Hon'ble Apex Court classified witnesses into three categories: (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In this category of witnesses the court have to be circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

25. In **Musheer Khan alias Badshah Khan v. State of Madhya Pradesh, 2010 (74) ACC 150** the Hon'ble Apex Court held that identification test meant for purposes of helping investigating agency to ensure that it is proceeding in right direction it is not substantive.

26. In **Vijay Chinee v,. State of Madhya Pradesh (2010) 6 SCJ 492** the Hon'ble Supreme Court held that evidence of a witness must be read as a whole and the cases are to be considered in totality of the circumstances. It further held that men may tell lies but circumstances do not.

27. Apart from it it is a trite law that in arriving at the conclusion about the guilt of the accused charged with a commission of the crime, the court has to judge the evidence by yardstick of probabilities its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.

28. It is established law that every case has to be appreciated on its own fact and in the light of evidence led by the parties. The court has to examine the cumulative effect of evidence in order to determine as to whether the prosecution has been able to establish its case beyond reasonable doubt or that the accused is entitled to the benefit of doubt. The court has to examine the evidence in its entirety. The court cannot just take an aspect of the entire evidence.

29. It is settled legal proposition that even the sole testimony of a witness can form basis of conviction provided it finds corroboration from other physical factors and circumstances. It is also well settled that it is not necessary for the defence to prove its case with 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 sufficiently enables the court to reject the prosecution version.

30. It is also a well settled legal proposition that a reasonable doubt is not an imaginary, trivial, or merely possible doubt but a fair doubt upon reason and common sense and it must grow out of the evidence in the case and it is quality of each individual circumstance that is material and that would essentially depend upon quality of evidence.

31. Tested on the anvil and touchstone of the aforesaid principles, we find that there is substance (force) in the arguments of the learned counsel for the accused appellant Baseem Akhtar because admittedly, the accused Baseem Akhtar was not arrested on the spot where the recovery of the abducted victim Dr. Mannan Abdul Hussain is allegedly made by the prosecution. It is also an admitted fact that the name of accused Baseem Akhtar first came to light during investigation in the confessional statement of co-accused Shamshad and he was arrested on the execution of warrant 'B' at Delhi jail and transit remand was granted and he was finally taken into judicial custody on 11.8.2006 by the Chief Judicial Magistrate having jurisdiction whereas the occurrence is of 20.6.2006 and recovery of the abducted victim was of 1.7.2006. It is also the defence version that he was kept baparda. Inspite of this admitted fact identification parade was not conducted on the accused during investigation. The accused in his statement under Section 313 Cr.P.C. specifically stated that since he was not named in the first information report and arrest was made by the Delhi police on execution of warrant 'B', he moved an application on 18.6.2006 claiming identification which was not done. Perusal of record shows that for the first time during trial of the case, PW-3 abducted victim Dr. Mannan Abdul Hussain Wasanwala recognised Baseem Akhtar but with wrong identity of name. It is also relevant to mention that Dr. Mannan was abducted on 20.6.2006 and the police recovered him on 1.7.2006 and accused Baseem Akhtar was arrested by the Delhi police on the execution of warrant 'B' issued by the Magistrate having jurisdiction and was taken in judicial custody on 11.8.2006. While the statement of PW-3 Dr. Mannan Abdul Hussain was recorded on 30.7.2007 after lapse of considerable time from the date of the incident on 20.6.2006 and more so the accused was recognised by wrong name before the court. This itself is indicative of a fact that there is a serious omission (lapse) prejudicing the right of the accused charged for an offence under Section 364A IPC.

32. To substantiate his arguments learned counsel appearing for appellant Baseem Akhtar has placed reliance on the decision of the Hon'ble Apex Court in the case of **Dana Yadav alias Dahu and others vs. State of Bihar, 2002 SCC (cri) 1698.** In this case the Hon'ble Apex Court observed that belated identification of the accused in court for the first time after more than 2 years from the date of the incident should not form the basis of conviction, especially when the same is not corroborated by previous statements made before the police or any other evidence. It was also observed that ordinarily if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.

33. Admittedly, in this case the incident is of 20.6.2006, abducted person was alleged to be recovered on 1.7.2006. Accused Baseem Akhtar not named in the first information report was arrested by the Delhi police on execution of warrant 'B' and then taken into custody on 11.8.2006 in this case and for the first time he was recognized by PW-3 Dr. Mannan (abductee) during his deposition before court on 30.7.2007. More so there is no corroborative/supportive evidence, therefore, on the sole testimony of identification before court by PW3 conviction of accused Baseem Akhtar cannot and should not sustain.

34. Apart from it learned counsel for the accused appellant Baseem Akhtar made submissions that learned trial Judge has not complied with the basic requirements of Section 313 Cr.P.C. the requisite questions and the specific incriminating evidence which was against this accused have not been put to the accused, as there is no evidence on record even remotely to show that appellant Baseem Akhtar had abducted Dr. Mannan Abdul Hussain Wasanwala for ransom, In support of his arguments, he placed reliance upon a decision of Hon'ble Apex Court in the case of **Sukhjit Singh vs. State of Punjab 2015 (1) SCC (Cri) 76**, wherein the Hon'ble Apex Court laid down that the statements of accused under Section 313 Cr.P.C. sis not an empty formality. Incriminating material has to be brought to the notice of the accused under Section 313 Cr.P.C. The Court also held that it can cause immense prejudice to him especially when there is no evidence to establish his complicity in the alleged offence. Further, in **Shaikh Maqsood v. State of Maharashtra, 2009 (6) SCC 583,** the Hon'ble Apex Court held that if no question was put to the accused which established that he was the author of the crime, the effect of non putting of appropriate question will be a good ground for setting aside of the conviction of the accused. The Court further observed that the object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt.

35. A perusal of the statement of accused Baseem Akhtar under Section 313 Cr.P.C. reveals that general questions were put to him like that of the other co-accused whereas he being neither named in the first information report nor arrested on the recovery spot, his identification for the first time before court during statement of PW-3 Dr.Mannan Abdul Hussain after a long gap from the incident. The evidence specifically of identification has not been put before him or any incriminating evidence whatsoever regarding his presence and involvement in the commission of crime has been brought to the notice of this accused. Appropriate questions which could establish

that he was author of the crime had not been put before this accused hence we find substance in the plea of the learned counsel for the appellant that no requisite question and incriminating evidence which was against this accused have been put before him to establish that he was present and involved in the commission of offence under Section 364A IPC. That being so, the conviction of accused appellant Baseem Akhtar cannot be maintained and is liable to be set aside.

36. With regard to the criminal appeals of other co-accused, prosecution case is that Dr. Mannan Abdul Hussain Wasanwala was abducted on 20.6.2006, he was forcibly taken to the house of Shamshad. There victim was detained in a small room of a tubewell for four days,thereafter shifted to other place for 8 days. The wife of the abducted victim first lodged a missing report on 20.6.2006, thereafter first information report of abduction for ransom was lodged on 1.7.2006 by the wife of the abducted victim. In between 20.6.2006 to 1.7.2006, wife got first anonymous threat call for ransom on 24.6.2006 and thereafter continually received such calls and finally on 1.7.2006 she received threat from a person who disclosed his name as Shaimuddin for ransom of Rs.40 lakhs by tomorrow otherwise, Dr. Mannan Abdul Hussain would be killed and then she lodged the F.I.R. The other part of the prosecution case is that on information by informer on 1.7.2006, a joint team of police was formed and divided in three units, took the task for raiding the house of Shamshad, the recovery of abducted victim Dr. Mannan was successfully conducted and police arrested three persons on the spot but two persons, who were sitting on the roof fired on the police team, jumped from the roof, took the motor cycle standing nearby and escaped from the spot. They were chased by two units of joint police team and the accused person who was sitting on the pillion of motorcycle indiscriminately fired towards the chasing police party and at some point of time they stopped and took the motorcycle by the side of the road, hid themselves behind road side bushes and pits from where they again started firing on the police party. On this point of time the police also opened fire on the accused resulting in encounter of one person and the other accused escaped successfully. The dead was later on identified as accused Shaimuddin.

37. Now taking it to be correct version of the prosecution, the first question that arises for consideration is that how and under which circumstances the dead body of the encountered accused Saimuddin was found in the middle of the road because it has come in the evidence of prosecution witness PW-3 Dr. Mannan Abdul Hussain Wasanwala that he had identified the dead body of accused Saimuddin that was kept in the middle of the road.

38. The next question that does not appeal to us (seemingly improbable) is that how the two accused persons who were sitting on the roof of the house where abducted victim was detained, jumped and took the motorcycle standing there and escaped from the spot in front of three police teams and that too indiscriminately firing on the chasing police personnel. There is material contradiction on width of the road from where it is alleged that the two accused escaped and on the point whether accused escaped from back side of the house or from front of the house. The material in this way that police team is said to be standing in front of the house and it is impossible to escape if road is so narrow by motorcycle. Therefore, from the very beginning the prosecution story seems to be doubtful about the recovery of abducted victim Dr. Mannan from the house of accused Shamshad and encounter of accused Saimuddin as alleged by the prosecution. As regards the

recovery of abducted victim Dr. Mannan and preparation of recovery memo on spot, there is a lot of contradiction between the statement of PW-3 Dr. Mannan and PW-5 Yogendra Singh Bhati and PW-6 Rajesh Kumarr Dwivedi who were the witnesses of recovery as PW-5 Yogendra Singh Bhati who is recovery witness stated in his deposition that accused escaped towards the north direction and the police team was also standing in the north direction and the way towards the front of the alleged house was only of 10 feet and the motorcycle was at a distance of 15-20 steps ahead of them from where the two accused jumped from the roof took the motorcycle and escaped successfully riding on the motorcycle whereas PW-6 Rajesh Kumar Dwivedi who is also the witness of recovery of the abducted victim Dr. Mannan stated that width of the road in front of the house is only of 4-5 feet and according to this witness the two accused jumped from the alleged house and escaped from the back of the house. This is a material contradiction on the point whether the two accused jumped and escaped from the side of the alleged house which creates a doubt in prosecution story about the recovery of the abducted victim as well as encounter of accused Saimuddin whereas PW-7 I.O. Ram Pal Singh stated in his evidence that width of the road in front of the place of occurrence is about 6-7 feet hence there is contradiction about the width of the road in front of the house of Shamshad.

39. The next contradiction in the statements of prosecution witnesses is with regard to source of light at the time of recovery of the abducted victim Dr. Mannan PW-3 who stated that at the time of recovery there was kerosene oil light and there had not been electricity in his room and it was a complete dark room at the time of recovery. PW-5 stated at that time there was electric light in the room. PW-6 also stated that there was light at the time of recovery of Dr. Mannan. He specifically stated that recovery memo was prepared in electric light. This is a material contradiction which cannot be overlooked. It is also a fact that there was no public independent witness of the recovery memo.

40. The next important point is with regard to the preparation of site plan Exhibit Ka-6 proved by PW-6 Rajesh Kumar Dwivedi. According to the witness, site plan of the place of occurrence was prepared on the basis of pointing out by abducted victim Dr. Mannan. PW-7 Inspector Ram Pal Singh stated that on the pointing of S.I. Kamlesh Kumar he prepared the site plan on 13.9.2006 of place of recovery of abducted victim Dr. Mannan. The witness has admitted that site plan exhibit Ka-8 was prepared in absence of abducted victim Dr. Mannan which is confirmed by the statement of PW-3 Dr. Mannan. He also admitted that the place of parking of motorcycle used by the two accused persons in escaping from the spot has not been shown by him in his site plan exhibit Ka-8. He also admitted that place of firing by the accused on the recovery spot has not been shown in the site plan. Also admitted that the direction in which the accused had escaped has not been shown in the map exhibit Ka-8, a place denoted by 'H' shown as electric bulb on the recovery spot but PW-3 abducted victim in his deposition before court denies the existence of electric light in the room where captive had been detained. According to this witness there was complete dark at the place of recovery except a kerosene light in his room. Therefore, it is apparent that on the point of source of light at the time of recovery of abducted victim Dr. Mannan and preparation of the site plan/map there is material contradiction among the prosecution witnesses as well as material omissions in the site plan.

41. Another contradiction which requires attention is that PW-3 abducted victim Dr. Mannan who is an educated person in his oral testimony specifically and categorically stated about the presence of Senior Superintendent of Police Akhilesh at the time of his recovery till identification of encountered accused Saimuddin but other prosecution witnesses have denied the presence of Senior
Superintendent of Police Akhilesh on the place of incident. This poses another question mark on the prosecution story regarding recovery of abducted victim Dr. Mannan as alleged and arrest of three accused persons on the spot and encounter of accused Saimuddin highly doubtful. Apart from it, PW-3 Dr. Mannan in his oral evidence before court stated that at the time of his recovery his signature on any paper whatsoever on the recovery spot had not been taken by any of the police personnel which makes preparation of the recovery memo on the spot highly improbable (doubtful). Apart from it, the original recovery memo has not been produced before the court which is established by the evidence recorded before the trial court wherein PW-5 Yogendra Singh Bhati who is witness of recovery of abducted victim as well as the recovery of illegal incriminating articles from the arrested accused Shamshad, Alimuddin and Bhura on spot proved it admitting his signatures on the photocopy of the original recovery memo Exhibit Ka-5. Likewise, PW-6 Rajesh Kumar Dwivedi in his statement admitted that original recovery memo is not before him but admitted his signatures on the photo copy of the original recovery memo which is another question mark in this case.

42. Yet another relevant circumstance of this case which requires consideration is that PW-3 victim has stated that during the incident his purse money, mobile, A.T.M. Card, watch and PAN Card were taken by the accused. It is also an admitted fact that the victim was abducted along with his Maruti Zen car but there was no recovery of the said articles from any of the accused persons. Another relevant circumstance which is to be considered is that PW-3 Dr. Mannan stated that the accused took the PIN number of his ATM card, but no money has been withdrawn by any of the accused. PW-3 could not explain the location of the site from where he was said to be recovered. Likewise, PW-5 Yogendra Singh Bhati- witness of recovery memo could not explain the location of the recovery spot.

43. Another peculiar circumstance is that PW-3 Dr. Mannan who was forcibly abducted by the accused persons and was kept under instant fear of death for about 12 days and it has also come in his deposition that after the incident before his release he was continuously being harassed and tortured by the accused but from perusal of his oral testimony it transpires that inspite of all these facts he had a sympathy with the three accused persons who had been arrested on the recovery spot. This fact is not understandable why this sympathy was developed in the mind of a tortured abducted person.

44. It is also not understandable that how the two accused persons who were sitting on the roof of alleged house in which the captive was detained jumped down and able to take the motorcycle standing in front of the alleged house and run away through the narrow road that was 4-5 feet wide and that too in front of the police team that had been there attempting to recover abducted victim Dr. Mannan on the information of an informer.

45. As regards the electronic call details whose description has come in the statements of PW-6 Rajesh Kumar Dwivedi which are exhibits 4 to 15 but it has no relevance to the case as no evidence whatsoever has been tendered to identify the voice and accuracy of the conversation and connecting incriminating evidence hence as required evidence has not been tendered to prove it by the prosecution, therefore, has no relevance in this case.

46. After the close scrutiny of the evidence tendered by the prosecution in this case and considering the peculiar facts and circumstances of this case, it can be safely concluded that abduction of Dr. Mannan Abdul Hussain Wasanwala is a proved fact but the prosecution has miserably failed to prove beyond reasonable doubt the presence and involvement of the appellants accused in the commission of the crime under Section 364A IPC.

47. Microscopic analysis of the entire case will transpire that in order to justify the encounter of accused Saimuddin, his close relatives have been falsely implicated in this case. Short reasons thereof are as follows:

(i) No identification proceedings conducted on accused BaseemAkhtar after his arrest. More so, his identification for the first time before the trial court by PW-3 victim Dr. Mannan Abdul Hussain Wasanwala after a long lapse of more than one year found to be defective as the two accused were not identified by correct name.

(ii) Another peculiar feature of the case is that statement underSection 164 Cr.P.C. had not been recorded.

(iii) Mode and manner of recovery of the abducted victim and arrestof three accused persons on the spot are highly doubtful.

(iv) Recovery memo of the abductee was found to be doubtful.

(v) No independent public witness of recovery of the abducted victim.

(vi) No recovery of looted articles nor recovery of Maruti Zen of the victim.

(vii) Material laches/lapse in preparation of the site plan.

(viii) Major contradiction/discrepancy/variation in the statements ofthe prosecution witnesses and lastly

(ix) chain of link evidence particularly that of electronic evidence isnot proved.

48. Under the facts and circumstances as stated above, the evidence of the prosecution witnesses is neither cogent nor credible or trustworthy hence cannot be believed.

49. For the foregoing reasons, in our view the appeals filed by the appellants deserve to be allowed and are, accordingly, allowed. The judgment and order dated 28.1.2009 convicting and sentencing the accused appellants are set aside and the accused appellants are acquitted for the offence under Section 364A IPC. Accused appellants Baseem Akhtar @ Banti and Bhoora Khan @ Bhalu who are in jail be released, if not detained in any other case. Accused appellants Shamshad and Alimuddin who are on bail, their bail bonds are cancelled and sureties stand discharged. Compliance of the provisions of Section 437A Cr.P.C. be ensured.

50. Let a certified copy of the judgment and order be sent to the Chief Judicial Magistrate concerned for compliance report. The lower court records be returned for compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.07.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Criminal Appeal No.- 578 Of 2014

State Of U.P. (State Appeal) **...Appellant**
Versus
Ramjiwan & Ors. **...Respondents**

Counsel for Appellant:
Govt. Advocate

Counsel for Respondents:
R.K.Tripathi

Code of Criminal Procedure, 1973 — Appeal Against Acquittal — Scope of Appellate Jurisdiction — Double Presumption in favour of accused after acquittal — Appellate Court has full power to review, re-appreciate and reconsider evidence — Interference warranted only when judgment is palpably wrong, manifestly erroneous or demonstrably unsustainable — If two reasonable conclusions possible, acquittal not to be disturbed — Upon acquittal by a competent court of law, the accused enjoys a double presumption of innocence — firstly, the general presumption available to every accused under the fundamental principle of criminal jurisprudence, and secondly, the reinforcement of that presumption by the order of acquittal itself. While the Code of Criminal Procedure places no restriction on the power of an appellate court to review, re-appreciate and reconsider the entire evidence on record, such power must be exercised with circumspection. The appellate court must first determine whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable; only if this threshold is met may it proceed to re-appraise the evidence and arrive at its own conclusion. Interference with an acquittal is warranted only for compelling and substantial reasons. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal. Relied

upon: Chandrappa v. State of Karnataka, (2007) 4 SCC 415; Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1; State of U.P. v. Ram Sajeevan, (2010) 1 SCC 529.

Indian Penal Code, 1860 — S. 304B — Dowry Death — Ingredients — Death within seven years of marriage in unnatural circumstances — Cruelty or harassment soon before death in connection with demand of dowry — All ingredients must be cumulatively proved — Mere unnatural death within seven years insufficient without proof of demand of dowry and harassment — To establish the offence of dowry death under Section 304B IPC, the prosecution must prove cumulatively: (i) the death of the woman occurred within seven years of marriage; (ii) such death was caused by burns, bodily injury or otherwise than under normal circumstances; (iii) soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband; and (iv) such cruelty or harassment was for, or in connection with, any demand for dowry. In the present case, although the deceased died within two years of her marriage in unnatural circumstances, the prosecution failed to prove either the demand of dowry or cruelty or harassment of the deceased in connection with any such demand soon before her death. Held: In the absence of proof of demand of dowry and harassment for dowry, no presumption under Section 113B of the Indian Evidence Act could be raised, and the acquittal recorded by the trial court was not liable to be interfered with.

Indian Penal Code, 1860 — S. 304B — Demand of Dowry — Proof — General and vague allegations insufficient — No specific amount of cash demand disclosed — Contradictions between prosecution witnesses — Mediator of marriage not produced by prosecution but examined as defence witness who denied demand — Demand of dowry not proved — The prosecution alleged that the respondents-accused demanded a double bed and cash for purchase of a motorcycle in dowry. However, no specific amount of cash was mentioned in the F.I.R. or prosecution evidence, making the allegations general and vague in nature. PW-1 (father of the deceased) admitted in cross-examination that the respondents-accused never demanded any dowry when he visited their house, and that no dowry was demanded at the time of marriage. The statement of PW-2 (brother of the deceased) was in material contradiction to PW-1. The mediator of the marriage, Bal Govind, though cited by the prosecution, was not produced by it; he was instead examined as DW-1 by the defence and categorically denied that any demand of dowry was ever made or that the complainant had ever complained to him of such demand. Held: In view of the general and contradictory nature of the allegations, the contradictions in the statements of prosecution witnesses, and the non-production of the mediator by the prosecution, the demand of dowry was not proved. Relied upon: Rajendra Singh v. State of U.P., Criminal Appeal No. 2321 of 2009 (SC).

Indian Evidence Act, 1872 — S. 113B — Expression 'Soon Before Death' — Proximity Test — Not synonymous with 'immediately before' — Live and proximate link between cruelty based on dowry demand and death must be established — Inquest report showing contusions on body of deceased not supported by postmortem report — Doctor not confronted with inquest report — Harassment soon before death not proved — The expression 'soon before death' appearing in Section 304B IPC and Section 113B of the Evidence Act is laden with the notion of a proximity test but is not synonymous with 'immediately before'. There ought to be a proximate and live link between the impact of cruelty based on dowry demand and the consequential death. The expression cannot be fixed in a straitjacket formula so as to be limited to any fixed time period. In the present case, though the inquest report disclosed contusions on the body of the deceased below both knees, this was not supported by the postmortem report, which disclosed only a ligature mark and found cause of death to be asphyxia due to hanging. The doctor who conducted the postmortem (PW-3) was not confronted with the inquest report on this point. No prosecution witness was examined who could prove cruelty or harassment of the deceased soon before her death. Held: Harassment or cruelty soon before the death of the deceased in connection with any demand of dowry was not established. Relied upon: M. Narayan v. State of Karnataka, (2015) 6 SCC 465.

Code of Criminal Procedure, 1973 — S. 174 — Inquest Report — Not substantive evidence — Limited purpose — May only be used for contradicting witnesses to inquest — Entries regarding mode or cause of assault not within scope of S. 174 — Discrepancy between inquest report and postmortem report — Inquest report alone not sufficient to prove cruelty — An inquest report prepared under Section 174 Cr.P.C. is not a piece of substantive evidence and its purpose is limited to ascertaining whether a person died under suspicious or unnatural circumstances and, if so, the apparent cause of death. The question of the details as to how, by whom, or under what circumstances the deceased was assaulted is foreign to the ambit and scope of proceedings under Section 174. The inquest report may only be utilised for contradicting the witnesses mentioned therein. Any omission or discrepancy in the inquest report is not fatal to the prosecution case. In the present case, the contusions noted in the inquest report found no support in the postmortem report, and the inquest report, being in contradiction to the postmortem report, was not sufficient to establish that the deceased was subjected to any cruelty soon before her death. Relied upon: Pedda Narayana v. State of Andhra Pradesh, AIR 1975 SC 1252.

Criminal Trial — Defence Witnesses — To be treated at par with prosecution witnesses — Evidence not to be discarded merely because witness was produced by defence — Credibility and trustworthiness to be assessed on same standard — The testimony of a witness does not become tainted or unreliable merely by reason of such witness having been examined by the defence. Defence witnesses are entitled to equal respect and equal treatment as prosecution witnesses, and the standard of proof applicable to prosecution witnesses is equally applicable in assessing the credibility and trustworthiness of defence witnesses. If the testimony of a defence witness does not fit in with the facts and circumstances of the case, it may be rejected; but it cannot be rejected solely on the ground that the witness was produced by the accused. In the present case, DW-1 Bal Govind, the mediator of marriage, who was cited as a prosecution witness but not produced by the prosecution, was examined by the defence and his denial of any demand of dowry or harassment was rightly taken into account by the trial court. Relied upon: Munshi Prasad v. State of Bihar, (2002) 1 SCC 351; Alok Deb Roy v. State of Assam, 2003 (3) GLJ 592.

(Delivered by Hon'ble Ravindra Nath Mishra-II, J.)

1. This appeal has been preferred by appellant-State of U.P against judgment dated 18th January, 2008 passed by Additional District and Sessions Judge, Sitapur in Sessions Trial No. 442/2006 'State Versus Ramjiwan and others' arising out of Crime No. 396 of 2005, under Sections 498A and 304B I.P.C. and Section 3/ 4 Dowry Prohibition Act, Police Station Hargaon, District Sitapur whereby the respondent/accused have been acquitted of the charges levelled against them.

2. The brief facts, giving rise to this appeal, as deciphered from written complaint (Exhibit Ka-1), are that deceased Asha Devi was married to respondent- accused Ramjiwan two years prior to the date of occurrence. As per prosecution case the deceased used to complain of demand of double bed and cash by her husband, father-in-law and mother-in-law in dowry whenever she came to her parental house. Due to his poor economic condition, the complainant could not fulfill the demand of her in-laws. His son-in-law Ramjiwan wanted some money to purchase motorcycle. Due to harassment for dowry by her in-laws the deceased had come to her parental house. But approximately 7-8 days before the date of occurrence, her husband, accused Ramjiwan came to her and took her alongwith him. The deceased did not want to go to her matrimonial home, but the complainant persuaded her to go. Thereafter, on 15.10.2005 the complainant received information that she committed suicide. On inquiry from neighbours, it came to his knowledge that due to non-

fulfillment of demand of dowry, her husband Ramjiwan, father-in-law Mahesh and mother-in-law Smt. Savitri harassed her and killed her. As per complainant's case the respondents-accused after killing her, hanged her from ceiling. A written complaint (Exhibit Ka-1) was given by complainant Sunder Lal in Police Station Hargaon on which first information report (Exhibit Ka-3) was lodged. Corresponding entries were made in General Diary of police station, copy of which is Exhibit Ka-4. Inquest report (Exhibit Ka-5) was also prepared by Naib Tehsildar, Hargaon, Sitapur. Thereafter, autopsy was conducted on cadaver of the deceased and postmortem report was prepared by Dr. S. P. Ojha, which is Exhibit Ka-2. During investigation, site-plan of place of occurrence was prepared by the investigating officer, which is Exhibit Ka-12. Letter to Chief Medical Officer (Exhibit Ka-6), Specimen of seal (Exhibit Ka-7), Photo of the dead body (Exhibit Ka-8), Challan of the dead body (Exhibit Ka-9) and letter of R.I. (Exhibit Ka-10) are also on record. Prima-facie, case having been found during investigation, charge-sheet against respondents-accused was prepared and filed in the Court, which is Exhibit Ka-11. On the basis of charge-sheet, respondents-accused were summoned and committed to the Court of Sessions where charges were framed against the respondents-accused under Sections 498-A and 304-B Indian Penal Code and 3/4 Dowry Prohibition Act. The charges were read-over and explained to the accused persons, which were denied by them and they claimed to be tried.

3. To prove charges of demand of dowry and harassment of the deceased against the accused, prosecution examined complainant Sunder Lal as PW-1 and Virendra Kumar as PW-2. PW-1 has stated that the deceased Asha Devi was married to respondent-accused Ramjiwan two years before the occurrence of the incident. Two months after the marriage when she came to her parental home, she complained that her husband Ramjiwan, father-in-law Mahesh and mother-in-law Smt. Savitri started putting pressure on her to bring double bed and cash for purchase of motorcycle. He has also stated that the accused also stopped food and clothes to her. They threatened to kill her in case demand is not fulfilled. He has also stated on oath that last time when her husband Ramjiwan came to take her with him to her matrimonial house, she was not willing to go as she had apprehension that they would kill her. Thereafter, he received information from one Shri Shahnoor that respondent-accused killed her. When the complainant reached her house, the respondent-accused were not present on the scene of occurrence and door of their house was also closed. Then with the help of villagers the complainant entered the house and found his daughter hanging from ceiling. There upon he dictated the complaint to Shri Ram Chander and went to police station Hargaon to lodge first information report.

4. PW-2 Virendra Kumar, brother of the deceased, has also endorsed the statement of PW-1 that the deceased got married to accused Ramjiwan two years before the incident, that respondent-accused were demanding double bed and cash for purchase of motorcycle. He has also stated that 7-8 days before the occurrence, when her husband Ramjiwan came to take her with him to her matrimonial house, She was not willing to go, but he and family members persuaded her to go to her matrimonial home, thereafter he received information about her death. He has also gone to the house of accused persons, but the respondent-accused were not present there and the room was closed from outside.

5. PW-3 Dr. S.P. Ojha has proved Exhibit Ka-2. According to him cause of death was hanging. She had died on 15.10.2005 between 8 to 12 a.m due to asphyxia.

6. PW-4 is Constable 162 Shri Jyoti Narain Tiwari. He has proved Chik F.I.R. (Exhibit Ka-3) and corresponding entries on General Diary (Exhibit Ka-4).

7. PW-5 Constable 272 CP Dipty Singh is witness of inquest report.

8. PW-6 Shri Satish Kumar Verma, Naib Tehsildar, who has prepared inquest report (Exhibit Ka-5). He has also proved letter to Chief Medical Officer (Exhibit Ka-6), Specimen Seal (Exhibit Ka-7), Photo of dead body (Exhibit Ka-8), Challan of dead body (Ehibit Ka-9) and letter of R.I. Exhibit Ka-10.

9. PW-7 Rahul Kumar, Circle Officer and PW-8 Ram Charan. Circle Officer are investigating officers, who after recording statement of the witnesses under Section 161 Cr.P.C. prepared charge-sheet against respondent-accused, which is Exhibit Ka-11.

10. Statement of accused were recorded under Section 313 Cr.P.C. Wherein respondent-accused denied allegations made by the prosecution and has stated that his relations with the deceased was always sweet and cordial. On request of the deceased itself he had taken her to her parental home 6-7 days before the date of occurrence where she intended to go back to her matrimonial home with accused Ramjiwan, turning down the request of her father to stay back till 'Karwachauth'. She has told her father that someone from her parental home must come to her matrimonial home to take her to her parental house on 'Karwachauth' then only she would come with 'Karwa'. It is also stated in the statement of Ramjiwan recorded under Section 313 Cr.P.C. that her father has told her if she did not want to stay back then she should leave parental house and should not show her face again. The deceased, therefore, was very much perturbed over this episode and committed suicide by hanging herself. It is also stated in the statement that it was upon his information that the complainant and his family members came to house of accused persons where they demanded Rs.15,000/- to enter into compromise. A compromise was also written, but on inability of respondent-accused to pay Rs.15,000/- this F.I.R. was lodged by the complainant.

11. In defence, DW-1 Bal Govind, DW-2 Gaffar Ali alias Pappu and DW-3 Roj Ali have been examined from respondent-accused side.

12. On appreciation of evidence adduced by the prosecution as well as the respondent-accused, the trial Court found the charges not proved, holding, inter-alia, that prosecution has failed to prove:-

a- demand of double bed and cash in dowry;

cruelty for non-fulfillment of dowry; and

c- cruel treatment of deceased in connection with dowry soon before her death.

Thus, trial Court acquitted respondent-accused of the charges levelled against them. Feeling aggrieved by the judgment and order of acquittal passed by the trial Court the State has preferred this appeal, which has come up before us for hearing.

13. Challenging the judgment and order of acquittal the learned Additional Government Advocate Smt Smiti Sahay, appearing on behalf of the State, has argued that the trial Court has failed to appreciate the evidence available on record. There is sufficient evidence on record to hold respondent-accused guilty of the charges. It has also been argued that an appellate Court, hearing appeal against acquittal, has full power to review, re-appreciate and reconsider the evidence available on record. The learned trial Court has wrongly held that evidence to prove the demand of dowry or cruelty in connection with dowry soon before her death available on record is insufficient.

14. Per contra, learned counsel appearing for the respondent-accused has argued that if the conclusion reached by the trial Court is also possible on the basis of evidence available on record, then the same cannot be categorized as unreasonable or perverse to justify interference by the appellate Court. The trial Court has rightly reached the conclusion that the evidence to prove demand of dowry and cruelty in connection with dowry soon before her death is absolutely lacking.

15. Before examining the spectrum of the prosecution case, we are required to deal with argument of learned counsel for the respondents-accused regarding the scope and ambit of an appeal against acquittal.

Appeal against acquittal

1. It is settled principle of criminal jurisprudence that every person having been presumed to be innocent unless he is proved to be guilty by a competent Court of law. After acquittal by the trial Court this presumption of innocence is further strengthened and reaffirmed. Thus, an accused enjoys double presumption in criminal jurisprudence after acquittal by a competent court of Law as there is double presumption in favour of accused. It has been argument of respondents-accused that judgment of acquittal can be interfered in appeal only if the judgment is either perverse or not supported by reasons. This Court can not reverse the judgment of the Trial Court as the view taken by the Trial Court was plausible view based on the evidence on record, hence the finding of the Trial Court can not be overturned.

2. In **State of U.P. Vs. Ram Sajeevan and others** (2010) 1, SCC 529, Hon'ble Apex Court is of the opinion that ordinarily a Court would be slow in interfering in the order of acquittal. There is plethora of cases on the power of appellate Court to interfere in judgment of acquittal, however, broader principles on the point was laid down by Hon'ble Apex Court in **Chandrappa and others v. State of Karnakata** 2007 (4) SCC 415 in which having considered almost all leading decisions on the point, following principles were culled out:

"(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 emphasize 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."

(Emphasis is given by us)

16. Similarly, in the case of **Sidhartha Vashisht @ Manu Sharma vs State (Nct Of Delhi),** (2010) 6 SCC**,** Page 1, Hon'ble Apex Court taking similar view, has laid down following guidelines:-

"(i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.

(ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding 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 reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed."

17. Thus, if the judgment of trial Court is found to be erroneous and against the settled principle of law then appellate Court can interfere in it. Keeping in view the above broad principles laid down by Hon'ble Apex Court, this Court is expected to examine the impugned judgment with reference to the evidence adduced by the prosecution and defence.

Case set up by the prosecution

18. As per prosecution case, the deceased was married to respondent-accused Ramjiwan two years before her death. After her marriage, her husband, father-in-law and mother-in-law demanded double bed and some cash to purchase motorcycle. When this demand was not fulfilled, they started harassing her and on 15th October, 2005 the informant, father of the deceased, received information that she was killed and hanged with ceiling.

19. In our society, dowry system is a big menace. In order to curb this social menace, Section 304-B Indian Penal Code was enacted. Section 304-B Indian Penal Code and Section 113-B Indian Evidence Act read as under:-

304B Indian Penal Code:

"(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."

113B Indian Evidence Act:

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)."

20. The ingredients of the offence under Section 304B Indian Penal Code may be stated as under:-

"a. death of a woman must have occurred within seven years of her marriage;

b. such death must have been caused by any burn or bodily injury or her death must have occurred otherwise than under normal circumstances;

c. soon before her death, she must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

d. such cruelty or harassment must be in connection with the demand for dowry.

Death within seven years of marriage

21. Now coming to the facts of the present case, it is not disputed that the deceased was married to accused Ramjiwan before two years of her death. F.I.R. (Exhibit Ka-1) also states that two years before her death she was married to Ramjiwan. Accused Ramjiwan has admitted this fact in his statement under section 313 Cr PC. It is also not disputed that her death has occurred otherwise than under normal circumstances. Now questions, which remain to be seen are whether there was any demand of dowry; and whether she was subjected to cruelty or harassment for dowry or in connection with any demand of dowry.

Demand of Dowry

22. According to prosecution case, respondents-accused started demanding double bed and cash for purchase of motorcycle in dowry, after her marriage with respondent-accused Ramjiwan. Prosecution has examined informant Sunder Lal, who is father of the deceased and PW-2 Virendra Kumar, who is brother of the deceased.

23. Though PW-1 Sunder Lal has stated in his examination-in-chief about demand of dowry, but in his cross-examination he has admitted that the respondents-accused never demanded any dowry from him when he visited their house. He has also admitted that at the time of marriage also, there was no demand of dowry. The statement of PW-2 Virendra Kumar is in contradiction to PW-1. PW-2 has stated in his examination-in-chief itself that when his father Sunder Lal came to know about demand of dowry, he went to matrimonial house of the deceased and inquired about the demand. Respondents-accused again demanded double bed and cash to purchase motorcycle from his father Sunder Lal. His father requested many times, but the respondents-accused did not pay any heed, then his father came back. PW-1 has stated that he complained it to Shri Bal Govind, who was mediator in marriage. But Shri Bal Govind has not come in the witness box to substantiate the case of prosecution. He has been produced by respondents-accused in their defence wherein he has denied this fact that respondents-accused ever demanded any dowry or the informant ever complained him in respect of demand of dowry.

24. It has been argued by the learned counsel for the respondents that the allegations made in the F.I.R. are also very general in nature. No amount of cash has been disclosed, which was demanded by the respondents-accused in dowry. He has cited Criminal Appeal No. 2321 of 2009 **Rajendra Singh Vs. State of U.P**. where Hon'ble Apex Court has held that any demand for money on account of some financial exigency or for purchasing manure cannot be termed as a demand of dowry. Thus, keeping in view the general and contradictory nature of demand, contradictions in statement of witnesses on the point of demand and non-production of any independent witness though the mediator could have been produced by the prosecution, it is difficult to hold that the respondents-accused demanded double bed and cash to purchase motorcycle in dowry.

Witnesses produced by the prosecution and defence stand on the same footing.

25. The learned Additional Government Advocate has argued that the trial Court has wrongly drawn adverse inference against the prosecution for not producing material witness Sri Bal Govind and relying upon the testimony of Shri Bal Govind DW-1 who has been examined as DW-1 on behalf of the respondents-accused. Appellant-State has argued that Bal Govind has been won over by the accused. Hence his statement can not be given same weight as that to prosecution witness. The trial Court has expressed the view that the testimony of DW-1 Bal Govind cannot be discarded only because he has been produced by the respondents-accused. In this regard Hon'bleHigh Court of Gauhati in **Alok Deb Roy and others Vs. State of Assam reported in 2003 (3) GLJ 592**, has observed:-

"Evidence of defence witnesses has to be treated at par with that of prosecution witnesses. Court should not proceed in premises that it is a tainted one. Standard of proof prescribed for prosecution is not applicable in assessing defence evidence. If testimony of defence witness does not appear to fit in with facts and circumstances of case, the same has to be rejected."

26. The above view of Gauhati High Court finds approval of Apex Court in **Munshi Prasad and others Vs. State of Bihar, (2002) 1 SCC 351**, which can be extracted as below:-

"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. Lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutor's witnesses."

Soon before her death

27. The learned Additional Government Advocate Ms. Smiti Sahay has argued vehemently that soon before her death the deceased was subjected to harassment in connection with demand of dowry**. M. Narayan Vs. State of Karnataka (2015) 6 SCC 465** is relied on by the Learned Additional Government Advocate in which explaining the word "soon before" Hon'ble Apex Court has observed:

"33. Qua the words "soon before" appearing in Section 113B of the Evidence Act, 1872 and Section 304B IPC, it is no longer res integra that the same is laden with the notion of proximity test, but not synonymous with the term "immediately before". It has been inter alia stated also in Surinder Singh v. State of Haryana that though the applicability of this expression would obviously depend on the facts and circumstances of each case, it ought to mean that the time interval cannot be stretched to any period. This Court in Kans Raj v. State of Punjab, while dwelling upon the import of the words "soon before death" observed that there ought to be a proximate and live link between the impact of cruelty based on dowry demand and the consequential death. That these words, however, should receive a fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304B was highlighted by this Court in Sher Singh v. State of Haryana. In Dinesh v. State of Haryana, it was underscored that the expression "soon before" cannot be lodged in a straitjacket formula so as to fix any time for its relevance and applicability."

28. Thus, the Hon'ble Apex Court has distinguished word "soon before" and "immediately before" and proximity test has been held to be applied in such cases.

29. The learned Additional Government Advocate has pointed out towards some contusions below both the knees of deceased appearing in inquest report (Exhibit Ka-5) and has argued that it is sufficient to indicate that soon before her death the deceased was subjected to harassment.

30. The argument of learned Additional Government Advocate is not supported by postmortem report and statement of doctor, who conducted the postmortem examination as except one ligature mark no external injury has been found at the postmortem.

Inquest Report

31. Inquest report is not a piece of substantive evidence and it has been a constant view of Hon'ble Apex Court that it can only be utilized for contradicting witnesses to inquest examined during trial. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstance he was assaulted is matter not falling within the ambit and scope of the provisions of Section 174 Cr.P.C. The purpose of preparing the inquest report is only for making a note in regard to identification marks of the deceased. In **Pedda Narayana and others Vs. State of Andhra Pradesh** AIR 1975 Supreme Court, Page 1252, discussing the provisions contained in Section 174 Cr.P.C. the Hon'ble Apex Court has observed:-

"A perusal of this provision would clearly show that the object or the proceedings under s. 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under s. 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report. The High Court has adverted to this point and has rightly pointed out as follows: "The learned Sessions Judge had also stated that the details regarding the weapons armed by each of the accused and which accused had attacked on which part of the body of the deceased are not found in the inquest report and from this he sought to draw the inference that the statements of the witness now, found recorded under section 161 Cr. P.C. could not have been the statements then read over to the panchayatdars. Column 9 of the inquest report shows that the injuries on the deceased were caused by knives and daggers. Column 11 (a) shows that A1 to A3, A4 and A5 with 3 strangers came in the jeep driven by A4, got down the jeep, stabbed the deceased with daggers and knives, pushed P.W. 1, lifted the deceased, put him in the jeep, and drove' away the jeep and death was the result of the injuries inflicted. The object of holding any inquest as can be seen from Section 174 Cr.P.C. is to find whether a person died a natural death, or a homicidal death or due to suicide. It was therefore not necessary to enter all the details of the overt-acts in the inquest report. From the mere fact that these details were not noted in the inquest report it cannot be concluded that the statements given by the witnesses and read over at the inquest did not contain those overt-acts and the statements now produced are those of the witnesses which were taken later."

32. From the above, it is clear that any entry made in inquest report prepared under Section 174 Cr.P.C. has no evidentiary value as such. The object of the proceeding is merely to ascertain whether a person has died in a suspicious circumstance or unnatural death, if so what is apparent cause of death and the inquest report may be utilized for contradicting the witnesses mentioned in inquest report. Any omission or discrepancy in the inquest is not fatal to the prosecution's case.

33. In the instant case, though in the inquest report contusions have been shown on the body of the deceased below her knees, but it does not find support from postmortem report. Even the doctor, who had conducted postmortem has not been confronted with inquest report on this point. The statement of doctor (PW-3) and postmortem report show only suicidal death of Smt. Asha Devi, the deceased. In these circumstances, inquest report in contradiction to the postmortem report is not sufficient to indicate that the deceased was subjected to any kind of cruelty soon before her death.

Harassment

34. Harassment or cruelty is a question of fact which is to be proved by examination of witnesses, but the prosecution had made no effort to examine any witness, who can prove harassment of deceased by accused persons, contradictory to it the statement of PW-1 Sunder Lal and PW-2 Virendra Kumar , father and brother of the deceased respectively, so that the deceased was happy in her matrimonial house. She used to come to her parental house by herself along with her husband and after staying there overnight returned to her home. PW-1 in his examination-in-chief himself has stated that the deceased came to him along with her husband and left with him in the next morning. No occasion has been quoted by PW-1 where her husband or her inlaws had refused to send her. PW-1 Sunder Lal has admitted in his statement that Bal Govind, who was mediator of marriage, has his Sasural in complainant's neighbourhood, but there is nothing on record to show that the complainant or the deceased have ever complained of her harassment to Bal Govind. In contradiction to it, DW-1 Bal Govind has denied any harassment of deceased by accused persons. He has also stated that the complainant never complained of any demand of dowry or harassment. In view of above it is evident that the prosecution has miserably failed to prove factum of harassment of the deceased by the accused persons.

35. In these circumstances, the trial Court has rightly held that there was neither any demand of dowry nor harassment by respondents-accused. Though marriage of deceased was within 7 years of her death and her death has also occurred in unnatural circumstances, but in absence of any demand of dowry or harassment for dowry, no presumption under Section 113B Indian Evidence Act can be drawn.

36. Thus, we do not find the judgment passed by the trial Court to be palpably wrong or erroneous, which may warrant interference by appellate Court.

37. The appeal has no merit and, hence, it is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No.- 606 Of 1999

Smt.Shyama Devi & Ors. **...Appellants**
Versus
Smt. Chanda Devi **...Respondent**

Counsel for the Appellants:
S.K. Jauhary, Kshtij Shailendra, Murtaza Ali, S.C. Verma, Shailendra Kumar

Counsel for the Respondent:
Dinesh Pathak, Rakesh Dwivedi, Rakesh Pathak

Civil Law—Second Appeal —Specific performance of contract – Registered agreement for sale – Executed by Smt. Ram Bitoli – Fraud – Not proved – Ready and willing – Notice by registered post and telegram – Subsequent purchasers – Bonafide purchasers for value without notice – Not proved – Consolidation operations – Change of numbers within the same plot (Chak) – Identity of land – Not changed – Section 30 of U.P. Consolidation of Holdings Act – Section 56 of Indian Contract Act – Impossible of performance – Not made out – Contingent contract – Apportionment – Splitting the contract – Section 16(C) of Specific Relief Act – Concurrent findings of fact – Section 100 C.P.C. – Substantial questions of law – Appeal dismissed with costs – Judgment and decree affirmed.

This second appeal has been filed by the defendants-appellants against the judgment and decree dated 11.12.1998 passed by Ist Additional District Judge, Farrukhabad in Civil Appeal No.5 of 1988 (Smt. Shyama Devi and others Vs. Smt. Chanda Devi), arising out of judgment and decree dated 11.12.1987 passed by Additional Civil Judge, Farrukhabad in Civil Suit No.242 of 1984 (Smt. Chanda Devi Vs. Shyama Devi and others) and the relief sought by this appeal is to allow the appeal and set-aside the judgment and decree passed by two courts below and dismiss the suit of plaintiff with costs throughout.(Para 1)

The brief facts relating to the case are that Smt. Chanda Devi, widow of Pandit Suraj Prasad filed Civil Suit No.242 of 1984 on 23.8.1984 for specific performance of contract with the contention that Smt. Bitola Kunwar @ Ram Bitoli, widow of Raghunandan Prasad was bhoomidhar of the land detailed at the foot of the plaint, with transferable rights, agreed to sell her land in favour of plaintiff for an agreed consideration of Rs.20,000/- , executed a registered agreement for sale after receiving Rs.5,000/- as advance sale consideration and sale deed was agreed to be executed after notification of village under Section 52 of U.P. Consolidation of Holdings Act or upon obtaining of requisite permission from consolidation authorities; that on death of Smt. Ram Bitoli @ Bitola Kunwar on 6.9.1982 her real sister Smt. Shyama Devi, the defendant no.1 became owner and Bhumidhar of the property in suit and plaintiff is entitled to get the sale deed executed by defendant no.1; that though Smt. Ram Bitoli had only half share in the property in suit and was competent to execute agreement only in respect of her half share, she pretending herself to be owner of entire property executed the agreement for sale in respect of entire; that the plaintiff has always been ready and willing to perform her part of contract and served the defendant no.1 with notice by registered post as well as telegram for execution of sale deed but she did not turn up; that since the price of entire land was agreed to be Rs.20,000/- and Smt. Ram Bitoli was held owner only to the extent of half share during consolidation, the sale deed of ½ share in the land in suit is required to be executed for half consideration Rs.10,000/- and plaintiff has always been ready and willing to perform her part of contract and get the sale deed executed in her favour on payment of Rs.5,000/-; that after execution of agreement for sale instead of executing sale deed in favour of the plaintiff, defendant no.1 in order to delay and defraud the claim of plaintiff, executed sale deeds of the property in suit in favour of defendant nos.2 & 3, who have also been impleaded as defendants; that the defendant nos.2 & 3 had full knowledge of the agreement in favour of the plaintiff and are not bonafide purchasers for value without notice and being subsequent purchasers are bound to execute sale deed in favour of plaintiff.(Para 2)

Held:(Paras 29-32)

1. It is not the case of defendants-appellants that the two courts below in arriving at above findings, either failed to consider any material evidence on record or acted wrongly in relying or misreading any inadmissible evidence. In absence of any such illegality or glaring mistake by the courts below, the learned counsel for the defendants appellants has failed to show any manifest error of fact and law or any perversity in the above concurrent findings of fact and there is no sufficient ground for interfering with or setting it aside or displacing above findings. The learned counsel for defendants-appellants have failed to show that disputed agreement is a 'Contingent Contract' to do an impossible act within the purview of provisions of Sections 39 & 56 of Indian Contract Act. Since there was no material change in allotment of plots to the tenure holder during

consolidation and the land agreed to be sold, remained same. The provisions of Section 30 of U.P. Consolidation of Holdings Act do not come in the way of granting relief for specific performance of contract and decreeing suit for such relief.

2. In view of the discussions made above, I have come to the conclusion that learned counsel for the appellants has failed to show that the courts below have passed the decree for specific performance of contract by splitting the contract or by way of apportionment, or the specific performance of contract had become impossible due to any change of property/plots in view of provisions of Section 30 of U.P. Consolidation of Holdings Act or Section 56 of Indian contract Act or that the plaintiff was not ready and willing to perform her part of contract and the suit was hit by provisions of Section 16 (C) of Specific Relief Act.

3. All the three substantial questions of law framed for disposal of this appeal are liable to decided against the defendants-appellants. The appeal has no merits and is liable to be dismissed with costs.

4. The appeal is **dismissed** with costs. The impugned judgment and decree are affirmed.

Case Law discussed:

1. Shanker Singh Vs. Narendra Singh, 2012 (90) ALR 698 (SC) (Para 23)
2. Babulli Vs. Hamidul Bibi, 2009 (75) ALR 865 (Para 23)
3. Ghori Lal Vs. Additional District Judge, Agra, 2011 (113) R.D. 430 (Para 25)
4. Mahendra Nath Vs. Baikunthi Devi, 1976 (2) ALR 21 (Para 26)
5. Zarina Sidiqqui Vs. A. Rama Lingam, 2015 (1) SCC 705 (Para 26)
6. K. Prakash Vs. B.R. Sampat Kumar, 2015 (126) Revenue Decisions 563 (Para 27)
7. Alok Bose Vs. Parmatma Devi, 2009 (2) SCC 582 (Para 27)

(Delivered by Hon'ble Harsh Kumar, J.)

1. This second appeal has been filed by the defendants-appellants against the judgment and decree dated 11.12.1998 passed by Ist Additional District Judge, Farrukhabad in Civil Appeal No.5 of 1988 (Smt. Shyama Devi and others Vs. Smt. Chanda Devi), arising out of judgment and decree dated 11.12.1987 passed by Additional Civil Judge, Farrukhabad in Civil Suit No.242 of 1984 (Smt. Chanda Devi Vs. Shyama Devi and others) and the relief sought by this appeal is to allow the appeal and set-aside the judgment and decree passed by two courts below and dismiss the suit of plaintiff with costs throughout.

2. The brief facts relating to the case are that Smt. Chanda Devi, widow of Pandit Suraj Prasad filed Civil Suit No.242 of 1984 on 23.8.1984 for specific performance of contract with the contention that Smt. Bitola Kunwar @ Ram Bitoli, widow of Raghunandan Prasad was bhoomidhar of the land detailed at the foot of the plaint, with transferable rights, agreed to sell her land in favour of plaintiff for an agreed consideration of Rs.20,000/-, executed a registered agreement for sale after receiving Rs.5,000/- as advance sale consideration and sale deed was agreed to be executed after notification of village under Section 52 of U.P. Consolidation of Holdings Act or upon obtaining of requisite permission from consolidation authorities; that on death of Smt. Ram Bitoli @ Bitola Kunwar on 6.9.1982 her real sister Smt. Shyama Devi, the defendant no.1 became owner and Bhumidhar of the property in suit and plaintiff is entitled to get the sale deed executed

by defendant no.1; that though Smt. Ram Bitoli had only half share in the property in suit and was competent to execute agreement only in respect of her half share, she pretending herself to be owner of entire property executed the agreement for sale in respect of entire; that the plaintiff has always been ready and willing to perform her part of contract and served the defendant no.1 with notice by registered post as well as telegram for execution of sale deed but she did not turn up; that since the price of entire land was agreed to be Rs.20,000/- and Smt. Ram Bitoli was held owner only to the extent of half share during consolidation, the sale deed of ½ share in the land in suit is required to be executed for half consideration Rs.10,000/- and plaintiff has always been ready and willing to perform her part of contract and get the sale deed executed in her favour on payment of Rs.5,000/-; that after execution of agreement for sale instead of executing sale deed in favour of the plaintiff, defendant no.1 in order to delay and defraud the claim of plaintiff, executed sale deeds of the property in suit in favour of defendant nos.2 & 3, who have also been impleaded as defendants; that the defendant nos.2 & 3 had full knowledge of the agreement in favour of the plaintiff and are not bonafide purchasers for value without notice and being subsequent purchasers are bound to execute sale deed in favour of plaintiff.

3. The defendants filed their respective written statements. The defendant no.1 contended that it is wrong to say that Smt. Ram Bitoli executed any agreement for sale in favour of plaintiff-respondent or concealed any fact regarding her bhoomidhari rights in respect of half share in the land in suit; that the sale deed in favour of defendant no.3 was executed after due permission from the consolidation authorities; that the agreement is void being a 'contingent contract' and specific performance in piecemeal, in respect of ½ share of Smt. Bitoli may not be permitted; that since the nature of property in suit has been changed and major part of the land has been sold to defendant nos.2 & 3 before filing of the suit, the specific performance of agreement has become impossible; that the plaintiff was tenant of Smt. Ram Bitoli, and got executed a registered power of attorney from Smt. Ram Bitoli in favour of her son Ram Sewak, at the office of Sub Registrar and appears to have obtained the agreement for sale in question by playing fraud on Smt. Ram Bitoli without her knowledge; that Smt. Ram Bitoli was not aware of the execution of alleged agreement; that Smt. Ram Bitoli had cancelled the power of attorney dated 20.5.1982 executed in favour of the son of plaintiff by executing a registered deed of cancellation on 16.7.1982 and also informed through notice; that the description of property is wrong and vague; that the suit is liable to be dismissed with costs.

4. The defendant nos.2 & 3 filed their separate written statements claiming themselves to be bonafide purchasers for value and in actual physical possession over the property purchased by them.

5. Upon parties' pleadings, the trial court framed as many as 12 issues and after evidence of parties on the basis of findings of different issues in favour of plaintiff, decreed the suit for specific performance of contract, directing the defendants to execute the sale deed of the property in suit in favour of plaintiff on receipt of Rs.5,000/-, the balance sale consideration.

6. Feeling aggrieved, the defendants filed Civil Appeal No.5 of 1988 and the appellate court affirming the findings of trial court came to the conclusion that the vendee has to pay entire consideration agreed between the parties, allowed the appeal partly and maintaining the decree for specific performance of contract, modified it to the extent that the sale deed shall be executed by defendants on receipt of Rs.15,000/- as balance sale consideration.

7. Feeling aggrieved, the defendants have preferred this second appeal under section 100 of Code of Civil Procedure.

8. This second appeal has been admitted on following substantial questions of law:-

"(a) whether the Court below was justified in granting a decree for specific performance of contract by splitting the contract by appointment (apportionment).

(c) whether the contract has become impossibility of performance dueto section 30 of the Consolidation of Holdings Act and Section 56 of the Contract Act.

(d) whether the plaintiff was ready and willing to perform her part ofthe contract and the suit is hit by Section 16(C) of the Specific Relief Act."

9. On various issues framed by trial court, upon detailed discussions and analysis of evidence on record, the trial court has held in its findings on issue nos.5, and 11 that it is proved from the evidence on record that the disputed agreement for sale was executed by Smt. Ram Bitoli in favour of plaintiff Smt. Chanda Devi which is not proved to have been obtained by playing fraud on Smt. Ram Bitoli at the time of execution of power of attorney in favour of Pandit Ram Sewak, the son of plaintiff-respondent.

10. On issue no.10, it held that it is proved from the evidence on record that during consolidation due to the change of numbers within the same plot (CHAK), the identity of land in dispute was not changed and on the ground of change of identity of property in suit, the relief of specific performance may not be refused.

11. On issue no.8, the trial court has held that the plaintiff has proved that she served notice on defendants through registered post as well as through telegram and that she was always ready and willing to perform her part of contract and to get the sale deed executed in her favour on payment of balance sale consideration.

12. On issue no.7, the trial court upon considering the statements of subsequent purchasers, defendant no.2 Smt. Saraswati Devi who has stated as D.W.-2 that negotiations for purchase of property were made by her husband who is Lekhpal and before purchasing the land from
Smt. Shyama Devi necessary enquiry was not made by her from the office of Sub-Registrar, and defendant no.3 Indresh Singh, who has also stated as D.W.-3 that he did not make any enquiry in the office of Sub-Registrar, held that the disputed agreement for sale is a registered agreement, of

which there is a presumption of due notice to subsequent purchasers and since they have not taken due care and precaution and did not make necessary enquiry, before getting the sale deed executed in their favour, it is proved from the evidence on record that they are not bonafide purchasers for value, without notice of the disputed agreement for sale.

13. On above findings, the suit of plaintiff was decreed for specific performance of contract and defendants were directed to execute sale deed of property in suit in favour of plaintiff on receipt of Rs.5,000/-, the balance sale consideration from the plaintiff.

14. In first appeal filed under Section 96 of Code of Civil Procedure by defendants against the judgment and decree passed by the trial court, the appellate court affirmed the findings of court below on all the above points/issues. However, the first appellate court held that since the agreement for sale was executed in respect of the entire share of Smt. Ram Bitoli in the plot numbers in question, so inspite of the fact that she had only half share, the plaintiff is not entitled to get the sale deed executed in respect of the half share of Smt. Bitoli on payment of proportionately half sale consideration, rather she has to make payment of entire amount of agreed sale consideration, even on getting the sale deed executed in her favour, only in respect of half share of Smt. Bitola Kunwar in the property in suit. It accordingly modified the judgment and decree passed by trial court, maintaining the decree for specific performance of contract subject to payment of Rs.15000/- instead of Rs.5000/- towards balance consideration.

15. It is settled principle of law that in second appeal under Section 100 of C.P.C., the concurrent findings of fact recorded by two courts below may not be set aside or interfered with, unless there is some manifest error, illegality or perversity and appeal has to be decided only on substantial questions of law, if any involved.

16. Learned counsel for the defendants-appellants addressing on all the three substantial questions of law, contended that the disputed agreement for sale was not executed by Smt. Ram Bitoli and since plaintiff Smt. Chanda Devi was her tenant and Smt. Ram Bitoli had executed a registered power of attorney in favour of Pandit Ram Sewak, the son of plaintiff, it appears that at the time of execution of deed of power of attorney on 20.5.1982, the disputed agreement for sale was obtained by playing fraud on Smt. Ram Bitoli without any knowledge to her; that since the village was under consolidation operations, so no sale deed could have been executed, till completion of consolidation proceedings or without permission by the consolidation authorities; that since the property in suit was changed during consolidation operations and the plots given in exchange were at different place, so due to change of subject matter of the suit, the specific performance of contract has became impossible and the decree for specific performance of contract may not be passed; that while the agreement for sale was executed for entire plots, the trial court and first appellate court had no jurisdiction to grant decree for specific performance of contract in respect of half share by apportionment and have acted wrongly in granting decree for specific performance of contract; that the grant of relief of decree for specific performance of contract upon apportionment is legally not permissible under law; that the plaintiff/respondent had failed to show that she was or has been ready and willing to perform her part of contract and to get the sale deed

executed in her favour on payment of balance sale consideration; that the appellants/defendants nos.2 & 3 are proved to be bonafide purchasers for value without notice of disputed agreement for sale and no decree can be passed against them; that due to change of plot numbers during consolidation specific performance of contract has become impossible and the decree for specific performance of contract is barred by provisions of Section 30 of U.P. Consolidation of Holdings Act as well as Section 56 of Indian Contract Act; that both the courts below failed to exercise discretion correctly and the decree for specific performance is hit by provisions of Section 16(C) of Specific Relief Act; that the impugned judgments and decrees passed by two courts below are liable to be set-aside and suit is liable to be dismissed with costs throughout.

17. Learned counsel for the defendants-appellants has relied on following case laws in support of his arguments:- (1) ***Shanker Singh Vs. Narendra Singh, 2012 (90) ALR 698 (SC), (2) Babulli Vs. Hamidul Bibi, 2009 (75) ALR 865, (3) Ghori Lal Vs. Additional District Judge, Agra, 2011 (113) R.D. 430 and (4) Mahendra Nath Vs. Baikunthi Devi, 1976 (2) ALR 21.***

18. Per contra, learned counsel for the plaintiff-respondent submitted that there is no evidence on record to show that the disputed agreement for sale was obtained by fraud and in absence of any evidence to above effect, the mere contention of defendants-appellants is baseless and worthless; that there is no evidence on record to show that any fraud was played by plaintiff or her son in obtaining the disputed agreement for sale from Smt. Ram Bitoli; that undisputedly, Smt. Ram Bitoli by executing the deed of cancellation of power of attorney on 16.7.1982, cancelled the power of attorney executed in favour of Pandit Ram Sewak, the son of plaintiff but mere cancellation of above deed of power of attorney, does not mean that the agreement for sale executed on 20.5.1982 was also wrong and illegal, particularly when in the deed of cancellation of power of attorney Paper No.106-A on record, she has not stated of any fraud having been played on her; that moreover, Smt. Ram Bitoli got it cancelled the deed of power of attorney only and did not take any action for cancellation of disputed agreement for sale rather allowed it to stand; that considering all these aspects and evidence on record, the trial court has rightly held on issue nos.5 & 11 that the agreement for sale was executed by Smt. Ram Bitoli, which is not proved to have been obtained by fraud and these findings were affirmed by the first appellate court; that there is nothing on record to show that during consolidation proceedings the property in suit was changed and instead of the property/plots agreed to be sold by Smt. Ram Bitoli, some other plots or land at some other place was allotted to her or her successor or that the property/land in suit was materially or completely changed with other plots; that it is proved from the evidence on record that during consolidation operations, neither the numbers and area of plots nor its location/place was changed and if some plot no.2406/2 of negligible area did not fell in share of Smt. Ram Bitoli in consolidation, it does not adversely affect the rights of plaintiff, as the land considerably remained the same; that in the circumstances Section 30 of U.P. Consolidation of Holdings Act as well as Section 56 of Indian Contract Act does not come into play and does not adversely affect the granting the decree for specific performance of contract on the ground of its becoming impossible of performance; that it is proved from the evidence on record that the plaintiff has always been ready and willing to perform her part of contract and to get the sale deed executed in her favour on payment of entire balance consideration despite the fact that Smt. Ram Bitoli was adjudged owner

of only ½ share in the property in suit while she agreed to sell full share claiming to be exclusive owner of all the plot numbers; that the learned courts below have not granted decree for specific performance of contract by splitting the contract by way of apportionment and so the substantial question of law in this regard as framed is unwarranted; that the case laws relied by and on behalf of defendants-appellants are based on different facts wherein plots agreed to be sold were entirely or considerably changed with some other plots to the vender and so in view of provisions of Section 30 of U.P. Consolidation of Holdings Act it was held that due to change of property the decree for specific performance of contract cannot be passed and the alternative relief of money decree would be appropriate in such cases; that the defendant nos.2 & 3 had full knowledge of the registered agreement for sale in favour of plaintiff and having full knowledge of the agreement they have obtained sale deeds in respect of part of disputed property, without payment of sale consideration; that the defendant-appellant nos.2 & 3 did not produce any evidence to prove their sale deeds and payment of sale consideration; that the defendant nos.2 & 3 have failed to prove themselves to be bonafide purchasers of value without notice of the disputed registered agreement for sale.

19. During hearing, upon noticing that the dispute agreement for sale has been executed by Smt. Ram Bitoli alone and it is not a bilateral document having also been signed or thumb marked by the plaintiff, upon query of enforcibility of such an unilateral agreement for sale, learned counsel for the defendants-appellants did not address the court. However, learned counsel for the plaintiff-respondent contended that the agreement for sale is a contract between the parties for sale and purchase of property at agreed price and it may also be oral and if an unilateral document of agreement for sale has been executed, it is equally enforceable at law as a bilateral document.

20. Learned counsel for the plaintiff-respondent has relied on following case laws:- (1) ***Zarina Sidiqqui Vs. A. Rama Lingam, 2015 (1) SCC 705, (2) K. Prakash Vs. B.r. Sampat Kumar, 2015 (126) Revenue Decisions 563*** and ***(3) Alok Bose Vs. Parmatma Devi, 2009 (2) SCC 582.***

21. Upon hearing learned counsel for the parties and perusal of record, I find that the two courts below have given concurrent findings of fact that plaintiff has proved that Smt. Ram Bitoli executed disputed agreement for sale in her favour and got it registered. The two courts below have also come to the conclusion that the disputed agreement for sale is not an outcome of fraud and plaintiff has proved that she has always been ready and willing to perform her part of contract and to get the sale deed executed in her favour on payment of balance sale consideration. The trial court on its findings on issue nos.5 & 11 has held that it is proved from the evidence on record that agreement for sale was executed by Smt. Ram Bitoli and was not obtained by fraud. On issue no.8, it held that plaintiff served the defendants with notice through registered post as well as telegram and has always been ready and willing to perform her part of contract. On issue no.10, it held that during consolidation, as per form C.H.-23 issued on 13.8.1984 the numbers of plot (Chak) allotted to Smt. Ram Bitoli are the same and only minor changes were made within the same plots so it will not be correct to say that due to minor changes within the plot (Chak), the land in suit is not identifiable and execution of sale deed has become impossible. The trial court on issue no.7, held

that the defendant nos.2 & 3 had full knowledge of the disputed registered agreement for sale and they are not bonafide purchasers of value without notice. The above findings of fact were affirmed by the appellate court in Civil Appeal No.5 of 1988 by the impugned judgment and decree.

22. It is settled principle of law that the relief of specific performance is a discretionary relief and the court should exercise its discretion judicially and not arbitrarily. It is also settled principle of law that discretion so exercised by the courts in granting or refusing the decree of specific performance of contract, if has been exercised in accordance with sound and reasonable judicial principles, the appellate court should not interfere with the discretion so exercised, either way.

23. In the case laws relied by defendants-appellants, I find that in the case of ***Shanker Singh Vs. Narendra Singh, 2012 (90) ALR 698 (SC),*** the decree for specific performance of contract was refused on the ground that the vender had agreed to sell entire house property alongwith half share of his wife and since he had no authority to enter into contract on behalf of his wife, the decree for specific performance of contract was refused. Similarly, in the case of ***Babulli Vs. Hamidul Bibi, 2009 (75) ALR 865,*** the mother had executed agreement for sale in respect of the share of her minor children, which was found unenforceable.

24. The above case laws being based on different facts, have no application in this case.

25. In the case of ***Ghori Lal Vs. Additional District Judge, Agra, 2011 (113) R.D. 430,*** the description of property was found to have been completely changed and so the decree for specific performance was refused in view of provisions of Section 30 of U.P. Consolidation of Holdings Act.

26. In the case of ***Mahendra Nath Vs. Baikunthi Devi, 1976 (2) ALR 21,*** the Full Bench of this Court upon considering the provisions of Section 30 of U.P. Consolidation of Holdings Act held that:-

" if after consolidation tenure holder was allotted different plots in Chak then contracted, the agreement to sale, will not be enforceable in view of the provisions of Section 30 of U.P. Consolidation of Holdings Act as if the disputed land has gone finally in the Chak of third person the suit for specific performance has to be dismissed. However, if the decree passed before finalisation of Chaks or if the land remains with the judgment debtor even on allotment, effect can be given to the decree under Section 52 (2) of U.P. Consolidation of Holdings Act."

The court in suit for specific performance of a contract for sale, has to specifically enforce the contract, if possible. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view, and if untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargains, it can very well be said that the promiser finds it impossible to do the act which promised to do."

27. The case laws relied by plaintiff-respondent are as under:-

28. In the case of ***Zarina Sidiqqui Vs. A. Rama Lingam, 2015 (1) SCC 705,*** the Apex Court has held that:-

"the defendants' plea that execution of agreement was obtained by practicing fraud not made out and defendants suppressed the material facts to mislead the court, the exercise of discretion in favour of granting the decree for specific performance was correct."

29. In the case of ***K. Prakash Vs. B.r. Sampat Kumar, 2015 (126) Revenue Decisions 563,*** the court has held that:-

"appellate court not to interfere with the order of trial court unless it is established that discretion has been exercised perversely, arbitrarily or against the judicial principles, and subsequent rise in price not to be treated as hardship entailing refusal of decree for specific performance".

30. In the case of ***Alok Bose Vs. Parmatma Devi, 2009 (2) SCC 582,*** the Apex Court has held that

"*an agreement of sale comes into existence when vender agrees to sell and vendee agrees to purchase for an agreed consideration on agreed terms, may it be by way of communication signed or unsigned, it may be a single document signed by both parties, it may also be by a document in two parts, each party signing one part one copy and then exchanging, thus both may have copies signed by other parties.* ***It may also by vender executing the document and delivering it to purchaser, who accepts it.*** *Even an oral agreement to sell is valid, then, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. Mere form or manner of drafting of an agreement would not be a decisive factor, real intention and conduct of parties in proceedings in terms of the same would decide, whether an concluded contract came into existence or not."*

28. In view of the above case law, if after consolidation tenure holder gets allotted substantially the same plots in his Chak, without any material considerable or complete change, as in this case, the relief for decree for specific performance of contract can be and should be granted and should not be refused. It is pertinent to mention that there is nothing on record to show that the plots in the Chak allotted to Smt. Ram Bitoli were different from those which were contracted under the disputed agreement for sale. Further there is nothing to show that the plots agreed to be sold under the disputed agreement for sale were allotted to some other persons during consolidation, making the specific performance of contract impossible on account of its becoming 'contingent contract' or in view of provisions of Section 30 of U.P. Consolidation of Holdings Act and Section 56 of Indian Contract Act.

29. It is not the case of defendants-appellants that the two courts below in arriving at above findings, either failed to consider any material evidence on record or acted wrongly in relying or misreading any inadmissible evidence. In absence of any such illegality or glaring mistake by the courts below, the learned counsel for the defendants appellants has failed to show any manifest error of fact and law or any perversity in the above concurrent findings of fact and there is no sufficient ground for interfering with or setting it aside or displacing above findings. The learned counsel for defendants-appellants have failed to show that disputed agreement is a 'Contingent Contract' to do an impossible act within the purview of provisions of Sections 39 & 56 of Indian Contract Act. Since there was no material change in allotment of plots to the tenure holder during consolidation and the land agreed to be sold, remained same. The provisions of Section 30 of U.P. Consolidation of Holdings Act do not come in the way of granting relief for specific performance of contract and decreeing suit for such relief.

30. In view of the discussions made above, I have come to the conclusion that learned counsel for the appellants has failed to show that the courts below have passed the decree for specific performance of contract by splitting the contract or by way of apportionment, or the specific performance of contract had become impossible due to any change of property/plots in view of provisions of Section 30 of U.P. Consolidation of Holdings Act or Section 56 of Indian contract Act or that the plaintiff was not ready and willing to perform her part of contract and the suit was hit by provisions of Section 16 (C) of Specific Relief Act.

31. All the three substantial questions of law framed for disposal of this appeal are liable to decided against the defendants-appellants. The appeal has no merits and is liable to be dismissed with costs.

32. The appeal is dismissed with costs. The impugned judgment and decree are affirmed.

33. After preparation of decree, let the record be sent to court below at earliest.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE VIPIN SINHA, J.

Criminal Appeal No.- 613 Of 1983

Net Ram **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:

Pratap Narain Mishra

Counsel for the Respondent:
Govt. Advocate

Appellant Net Ram has assailed the judgment and order dated 9.3.1983 passed by the Sessions Judge, Budaun in S.T. No.422 of 1982 (State Vs. Net Ram) arising out of Crime No.44 of 1982 whereby he was held guilty of offence under Section 302 I.P.C. and sentenced to undergo an imprisonment for life.

The judgment and order dated 9.3.1983 passed by the Sessions Judge, Budaun in S.T. No.422 of 1982 (State Vs. Net Ram) arising out of Crime No.44 of 1982 is, hereby, set aside. The appeal is allowed. The appellant is acquitted.

Held: Para-

Case Law discussed: N.A

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Appellant Net Ram has assailed the judgment and order dated 9.3.1983 passed by the Sessions Judge, Budaun in S.T. No.422 of 1982 (State Vs. Net Ram) arising out of Crime No.44 of 1982 whereby he was held guilty of offence under Section 302 I.P.C. and sentenced to undergo an imprisonment for life.

2. Prosecution case in brief is that one Basanti the real brother of complainant Moti Ram was the resident of village Panotha, Police Station Kunwargaon, district Budaun. He was living with his son Kalicharan (deceased), daughter Smt. Chandrawati (P.W.3) and son-in-law, appellant Net Ram.

3. It appears that Basanti after the death of his wife invited his daughter, P.W. 3 Chandrawati and her husband accused Net Ram to live with him at his house village Panotha. Thus, accused Net Ram and Chandrawati started living with Basanti at his house. Deceased Kali Charan, the only son of Basanti, was also living with them.

4. It is alleged that accused Net Ram started pressurizing his father-in-law to transfer his landed property in his name. Basanti advised patience. Four days prior to the incident ie. on 14.6.1982, Basanti left his residence to visit his relations in another village.

5. Appellant Net Ram and his wife Chandrawati and Kalicharan remained in the house. It is alleged that on 14.6.1982 early, in the morning at about 5 am., appellant Net Ram was seen going out of the village. Suddenly in the morning of 14.6.1982 informant and other villagers heard wailing of woman emanating from the house of Basanti. On inquiry, Chandrawati (P.W. 3) told his uncle informant Moti Ram (P.W. 1) that her brother Kalicharan (deceased) had disappeared. A search party was organized. Appellant Net Ram was found at the periphery of their village. It is alleged that he was throwing the corpse of Kalicharan in the pond. They caught appellant Net Ram

and took out the dead body of Kalicharan from the pond. Informant Moti Ram (P.W.1) the brother of Basanti and uncle of Chandrawati and deceased Kalicharan, lodged oral report of this incident against the appellant Net Ram. The police registered the case under Section 302 and 201 I.P.C. Investigation ensued and charge sheet under Section 302 and 201 I.P.C. was submitted against the accused appellant.

6. Accused appellant Net Ram was charged under Section 302 and 201 I.P.C. on 23.12.1982. He pleaded not guilty and claimed to be tried. The trial was conducted. Prosecution adduced the testimony of informant Moti Ram as P.W. 1, Chadammi as P.W. 2, Chandrawati as P.W. 3, Dr. Raj Kumar Verma as P.W. 4 and Sub Inspector, Mahendra Singh Malik as P.W. 5. Accused appellant denied all allegations in his statement recorded under Section 313 Cr.P.C. and also claimed that he has been falsely implicated by informant Moti Ram, uncle of deceased Kalicharan in order to grab the property of Basanti. An opportunity was given to appellant to adduce evidence in defence but of no avail. Thereafter trial Judge concluded that there is sufficient evidence to hold Net Ram guilty of offence under Section 302 I.P.C., therefore, he was sentenced to undergo life imprisonment vide judgment and order dated 9.3.1983. This judgment is under challenge before Court in this appeal.

7. Heard Sri S. Rashid, learned counsel for the appellant and Sri Rajiv Kumar Mishra, learned counsel for State.

8. Learned counsel for appellant has submitted that there is no evidence on record to hold appellant guilty of offence under Section 302 I.P.C. No eye witness account is available regarding his alleged involvement in murder of deceased Kalicharan. The circumstances relied by the Trial Judge have not been established by cogent and credible evidence. In any case, the circumstances relied by the Trial Judge by themself are not sufficient to hold the appellant Net Ram guilty of murder of Kalicharan.

9. Per contra, learned A.G.A. has submitted that case is based on circumstantial evidence. Circumstances have been established by independent and credible evidence and they unerringly indicate that deceased was done to death by appellant Net Ram.

10. A bare perusal of record would reveal that there is no direct evidence of assassination of deceased Kalicharan against the accused appellant. Informant Moti Ram (P.W. 1), Chadammi (P.W. 2) and Chandrawati (P.W. 3) did not witness the incident of murder. This case is based purely on circumstantial evidence. Two witnesses, namely, P.W. 1 Moti Ram and P.W. 2 Chadammi have primarily given evidence of the fact that on day of incident i.e. on 14.6.1982 at about 5 am. they heard wailing of Chandrawati emanating from her house whereupon informant Moti Ram and his companions questioned her. Smt. Chandrawati (P.W. 3) divulged that her deceased brother Kalicharan is missing and also said that appellant Net Ram had taken deceased Kalicharan along with him. However this part of statement is not consistent with the content of F.I.R. in which Smt. Chandrawati had merely reported the disappearance of deceased Kalicharan only. The interesting part is that Smt. Chandrawati (P.W. 3) did not give any information regarding

appellant, Net Ram to his uncle or villagers. Involvement of appellant Net Ram was not divulged by Smt. Chandrawati (P.W. 3) as reflected by the F.I.R. It mere discloses that appellant Net Ram was seen in the company of deceased Kalicharan by informant Moti Ram (P.W. 1), Chadammi (P.W. 2) and other persons at 5 am. and they in fact, questioned appellant Net Ram of this early morning stroll with deceased Kalicharan. Thereafter these very people, namely, Moti Ram (P.W. 1), Chaddammi (P.W. 2) etc. heard the wailing of Smt. Chandrawati (P.W. 3) coming out of her house. F.I.R. says that complainant informed Smt. Chandrawati that Net Ram had taken away deceased Kalicharan.

11. F.I.R. further says that when they reached the pond, they saw that the appellant Net Ram was throwing the dead body of deceased Kalicharan in it. When the search party intervened and questioned him, he started running away from the spot. Thereafter the search party chased him and caught him at the periphery of the village. The dead body of Kalicharan was taken out of the pond which was full of mud. The informant Moti Ram lodged the report on same day about 7:30 am. at Police Station Kunwargaon which was three and a half kilometers away from the place of occurrence.

12. The testimony of informant Moti Ram (P.W. 1) changes the complexion of story enshrined in F.I.R. Testimony given by Smt. Chandrawati (P.W.3) that appellant Net Ram had taken deceased Kalicharan with him during middle of night is contradictory. Different story is given by P.W. 2 Chadammi, a member of same clan. The evidence would reveal that there are vast and significant discrepancies between the statements of Moti Ram (P.W. 1), Chadammi (P.W.2) and Smt. Chandrawati (P.W. 3). Chandrawati significantly changed the story of preceding night during her testimony. She has stated that her husband, Net Ram (appellant) snatched deceased Kalicharan from her house at about mid night. She has further stated that she had opposed the capture of deceased Kalicharan but her husband forcibly lifted Kalicharan overruling her objection. She reportedly raised alarm immediately. Now other witnesses have claimed that they went to the residence of Smt. Chandrawati (P.W. 3) after hearing her cries at 5 am. and that; they had already seen the decampment of appellant Net Ram with deceased Kalicharan. If the evidence of P.W. 3, Smt. Chandrawati is taken into account then it is apparent that evidence of witnesses that they observed accused Net Ram leaving with deceased Kalicharan in the early morning at 5 am. of 14.6.1982, cannot be correct. If evidence of P.W. 1 Moti Ram and P.W. 2 Chadammi is correct that they witnessed the departure of appellant Net Ram along with deceased Kalicharan in the early morning at about 5 am., then the testimony of P.W. 3 Chandrawati would become false. At one place informant Moti Ram (P.W. 1) said that he was feeding his cattle when he saw that appellant Net Ram was going along with deceased Kalicharan whereas Chadammi (P.W. 2) has stated that Moti Ram was siting along with him and Meharban etc. at his Chaupal when they witnessed the exit of appellant and deceased Kalicharan towards the pond. P.W. 1,Moti Ram refused to acknowledge the presence of Manohar, Chadammi and Meharban on that occasion. It is alleged that Manohar, Chadammi and Meharban informed him subsequent to this episode that they too had seen the appellant Net Ram and deceased Kalicharan going together towards the pond. This evidence is contrary to the testimony of P.W. 2 Chadammi who has testified that Moti Ram (P.W. 1) had asked the accused appellant Net Ram as to where he was going.

13. The evidence of both P.W. 1, Moti Ram and P.W. 2 Chadammi regarding the manner in which corpse of Kalicharan was taken out from the pond is also full of discrepancy. P.W. 1 Moti Ram said that corpse of deceased Kalicharan was lying in the water whereas P.W. 2 Chadammi has testified that the body was buried one foot deep in the mud of pond. It is therefore, evident that the stories of 'last seen' and discovery of dead body are both doubtful as witnesses have deposed contrary to each other. P.W. 3 Chandrawati has also given contradictory statement. If the testimonies of P.W. 1 Moti Ram and P.W. 2 Chadammi are taken into account then that Smt Chandrawati P.W. 3 raised alarm in the morning at 5 am. while P.W. 3 Chandrawati says that she raised alarm in the middle of the night whereupon some villagers reached her place. It is therefore, clear that none of these witnesses are credible, reliable and trustworthy.

14. Surprisingly, even the Trial Judge concluded that the witnesses have deposed in a very shady manner and their testimony is not reliable. At few places the Trial Judge has concluded that witnesses have deposed falsely yet he concluded that the part of the testimony of these witnesses can be accepted for establishing some circumstances which indicate that appellant Net Ram had committed crime. The Trial Judge concluded that in the night in question deceased Kalicharan was taken away by accused appellant Net Ram and that the body of the deceased was recovered at his instance. The Trial Judge opined that these two circumstances have been established by evidence and they unerringly point out at the guilt of appellant.

15. We are afraid the circumstances relied by the Trial Judge are not at all conclusive. The alleged departure of deceased Kalicharan with the accused appellant in the night of incident has not been established at all. Smt. Chandrawati (P.W. 3) herself has said that deceased was taken by appellant Net Ram in the middle of night and she claims to have raised hue and cry immediately. If informant Moti Ram and villagers reached her residence in the middle of night, then there was no occasion and reason for them to fabricate the story of 5 am. They could have simply stated that they heard the cries of Chandrawati in the middle of night and that; later the dead body of Kalicharan was recovered at the instance of appellant. But the story given by P.W. 1 Moti Ram and P.W.2 Chadammi is diametrically opposite to the testimony of P.W. 3 Chandrawati. Only three witnesses have been produced by prosecution and all three have testified in a different and contradictory manner regarding departure of deceased Kalicharan in the alleged company of appellant Net Ram and also on the point of position of dead body in the pond as well as its recovery. The Trial Judge himself has pointed out several discrepancies. If P.W. 1 Moti Ram and P.W. 2 Chadammi did not see the departure of deceased Kalicharan in the company of appellant Net Ram, then the obvious question would be if the incident occurred in the middle of night then why was report lodged with considerable delay?

16. We believe that testimony of P.W. 3 Chandrawati that she had resisted the attempt of appellant Net Ram in the night cannot be believed. If she raised alarm, immediately in the aftermath of Net Ram lifting the minor boy, then other family member and villagers could have easily stopped Net Ram from doing what he allegedly did. The murder of a person is not a everyday affair. The pond was two kilometers away from the residence of Net Ram. It would take considerable time to reach the place of occurrence. Therefore, if Chandrawati (P.W. 3) was aware

of the alleged misdeeds of Net Ram and raised the alarm in the night as claimed, then it would have been possible for other villagers, Moti Ram etc. to catch appellant Net Ram before the murder of Kalicharan.

17. We have carefully scanned all material on record and we believe that there was a tension in the family probably on account of arrival of appellant Net Ram and his wife Chandrawati in the family of Basanti, brother of P.W. 1 Moti Ram. Perhaps some people even apprehended that some part of agriculture land or the property of Basanti would go to Net Ram and this apprehension has probably given rise to this case. A bare perusal of the entire record would reveal that an attempt to manufacture and create evidence is palpable. We have noticed that manner of recovery of corpse has been described differently by both witnesses, namely, P.W. 1 Moti Ram and P.W. 2 Chadammi. It begs the question why these significant discrepancies are available in the testimony of both witnesses, if they were present at the time of recovery of the body. If their presence on the place of recovery of dead body is doubtful then the so called extra judicial confession of appellant Net Ram to P.W. 2 Chadammi cannot be taken into account. We believe that significant time lag between the two stories of departure of appellant Net Ram allegedly in the company of Kalicharan cannot be reconciled. While P.W. 3 Chandrawati says that Net Ram departed in the middle of night and accompanied by Kalicharan but two other eye witnesses claimed that Net Ram left early in the morning. Both set of witnesses belong to the same clan and both claimed to have witnessed the departure of appellant Net Ram. Therefore, the aforesaid discrepancies are fatal to the prosecution story.

18. Criminal trial based on the circumstantial evidence needs specific kind of evidence. Each circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Those established circumstances should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by accused and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of guilt of accused and such evidence should not only be consistent with the guilt of accused but should be inconsistent with his innocence.

19. We have carefully examined the material available before us. It is evident that the trial judge merely believed certain parts of testimonies of witnesses. We believe that Trial Judge was right in disbelieving certain parts of testimonies of witnesses. We also believe that Trial Judge rightly discarded the significant portion of evidence of prosecution but surprisingly, he believed that two circumstances have been established by the same evidence i.e. the alleged departure of deceased Kalicharan in the company of appellant and later on recovery of corpse of deceased at his instance. We have no hesitation to hold that even the remaining part of evidence relied by the Trial Judge is very weak and unworthy of credit. The alleged extra judicial confession is not trustworthy at all. The circumstances pointed out by the Trial Judge have not been established in convincing manner and even if these two circumstances are taken into account that alone would not be sufficient to hold that appellant Net Ram was guilty of murdering deceased Kalicharan.

20. Admittedly, Net Ram was living with deceased and his family, therefore, their association was not at all surprising. The evidence regarding recovery of dead body at the instance of accused appellant is full of holes. The witnesses have testified in contradictory manner in this regard, therefore, in our opinion they cannot be relied. We have carefully gone through the entire record. We believe that prosecution has failed to bring home the guilt of accused by trustworthy evidence.

21. In view of the aforesaid, the judgment and order dated 9.3.1983 passed by the Sessions Judge, Budaun in S.T. No.422 of 1982 (State Vs. Net Ram) arising out of Crime No.44 of 1982 is, hereby, set aside. The appeal is allowed. The appellant is acquitted. His sureties are discharged. The appellant be released forthwith if he is in custody and not wanted in any other case. Let a copy of this order be certified to concerned court through Sessions Judge, Budaun within a fortnight for compliance. The court concerned shall report the compliance within a month thereafter.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 697 Of 1983

Ram Autar Singh & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
Ram Prasad Singh, J.R.S. Tomar

Counsel for Respondent:
A.G.A.

Unlawful Assembly — Common Object — Murder — Culpable Homicide — Hostile Witnesses — Injured Witness Exonerating Accused — Inconsistency Between Two Medical Reports — Affidavits as Substantive Evidence — Abatement of Appeal on Death of Accused — Benefit of Doubt — Acquittal — Sections 147, 148, 149 and 304, Indian Penal Code, 1860.

1. Abatement of appeal on death of accused — Surviving co-appellants — Adjudication confined to surviving appellants: Where one of the convicted appellants dies during the pendency of a criminal appeal, the appeal of such appellant abates and the High Court is thereafter concerned only with the appeals of the surviving appellants. In the present case, the appeal of Appellant No. 1 Ram Autar Singh stood abated on account of his death vide order dated 19.05.2016, and accordingly the Court adjudicated only the appeals of surviving appellants Ram Vishal Singh and Raj Bahadur Singh.

2. Hostile witnesses — Majority of prosecution witnesses turning hostile — Four out of six witnesses of fact not supporting prosecution version — Effect on prosecution case — Conviction not sustainable: Where, out of six witnesses of fact produced by the prosecution, four witnesses — including the scribe of the FIR (PW-3 Munna Singh), an eyewitness (PW-1 Subedar Singh), another eyewitness (PW-4 Shiv Baran Singh), and the sole injured witness (PW-5 Jagat Prasad) — entirely disown the prosecution version, deny their respective statements made to the Investigating Officer during investigation, and refuse to support the FIR, the prosecution case rests only on the evidence of the remaining two witnesses. Where those two witnesses are themselves found unreliable and contradictory inter se, conviction of the accused cannot be sustained. The mass turning hostile of prosecution witnesses in a case of this nature severely impairs the prosecution case.

3. Injured witness exonerating accused — Testimony of sole injured witness (PW-5 Jagat Prasad) completely denying involvement of accused — High evidentiary value — Prosecution story demolished: The testimony of an injured witness is generally accorded a high degree of evidentiary value since the fact of his injuries establishes his presence at the scene of occurrence. Where the sole injured witness (PW-5 Jagat Prasad), whose presence on the spot is admitted by both parties, completely exonerates the accused persons — stating that he and the deceased were attacked by unknown miscreants, that the incident occurred at 8:00 p.m. (and not 5:00 p.m. as alleged by prosecution), and that he denied giving any statement to the Investigating Officer implicating the accused — such testimony is a powerful circumstance militating against the prosecution. The court cannot lightly discard the testimony of the injured witness and sustain a conviction on the basis of two other interested and contradictory witnesses.

4. FIR — Scribe of FIR denying authorship — FIR not written or signed by alleged scribe — Denial of prosecution story regarding lodging of FIR — Serious infirmity: Where the person named as the scribe of the FIR (PW-3 Munna Singh) categorically denies having written or signed the FIR, denies being present at the police station at the time of its lodging, and further denies having gone to the police station in the company of the informant, the very foundation of the FIR is rendered suspect. The denial by the alleged scribe of both the authorship of and his presence during the registration of the FIR constitutes a serious infirmity going to the root of the prosecution case, particularly where the informant himself gave shifting and contradictory accounts of the circumstances of the FIR's registration.

5. Inconsistency between two medical reports — Initial examination report and post-mortem report at variance — Number and nature of injuries inconsistent — Prosecution failing to explain inconsistency — Non-production of first examining doctor — Adverse inference: Where the deceased was initially examined by one doctor who found five injuries including four incised wounds, but the post-mortem report prepared by another doctor after death recorded eleven ante-mortem injuries with no incised wound at all — the death being attributed primarily to a blunt-force head injury — such a glaring and unexplained inconsistency between the two medical reports is a serious infirmity. The inconsistency is further aggravated by the fact that the first examining doctor, though available (he had merely gone to Bangalore for training), was not produced as a prosecution witness, thereby depriving the court of an explanation for the variance. Non-production of an available material witness gives rise to an adverse inference against the prosecution. Further, where the surviving appellants were charged specifically with using a sharp-edged weapon (Farsa/spade), the absence of any incised wound in the post-mortem report is a material circumstance favouring the defence.

6. Affidavits — Not substantive evidence — Cannot substitute testimony recorded in court — Use of affidavits confined to limited purpose during trial — Trial court erred in relying on affidavits for conviction: Affidavits allegedly executed by witnesses cannot be treated as substantive evidence and cannot substitute the evidence recorded by the court during trial. Their use is confined to limited purposes during the course of trial, such as confrontation of a witness with a prior inconsistent statement. The trial

court committed an error in relying upon affidavits allegedly executed by witnesses for the purpose of convicting the accused persons, particularly when the witnesses themselves had explained the circumstances under which such affidavits were prepared and had cast serious doubt on their veracity and authenticity by stating that they were prepared by counsel for the complainant.

7. Witnesses of prosecution — Testimony of sole informant (PW-2 Nathu Singh) riddled with contradictions — Self-contradictions regarding FIR registration, time of meeting Investigating Officer, and composition of the party — Not credible: Where the testimony of the informant is replete with material self-contradictions — such as giving conflicting accounts of whether the FIR was scribed before or after reaching the police station, stating at one place that the FIR was lodged at 12:00 midnight and at another that it was lodged at 7:00 a.m., contradicting himself on whether he met the Investigating Officer after four days or five-to-six days of the incident, and admitting that he alone accompanied the deceased contrary to his earlier claim that he was accompanied by a large group — his testimony fails to inspire confidence and is not reliable enough to sustain a conviction. Acknowledged enmity with the accused further diminishes the weight of his testimony.

8. Selective conviction by trial court — Same evidence used to convict some accused and acquit others — Approach unsustainable — Standard of evaluation of evidence must be uniform: Where the trial court relies upon the same body of evidence to convict three accused persons while simultaneously giving benefit of doubt to the remaining six accused persons on account of the same evidence, the selective approach of the trial court is unsustainable. The standard of evaluation of evidence must be uniform. Where the evidence is found insufficient to establish the guilt of some of the accused, the same insufficiency is equally applicable to the remaining accused unless there is a specific, particularised basis for differentiation. In the present case, no such differentiated basis was available, and the trial court's approach of relying on the same evidence selectively was not justified.

9. Unlawful assembly — Common object — Section 149 IPC — Liability of members — Prosecution must first establish membership of unlawful assembly — Where basic prosecution case not proved — Aid of Section 149 IPC cannot be invoked: Before invoking Section 149 IPC to fasten vicarious liability on members of an unlawful assembly for an offence committed in prosecution of the common object, the prosecution must first establish beyond reasonable doubt: (i) the formation of an unlawful assembly; (ii) the common object of such assembly; and (iii) the accused's membership of such assembly. Where the prosecution fails to prove even the basic facts of the incident through reliable and credible evidence — the majority of witnesses having turned hostile, the injured witness having exonerated the accused, and the medical evidence being inconsistent and unexplained — the aid of Section 149 IPC cannot be invoked to sustain a conviction.

10. Defective investigation — Investigating Officer not recording statements of important witnesses — Failure to seize blood-stained mattress — Bicycle at scene not found despite injured witness's statement — Failure to investigate pending revenue case — Effect: Defective investigation, while not by itself a ground for acquittal, is a relevant circumstance which must be weighed in evaluating the prosecution case when the evidence is otherwise weak and unreliable. In the present case, the Investigating Officer failed to: (i) take possession of the blood-stained mattress; (ii) find or seize the bicycle stated by the injured witness to have been at the spot; (iii) investigate the revenue dispute which formed the alleged motive; and (iv) record the statements of witnesses consistent with his claim of having done so immediately after the incident — a claim contradicted by the witnesses themselves. These infirmities, collectively considered alongside the other weaknesses in the prosecution case, further weaken the prosecution's case.

11. Benefit of doubt — Acquittal — Prosecution failing to prove guilt beyond reasonable doubt — Conviction set aside: Where the prosecution evidence is not convincing on any of the material aspects of the case — being contradicted by four out of six witnesses of fact, including the sole injured witness; suffering from a glaring and unexplained inconsistency between two medical reports; resting only on two unreliable and contradictory witnesses whose presence at the spot is itself doubtful; and further vitiated by defective investigation — the accused persons are entitled to the benefit of doubt. Conviction and sentence recorded by the trial court set aside; surviving appellants acquitted.

RESULT:
Criminal Appeal allowed. Judgment and order dated 18.03.1983 passed by the VIIIth Additional Sessions Judge, Kanpur in Sessions Trial No. 222 of 1981 (State vs. Ram Autar and others) arising out of Crime No. 46 of 1980, under Sections 148 and 304 read with Section 149 IPC, Police Station Musa Nagar, District Kanpur set aside. Surviving appellants Ram Vishal Singh and Raj Bahadur Singh acquitted. Sureties discharged. Appellants directed to be released forthwith if in custody and not wanted in any other case.

(Delivered by Hon'ble. Bharat Bhushan, J.)

1. Surviving appellants Ram Vishal Singh and Raj Bahadur Singh have been convicted under Sections 148, 304 and 149 of Indian Penal Code (In short I.P.C.) and sentenced to undergo life imprisonment under Section 304 read with Section 149 I.P.C. and rigorous imprisonment of one year under Section 148 I.P.C. vide judgment and order dated 18.3.1983 passed by VIIIth Additional Sessions Judge, Kanpur in Sessions Trial No. 222 of 1981 (State Vs. Ram Autar and others) arising out of Crime No.46 of 1980 P.S. Musa Nagar, District Kanpur.

2. Appellant no.1 Ram Autar Singh has died, therefore, his appeal stand abated in view of the order dated 19.5.2016 of this Court.

3. Prosecution story in brief is that one revenue case was pending between Munna Singh and Mukta Singh in the Tehsil Ghatampur. Deceased Harnam Singh was the Pairokar of Munna Singh while appellants Raj Bahadur Singh, Ram Vishal Singh and late appellant Ram Autar Singh were supporting Mukta Singh. Deceased Harnam Singh had also quarreled with appellants regarding some water dispute, one year prior to the incident. On day of occurrence i.e. on 28.3.1980 at about 5 pm. informant Nathu Singh (P.W.2), Subedar Singh (P.W. 1), Munna Singh (P.W. 3) Shiv Baran Singh (P.W. 4), Jagat Prasad (P.W. 5) and Shyam Singh (P.W. 6) were coming back from Tehsil Ghatampur towards their own village. As soon as they reached village Vallahan, (near an agricultural farm of one Jawaharlal) they were accosted by appellants Raj Bahadur, Ram Vishal, late appellant Ram Autar, Shiv Baran, Vishwanath, Surendra Singh, Madan Pal Singh, Suresh Singh and Jaipal Singh. They were armed with various weapons. Appellants Ram Vishal, Raj Bahadur and late Ram Autar were holding Farsa (spade) and remaining persons were wielding lathies. Appellant Raj Bahadur forcibly put down deceased Harnam Singh on the ground. Appellants Ram Vishal Singh and late Ram Autar Singh started beating deceased Harnam Singh with Farsa (spade) on the instigation of appellant Raj Bahadur Singh. Remaining persons used lathi in assaulting deceased Harnam Singh. Injured Jagat Prasad also received lathies blow. Informant and his companions raised alarm whereupon accused persons fled away from the spot. In this

assault deceased Harnam Singh and injured Jagat Prasad sustained injuries. Deceased Harnam Singh was taken to the Police Station on bullock cart where informant Nathu Singh, P.W. 2 dictated first information report (F.I.R.) Ext. Ka-2 to scribe Munna Singh which was then lodged at 12:30 in the night.

4. It is stated that the report was transcribed by Munna Singh out side the Police Station and thereafter it was submitted to Police personnel. Deceased Harnam Singh succumbed to injuries after two days. Autopsy was conducted. The Sub-Inspector started investigation. Samples of blood stained earth and simple earth were taken. Site plan was prepared. A charge sheet was submitted against the accused.

5. Trial Judge charged accused persons, namely, Raj Bahadur, Ram Vishal and late Ram Autar under Sections 148, 304 read with Section 149 I.P.C. vide order dated 3.11.1982. Similarly, remaining six accused were also charged under Sections 147, 304 read with Section 149 I.P.C. on the same day by VIIIth Additional Sessions Judge, Kanpur. Accused pleaded not guilty and claimed that they have been falsely implicated on account of previous enmity. The defence version is that deceased Harnam Singh was beaten to death by some unknown persons in the night and the accused persons have been falsely implicated in this case due to village rivalry.

6. Prosecution adduced the evidence of P.W. 1 Subedar Singh, P.W. 2 Nathu Singh, P.W. 3 Munna Singh, P.W. 4 Shiv Baran Singh, P.W. 5 Jagat Prasad, P.W. 6 Shyam Singh, P.W. 7. Advocate Harish Chandra Singh, P.W.8 Dr. R.B. Mishra, P.W. 9 D.S. Dixit (S.O.), P.W. 10 R.V. Verma, P.W. 11 Advocate Vijay Narain Singh and P.W.12 Advocate Sangram Singh.

7. Deceased Harnam Singh was initially examined by Dr. Vimal Bhattacharya who found following injuries on the person of deceased Harnam Singh:

"(i) Abraded contused swelling 6 cm.x3.5 cm. at the inner side of left forearm at middle 1/3 part. 10 cm. below the elbow joint. Clot shoft over abrasion present.

(ii) Incised wound 5 cm. x0.3 cm.x skin deep at the back of left hand. 4.0 cm. below the left wrist joint. Clotted blood present.

iii) Incised wound 5 cm. through x through from back to forward. Left little finger x ring finger is missing and ring finger hanging.

vi) Incised wound 2 cmx 0.5 cm. x muscle deep at the front of middle 1/3 of right leg. 22.0 cm below the right knee joint. Clotted blood present.

v) Incised wound 12.0 cm x 4 cm x bone deep at the out side of left ankle joint. Clotted blood present."

8. The same Doctor found following injury on the person of Jagat Prasad:

"1. Contusion 4.0 cm.x 1.0 cm. at the right side of back 1.0 cm right to mid line and 10.0 cm. above the right iliac crest reddish."

9. Injured Harnam Singh was sent to hospital where he died on 31.3.1980 at about 3:15 pm. Postmortem was conducted by Dr. R.B. Mishra (P.W. 8) who found following ante mortem injuries on his corpse:

(i) Contusion 10 cm. x 4 cm. on a temporal region of head.

(ii) Abraded contusion 12 cm.x 1.5 cm. on back of left forearm.

(iii) Abraded contusion 14 cm.x 4 cm. on back of left foreard.

(iv) Stitched wound 5 cm. long with 6 stitches with amputation of left finger. Left right finger also amputated but stitched.

(v) Stitched wound 5 cm. long with two stitches on front and middle of right leg with fracture of underlying bone.

(vi) Abraded contusion 9 cm. x5 cm. on outer side of right leg.

(vii) Stitched wound 13 cm. long with 11 stitches on front and outer side of right ankle joint.

(viii) Contusion 9 cm. x 4 cm. on front of middle of left leg.

(ix) Abraded contusion 13 cm. x 1.5 cm on back of left side below clavicle region.

(x) Abraded contusion 5 cm.x 3 cm. on the side of the left upper arm.

(xi) Abraded contusion 5 cm. x 3 cm. on right linear of right ear.

A) Clotted blood under the scalp in temporal region of head under injury no. 1 and clotted blood in temporal region in an area 6 cm.x 4 cm.

B) There is long spinal fracture of right tibia.

C) Cut injury of right ankle through and through and also the vessels in front of ankle joint cut.

The death was due to shock and haemorrhage as a result of multiple injuries."

10. The statements of accused persons were recorded under Section 313 Cr.P.C. wherein they denied all allegations. Incidentally accused appellants did not produce any oral evidence in

defence, though they have filed an application given by one Mulayam Singh in a case of Mulayam Singh Vs. Bhagga Singh pending in the court of Nayeb Tehsildar village Ghatampur. The Sessions Judge, Kanpur on the conclusion of said sessions trial, found appellants Raj Bahadur, Ram Vishal and late Ram Autar guilty of offence under Sections 148, 304 read with Section 149 I.P.C. The other accused namely, Shiv Baran, Vishwanath, Surendra Singh, Madan Pal, Suresh Singh and Jaipal were given benefit of doubt and acquitted. The convicted appellants were sentenced as aforesaid vide judgment and order dated 18.3.1983 which is under challenge before this Court in the appeal. After the abatement of appeal of Ram Autar Singh on account of his death, this Court is concerned only with the appeal of surviving appellants Ram Vishal and Raj Bahadur.

11. Heard Sri Jai Ram Singh Tomar Advocate on behalf of both surviving appellants and Sri Sayed Ali Murtaza on behalf of State.

12. Learned counsel for appellant has submitted that all independent prosecution witnesses have not supported the prosecution version and they in fact have been declared hostile. Submission is that there remains the solitary testimony Nathu Singh which is full of contradiction. He has argued that despite absence of any reliable evidence, the trial Judge has convicted the appellants primarily on conjectures, surmises and speculations. Further submission is that deceased Harnam Singh did not sustain any injuries caused by sharp edged weapon. He submits that appellants were allegedly using sharp edged weapon Farsa (Spade) and yet the corpse of deceased did not show even a single injury of sharp edged weapon.

13. On the other hand, learned A.G.A. has submitted that the responsibility of attack on deceased Harnam Singh lies on the shoulder of all accused and that; appellants can be held guilty of the same offence with the aid of Section 149 I.P.C. He claimed that large number of accused persons attacked the deceased. The accused persons, who were acquitted by the trial Judge were wielding the lathies and they used those lathies in the attack. He submits that surviving appellants can be and should be convicted with the aid of Section 149 I.P.C.

14. Before embarking to discuss the prosecution evidence in detail, it is pertinent to point out that as many as six witnesses of fact were produced by prosecution, out of which P.W.1 Subedar Singh, P.W. 3 Munna Singh, P.W. 4 Shiv Baran Singh and P.W. 5 Jagat Prasad (injured) did not support prosecution version at all. All of them have been declared hostile at the instance of prosecution itself.

15. P.W. 1 Subedar Singh has clearly stated that he went to the place of occurrence after receiving information of this attack. He has stated that he did not witness any person assaulting either deceased Harnam Singh or injured Jagat Prasad. He has completely disowned his statement allegedly given to the Investigating Officer during course of investigation. Similarly, P.W. 3 Munna Singh, P.W. 4 Shiv Baran Singh and P.W. 5 injured Jagat Prasad have not supported the prosecution story. All of them have disowned their statements allegedly given to the Investigating Officer during course of investigation.

16. Interestingly, the so called scribe of F.I.R. Munna Singh (P.W. 3) has not only denied his presence on the place of occurrence at the time of incident but also rejected the prosecution claim that F.I.R. was written by him on the dictation of P.W. 2 Nathu Singh. He has clearly asserted that the F.I.R. was not written by him nor was it signed by him. He has refused to support the claim of the prosecution that he went to police station along with informant etc. for lodging the F.I.R. Prosecution has claimed that this witness Munna Singh (P.W.3) had also executed the affidavit supporting prosecution version but he has also debunked this claim. The statement of one Jagat Prasad (injured) is vital but he too has denied the involvement of accused persons in the attack upon him and deceased Harnam Singh. This witness has stated that incident occurred at about 8 pm. in the night. He and deceased Harnam Singh was accosted by unknown persons. They were attacked by those unknown miscreants. This injured witness has clearly exonerated accused persons of any involvement in this attack. This witness has also denied that he had given any contrary statement to the Investigating Officer (I.O.) during investigation.

17. The testimony of P.W. 5 Jagat Prasad (injured) is very important. Both parties accept his presence on the place of occurrence. It is said by rival parties that deceased Harnam Singh was accompanied by P.W. 5 Jagat Prasad at the time of incident. Jagat Prasad also sustained injuries in the same attack. He was examined by the same doctor. Now this witness has totally denounced the prosecution story. He has shifted time of incident to 8 pm. while original prosecution story is that incident occurred at 5 pm. and the F.I.R. was lodged on the same night at about 12:30 pm. Distance between place of occurrence and Police Station is said to be 8 kilometers as per chick report (Ext. Ka-5).

18. Prosecution case is that deceased Harnam Singh was immediately taken to the Police Station. Injured Jagat Prasad also says that they went to the police station in the aftermath of the incident. The extract of G.D. (Ext Ka-6) does indicate that injured Jagat Prasad and deceased Harnam Singh reached the Police Station in the mid night by bullock cart. Now the question is if incident occurred at 5 pm. and deceased Harnam Singh was taken to the police station on bullock cart and yet it took 7 hours to traverse distance of 8 kilometers. Informant Nathu Singh(P.W. 2) and Shyam Singh (P.W. 6) have claimed that they were present at the time of incident and yet their story has not been supported by several witnesses. Injured witness (P.W. 5) has completely denied the involvement of accused persons in the incident. Scribe informant Munna Singh has also denied writing and signing the F.I.R. The refusal of aforesaid witnesses to support prosecution story leaves only two witnesses, namely, P.W. 2 Nathu Singh and P.W. 6 Shyam Singh. Nathu Singh says that he had gone in connection of revenue dispute between Munna Singh and Mukta Singh yet he could not give the details of this case at all. In a very interesting turn of event, informant Nathu Singh said that they reached police station around 12 pm. and then he claims that the Incharge of the police station refused to register the F.I.R. and demanded written report. In his examination-in-chief these witnesses have claimed that F.I.R. (Ext. Ka-2) had been dictated and scribed while still on the road before reaching Police Station and thereafter it was lodged at police station with the signature of scribe Munna Singh. But later on during the cross examination, he twisted this claim and said that he went to police station for oral F.I.R. which was refused by police personnel and

thereafter he went out and got the report scribed and signed by P.W. 3 Munna Singh. Thereafter the report was lodged.

19. The claim of appellants is that the F.I.R. was registered in the morning but shown to have been recorded at 12:30 pm. Now this claim of defence gets support from the evidence of P.W. 2 Nathu Singh himself who says that he went to the Police Station in the night and slept there. He woke up in the morning and came back to his residence, while Pyarelal, Rajendra Singh and Nanku Singh took deceased Harnam Singh to Kanpur. Injured Jagat Prasad (P.W. 5) accompanied deceased Harnam Singh to Kanpur. Injured Jagat Prasad does not accept it. He has said that he left Harnam Singh at his residence. This witness has asserted that Nathu Singh (P.W. 2), Munna Singh (P.W. 3) and Subedar Singh (P.W. 1) met him in the village and he narrated the entire story to them and then all of them took Harnam Singh to the Police Station. He further claimed that injuries were not noted by the constable clerk who registered the F.I.R. He has denied the presence of all other witnesses except himself on the place of occurrence. Interestingly, G.D. Ext. Ka-6 contains brief information about the injuries of deceased Harnam Singh and Jagat Prasad but they do not tally with the injuries found during the autopsy.

20. The testimony of Nathu Singh is full of contradictions and discrepancies. His story of sleeping soundly at police station is rather weird. He conceded at one place that F.I.R. was lodged at 7am. At one place he said that he met the Investigating Officer after four days of the incident and another place, said that he met the Investigating Officer after 5-6 days. He has conceded the fully grown wheat crop existed on the agriculture field of Jawahar Lal at the time of incident. Farmers were busy in cutting the crops. It is pertinent to point out that incident did not occur either in Tehsil Ghatampur or in the village of accused persons. The incident is said to have been occurred near the agriculture field of Jawahar Lal at village Vallaham. Admittedly, the farmers were busy in cutting the crops at the time of incident yet not a single witness of the vicinity has been produced by prosecution in support of his story. All witnesses belong to distant places whose presence has been denied by the sole injured witness, P.W. 5 Jagat Prasad.

21. The prosecution story is that deceased Harnam Singh was being accompanied not only by P.W. 2 Nathu Singh but also by several other persons and yet the same witness has admitted during cross examination that he alone went with deceased Harnam Singh.

22. The description of the event by P.W. 2 Nathu Singh itself creates doubt about his presence on the spot. He said that deceased Harnam Singh was beaten for few minutes both by Farsa (spade) and lathies. First Harnam Singh was put down on the ground and then beaten by Farsa (spade) and lathies. Incidentally, P.W. 2 Nathu Singh escaped any injury despite claim of raising hue and cry. He has said that he tried to save his uncle Harnam Singh but surprisingly was not injured in this attack committed by as many as nine persons. Two medical examination reports of deceased Harnam Singh are available on record. Dr. Vimal Bhattacharya initially examined the injuries of deceased Harnam Singh and thereafter ante

mortem injuries were found in postmortem report. Both reports do not tally. They are inconsistent with each other. It was the responsibility of prosecution to explain these inconsistencies especially in the light of fact that several witnesses including injured witness have not supported the prosecution version.

23. P.W. 2 Nathu Singh has admitted the previous enmity with the accused persons. His testimony has to be appraised with care. The testimony of P.W. 2 Nathu Singh is not credible at all and to rely solely upon him for conviction of appellant is risky. Similarly, the testimony of P.W. 6 Shyam Singh is neither natural nor consistent with the basic prosecution story. He has increased the number of assailants to more than 10-11. He could not describe separately the weapons wielded by each accused. He said that Raj Bahadur Singh grabbed deceased Harnam Singh, meaning thereby that Raj Bahadur Singh was not holding any weapon otherwise it would have been impossible for him to grab the deceased Harnam Singh by hands. Remaining persons were using weapons. P.W. 6 Shyam Singh has said that they all were standing frozen due to sheer fear. But the fact of the matter is that Shyam Singh(P.W. 6) has named only two assailants Raj Bahadur and Surendra Singh. He could not name a single other accused than these two. Surprisingly, this witness has not disclosed the presence of injured Jagat Prasad. Shyam Singh (P.W. 6) has asserted that accused persons did not attack any other person except deceased Harnam Singh. Now this claim is totally contrary to the basic prosecution story because F.I.R. itself says that both deceased Harnam Singh and injured Jagat Prasad were assaulted by miscreants. But P.W. 6 Shyam Singh clearly denies this story. He has claimed that after this incident he went to his house. On the other hand, G.D. (Ext. Ka-6) entry says that Shyam Singh (P.W.6) went to the Police Station. Interestingly, this witness has also admitted that he along with informant Nathu Singh (P.W. 2) started going towards their village even during the attack. He also admitted that he did not raise any alarm. He has also admitted that he did not try to rescue deceased Harnam Singh. He has denied that he went to the Police Station but prosecution story states that Shyam Singh went to the Police Station.

24. A perusal of prosecution evidence would reveal that out of six witnesses, four witnesses have not supported prosecution version. Two witnesses, namely, P.W. 2 Nathu Singh and P.W. 6 Shyam Singh have given evidence against the accused persons but their testimony is full of discrepancies and contrary to each other. Their conduct during and after the incident is not in accordance with normal human conduct. Their testimony reveals that their presence on the spot is highly doubtful. Presence of only one witness, namely, Jagat Prasad (P.W. 5) can be believed but he has completely denied the involvement of accused persons. Remaining witnesses are formal witnesses. The medical evidence is also inconsistence. Dr. Vimal Bhattacharya examined the deceased Harnam Singh and he found only five injuries on his person. While during course of autopsy, as many as, 11 injuries were found by Dr. R.B. Mishra (P.W. 8). The medical evidence is not inconsonance with the ocular testimony which indicates that so called eye witnesses were perhaps not present on the spot and they have been manufactured in order to implicate the accused persons.

25. The trial Judge has relied upon some affidavit allegedly executed by some witnesses. Those affidavits cannot be taken into consideration for convicting the accused persons. Some of the witnesses have in fact explained circumstances in which these affidavits were prepared. These affidavits were prepared by the counsel for complainant. Veracity and authenticity of these affidavits are very much in doubt. In any case these affidavits cannot substitute the evidence recorded in the court. They can be used for the limited purpose during trial. They can not be treated substantive evidence at all. The trial Judge believed the evidence with regard to appellants Ram Autar, Raj Bahadur and Ram Vishal and disbelieved the same evidence against other six persons. Interestingly, autopsy has shown no incised wound on the person of deceased. Dr. R.B. Mishra (P.W. 8) has indicated that deceased primarily died on account of injury no. 1 which was caused by blunt object. It is pertinent to point out all the surviving appellants were using Farsa (spade). Initial medical examination of deceased Harnam Singh by Dr. Vimal Bhattacharya disclosed at least four incised wounds. The inconsistency between two medical report is glaring and has not been explained by prosecution.

26. It is also important to note that Dr. Vimal Bhattacharya despite his availability was not produced during course of trial. He had merely gone to Bangalore for training. Had he been produced during trial, the inconsistency between two medical reports could have been explained. There are vital contradictions between the testimony of Investigating Officer D.S. Dixit (P.W. 9) and other witnesses. This witness has said that the report was lodged at about 12:30 hours in the night and he immediately started recording of statements of witnesses at 1:00 am. in the night. He recorded the statement till 4 am. in the same night but this claim does not find support from other witnesses. One witness has said that he never met Investigating Officer; another has said that he met Investigator after 5-6 days. He did not even investigate the files of revenue case said to be pending in Tehsil Ghatampur. He did not take the blood stained mattress (Gadda) in his possession. Surprisingly, he did not find any bicycle on the spot despite the statement of injured witness Jagat Prasad that he was traveling on bicycle.

27. We have carefully examined all material on record. Evidence produced by prosecution is not convincing at all. We believe that prosecution has failed to bring home the stated guilt of surviving appellants with trustworthy evidence.

28. In view of the aforesaid, the judgment and order dated 18.3.1983 passed by VIIIth Additional Sessions Judge, Kanpur in Sessions Trial No. 222 of 1981 (State Vs. Ram Autar and others) arising out of Crime No.46 of 1980 P.S. Musa Nagar, District Kanpur, is hereby, set aside. The appeal is **allowed**. Both surviving appellants, namely, Ram Vishal Singh and Raj Bahadur Singh are acquitted. Their sureties are discharged. The appellants be released forthwith if they are in custody and not wanted in any other case. Let a copy of this order be certified to concerned court through Sessions Judge, Kanpur within a fortnight for compliance. The court concerned shall report the compliance within a month thereafter.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No.- 716 Of 2008

Central Coal Fields Ltd ...Appellant
Versus
Janardan Singh & Ors. ...Respondents

Counsel for Appellant:
Madhur Prakash

Counsel for Respondents:
Rajendra Pd. Giri, A.K. Dubey, K.K. Mani, K.L. Pandey, Manoj Kumar, P.K. Giri, Pradeep Giri.

Territorial Jurisdiction — Coal Supply under Sponsorship System — Cause of Action— Evidence Act, 1872 — Section 101 — Burden of Proof — Elementary Rule — Proof of Payment — Bank Drafts — Non-disclosure of Particulars — Adverse Inference — Concluded Contract — Proof of Allotment — Supply of Coal —

Territorial Jurisdiction — Coal Supply under Sponsorship System — Cause of Action — Under the sponsorship system for supply of coal prevalent in 1984, applications were required to be moved before the District Supply Officer of the district concerned, who would process and recommend the same to the Director of Movement, U.P., Lucknow, and upon consideration, a permit would be issued to the coal company. The plaintiff-respondent moved his application before the District Supply Officer, Ballia, and the said application was duly processed by the authorities concerned. Held: Since part of the cause of action, namely, the filing and processing of the application, arose within the territorial limits of District Ballia, the Civil Judge (S.D.), Ballia, was vested with territorial jurisdiction to entertain the suit. No illegality was committed by the court below in deciding Issue No. 6 in favour of jurisdiction.

Evidence Act, 1872 — Section 101 — Burden of Proof — Elementary Rule — The burden of proving a fact invariably lies upon the person who asserts it. Until such burden is discharged by the asserting party, the opposite party cannot be called upon to prove its case. The court must first examine whether the party bearing the burden has discharged the same; and only thereafter may it consider the weakness of the opposing party's case. Ordinarily, the burden to prove an issue rests on the party who substantially asserts the affirmative. The initial onus is always upon the plaintiff; once he discharges that onus, the onus shifts to the defendant. Relied upon: Rangmmal v. Kuppuswami, (2011) 12 SCC 220; Anil Rishi v. Gurbaksh Singh, (2006) 5 SCC 558; State of J. & K. v. Hindustan Forest Company, (2006) 12 SCC 198.

Proof of Payment — Bank Drafts — Non-disclosure of Particulars — Adverse Inference — Where a plaintiff alleges payment of Rs. 4,10,000/- through two bank drafts but fails to disclose in the plaint, the Section 80 C.P.C. notice, or his oral evidence, any particulars of the bank drafts — including the name of the issuing bank, the branch, the denomination of each draft, or any receipt — such failure is fatal to his case. In the present case, the plaintiff's own cross-examination revealed that he could not remember the name of the bank, the amount of each draft, or produce any receipt. He also failed to examine the person alleged to have

got the drafts prepared. Held: In the absence of adequate disclosure of particulars of the alleged bank drafts, no adverse inference could be drawn against the defendant-appellant for failing to produce negative proof that the drafts were not encashed. The burden lay squarely on the plaintiff to establish payment, which he miserably failed to discharge.

Concluded Contract — Proof of Allotment — Supply of Coal — The existence of a concluded contract for supply of 1620 MT coal between the plaintiff and the defendant-appellant remained unproved, inasmuch as neither the alleged allotment order nor any documentary evidence of its receipt or acceptance was filed in evidence by the plaintiff. Two supply orders (Annexures 5 & 6) relied upon before the High Court showed distinct amounts of Rs. 37,203/- and Rs. 9,303.15/- corresponding to supplies of 150 MT and 50 MT coal respectively, and did not in any manner corroborate the claim of payment of Rs. 4,10,000/- as a lump sum for 1620 MT. Further, these documents were not filed as evidence either before the trial court or the High Court. Held: Points (ii) and (iii) decided against the plaintiff.

Result

The impugned judgment and decree passed by the Civil Judge (S.D.), Ballia, in O.S. No. 147 of 2006 was set aside. The plaintiff-respondent's suit was dismissed with costs. Any amount deposited by the defendant-appellant pursuant to the interim order dated 05.11.2008 was directed to be returned to the defendant-appellant along with accrued interest within one month. Appeal allowed.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri M.A. Qadeer, learned senior Advocate assisted by Sri Shakti Dhar Dubey, learned counsel for the appellant/ defendant No.6 and Sri C.L. Pandey, learned senior Advocate assisted by Sri K.K. Mani, learned counsel for the plaintiff respondent No.1.

Submissions of the parties:

2. Learned counsel for the defendant-appellant submits as under:

(i) No cause of action accrued as per plaint within the jurisdiction of District Court, Ballia rather as per allegations in the plaint, the cause of action accrued at Ranchi and, therefore, the suit filed by the plaintiff respondent No.1 at Ballia, was not maintainable due to lack of territorial jurisdiction.

(ii) The plaintiff respondent No.1 failed to prove that there was any concluded contract between the plaintiff-respondent No.1 and the defendant appellant. He neither led any evidence in this regard nor filed in evidence the alleged allotment order of 1620 MT coal.

(iii) The plaintiff respondent No.1 miserably failed to prove and place any evidence on record that the alleged payment of Rs.4,10,000/-, was made by him to the defendant-appellant. Neither complete particulars of the alleged two bank-drafts including the name of the bank, the issuing branch and denomination of each bank drafts, were disclosed in the plaint nor any evidence in this regard were filed and as such the court below committed a manifest error of law

and facts to decree the suit without there being any evidence of payment of Rs.4,10,000/- by the plaintiff-respondent No.1 to the defendant appellant through alleged bank-drafts.

3. In support of his submissions, learned counsel for the appellant has referred to the contents of notice dated 03.07.1985 (paper No.54Ga/1) under Section 80 C.P.C., various paragraphs of the plaint (paper No.88Ka/2), cross-examination of the plaintiff-respondent No.1 dated 15.03.2008 (paper No.88Ka/2/10), letters of the plaintiff-respondent No.1 dated 21.09.1984 (paper No.54ga/11), dated 12.10.1984 (paper No.54Ga/12), dated 26.11.1984 (paper No.54Ga/14) and dated 15.10.1984 (paper No.54Ga/15), FIR dated 11.06.1987 lodged by the Supply Inspector, District Ballia showing commission of offence on 02.08.1984 (paper No.72Ga/1), and statements of DW-1 dated 01.04.2008 and 02.04.2008 (paper No.98A2).

4. Sri C.L. Pandey, learned senior Advocate for the plaintiff respondent No.1 submits that in 1984, there was a coordinated system of supply of coal by the State Government and the coal companies. There were two systems of supply namely linkage system and sponsorship system. Under the sponsorship system, the plaintiff respondent No.1 applied before the District Supply Officer, Ballia for supply of 2000 MT coal. The application was processed and recommendation was made by the Director of Movement U.P. Lucknow, who issued permit of 1620 MT coal, a copy of which was sent to the defendant appellant and pursuant thereto, the plaintiff respondent No.1 deposited a sum of Rs.4,10,000/- for obtaining the supply and as such the cause of action arose within the territorial jurisdiction of Civil Court, Ballia. Thus, no error was committed by the court below while deciding issue No.6 by order dated 28.11.2007 on the question of jurisdiction.

5. He further submits that pursuant to the aforesaid permit, the plaintiff-respondent No.1 deposited a sum of Rs.4,10,000/- with the defendant appellant through two bank drafts totalling Rs.4,10,000/- but the supply was neither made to the plaintiff respondent No.1 nor the defendant appellant refunded the amount and consequently, the suit was lawfully decreed by the court below. The onus to prove that the aforesaid two bank drafts were not received, was on the defendant appellant which they completely failed to prove while the plaintiff respondent No.1 had proved by evidence that the aforesaid two bank drafts were given to the defendant appellant and the payment of 1620 MT coal was received by them from the plaintiff respondent No.1. He refers to two supply orders dated 28.09.1984 and 25.10.1984 for supply of 150 MT and 50 MT coal issued by the defendant appellant, copies of which have been filed as Annexures-5 & 6 to the affidavit accompanying the stay application of the defendant appellant. On the basis of these two papers, he submits that payment of a sum of Rs.4,10,000/- was received by the defendant appellant. He admits that these two papers were not filed in evidence by the defendant appellant or the plaintiff respondent No.1 either before the court below or before this court.

6. In support of his submissions on the question of territorial jurisdiction, he relied upon a Division Bench judgment of this court in the case of **Mamta Coal and Coke Pvt. Ltd. and others Vs. State of U.P. and others, 1993 (1) EFR 208 (para-11)** and another Division Bench judgment in the case of **M/s Singh Coal Traders Vs. General Manager (Sales) Northern Coal Fields Ltd. Singrauli and another, 1991 (2) EFR 324**. With respect to burden of proof, he relied upon a

decision of this court in the case of **Dhanesra and two others Vs. Smt. Sabira, 2004 (2) AWC 1686 (LB)** and **Sobaran Singh and another Vs. Shyam Singh, 2004 (2) AWC 1094 (para-13)**.

7. Replying the submissions in rejoinder, Sri Qadeer, learned senior Advocate submits that the plaintiff-respondent No.1 could not even point out before this court that what was the amount of each bank drafts, by which bank and branch it was issued and when it was delivered to the defendant appellant. He submitted that there was no evidence filed by the plaintiff respondent No.1 that the aforesaid two alleged bank drafts were received and encashed by the defendant-appellant. No evidence of issuance of permit of 1620 MT coal, was filed by the plaintiff respondent No.1. Two supply orders filed as Annexures 5 & 6 to the affidavit accompanying the stay application and relied by the plaintiff respondent No.1 before this court, do not support the case of the plaintiff respondent No.1 inasmuch as in both the aforesaid two supply orders, separate receipts of Rs.37203/- and Rs.9303.15 being cost for supply of specific quantity of coal of 150 MT and 50 MT respectively, are mentioned. It goes to show that the case set up by the plaintiff-respondent No.1 for payment of Rs.4,10,000/- through two alleged bank drafts, is wholly baseless and without any evidence on record. He also admits that these two supply orders were neither filed in evidence before the court below nor have been filed as additional evidence before this court.

Facts, Discussion and Findings:-

8. I have carefully considered the submissions of the learned counsel for the parties and with their consent, following three points are framed to decide the controversy involved in this appeal:

(i) Whether the court of of Civil Judge (S.D.), Ballia was having territorial jurisdiction to entertain the O.S. No.147 of 2006, Janardan Singh Vs. State of U.P. and others.

(ii) Whether there was a concluded contract between the defendant-appellant and the plaintiff-respondent No.1 for supply of 1620 MT coal.

(iii) Whether the plaintiff respondent No.1 has made payment of Rs.4,10,000/- through alleged two bank drafts to the defendant-appellant and the payment was proved by the plaintiff-respondent No.1.

9. **Point No.(i) Whether the court of of Civil Judge (S.D.), Ballia was having territorial jurisdiction to entertain the O.S. No.147 of 2006, Janardan Singh Vs. State of U.P. and others:**

So far as question of territorial jurisdiction is concerned, it has not been disputed by the defendant-appellant that under the sponsorship system of supply of coal, application was used to be moved before the District Supply Officer of the District concerned who could recommend and send the application to the Director of Movement U.P., Lucknow and on consideration of the application, a permit could be issued by the Director of Movement U.P.

Lucknow to be sent to the Coal Company concerned and thereupon, applicant could obtain supply of coal. There is no denial of the fact that an application was moved by the plaintiff respondent No.1 before the District Supply Officer, Ballia and the same was processed by the authorities concerned. However, the receipt of the alleged payment for supply of coal and issuance of permit have been denied by the defendant-appellant. Thus, cause of action arose within the territorial jurisdiction of District Court, Ballia. The court below has considered the question of jurisdiction while deciding issue No.6. I do not find any illegality in the judgment of the court below on the question of territorial jurisdiction. Consequently, it is held that the issue No.6 regarding territorial jurisdiction of Civil Court, Ballia, was lawfully decided by the court below.

10. **Point No.(ii) Whether there was a concluded contract between the defendant-appellant and the plaintiff-respondent No.1 for supply of 1620 MT coal**

AND

Point No.(iii) Whether the plaintiff respondent No.1 has made payment of Rs.4,10,000/- through alleged two bank drafts to the defendant-appellant and the payment was proved by the plaintiff-respondent No.1:

The points No.(ii) and (iii) framed above, are interlinked and therefore, they are being decided together.

In the impugned judgment, while deciding issues No.1, 2 & 3, the court below recorded a finding that a sum of Rs.4,10,000/- was paid by the plaintiff-respondent No.1 to the defendant-appellant through two bank drafts dated 24.09.1984 and 26.09.1984. To reach to the aforesaid conclusion, the court below has relied upon the contents of the FIR dated 11.06.1987, the assessment order passed by the Sales Tax Officer, Ballia (paper No.129Ga), the oral evidence of P.W.-1, oral evidence of OPW-1, Sri Sunil Kumar Singh and failure of the defendant-appellant to disprove that the aforesaid two alleged bank drafts were not received by them. While recording the aforesaid finding, the court below has drawn adverse inference against the defendant-appellant on the ground that since bank draft numbers were disclosed and as such it was the responsibility of the defendant-appellant to prove that they have not deposited these bank drafts in their account or these bank drafts were not submitted by the plaintiff respondent No.1 with them and the same were not encashed.

11. The plaintiff respondent No.1 issued a notice dated 03.07.1985 (paper No.54Ga/1) under Section 80 C.P.C. to the defendant-appellant and five others. In paragraph-8 of the notice, it was merely stated that bank drafts dated 24.09.1984 and 26.09.1984 amounting to Rs.4,10,000/-, were deposited with the defendant-appellant against supply of 1620 MT coal. In paragraph-8 of the plaint (paper No.50ka), same averment was made. Neither in the notice under Section 80 C.P.C. nor in the plaint, the plaintiff-respondent No.1 has disclosed any particulars of the amount of each bank drafts, the name of the bank and the issuing branch. The plaintiff respondent No.1 gave his

oral evidence on 19.12.2007 (paper No.88Ga/2). In his cross-examination dated 15.03.2008 (paper No.88Ga/2), he stated as under:

"सशपथ जिरह साक्षी जनार्दन सिंह पुत्र श्री बृजनंदन सिंह ने कहा कि ड्राफ्ट से पैसा जमा करते समय प्रार्थनापत्र दिया था। जिसकी प्रति ली थीं। प्रार्थनापक में बैंक ड्राफ्ट पर लिखा था। रसीद मेरे पास नहीं हैं मेरे साथ जो आदमी था उसके पास है। उनका नाम तारा शंकर उपाध्याय हैं। तारा शंकर उपाध्याय मेरी फर्म का कार्य देखते थे। तारा शंकर उपाध्याय मेरी फर्म में कार्य करते थे। इस बात का लिखित प्रमाण नहीं है। ड्राफ्ट नं० 3106 किस बैंक से बनवाया था, याद नहीं है। उसमें कितनी धनराशि अंकित थी याद नहीं है। दूसरा ड्राफ्ट DL 065853/461 दिनाक 24.9.84 तास शंकर उपाध्याय दोनों ड्राफ्ट

बनवाकर लाये थे। दोनो मैंने ही देखा था। मैं बैंक गया था। नकद लेकर गया था। मैंने पैसा नकदः सूर्य देव सिंह, निवासी धनबाद से लिया था। कर्ज नहीं लिया था। सम्बन्ध अच्छे होने के नाते पैसा मुझे दिया था। मैंने ड्राफ्ट का विवरण दिया है।

मैने बैंक से यह मालुम नहीं किया था कि ड्राफ्ट का भुगतान हो गया है। बैंक से कोई प्रमाणपत्र ड्राफ्ट के सम्बन्ध में नहीं लिया था। के०एस०टी० फार्म मैंने जमा नहीं किया था। मैने Sale Tax Office से फार्म लिया था। लेकिन ड्राफ्ट के समय लेकर नहीं गया था। सीएसटी फार्म कोयला लेने के लिये जमा करना जरूरी होता है। अभी मैने यह कहा था कि दो दिन में फार्म जमा कर देगें मैने सीएसटी फार्म जमा नहीं किया है।

मैंने अपना पैसा लेने के लिये कोई प्रार्थनापत्र नहीं दिया है मैने सप्लाई आफिस के लिये पैसे के सम्बन्ध में लिखा था। मेरा कोई विवाद तारा शकर उपाध्याय से नहीं है। एफआईआर से पहले मेरी लिखा पढी चल रहीं थी। नोटिस मैने एफआईआर के बाद दिलाया या नहीं, नहीं मालुम। मेरे खिलाफ एफआईआर दर्ज हुई थी। एफआईआर इसलिये हुई कि मैने ऊपर अधिकारियों के खिलाफ शिकायत की थी। जिससे कुछ अधिकारी निलम्बित हुए। इसका लिखित प्रमाण मेरे पास नहीं है। Sponsharship जारी होने के बादः जिला पूर्ति आधिकरी की भूमिका रहती है। मैंने जिलापूर्ति अधिकारी को 15:10:1984 को सूचना दी। तथा Director of Movement को सूचना दिनाक 10.10.1984 को सीसीएल के मैनेजर को सूचना दी। मैंने पैसे जमा करने की बात लिखी थी। यह कहना गलत हैं कि मैं Sponsharship को बेचता था। यह कहना भी गलत है कि बैंक ड्राफ्टों का कोई वजूद ना हो। मै सेन्ट्रल कोल फिल्डस में कोई पैसा न जमा किया हो।"

12. Thus, in his cross-examination, the plaintiff-respondent No.1 stated that one Sri Tara Shankar Upadhyay was looking after the work of his firm, he did not remember from which bank he got prepared the bank drafts, he has no receipt, he did not remember what was the amount mentioned in the bank drafts, he went to the bank carrying cash for preparation of bank drafts which amount was taken by him from one Sri Surya Dev Singh of Dhanbad but he did not remember name of the bank and he had neither inquired from the bank whether the bank drafts were encashed nor any certificate was obtained from the bank. He further stated that both the bank drafts were got prepared by Sri Tara Shankar Upadhyay. He also stated that he has not moved any application for refund of his money and he has no dispute with Sri Tara Shankar Upahyay. In his letter dated 12.10.1984 (paper No.54Ga/12) addressed to the Director of Movement U.P. Lucknow, he alleged that the aforesaid Sri Tara Shankar Upahdyay is the proprietor of M/s Chandra Coal Agency Bada Garaha, Ballia and has submitted forged papers and fraudulently completed formalities to obtain supply of coal and, therefore, the delivery of coal be stopped. In the aforesaid paper No.54Ga/12, he made allegations of forgery against Sri Tara Shankar Upadhayay but in his cross-examination dated 15.03.2008 (paper No.88Ka/2), he stated that he has no dispute with Sri Tara Shankar Upadhyay who got prepared the aforesaid two bank drafts. Thus own evidence of plaintiff-respondent No.1 (PW-1) dated 15.03.2008 (paper No.88Ka/2/10) clearly indicates that he completely failed to give particulars of the two alleged bank drafts. He has not even disclosed the

name of the bank and the issuing branch from where he allegedly got prepared two bank drafts. He also did not produce Sri Tara Shankar Upadhayay in evidence. Thus, in the absence of disclosure of particulars of the alleged two bank drafts and any receipt of the defendant appellant, there was no occasion for the defendant-appellant who are said to receive thousands of bank drafts every day, to give negative evidence that the alleged two bank drafts were not encashed by them. In his afore-quoted cross-examination, he made conflicting statement. His statement that he himself along with one Sri Tara Shankar Upadhyay went to the bank carrying money for preparation of two bank-drafts totalling Rs.4,10,000/-, is wholly unbelievable and not supported by any evidence inasmuch as he could neither file receipts for preparation of bank-drafts nor could disclose the name of the bank and the branch issuing the alleged bank-drafts nor could disclose the denomination of the alleged two bank-drafts. He had not even produced in evidence the aforesaid Sri Tara Shankar Upathyay.

13. The finding of the court below that the defendant-appellant should have obtained a certificate from the bank regarding non-encashment of the bank drafts, was to put a negative burden on the defendant-appellant and that too in the circumstances when absolutely no relevant particulars of the alleged two bank drafts were disclosed by the plaintiff respondent No.1. The defendant-appellant has clearly denied the receipt of alleged two bank drafts.

14. In his evidence dated 01.04.2008 and 02.04.2008 (paper No.98A/2), Sri Sunil Kumar Singh (DW-1), clearly stated as under:

"यह कि वादी द्वास प्रस्तुतः वादः में वार्ष 1984 में 1620 मिट्रिक टन कोयले के आवंटन का कथन किया गया है। उक्त अवधि में कोयले के मूल्य का कोई बैंक ड्राफ्ट तथा सेन्ट्रल कोल फिल्ड लिमिटेड दस्मगा हाउस संचीं के नाम दी गयीं स्पान्सरशीप आर्डर की 67 प्रति लिपिया जो संबंधित स्थानों पर भेजी गयीं है. उनमें से एक आवेदन पत्र एवं बैंक ड्राफ्ट के साथ सेन्ट्रल कोला फिल्ड के संबंधित कार्यालय में जमा किया जाना था। परन्तु वादी द्वारा कोई भी बैंक ड्राफ्ट वा आवेदन पत्र सेन्ट्रल कोल फिल्ड लिमिडेड के किसी भी कार्यालय में जमा नहीं किया गया है।

यह कि वादी द्वारा दिनांक 24.09.1984 या दिनाक 25.09. 1984 या दिनांक 21:09:1984 अथवा किसी दिन ड्राफ्ट नं0 3106 अथवा ड्राफ्ट नं० टी० एल० 065853/451 अथवा कोई भी बैंक ड्राफ्ट सेन्ट्रल कोल फिल्ड लिमिटेड के संबंधित कार्यालय में नहीं जमा किया गया है।"

15. In paragraph-9 of the written statement (paper No.61ka/1), the defendant-appellant clearly stated that the plaint is vague and no required information is furnished, no details of so called bank drafts of Rs.4,10,000/- is given and no document showing payment to the defendant-appellant, i.e. the receipts have been filed or referred in the plaint itself. In paragraph-11 of the written statement, it was clearly mentioned that no documents showing details of link, i.e. the basis of allotment of coal or the demand drafts or details regarding bank and branch etc. have been furnished in the plaint and no bank statement showing credit/ debit and encashment details are furnished in the plaint or in evidence. No details regarding the area of CCL/ Colliery/ Project office where the alleged amount was deposited, has been given in the plaint.

16. The mechanism of supply of coal has been briefly mentioned in paragraph-12 of the written statement. In paragraph-15 of the written statement, the contents of paragraphs 7 & 8 of the plaint, were denied being vague and devoid of information. It was further stated that the plaintiff claimed having deposited bank drafts of Rs.4,10,000/- on 24.09.1984 and 21.09.1984 but has not given any details in this regard about those bank drafts, their numbers, date, name of issuing bank nor has produced the copy of the sale order which ought to have been issued to him or his unit as the case may be. The contents of paragraphs 15 & 16 of the plaint, were denied in paragraphs 21 & 22 of the written statement being wholly incorrect and baseless.

17. A perusal of the aforementioned pleadings and evidences, leave no manner of doubt that the plaintiff-respondent No.1 has completely failed to establish that payment of a sum of Rs.4,10,000/- was made by him to the defendant-appellant through alleged two bank drafts and there was a concluded contract between him and the defendant appellant for supply of 1620 MT coal. The plaintiff-respondent No.1 has set up the case and filed the suit on the ground that he had made payment to the defendant-appellant through two bank drafts totalling to Rs.4,10,000/- and as such burden was on him to disclose full particulars of alleged two bank-drafts and to prove that those alleged bank drafts were received by the defendant-appellants against supply of coal and the same were encashed by them.

18. The court below, as evident from the pleadings briefly noted above; has missed the basic principle that a suit has to be tried on the basis of the pleadings of contesting parties which is filed in the suit in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting defendant in the form of issues emerging out of that.

19. Section 101 of the Indian Evidence Act defines the phrase "burden of proof" as under:

*"**101.Burden of proof**.- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

20. The aforesaid provision clearly provides that the burden of proof of fact, always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies, has been able to discharge his burden and until the court arrives at such a conclusion, it may not proceed on the basis of weakness of the other party. In the present set of facts, the plaintiff-respondent No.1 has alleged that he made the payment of Rs.4,10,000/- through two bank drafts to the defendant-appellant but could not prove it. Neither in the notice under Section 80 C.P.C. nor in the plaint nor in his any evidence, the plaintiff-respondent No.1 has disclosed the particulars of the alleged bank drafts, namely, the name of the issuing bank and branch, amount of each bank draft and the receipts. He has also not filed any evidence to establish that the alleged two

bank drafts were given to the defendant-appellant as payment against alleged supply of 1620 MT coal. He had also not filed any certificate of the issuing bank that the alleged two bank drafts were encashed by the defendant appellant. Neither there was any pleading in the plaint nor any evidence was led by the plaintiff respondent No.1 that the alleged two bank drafts were prepared in the name of the defendant-appellant. Thus, in view of the provisions of Section 101 of the Evidence Act, 1872, the burden was on the plaintiff-respondent No.1 to prove the fact of making payment of Rs.4,10,000/- to the defendant-appellant through the alleged two bank drafts which he miserably failed to do.

21. The elementary Rule under Section 101 of the Evidence Act, is inflexible. Ordinarily, the burden to prove the fact rests on the party who substantially asserts affirmative of the issue and not on the party who denies it. In terms of Section 102 of the Act, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would dis-entitle the plaintiff to the relief. In the case of **Anil Rishi Vs. Gurbaksh Singh, (2006) 5 SCC 558 (**para-19), Hon'ble Supreme Court held that a distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others.

22. In the case of **Rangmmal Vs. Kuppuswami and another, (2011) 12 SCC 220** (para-21), Hon'ble Supreme Court held that Section 101 of the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts the fact. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. In paragraph 29 of the judgment, Supreme Court further held that the party who alleged the sale deed to be not genuine, sham or bogus, had to prove nothing until the party relying upon the document, establishes its genuineness. In the present set of facts, the plaintiff respondent No.1 has neither proved the alleged two bank drafts nor its encashment by the defendant appellant and thus failed to discharge the buraden to prove.

23. Apart from this, the evidences led by the plaintiff respondent No.1 and the defendant-appellant clearly shows that the plaintiff respondent No.1 has completely failed to establish that the alleged two bank drafts in question were got prepared by him and were given by him to the defendant-appellant towards cost of 1620 MT coal. In the case of **Bala Shankar Mama Shankar Bhattji Vs. Charity Commissoner, Gujrat State, 1995 Suppl. (1) SCC 485** (para-19), Hon'ble Supreme Court held that burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour. Either of the two contending parties has to introduce evidence on a contested issue. The question of onus is material only when the party on which it is placed, would eventually lose if he failed to discharge the same. Where, however, parties joined the

issue and led evidence then such evidence can be weighed in order to determine the issue and in that situation, the question of burden becomes academic.

24. In **Subhra Mukherjee Vs. Bharat Coling Coal Ltd., (2000) 3 SCC 312**, Hon'ble Supreme Court held that the party that makes allegation, must prove it but where the question before the court was "whether the transaction in question was a bona fide and genuine one" the party relying upon the transaction has to prove its genuineness first and only thereafter would the defendant be required to dislodge such proof and prove that the transaction was sham and fictitious.

25. In the case of **Deena Vs. Union of India, 1983 (4) SCC 645**, Hon'ble Supreme Court held that the question of burden of proof ceases to have the same importance when the entire evidence is before the Court, each side having placed before it such material as it considers necessary to support its case. But then, the fact that parties have produced their respective data before the Court does not absolve the Court from considering the question whether, on the basis of the entire material before it, the burden can be said to have been discharged by the party on whom it lies.

26. The plaintiff-respondent No.1 completely failed to lay any evidence to establish that he made payment to the defendant-appellant through the alleged two bank drafts. In the case of **State of J. & K. Vs. Hindustan Forest Company, (2006) 12 SCC 198**, Hon'ble Supreme Court held that the onus is on the plaintiff to establish positively its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus. In the case **of Corporation of City of Bengalore Vs. Zulekha Bi, (2008) 11 SCC 306**, it was held that it is for the plaintiff to prove his title to the property.

27. In the judgment of this court in the case of **Sobaran Singh Vs. Shyam Singh** (supra) relied by the learned counsel for the plaintiff-respondent No.1, it was held that the parties cannot be permitted to travel beyond from pleadings and no evidence can be looked into with respect to which there is no pleading. This judgment does not support the case of the plaintiff respondent.

28. In the case of **Dhanesra Vs. Smt. Sabira (supra**), the court was considering the provisions of Section 11 of the Evidence Act which deals with the situation that when fact not otherwise relevant becomes relevant.

29. In view of the above discussion, the impugned judgment and decree passed by the court of Civil Judge (S.D.), Ballia, Court No.9 in O.S. No.147 of 2006, Janardan Singh, Proprietor, Anuj Coal Agency Vs. State of U.P. and five others, is hereby set aside and the plaintiff's suit is dismissed with costs.

30. Any amount deposited by the defendant-appellant in terms of the interim order dated 05.11.2008 passed in this first appeal, shall be returned to the defendant-appellant by the court concerned within a month along with interest accrued on such deposit, if any.

31. Appeal is allowed as indicated above.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 864 Of 2012

Smt. Rani Devi ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Dhirendra Kumar Srivastava

Counsel for the Opposite Parties:
Learned Government Advocate, Sri M.P. Yadav, Sri Rajesh Kushwaha

HEADNOTE:
Criminal Revision—Protection of Women from Domestic Violence Act, 2005—Sections 13 and 23—Rule 12 of the Protection of Women from Domestic Violence Rules, 2006—Ex-party order—Service of notice—Mandatory compliance—Illegality—Setting aside of orders.
An ex-party interim order passed by the Magistrate under Section 23 of the Protection of Women from Domestic Violence Act, 2005 without recording compliance of mandatory service of notice as required under Section 13 of the Act read with Rule 12 of the Rules, 2006 is unsustainable in law. Dismissal of appeal affirming such order, without addressing statutory non-compliance, is also without jurisdiction.

PROCEDURE:
Criminal Revision against:
(i) Order dated **08.09.2011** passed by Judicial Magistrate-I, Allahabad in Complaint Case No. 1796 of 2011 (Smt. Sudha & Ors. v. Prabhat Kumar & Ors.) under Section 23 of the Protection of Women from Domestic Violence Act, 2005; and
(ii) Appellate order dated **06.03.2012** passed by Additional Sessions Judge, Court No. 5, Allahabad in Criminal Appeal No. 239 of 2011 dismissing the appeal.

HELD:
The Magistrate failed to record satisfaction regarding service of notice as mandated under Section 13 of the Act and Rule 12 of the Rules, 2006. The ex-party order was thus passed in violation of mandatory statutory provisions. The appellate court erred in affirming the said order. Both orders are liable to be set aside.

DECISION:
Revision allowed.
Orders dated **08.09.2011** and **06.03.2012** set aside.
Matter remanded to the trial court to pass a fresh order after hearing the parties.
Revisionist directed to appear before the trial court on **27.07.2016**.

CASE LAW RELIED UPON:
S. Vishwanathan v. Smt. Pushpa,
2011 (74) ACC 43 (Uttarakhand)

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. List has been revised. Ms. Anamika Srivastava, Advocate holding brief of Sri D.K. Srivastava, learned counsel for the revisionist, learned A.G.A. for the State of U.P. and Sri M.P. Yadav, learned counsel for the opposite parties no.2 and 3 are present.

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

3. This revision has been filed against the order dated 06.03.2012 passed by the learned Additional Sessions Judge, Court No.5, Allahabad in **Criminal Appeal No.239 of 2011 (Smt. Rani Devi v. Smt. Sudha Jaiswar and others)** as well as order dated 08.09.2011 passed by the learned Judicial Magistrate- I, Room No.1, Allahabad in Complaint Case No.1796 of 2011 (Smt. Sudha and others v. Prabhat Kumar and others).

4. It has been argued on behalf of the revisionist that the impugned order dated 08.09.2011 passed by the learned Judicial Magistrate- I, Room No.1, Allahabad in Complaint Case No.1796 of 2011 (Smt. Sudha and others v. Prabhat Kumar and others), under Section 23 of the Protection of Women from Domestic Violence Act, 2005, Police Station Khuldabad, District Allahabad is erroneous in the eye of law because it has been passed as an ex-parte order and the order dated 06.03.2012 passed by the learned Additional Sessions Judge, Court No.5, Allahabad in Criminal Appeal No.239 of 2011 (Smt. Rani Devi v. Smt. Sudha Jaiswar and others), whereby the appeal been dismissed is also beyond the jurisdiction and against the provisions mentioned in Section 13 of the Protection of Women from Domestic Violence Act, 2005 read with Rule 12 of the Protection of Women from Domestic Violence Rules, 2006.

5. In the impugned order dated 08.09.2011 of the learned Judicial Magistrate- I, Room No.1, Allahabad it is clearly mentioned that the order has been passed as an ex-parte and the same has been affirmed by the court of learned Additional Sessions Judge, Court No.5, Allahabad vide order dated 06.03.2012.

6. Learned counsel for the revisionist has relied upon the judgement of Uttarakhand High Court in case of **S. Vishwanathan v. Smt. Pushpa [2011 (74) ACC 43]**.

7. Section 13 of the Protection of Women from Domestic Violence Act, 2005 is a mandatory section which cannot be over-sighted. Learned Magistrate has not complied with Rule 12 of the Protection of Women from Domestic Violence Rules, 2006 where it was required by him to clearly mention about the service of notice. Resultantly, the impugned order dated 08.09.2011 passed by the learned Judicial Magistrate-I, Room No.1, Allahabad and the order dated 06.03.2012 of the Additional Sessions Judge, Court No.5, Allahabad are liable to be set aside.

8. For the reasons discussed above, this revision is summarily allowed. The impugned order dated 08.09.2011 passed by the learned Judicial Magistrate-I, Room No.1, Allahabad and the order dated 06.03.2012 of the Additional Sessions Judge, Court No.5, Allahabad are hereby set aside.

9. Revisionist, Smt. Rani Devi is directed to appear before the trial court on 27th July, 2016. Learned trial court is directed to pass a fresh order after hearing the parties. In case she fails to appear before the trial court personally or through the counsel on the date fixed i.e. 27th July, 2016 or on the date fixed thereafter by the said court, the trial court is at liberty to pass appropriate order after hearing the opposite parties no.2 and 3.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 1090 Of 2014

Jameel Haider **...Revisionist**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsel for the Revisionist:
Vivek Sharma

Counsel for the Opposite Parties:
Govt. Advocate

The revisionist by way of filing this revision has sought to quash the impugned judgement and order dated 24.2.2014 passed by the learned Sessions Judge, J.P. Nagar, District Amroha.

The revision of the opposite parties was allowed firstly; on the ground that the witnesses were present on the spot but they have not made an attempt to stop the tractor on which the stolen cut wood were being carried; secondly on the ground that on perusal of the enquiry paper No.12 b and 13 b produced by the opposite parties 'Neem' tree was not found standing on Gata No.138, so there was no question of cutting the 'Neem' tree by them. The finding recorded by the revisional court is against the face of evidence on record. Khasra of the said land clearly show that certain neem and mango trees were standing on the land in question. Moreover, the impugned order dated 24.02.2014 is liable to be set aside.Resultantly, revision is liable to be allowed.

Held: Para-

Case Law discussed:
Nirmaljit Singh Hoon v. State of W.B., (1973) 2 SCC 753 : 1973 SCC (Cri) 521;

Chandra Deo Singh v. Prakash Chandra Bose, AIR 1963 SC 1430;
Nagawwa v. Veerappa Shivalingappa Koujalgi, (1976) 3 SCC 736 : 1976 SCC (Cri) 507;
Sripat Sahai v. Ganpat Sahai, 1979 All Cr C 127 (All)."

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. List has been revised. None responds on behalf of the revisionist and the opposite parties no.2, 3 and 4. Learned A.G.A. is present on behalf of the State of U.P.

2. The revisionist by way of filing this revision has sought to quash the impugned judgement and order dated 24.2.2014 passed by the learned Sessions Judge, J.P. Nagar, District Amroha in Criminal Revision No.418 of 2013 (Nafisul and others Vs. State of U.P. and another).

3. The revision of the opposite parties was allowed firstly; on the ground that the witnesses were present on the spot but they have not made an attempt to stop the tractor on which the stolen cut wood were being carried; secondly on the ground that on perusal of the enquiry paper No.12 b and 13 b produced by the opposite parties 'Neem' tree was not found standing on Gata No.138, so there was no question of cutting the 'Neem' tree by them. The finding recorded by the revisional court is against the face of evidence on record. Khasra of the said land clearly show that certain neem and mango trees were standing on the land in question. Photostat copy of the same has been filed along with the affidavit filed in support of this revision. It is further argued that the impugned order is palpably erroneous and against the provisions of law and is, therefore, liable to be set aside.

4. In the impugned order dated 24.2.2014 of the learned Sessions Judge, J.P. Nagar, District Amroha it has been mentioned that the complainant Jameel Haider was examined under Section 200 Cr.P.C. and the witnesses, namely, Safdar Ali and Sabana were examined under Section 202 Cr.P.C., who were brother-in-law (looser) and wife of the complainant respectively and they have been found as interested witness. It has also been found that no independent witness have been examined.

5. In the copy of the Khasra, no 'Neem' tree has been mentioned. On this analysis, the learned Sessions Judge, J.P. Nagar, District Amroha has allowed the Criminal Revision No.418 of 2013 (Nafisul and others Vs. State of U.P. and another) vide order dated 24.02.2014.

"Sufficient ground: Meaning- The words "sufficient ground" used in Section 203 have been construed to mean the satisfaction that a prima facie case is made out against the person accused by the evidence of witnesses entitled to a reasonable degree of credit, and not sufficient ground for the purpose of conviction, Nirmaljit Singh Hoon v. State of W.B., (1973) 2 SCC 753 : 1973 SCC (Cri) 521; See also Chandra Deo Singh v. Prakash Chandra Bose, AIR 1963 SC 1430; Nagawwa v. Veerappa Shivalingappa Koujalgi, (1976) 3 SCC 736 : 1976 SCC (Cri) 507; Sripat Sahai v. Ganpat Sahai, 1979 All Cr C 127 (All)."

6. Resultantly, the order dated 17.09.2013 passed by the learned Judicial Magistrate, Amroha in Complaint Case No.1899 of 2013 (Jameel Haider v. Nafisul and others) suffers from no legal infirmity.

7. Moreover, the impugned order dated 24.02.2014 passed by the learned Sessions Judge, J.P. Nagar, District Amroha is liable to be set aside.

8. Resultantly, revision is liable to be allowed.

9. Criminal Revision is allowed.

10. The impugned judgement and order dated 24.02.2014 order passed by the learned Sessions Judge, J.P. Nagar, District Amroha in Criminal Revision No.418 of 2013 (Nafisul and others Vs. State of U.P. and another) is quashed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.07.2016

BEFORE

THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.
THE HON'BLE MRS. ANIL KUMAR SRIVASTAVA II, J.

Criminal Appeal No.- 1158 Of 2009

Buddhipal Verma **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Mukesh Kumar Tewari, Anil K. Tripathi, Soniya Mishra

Counsel for the Respondent:
G.A

Instant appeal has arisen out of the judgment of conviction and sentence dated 29.4.2009, whereby accused-appellant was convicted under section 302 IPC and sentenced to imprisonment for life and to pay a fine of Rs.5000/-with default stipulation of six months' imprisonment.

According to the prosecution version, accused-appellant (Buddhipal Verma) is the husband of deceased (Sunita Devi). FIR was lodged by Ram Ujagar father of the deceased on 28.10.2006 at 22.30 hours stating that deceased Sunita Devi was married to accused-appellant Buddhipal Verma in their childhood. Gauna took place about three years back. Sufficient articles were giving in the marriage but in the Gauna accused and his father Madhau Ram, brother Vijay Pal and Dhrub Pal were insisting for a ''Splendor Motor Cycle' but the complainant could not give it due to his poverty. Since then deceased went to her in laws house three or four times. Whenever she was in her in laws house she was tortured for the demand of motor cycle. In the

evening of 27.10.2006 complainant got a telephonic communication that Sunita Devi is seriously ill and admitted in Mission Hospital. When complainant alongwith family members reached Mission Hospital, she was not there then he went to the in laws house of Sunita he came to know that she has been killed. Number of injuries were found on her body. Dr. Rajendra Kapoor has conducted postmortem and opined that the cause of death is strangulation.

Learned counsel for the accused has vehemently argued that it was a case of circumstantial evidence wherein chain of circumstances is not complete. There was no motive for the accused to commit the murder of his own wife. Deceased was a lady of loose temper who was not agreeable to live in her in laws house. Some altercation took place between the accused and deceased on this count, consequently, deceased hanged herself but accused immediately took her down to the floor. He made all attempts to save her. He took her to Mission Hospital, thereafter, District Hospital but she could not be saved. It is further submitted that it was not a case which could be covered under section 302 IPC rather it is a case which can be covered under section 304 Part I IPC or 306 IPC.

In the present case also theory of suicide has been negated by the learned trial court. No mitigating substance could be shown to infer that it was an act which can be covered under Section 304 part I IPC. Hence, we are of the considered view that the learned trial court has correctly appreciated the evidence on record and concluded that the accused-appellant was guilty of murder of his wife. Learned trial court has rightly convicted and sentenced the accused under section 302 IPC. Appeal is without any merit and is liable to be dismissed and is accordingly dismissed. Judgment and order of conviction of trial court is hereby confirmed.

Held: Para

Case Law discussed:

Raviralalaxmaiah v. State of Andra Pradesh (2013) 9 Supreme Court Cases 283,
Sk Yusuf v. State of West Bengal reported in AIR 2011 SC 2283 in para 26,
Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80,
"Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622,
Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430,
Wakkar and another v. State of Uttar Pradesh (2011) 3 SCC 306,
Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56,
Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430,

(Delivered by Hon'ble Anil Kumar Srivastava-II, J.)

1. Heard Sri Rajeev Misra holding brief of Mrs. Soniya Mishra, learned counsel for the appellant and Shri Sharad Dixit, learned AGA for the State.

2. Instant appeal has arisen out of the judgment of conviction and sentence dated 29.4.2009 passed by learned Additional Sessions Judge/ Fast Track Court, Balrmapur in Sessions Trial No.33 of 2007, arising out of Case Crime No.627 of 2006, under section 302 IPC, P.S. Kotwali, Uttaraula, District-Balrampur whereby accused-appellant was convicted under section 302 IPC and sentenced to imprisonment for life and to pay a fine of Rs.5000/-with default stipulation of six months' imprisonment.

3. According to the prosecution version, accused-appellant (Buddhipal Verma) is the husband of deceased (Sunita Devi). FIR was lodged by Ram Ujagar father of the deceased on 28.10.2006 at 22.30 hours stating that deceased Sunita Devi was married to accused-appellant Buddhipal Verma in their childhood. Gauna took place about three years back. Sufficient articles were giving in the marriage but in the Gauna accused and his father Madhau Ram, brother Vijay Pal and Dhrub Pal were insisting for a "Splendor Motor Cycle' but the complainant could not give it due to his poverty. Since then deceased went to her in laws house three or four times. Whenever she was in her in laws house she was tortured for the demand of motor cycle.

4. On 19.10.2006 deceased Sunita went to her in laws house with Buddhipal Verma. In the evening of 27.10.2006 complainant got a telephonic communication that Sunita Devi is seriously ill and admitted in Mission Hospital. When complainant alongwith family members reached Mission Hospital, she was not there then he went to the in laws house of Sunita he came to know that she has been killed. Number of injuries were found on her body.

5. After lodging the FIR investigation was handed over to Sri Ajay Pratap Circle Officer Uttaraula who reached at the spot. Inquest proceedings were conducted on 29.10.2006 at 9.30 AM. Spot inspection was made. Dead body was sent for postmortem which was conducted on 29.10.2006 at about 3.30PM. Dr. Rajendra Kapoor has conducted postmortem and opined that the cause of death is strangulation. Thereafter, statement of witnesses were recorded. During investigation statement of complainant Ram Ujagar, Radhey Shyam, Sursati were also recorded under section 164 Cr.P.C. After investigation charge-sheet under section 302 IPC was submitted against accused-appellant.

6. Accused-appellant was charged under section 302 IPC. He denied the charges and claimed trial.

7. In order to prove its case, prosecution has produced P.W. 1 Ram Ujagar complainant father of the deceased. P.W.2 Radhey Shyam brother of the deceased, P.W.3 Usha Devi sister-in-law (Nanad) of the deceased who was declared hostile. P.W.4 Raghaw Ram, P.W.5 Chandrawati sister-in-law (Nanad) of the deceased. P.W.6 Dashrath Kumar Verma. P.W.7 Gayanwati witness of inquest. P.W.8 Sursati mother of the deceased. P.W.9 Kailash Nath who is a teacher in Primary School Chawaipur where the deceased was working as "Shiksha Mitra'. P.W.11 Dr. Rajendra Kapoor who has conducted the postmortem of the body of deceased on 29.10.2010 at 3.30pm and found following antemortem injuries on her body.

(i) Contusion 6cm x 3cm on right side neck situated just below right angle of mandible underlying neck muscles contused. Hyoid bone fractured on right side haematoma at base of fracture right corner.

(ii) Contusion 5cm x 2cm on left side neck situated about 2cm below left angle of mandible underlying neck muscles contused

(iii) On internal examination doctor found that hyoid bone was fractured in right side. It was found that Rigor Mortis passed off in upper limbs while passing in lower limbs. Abdomen was distended.

8. According to the team of doctors, who have conducted the postmortem, cause of death was asphyxia as a result of strangulation. Duration was about two days.

9. P.W.12 Ajay Pratap initial investigating officer had prepared the site plan. Recorded the statement of witnesses. Accused was arrested on 13.12.2006. Case was converted under Section 302 IPC as no evidence was found to support the charge under Sections 498A, 304B IPC and Section ¾ Dowry Prohibition Act. Charge-sheet under Section 302 IPC was filed against accused.

10. P.W.13 tehsildar Kunwar Bahadur Singh has conducted the inquest proceedings and recommended the postmortem by two doctors.

11. P.W.14 H.C. 15 Mohd. Zamir has prepared the chik FIR under section 498A, 304B and ¾ Dowry Prohibition Act and recorded it in the general diary.

12. P.W.15 Brij Mohan Yadav is inspector of CBCID, Lucknow. Investigation was transferred to him he has again recorded the statement of witnesses, thereafter, submitted the supplementary charge-sheet under section 302 IPC against accused.

13. P.W.16 Dilip Kumar has stated that he is the driver of the jeep who carried the deceased to the Mission Hospital from the house of accused. Thereafter she was taken to Government Hospital. Buddhipal told him that deceased has died. Then he took the body to village-Jogiveer.

14. In the statement under section 313 Cr.P.C. accused has denied the allegations levelled against him and has stated that the deceased was working as "Shiksha Mitra' and was living in her parental house. Occasionally, during holidays she used to come to live with the accused who was living all alone in his ancestral house. Accused used to insist the deceased to live in her in laws house and serve from there but she was not agreeable. Deceased came to accused house before Diwali's holidays then accused again asked her to live in her in laws house but she did not agree and got annoyed. Accused left the house then deceased tried to commit suicide by hanging herself when accused came back in his house and saw his wife then he took her down to floor. She was alive, he took her by jeep to Mission Hospital Uttaraula where doctor advised him to take her to government hospital but on the way she died. Accused brought her body to his house and informed the parents of deceased.

15. Learned trial court after assessing the evidence on record concluded that accused has taken a false defence of suicide by the deceased rather it was a case of murder by the accused. Accordingly, learned trial court found the accused guilty of offence punishable under section 302 IPC and convicted and sentenced accused as above.

16. Learned counsel for the accused has vehemently argued that it was a case of circumstantial evidence wherein chain of circumstances is not complete. There was no motive for the accused to commit the murder of his own wife. Deceased was a lady of loose temper who was not agreeable to live in her in laws house. Some altercation took place between the accused and deceased on this count, consequently, deceased hanged herself but accused immediately took her down to the floor. He made all attempts to save her. He took her to Mission Hospital, thereafter, District Hospital but she could not be saved. It is further submitted that it was not a case which could be covered under section 302 IPC rather it is a case which can be covered under section 304 Part I IPC or 306 IPC.

17. Per contra, learned AGA submitted that prosecution has proved the charge against accused beyond reasonable doubt. It is an admitted position that accused and deceased were husband and wife. It is also admitted that the deceased was working as "Shiksha Mitra' and was earning member. On the fateful day, she was in the house of accused where her dead body was found. According to the team of doctors, who had conducted the postmortem on the body of the deceased, cause of death was found as strangulation. There was no sign of hanging the body of the deceased. Hence, it could not be believed that deceased has committed suicide. It is further submitted that the accused has taken a false defence that too could not be proved by him. There is nothing on record to show that the deceased was taken to the Mission Hospital Utraula from where she was referred to the government hospital. It is further submitted by learned AGA that investigation was conducted in a very fair manner, investigating officer has not found any material to prove the charges under section 498A and 304B IPC and ¾ Dowry Prohibition Act rather he found evidence of committing murder by the accused.

18. Admittedly, accused and deceased were husband and wife.

19. Before proceeding further on the factual matrix of the matter, we would like to advert on the medico legal aspect. In this case, postmortem on the body of the deceased was conducted by a team of two doctors on 29.10.2006 at 3.30PM wherein the duration of death was found two days. Cause of death was asphyxia as a result of strangulation. Two injuries were found wherein hyoid bone was found fractured Dr. Rajendra Kapoor is one of the doctors of the team who has conducted the postmortem. He was cross examined in detail. It has specifically been stated by Dr. Kapoor that no sign of hanging were found on the body of deceased. There was no ligature mark present on the body. Hyoid bone was found fractured but there was no survical injuries. It is further stated by the Dr. Kapoor that it is not necessary that violent means should be adopted for strangulation. It is possible that strangulation is done while a person is sleeping. He has specifically stated that on the basis of condition of dead body, he has given a specific finding of asphyxia due to strangulation. Postmortem was conducted by a team of two doctors. Both the doctors were of the same view as per post mortem report.

20. In ***Raviralalaxmaiah v. State of Andra Pradesh*** (2013) 9 Supreme Court Cases 283 facts were same as in the present case, accused and deceased were husband and wife. There was

also a controversy as to whether deceased was done to death by strangulation or she has committed suicide. It was held by the Hon'ble Apex Court that :

"18. So far as the medical evidence is concerned, the issue involved herein is no more res integra. This Court dealt with the issue in Ponnusamy v. State of Tamil Nadu, AIR 2008 SC 2110, and observed as under:

"23. It is true that the autopsy surgeon, PW 17, did not find any fracture on the hyoid bone. Existence of such a fracture leads to a conclusive proof of strangulation but absence thereof does not prove contra. In Taylor's Principles and Practice of Medical Jurisprudence, 13th Edn., pp. 307-08, it is stated:

"The hyoid bone is "U' shaped and composed of five parts: the body, two greater and two lesser horns. It is relatively protected, lying at the root of the tongue where the body is difficult to feel. The greater horn, which can be felt more easily, lies behind the front part of the strip muscles (sternomastoid), 3 cm below the angle of the lower jaw and 1.5 cm from the midline. The bone ossifies from six centres, a pair for the body and one for each horn. The greater horns are, in early life, connected to the body by cartilage but after middle life they are usually united by bone. The lesser horns are situated close to the junction of the greater horns in the body. They are connected to the body of the bone by fibrous tissue and occasionally to the greater horns by synovial joints which usually persist throughout life but occasionally become ankylosed.

Our own findings suggest that although the hardening of the bone is related to age there can be considerable variation and elderly people sometimes show only slight ossification.

From the above consideration of the anatomy it will be appreciated that while injuries to the body are unlikely, a grip high up on the neck may readily produce fractures of the greater horns. Sometimes it would appear that the local pressure from the thumb causes a fracture on one side only. While the amount of force in manual strangulation would often appear to be greatly in excess of that required to cause death, the application of such force, as evidenced by extensive external and soft tissue injuries, make it unusual to find fractures of the hyoid bone in a person under the age of 40 years.

As stated, even in older people in which ossification is incomplete, considerable violence may leave this bone intact. This view is confirmed by Green. He gives interesting figures: in 34 cases of manual strangulation the hyoid was fractured in 12 (35%) as compared with the classic paper of Gonzales who reported four fractures in 24 cases. The figures in strangulation by ligature show that the percentage of hyoid fractures was 13. Our own figures are similar to those of Green.'

24. In Journal of Forensic Sciences, Vol. 41 under the title -- Fracture of the Hyoid Bone in Strangulation: Comparison of Fractured and Unfractured Hyoids from Victims of Strangulation, it is stated:

"The hyoid is the U-shaped bone of the neck that is fractured in one-third of all homicides by strangulation. On this basis, post-mortem detection of hyoid fracture is relevant to the diagnosis of strangulation. However, since many cases lack a hyoid fracture, the absence of this finding does not exclude strangulation as a cause of death. The reasons why some hyoids fracture and others do not may relate to the nature and magnitude of force applied to the neck, age of the victim, nature of the instrument (ligature or hands) used to strangle, and intrinsic anatomic features of the hyoid bone. We compared the case profiles and xeroradiographic appearance of the hyoids of 20 victims of homicidal strangulation with and without hyoid fracture (n =10, each). The fractured hyoids occurred in older victims of strangulation (39 ± 14 years) when compared to the victims with unfractured hyoids (30 ± 10 years). The age dependency of hyoid fracture correlated with the degree of ossification or fusion of the hyoid synchondroses. The hyoid was fused in older victims of strangulation (41 ± 12 years) whereas the unfused hyoids were found in the younger victims (28 ± 10 years). In addition, the hyoid bone was ossified or fused in 70% of all fractured hyoids, but, only 30% of the unfractured hyoids were fused. The shape of the hyoid bone was also found to differentiate fractured and unfractured hyoids. Fractured hyoids were longer in the anterior-posterior plane and were more steeply sloping when compared with unfractured hyoids. These data indicate that hyoids of strangulation victims, with and without fracture, are distinguished by various indices of shape and rigidity. On this basis, it may be possible to explain why some victims of strangulation do not have fractured hyoid bones.'

25. Mr Rangaramanujam, however, relied upon Modi's Medical Jurisprudence and Toxicology, 23rd Edn. at p. 584 wherein a difference between hanging and strangulation has been stated. Our attention in this connection has been drawn to Point 12 which reads as under:

	Hanging	*Strangulation*
12	*Fracture of the larynx and trachea-Very rare and that too in judicial hanging.*	*Fracture of the larynx and trachea-Often found also hyoid bone (sic fracture)*

19. A bare perusal of the opinion of the learned author by itself does not lead to the conclusion that fracture of hyoid bone, is a must in all the cases."

21. No evidence has been adduced in defence to rebut the opinion of Dr. Kapoor as mentioned in the postmortem report and deposed by him before the Court. Opinion of the doctors, if corroborated by ocular evidence, becomes a very important piece of evidence in criminal trial. It is not only an opinion but an expert opinion based on the factual condition of the dead body which could only be disbelieved in a case where cogent and strong grounds of rebuttal by a counter medico legal opinion is produced before the Court. In the present case, there is nothing on record to show that any counter medical opinion was sought. We do not find any reason to disbelieve or

discard the medico legal opinion of P.W.11 Dr. Rajendra Kapoor. We are in full agreement with the finding of the learned trial court that it was a case of death caused due to asphyxia as a result of strangulation. It is not a case of suicide by hanging.

22. Inquest proceedings of the dead body were conducted on 29.10.2006 at 9.30AM which were conducted in front of the house of accused. P.W.1 Ram Ujagar has stated that the deceased has gone to the house of accused on 19.10.2006. He got the information on 27.10.2006 about the illness of the deceased. He was informed that his daughter was being treated at Mission Hospital but when he reached there she was not found then he reached to the government hospital but again with no result. When he came back to the house of accused, he found that the dead body lying there. This fact is reiterated by the other prosecution witnesses. P.W.1 Ram Ujagar has stated that Sunita used to go to her in-laws house in holidays as she was working as 'Shiksha Mitra'. P.W. 3 Usha Devi has supported the prosecution version to the extent that deceased was serving as 'Shiksha Mitra' from her parental house. She used to go to her in-laws house in holidays. P.W.5 Chandrawati is Bhabhi of deceased who has also supported the prosecution version to the extent that deceased died in the house of accused. P.W.8 Sursati mother of the deceased has also stated that they were informed by the accused about the illness of deceased. It is also admitted by the accused in his statement under section 313 Cr.P.C. that deceased was at his house on the date of occurrence. There was some difference between him and deceased on account of the fact that the deceased was living in her parental house while accused wants that she should live with him. Some altercation took place between them. He left the house and when came back then he put the deceased to floor as she attempted to commit suicide by hanging.

23. Since it is a case based on circumstantial evidence therefore before proceedings further, we would like to discuss the law regarding the standard of proof which is required under law to establish the guilt of the accused persons in such cases. Hon'ble the Apex Court in the case of ***Sk Yusuf v. State of West Bengal*** reported in AIR 2011 SC 2283 in para 26 has held as under:

"Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. 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."

Hon'ble the Apex Court in the aforesaid case has followed its earlier pronouncements in the following cases:

"Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, **Krishnan v. State** represented by Inspector of Police (2008) 15 SCC 430 and **Wakkar and another v. State of Uttar Pradesh** (2011) 3 SCC 306." In the case of Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56, Hon'ble Apex Court following its earlier decision in the case of **Krishnan v. State represented by Inspector of Police (2008) 15 SCC 430** observed that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

"(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 definite tendency unerringly pointing towards guilt of the accused;

(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

(iv) 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."

Thus though a conviction can be based solely on circumstantial evidence, but the Court must bear in mind the aforesaid tests while deciding a case involving the commission of a serious offence.

24. In this background, it is relevant to mention Section 106 of the Indian Evidence Act which reads as under:-

"106. Burden of proving fact especially within knowledge.- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

25. Burden lies upon the accused to show as to how deceased died in his house. In order to discharge the burden accused has taken a plea of committing suicide by the deceased by hanging but this plea is falsified by the medical evidence. It means that accused has taken a false defence to save himself.

26. It is held by the Hon'ble Apex Court in ***Nizam and another vs. State of Rajasthan (2016)1 SCC 550*** that:

15. Elaborating the principle of "last seen alive" in State of Rajasthan vs. Kashi Ram (2006)12 SCC 254 this Court held as under: (SCC p. 265, para 23)

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, an additional link which completes the chain. The Principle has been succinctly stated in Naina Mohmad, AIR 1960 Mad 218."

27. In case ***Raviralalaxmaiah v. State of Andra Pradesh*** (2013) 9 Supreme Court Cases 283; It is a settled legal proposition that in a case based on circumstantial evidence, where no eye-witness account is available, the principle is that:

"6.....when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, 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."

28. *In* **Trimukh Maroti Kirkan v. State of Maharashtra**, *(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80, Hon'ble Apex Court held that:*

"22.Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime." (emphasis supplied)

29. Offence of murder was committed inside the house of the accused. Initial burden to establish the case would undoubtedly be upon the prosecution. In view of section 106 of the Evidence Act there will be a corresponding burden on the accused to give cogent explanation as to how the crime was committed. The accused cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. Prosecution is not expected to prove impossible. What happened actually inside the house of the appellant was best known to him only. On the date of occurrence, only the husband and wife were inside the house and the wife was found dead. It was for the accused to offer an explanation as to how she died. Accused had offered an explanation of committing suicide by the deceased which is absolutely false. Hence, it is a strong circumstance against the accused that he is responsible for the commission of the crime.

30. False defence plea taken by the appellant also provides an additional circumstance against him. Reference may be made on this point to the pronouncement of Hon'ble the Apex Court in the case of ***Ramesh Bhai Mohanbhai Koli Vs. State of Gujarat*** reported in ***(2011) 11 SCC 111 and Kuldeep Singh Vs. State of Rajasthan*** reported in ***(2000) 5 SCC 7***.

31. Accused has taken false defence which is strong circumstances against him. No doubt, it is not a case of direct evidence wherein direct eye witness account of Commission of the crime is given by the prosecution but it is a case where circumstances are such which gives a conclusive proof about the guilt of the accused.

32. Following circumstances gives irresistible conclusion of the guilt of accused:-

(i) Accused and deceased were husband and wife.

(ii) Deceased was working as 'Shiksha Mitra' she came to the house of accused on 19.10.2006.

(iii) Deceased died in the house of accused on 27.10.2006.

(iv) Cause of death was found as strangulation.

(v) A false defence was taken by the accused that deceased has committed suicide by hanging.

(vi) No article such as rope or dupatta was found which could have been used for hanging by the deceased.

(vii) It is not proved that accused has taken the deceased to Mission Hospital or Government Hospital for treatment rather a false story is cooked up to show that deceased was taken there while she was alive. In fact she was dead when she was taken to those two hospitals.

33. In the present case, chain of circumstances is complete which only gives an irresistible conclusion of the guilt of the accused.

34. Now we come to the second limb of the argument of appellant that it is a case it could be covered under Section 304 part I IPC or section 306 IPC.

35. No single circumstance or mitigating circumstance is on record which could show that the intention of the accused was not to commit the murder of the deceased or the offence was committed under a grave or sudden provocation even if we accept the statement of accused under section 313 Cr.P.C. that some altercation took place between him and deceased then he left the house, thereafter, deceased made an attempt to commit suicide by hanging and when he came back then he took her body down to the floor. This statement itself does not inspire confidence. How much time, accused was out of his house is not on record.

Further medico legal evidence is fully against the defence of the accused. No sign of hanging were found on the body of the deceased. Hence, by no stretch of imagination it could be accepted that the deceased has committed suicide. Hence, the case of accused neither covered by under section 304 part I IPC nor covered by under section 306 IPC rather it was a preplanned intentional murder.

36. In ***Raviralalaxmaiah vs. State of Andhra Pradesh (2013) 9 SCC 283*** wife was found dead in the house of husband. A false plea of suicide by hanging was taken by the accused who was husband of the deceased. Learned trial court found the charge under Section 302 IPC to be proved against the accused and convicted and sentenced him under Section 302 IPC for imprisonment for life. Hon'ble Apex Court confirmed the findings of the learned trial court and dismissed the appeal holding that the appellant had been doubting the chastity of his wife and therefore had adequate motive to eliminate her. He failed to furnish any explanation as to under what circumstances his wife was found dead. Particularly, in view of the fact that the courts below had excluded the theory of suicide.

37. In the present case also theory of suicide has been negated by the learned trial court. No mitigating substance could be shown to infer that it was an act which can be covered under Section 304 part I IPC. Hence, we are of the considered view that the learned trial court has correctly appreciated the evidence on record and concluded that the accused-appellant was guilty of murder of his wife. Learned trial court has rightly convicted and sentenced the accused under section 302 IPC. Appeal is without any merit and is liable to be dismissed and is accordingly ***dismissed***. Judgment and order of conviction of trial court is hereby confirmed.

38. Accused-appellant Buddhipal Verma is in jail. He shall serve his sentence as imposed by the learned trial court.

39. Office is directed to communicate this order forthwith to the court concerned and to send back the lower court record to ensure compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No. – 1235 Of 1983

Smt Ganpati **...Appellant**
Versus
State **...Respondents**

Counsel for the Appellant:
V.P. Mathur, G.P. Mathur, Hemant Kumar

Counsel for the Respondents:
D.G.A.

In this appeal sole surviving appellant Rajmani was convicted under Section 302 I.P.C. read with Section 34 I.P.C. and under Section 201 I.P.C. and sentenced to imprisonment for life and three years rigorous imprisonment in each section respectively along with deceased Smt. Ganpati and Ram Surat vide judgment and order dated 19.5.1983 passed by the then Sessions Judge, Basti in S.T. No. 116 of 1981 (State Vs. Smt. Ganpati and others).

We have no hesitation that the appellant is entitled of benefit of doubt as prosecution has failed to prove its case beyond all reasonable doubts. Hence, the criminal appeal is allowed. The judgment and order dated 19.5.1983 passed by the then Sessions Judge, Basti in S.T. No. 116 of 1981 (State Vs. Smt. Ganpati and others) is set aside. The appellant need not surrender before the Court. His sureties are discharged. Let a certified copy of this judgment be sent to concerned court through Sessions Judge Basti within fortnight.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Bharat Bhushan, J.)

1. In this appeal sole surviving appellant Rajmani was convicted under Section 302 I.P.C. read with Section 34 I.P.C. and under Section 201 I.P.C. and sentenced to imprisonment for life and three years rigorous imprisonment in each section respectively along with deceased Smt. Ganpati and Ram Surat vide judgment and order dated 19.5.1983 passed by the then Sessions Judge, Basti in S.T. No. 116 of 1981 (State Vs. Smt. Ganpati and others).

2. Appellants Smt. Ganpati and Ram Surat have died therefore, the appeal filed at their instance stand abated.

3. Background facts in nutshell are as follows:

The sole surviving appellant Rajmani along with his parents (Smt. Ganpati and Ram Surat) and sister Jhinkani were charged under Section 302 I.P.C. read with Section 34 I.P.C. and 201 I.P.C. on 22.9.1981. It is stated that on 20.2.1981 P.W. 4 Jugun Chaukidar of village Harpur Tola Sunderdas, P.S. Mahuli a resident of village Ratanpura, P.S. Mahuli heard that deceased Smt. Malti wife of Rajmani, appellant had died of burns. He went to the matrimonial home of Smt. Malti at village Harpur Tola Sunderdas but none of charged persons were present at their house. It is stated that only Tejai, the grand-father of surviving appellant was sitting outside the house. The door of the house was closed from outside. Jugan Chaukidar rushed to the Police Station Mahuli and furnished information about the incident. This oral report was recorded into general diary (G.D.) of P.S. Mahuli at about 6:30 pm. on 20.2.1981 (Exh. Ka-1). Sub Inspector, Uday Narayan Singh P.W. 10 went to the spot along with constable Aadya Shankar and others and reached the village Harpur Tola at about 9:30 pm. He went to the house of appellant Rajmani but did not found any person at the house. The house was closed from outside. He could not find the occupants of the

house in the village. On next day i.e. on 21.2.1981 Tejai the grand-father of sole appellant contacted the police personnel and took S.I. Udai Narayan Singh to the house and opened the lock of the house from the key which he took out from his pocket. The corpse of Smt. Malti was found inside the house. It was identified by Tejai,the grand-father.

4. The inquest proceedings were conducted. Dead body was sent for the postmortem. Meanwhile S.I. Sri Ram Adhar Mishra (P.W. 9) had also reached the village. Sri Ram Adhar Mishra was entrusted formal investigation. After autopsy and investigation a charge sheet was filed against four persons, namely, appellants Rajmani, Ram Surat (father of appellant Rajmani) and Ganpati (his mother) and his sister (Smt. Jhinkani). All of them were tried under Section 302 read with Section 34 I.P.C. and 201 I.P.C. During the course of trial as many as ten witnesses were produced by prosecution out of which four witnesses, namely, Rampati (P.W. 1), Ram Laut (P.W. 2), Udai Raj (P.W. 3) and Jagarnath (P.W. 6) did not support the prosecution story and were in fact declared hostile at the instance of prosecution. The statements of applicants were recorded under Section 313 Cr.P.C. wherein they denied all allegations but refused to produce any oral and documentary evidence in defence.

5. The learned Sessions Judge concluded that deceased Smt. Malti was murdered and that; circumstantial evidence indicates that three accused namely, Rajmani, his father, Ramsurat and his mother Ganpati were responsible for the murder of Smt. Malti. Accused Smt. Jhinkani, the sister of appellant Rajmani was given benefit of doubt despite the fact that evidence against all the four accused persons was identical. The Sessions Judge, therefore, convicted and sentenced appellants, namely, Rajmani, Ramsurat and Ganpati vide judgment and order dated 19.5.1983 as aforesaid. This judgment is under challenge before this Court in this criminal appeal. However appellant Ramsurat and Smt. Ganpati have died, therefore, this Court is only concerned with the appeal of sole surviving appellant Rajmani.

6. Heard Sri Dilip Kumar and Sri Rajrshi Gupta, learned counsel on behalf of appellant and learned A.G.A. Sri Sayed Ali Murtaza on behalf of State.

7. Learned counsel for appellant has submitted that there is virtually no evidence of complicity of appellant. Deceased died on 20.2.1983 somewhere in the day time yet not a single witness of that village is prepared to give evidence against the appellant. He further submits that as many as four prosecution witnesses have not supported the prosecution version. P.W. 8 Bhagwandin, father of deceased Smt. Malti was not examined during investigation. Learned counsel for appellant has further stated that entire prosecution case is based on circumstantial evidence but relevant circumstances have not been established in accordance with the Indian Evidence Act 1872 (Evidence Act) and chain of circumstances is not complete. He has argued that the appellant and his family members were not found on the date of incident either by village Chaukidar or by P.W. 10, S.I. Udai Narayan Singh. The only one family member, Tejai, the grand-father of appellant Rajmani was present. House was locked from outside. Key of the house was with Tejai but neither Tejai was arrayed as accused nor was made witness in this case despite the

fact that Tejai was only the member of the house who was present at the house. Learned counsel for the appellant has submitted that the entire judgment is based on no evidence.

8. Per contra learned A.G.A. has submitted that it is a case of circumstantial evidence and each circumstance has been established by prosecution by independent and trustworthy evidence. Chain of proved circumstances are complete and they only lead to irresistible conclusion that appellant was guilty of murdering his wife. He has also drawn the attention of this Court towards the fact that the postmortem indicates that deceased was done to death by throttling and later on the dead body was burnt. The learned A.G.A. has also used Section 106 of Indian Evidence Act to buttress his arguments, though the Sessions Judge has not referred Section 106 of Indian Evidence Act in his impugned judgment.

9. A bare perusal of the entire evidence produced by prosecution and the impugned judgment would reveal that there is absolutely no eye witness account of the incident. The prosecution story is that deceased Smt. Malti died of burn injuries in her matrimonial home on 20.2.1981 during day time. Village Chaukidar received information and visited the house of appellant Rajmani but only Tejai the grand-father was present. P.W.4, Jugun Chaukidar talked to Tejai but the details of these talks are not available on record. It is pertinent to point out that Jugun did not ask Tejai to open the house. He did not even see the dead body of Smt. Malti. He rushed to the police station Mahauli and orally informed the police. P.W. 10 S.I. Udai Narain Singh was deputed initially to verify the information and to conduct preliminary proceedings, if required. He reached at the place of occurrence at about 9:30 pm. The house was closed. No family member was available. No proceedings were conducted as it was dark. Next day i.e. on 21.2.1981 early morning Tejai the grand-father of the appellant contacted P.W. 10 S.I. Udai Narain Singh. Tejai then took out a key from his pocket and opened the lock of the house. The dead body of Malti was found inside the Kothari. Tejai identified the corpse of Malti.

10. It is pertinent to point out that neither the appellant nor his parents or even his married sister were present in the house. Only grand-father was present. Interestingly, P.W.10 Udai Narain Singh stated that house was closed but it was not locked when he reached there on 20.2.1981 in the night at about 9:30 pm. and yet in the morning of 21.2.1981 the house was found locked and key of that house was in possession of Tejai. It is also pertinent to point out that even village Chaukidar P.W. 4 Jugun did not ask Tejai to open the house on 20.2.1981 when he reached the place of occurrence on receipt of rumours and whispers floating around the village regarding the death of Malti. It is clear that the dead body was seen by the authorities in the early morning of 21.2.1981 for the first time after opening the locked house and key was found in possession of Tejai. During investigation the statements of several witnesses were stated to have been recorded but most of them have not been produced during trial. The witnesses who were produced by the prosecution, namely, Rampati (P.W. 1), Ram Laut (P.W. 2), Udai Raj (P.W. 3) and Jagarnath (P.W. 6) have not supported the prosecution version. There is no eye witness account of death of Malti. The learned Sessions Judge has considered this point in his judgment but he believed that despite the non availability of eye witnesses or other witnesses the prosecution has been able to establish the certain circumstances or the chain of circumstances which irresistibly lead to only one conclusion

that Smt. Malti was done to death by appellant and his companions. Now what is the evidence for this conclusion?

11. The learned trial judge has discussed the evidence of P.W. 7 Dr. R.C. Verma, who conducted the autopsy on the body of the deceased. Dr. Verma opined that deceased Malti Devi was first throttled and thereafter burnt by sprinkling kerosene oil. Dr. Verma did not find any line of redness. The body was found in pugilistic state. Skin was cracked. Decomposition had started. The doctor concluded that deceased died on account of asphyxia. He also gave opinion that burn injuries were caused postmortem i.e. first the deceased was throttled and thereafter kerosene oil was sprinkled over the body and then the body was set ablaze resulting in postmortem burns. On this evidence the learned Judge concluded that deceased Malti did not committed suicide and it was a clear cut case of murder. The learned Sessions Judge also noted the evidence of P.W. 7 Dr. Verma wherein he has stated that line of redness was absent in the corpse.

12. Ordinarily in the case of burn, a line of redness involving the whole skin is formed around the part. It is a permanent line persisting even after death. This line of redness is not found in postmortem burns. In the instant case Dr. R.C. Verma (P.W. 7) did not find line of redness on the body of deceased Malti. This conclusion is based merely on negative evidence. Ordinarily, line of redness is found on the burns caused during life. But there have been cases, where line of redness is not found even in the case of burn injuries caused during life. If burn injuries are caused to a living person who dies immediately from shock due to burn then line of redness may be absent. So the conclusion of P.W. 7 Dr. R.C. Verma is based on the surmise that deceased did not die immediately but there have been cases in the burn injuries of living persons where line of redness is not found (Modi's medical jurisprudence and toxicology). If we go through the postmortem report and the testimony of P.W. 7 Dr. R.C. Verma, it would reveal that the conclusions of Dr. Verma are based on half baked data. He has failed to give a specific reason for the conclusion that deceased Malti was throttled prior to the death. He has in fact testified that he did not find any external injuries for the simple reason that it was not possible to unearth them on account of extensive burn injuries. We do not believe that Dr. Verma would have been able to find ligature mark in either external or internal examination for the simple reason that body was completely and extensively burnt. Details of ecchymosis of blood in subcutaneous tissue of neck were not recorded by him. Their dimensions were not detailed. In our opinion the evidence of throttling is rather weak. The body of deceased was deeply burnt. Skin was cracked. Dr. Verma himself admitted that it was not possible to decipher any injuries. W.U. Spitz and R.S. Fisher have recorded that it is not possible to conclude with naked eye or by histological examination whether burns occurred immediately before death or soon after (WU Spitz, R.S. Fisher Medicolegal investigation of death, CC Thomas 1973 261). In such situation circumstantial evidence alone will provide the answer. In the instant case no such evidence is visible. In fact, it is evident that observations of doctor are based on examination of deceased with naked eye only. But fact of the matter is that even if it is assumed that victim died on account of throttling and thereafter her body was burnt, it does not necessarily indicate that victim was done to death by appellant.

13. We have perused the testimonies of all witnesses. Role of appellant or his companions have not been delineated at all. There is not a single witness who has mentioned the role of appellant. A careful perusal of judgment would reveal that learned Sessions Judge merely held the appellant guilty on account of his absence from the place of occurrence. The learned Judge has concluded that appellant has admitted his presence during his statement recorded under Section 313 Cr.P.C. and that; his presence automatically makes him liable to explain the circumstances of death of deceased. The learned Sessions Judge has written few reasons for holding appellant guilty of the offence of murder (i) When Sub Inspector Udai Narain Singh, P.W.10, reached the house of accused in the evening of 20.2.1981, not a single accused was present at their house. The house was closed from outside. Sub Inspector did not enter the house in the night of 20.2.1981 and next day at about 5:30 Tejai the grand-father of appellant Rajmani took a key from his pocket and opened the lock of Kothari in which the dead body of Smt. Malti was lying. The learned Judge concluded that as Kothari was locked from outside and none of the appellants were present which indicates that they were responsible for murder, inasmuch as they were absent from house even on 21.2.1981. They did not care to meet S.I. Udai Narain Singh, P.W. 10. (ii) The Police arrested co-accused Smt. Ganpati (now deceased) from village Natwa on the information given to him by unknown informant and the learned Sessions Judge found this conduct of Smt. Ganpati (deceased) highly suspicious. (iii) The learned Judge also found the conduct of appellant and his companions suspicious on account of fact that they did not inform the Police about the incident. The Judge believed that natural conduct should have been go to the Police Station immediately to inform the Police about the incident and lodge a report. (iv) Another circumstances found highly suspicious by the Judge is that appellant and his companions did not accompany the dead body of Smt. Malti after inquest to the mortuary.

14. The aforesaid circumstances relied on by learned Judge would indicate that the appellant and deceased companions have been convicted only on the perceived suspicious conduct of accused persons. There is not an iota of evidence against the appellant and his companions. In fact not a single witness has even mentioned their role in connection with the murder of deceased Malti. The learned Judge totally forgot the basic principle of criminal jurisprudence which says that every accused is innocent till found guilty and that; it is a duty of prosecution to prove its case by positive evidence.

15. As far as the statement of appellant under Section 313 Cr.P.C. is concerned, the answer to the first two questions would indicate that appellant was merely conveying that they were resident of village Harpur Tola Sunderdas, P.S. Maholi and they used to live in the same house during relevant times. We believe this answer is not specific to the date of occurrence. The admission on the part of the appellants is merely a generic and general answer. Of course, they used to live in house shared by deceased Smt. Malti, but the answer does not conclusively establish that they were present inside the house at the time of occurrence. They might have gone somewhere else. It was duty of prosecution to establish that appellants were present inside the house at the time of incident and that; house was exclusively in possession of only appellants and deceased on the date and time of occurrence. There is not even whisper to this effect from the side of prosecution. Not a single witness has made reference to the presence of appellant at the time of incident. On the

contrary when P.W. 4 Jugun visited the house in which occurrence allegedly took place, he only found Tejai, grand-father outside the house. P.W. 4 Jugun did not ask Tejai to open the house. Jugun has specifically asserted that no one was present at the house other than Tejai. Tejai has not been nominated as accused by investigator or produced as witness during the course of trial.

16. When on 21.2.1981 P.W. 10 Udai Narain Singh visited the house which was opened by Tejai, none of the accused appellants were present at place of occurrence. There is no evidence to demonstrate that the house where the body of deceased was found was exclusively in possession of appellants at the time of occurrence. No one has even whispered about it. Fact of the matter is that appellants were not present at the house for days.

17. It is true that sometimes the disappearance of accused persons can be considered as suspicious conduct but it does not necessarily mean that they committed the murder. There can be variety of reasons for absence of appellant from the house. They might have been busy in some private work. Smt. Ganpati (now deceased) was arrested in another village Natwa on the information furnished by unknown informant. It is possible that Smt. Ganpati might be visiting the relative. They might have panicked or got frightened. It is possible that appellant received information of death of Smt. Malti rather late and dreaded the consequences. All these things are in the realm of speculation. But then trial Judge has also passed the judgment merely on the basis of conjecture and speculation despite the fact that there is no evidence to suggest that place of occurrence was in exclusive possession of accused persons at exact time of occurrence. It was the duty of prosecution to establish roles of accused persons by positive evidence. No such evidence has been given. As the appellants were not present at the place of occurrence, therefore, to presume that they were aware of the incident and they did not deliberately give the information to the Police and did not accompany dead body to the mortuary, is absolutely a conjecture. There is no evidence to demonstrate that appellants were aware of the death of deceased. Learned Judge has assumed that the appellants were in possession of knowledge of death of deceased Malti despite the fact there is absolutely no evidence to establish this knowledge. The impugned judgment does not rest on positive evidence. It depends entirely on the suspicions, conjectures and surmises of the learned Judge.

18. Fact of the matter in criminal cases, burden of proof is always on prosecution. It is accepted principles of criminal jurisprudence that the burden is always on prosecution and never shifts. The criminal law presumes every accused is innocent unless proven guilty by trustworthy evidence and accused is entitled to the benefit of every reasonable doubt. The present case is based on circumstantial evidence wherein the roles of appellants have not been delineated at all. Appellants were even not found on the place of occurrence. Tejai who was in possession of the key of the house has not been prosecuted. Surprisingly, the motive of murder was not even discussed in this case. Once the prosecution evidence was on the verge of conclusion, prosecution perhaps realized this lacuna and produced P.W. 8 Bhagwandin, father of deceased who testified that appellants were not happy with the dowry given. Marriage of deceased Malti was solemnized some 15-16 years prior to his testimony and that; second marriage (Gauna) was performed after 7 years of marriage. Meaning thereby that deceased Malti was living in matrimonial home for several years

prior to her death. This witness has testified that appellants pressurized him to give additional dowry and that he could not pay the dowry, therefore, the appellants were unhappy. P.W. 8 Bhagwandin has stated that the Panchayat was organized to put pressure upon the appellants. The prosecution has not produced any evidence to support the organization of this Panchayat. P.W. 8, Bhagwandeen says that he went to P.S. Mahuli to register F.I.R. but the F.I.R. was not registered. There is no evidence on record to demonstrate that Bhagwandeen ever approached the Police Station Mahuli. No G.D. entry regarding presence of Bhagwandeen has been placed on record. The report given by Bhagwandeen has not been shown during course of trial. In any case, even if it is assumed that what Bhagwandeen is saying is correct and that dowry was indeed demanded by appellants that would not necessarily mean that deceased Malti was done to death by appellants. Demand of dowry is one thing but murder of deceased on account of non fulfilment of dowry is another. Appellants have been tried for murder of deceased Malti and there is nothing on record to show the complicity of appellant in the death of deceased Malti.

19. Learned A.G.A. has submitted that it was incumbent upon the accused persons to prove their innocence in view of Section 106 of Evidence Act. We are afraid that application of Section 106 of Evidence Act cannot be done to fasten guilt of murder upon appellant merely because of their silence. Law is very simple. Prosecution has to prove its case beyond all reasonable doubts. Section 106 of Evidence Act cannot be used to make up prosecution's inability to establish guilty by leading trustworthy evidence. Evidence Act lays down that in criminal cases burden of proof is always upon the prosecution and Section 106 of Evidence Act cannot be used to relieve the prosecution of their duty. This section is described to meet certain circumstances in which it would be impossible for prosecution to establish certain facts which are 'especially' within the knowledge of accused. This Section cannot be used to relieve the prosecution of the burden of proof otherwise it would lead to a strange conclusion that in a murder case, burden lies on accused to prove that he did not commit the murder, inasmuch as prosecution can claim in every case that accused was aware of the crime and therefore, he must show that he did not commit the crime. This topsy turvy attitude of criminal adjudication cannot be approved. We believe that learned A.G.A. is not right in applying the Section 106 of Evidence Act to this case. In this present case, prosecution has not demonstrated that the facts related to the murder of deceased was within the exclusive knowledge of appellants only. Admittedly, Tejai was present at the house where dead body of Malti was found. It was Tejai who opened the house when S.I. Udai Narain Singh, P.W. 10 reached the place of occurrence. At least Tejai should have been asked this question for the simple reason that he was in possession of the key of house which was locked from outside.

20. Fact of the matter is that locking of house itself is doubtful. At one place it has been indicated that the house was simply closed from outside and no lock was used in it and another at place it has been stated that on 21.2.1981 lock of the house was opened by Tejai, the grand-father. As far as appellants are concerned, there is absolutely no evidence on record to show that they were aware of murder of deceased or the room in which the corpse of deceased Malti was found was in their exclusive possession at the time of murder. The prosecution has

not led any evidence to demonstrate the circumstances of departure of appellants from the place of occurrence. Surprisingly, there is no evidence on record to show that the deceased was done to death inside the house of appellants. The only fact produced by the prosecution is that corpse of Smt. Malti was found inside the Kothari of the house. Rest of the things were assumed first by the Investigating Officer and then by the Trial Judge. Where is the evidence to demonstrate that deceased was murdered inside the house? If deceased was first throttled and then burnt; is there any evidence to demonstrate that she was not carried in the house from outside? May be she was throttled out side; or strangulated outside and brought inside the house later on and then burnt. In this scenario, it was incumbent upon the prosecution to show that deceased was murdered at a particular place and then she was burnt at a particular place and such people were involved in her murder. A piece of Sari, which was allegedly recovered from the room, where the dead body of Malti was found, was not even produced before the Trial Judge during trial.

21. We have carefully scanned the entire record. We believe that there is not enough evidence to show the complicity of appellants. Co-accused Jhinkani was acquitted by the trial judge on the identical evidence. The appellant cannot be held guilty merely because he was sharing the dwelling house with deceased. This does not necessarily mean that he was involved in the murder of deceased. The statement given under Section 313 Cr.P.C. merely indicates that appellant ordinarily shared the dwelling unit with deceased Smt. Malti. In our view it does not establish beyond all reasonable doubts that appellant was present inside the house at the time of stated death of deceased Smt. Malti. There is no evidence on record to show that the room where the corpse of deceased was found was exclusively in possession and control of appellant Rajmani at the time of death of deceased Smt. Malti. There is no evidence to demonstrate that this room or house continued to remain in possession of appellant Rajmani till the recovery of dead body by Police. On the contrary there is evidence on record to show that the house in question was found in possession of the grand-father Tejai at least subsequent to the death of deceased and Tejai has not been nominated either as witness or accused. We also believe that the statement of appellant under Section 313 Cr.P.C. was also not recorded in a fair manner. The importance of observing the provisions of Section 313 Cr.P.C. faithfully, cannot be emphasized more strongly. The learned trial Judge should have specifically asked questions about the possession of house at the time of death of deceased Smt. Malti. In the absence of such questions, it cannot be assumed that the appellant was present at the time of death of deceased.

22. In view of the foregoing discussions, we have no hesitation that the appellant is entitled of benefit of doubt as prosecution has failed to prove its case beyond all reasonable doubts. Hence, the criminal appeal is **allowed**. The judgment and order dated 19.5.1983 passed by the then Sessions Judge, Basti in S.T. No. 116 of 1981 (State Vs. Smt. Ganpati and others) is set aside. The appellant need not surrender before the Court. His sureties are discharged. Let a certified copy of this judgment be sent to concerned court through Sessions Judge Basti within fortnight.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2016

BEFORE

THE HON'BLE SATYENDRA SINGH CHAUHAN, J.
THE HON'BLE ANIL KUMAR, J.

Service Bench No.- 1369 Of 2010

Brijendra Kumar Agarwal ...Petitioner
Versus
State Of U.P. ...Respondent

Counsel for Petitioner:
P.K. Srivastava

Counsel for Respondent:
C.S.C

1. Service Law – Departmental Proceedings – Punishment Order – Advice of Public Service Commission – Non-Supply of Copy to Delinquent Employee – Violation of Principles of Natural Justice – Punishment Order Unsustainable.

Where, in the course of a departmental enquiry against a government servant, the Disciplinary Authority seeks the advice of the Public Service Commission and such advice is received by the State Government/Disciplinary Authority, it is mandatory that a copy thereof be supplied to the delinquent employee before the final order of punishment is passed. The failure to supply the copy of such advice deprives the delinquent employee of the opportunity to make an effective representation before the Disciplinary Authority with regard to the proposed punishment, and constitutes a violation of the principles of natural justice. In the present case, after the advice of the Public Service Commission, Allahabad was received by the State Government, no copy thereof was furnished to the petitioner before the impugned punishment order was passed. Held: The non-supply of the copy of the advice of the Public Service Commission to the petitioner is fatal to the punishment order; the impugned order of punishment imposing recovery of Rs. 1,81,000/- and reduction of pension by 20% is vitiated and cannot be sustained in law. Relied upon: S.N. Narula v. Union of India & Others, (2011) 4 SCC 591; Union of India & Others v. S.K. Kapoor, (2011) 4 SCC 589.

2. Service Law – Departmental Proceedings – Advice of Public Service Commission – Reliance by Disciplinary Authority – Distinction between Cases where Advice is Relied upon and where it is Not – Obligation to Supply Copy Arises only When Relied upon.

The obligation to supply a copy of the advice of the Public Service Commission to the delinquent employee is not absolute in all cases. A distinction must be drawn between cases where the Disciplinary Authority does not rely upon the advice of the Public Service Commission and cases where it does. In the former category, it is not necessary to supply a copy of the advice to the concerned employee. However, where the Disciplinary Authority relies upon the advice of the Public Service Commission in arriving at the quantum of punishment or the decision to punish, the copy of such advice must be supplied to the delinquent employee in advance to enable him to make an effective representation; failing which there will be a violation of the principles of natural justice rendering the consequent order of punishment liable to be set aside. Held: As laid down by the Supreme Court in Union of India & Others v. S.K. Kapoor, (2011) 4 SCC 589, the supply of the advice of the Public Service Commission is mandatory wherever the same is relied upon by the Disciplinary Authority.

3. Constitutional Law – Doctrine of Precedent – Per Incuriam – Subsequent Co-ordinate Bench Decision Without Noticing Earlier Binding Decision – Effect – Reference to Larger Bench Required for Departure.

It is a well-settled principle of the doctrine of precedent that if a subsequent co-ordinate bench of equal strength desires to take a view different from that of an earlier co-ordinate bench, it cannot do so on its own and must refer the matter to a larger bench. A decision rendered by a co-ordinate bench without noticing a binding earlier decision of equal strength on the same point is a judgment rendered per incuriam and does not have precedential value. The earlier decision, having not been noticed, retains its full binding force. Held: In Union of India & Others v. S.K. Kapoor, (2011) 4 SCC 589, the Supreme Court affirmed that the decision in T.V. Patel's case, which had purported to take a contrary view without noticing S.N. Narula v. Union of India (2011) 4 SCC 591, was per incuriam and that S.N. Narula continued to hold the field as binding precedent.

4. Service Law – Post-Retirement Departmental Proceedings – Civil Service Regulations – Article 351-A – Departmental Enquiry Continued After Retirement – Reduction of Pension and Recovery as Punishment – Impugned Order Set Aside – Post-Retiral Dues Directed to be Released.

Departmental proceedings against a government servant may, under the Civil Service Regulations (Article 351-A), be continued after his retirement and consequential punishment may be imposed in the form of reduction of pension or recovery. However, such proceedings must be conducted in strict compliance with the principles of natural justice, including the obligation to supply a copy of the advice of the Public Service Commission to the delinquent before the punishment order is passed. Where the impugned order of punishment — imposing recovery of Rs. 1,81,000/- and reduction of pension by 20% — is set aside on account of violation of natural justice, the petitioner is entitled to be restored to his full post-retiral benefits including revised pension. Held: Where the petitioner, aged 82 years at the time of adjudication, had been subjected to a prolonged departmental proceeding spanning over two decades and the punishment order was found to be vitiated for non-supply of the Public Service Commission's advice, the writ petition was allowed and the opposite parties were directed to release all post-retiral dues including revised pension.

Result: Writ petition allowed. The impugned punishment order dated 23rd June, 2010 directing recovery of Rs. 1,81,000/- and reduction of pension by 20% set aside. The opposite parties directed to release all post-retiral dues including revised pension to the petitioner forthwith.

Cases Referred:

1. S.N. Narula v. Union of India & Others, (2011) 4 SCC 591 – Applied.
2. Union of India & Others v. S.K. Kapoor, (2011) 4 SCC 589 – Applied.

(Delivered by Hon'ble Satyendra Singh Chauhan, J.
&
Hon'ble Anil Kumar, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. By means of this writ petition, the petitioner has challenged the order dated 23rd June, 2010, by which certain punishment has been awarded by making recovery of the amount to the tune of Rs. 1,81,000/- and also reduction of pension to the extent of 20% from the petitioner.

3. The petitioner was placed under suspension by means of the order dated 20th June, 1986 while working on the post of Sales Tax Officer in the department. A departmental proceeding was

initiated against him. The Deputy Commissioner(Executive) Moradabad was appointed as an Enquiry Officer vide order dated 21-08-1986. A Chargesheet was also served on the petitioner on 03-09-1986. The petitioner demanded certain documents by means of letter dated 20th September, 1986. A reminder letter was also given by the petitioner in this regard on 09-1-1987. The Enquiry Officer supplied the copies of the documents on 19th February, 1987, but, it is stated that the said documents were not relevant. Ultimately, the petitioner retired from service on 12th November, 1987. The State Government issued an order staying the disciplinary proceeding on account of pendency of a vigilance enquiry against him on 2nd April,1988. However, the enquiry was restarted by lifting the said stay order. The Joint Commissioner(Establishment) Jhansi, informed the petitioner vide order dated 30th September, 2002 that he has been authorized to hold enquiry in the matter and sought reply from him within a week. The petitioner demanded copy of the order dated 30th September, 2002 indicating that the enquiry had already been stayed by the State Government, but, he did not receive any reply from the Enquiry Officer. The petitioner requested the Principal Secretary to the Government of U.P. to get conducted the enquiry at Ghaziabad keeping in view his ill health and old age by means of letter dated 21st April, 2004. On 11th January, 2005, a reminder was also given by the petitioner to the Enquiry Officer as well as to the Principal Secretary of the department, but, no reply was received from them. The Enquiry Officer proceeded with the enqiry ex-parte on 10th June, 2005. On 9th March, 2006, the State Government issued another order to continue the enquiry under Article 351-A of the Civil Service Regulations. A show cause notice was also issued to the petitioner alongwith the enuiry report on 7th April,2006. The petitioner submitted reply to the show cause notice on 28th April, 2006. The Disciplinary Authority issued another notice to the petitioner on 12th April, 2007, by means of which he was informed that as to why the reduction of pension to the extent of 20% and recovery of Rs. 1,81,000/- should not be made from him. The petitioner submitted reply to the show cause notice dated 12th April, 2007. On 8th June, 2007, the State Government sought advice from the Public Service Commission, Allahabad and the Public Service Commission, Allahabad, gave its advice to the State Government on 20th May, 2010 and thereafter, the impugned order of punishment has been passed.

4. Learned counsel for the petitioner has submitted that while receiving the advice from the Public Service Commission, Allahabad by the State Government, its copy was never supplied to him, therefore, the impugned order is vitiated in the eyes of law. It also amounts to violation of principles of natural justice.

5. On the other hand, learned Standing Counsel has submitted that petitioner's punishment order has been passed in accordance with law and there was no delay in supply of the copy of advice of the Public Service Commission to the petitioner. He has also submitted that the enquiry was held in accordance with law.

6. We have gone through the record. From perusal of the record, we find that after initiation of disciplinary proceeding, an ex-parte enquiry was conducted against the petitioner. The opposite parties did not take into account the objections raised by the petitioner and ultimately a show cause notice was issued to the petitioner and the petitioner submitted reply to the said show

cause notice. However, another notice was issued to him with regard to the proposed punishment. An advice was sought from the Public Service Commission, Allahabad and the copy of the advice was received by the State Government, but, the same was never supplied to the petitioner. The non supply of document amounts to violation of principles of natural justice.

7. In this regard, learned counsel for the petitioner has relied upon a case reported in ***(2011) 4 Supreme Court Cases, 591 S.N. Narula Versus Union of India and Others.*** Relevant paragraphs from the case of S.N.Narula (Supra) are reproduced as under:

"5. This order was challenged by the Union of India by way of Writ Petition before the High Court of Delhi and by the impugned judgment the High Court interfered with that order. The Writ Petition was partly allowed and it was directed that the matter be again considered by the Tribunal. Against that order the Appellant has come up in appeal by way of Special Leave Petition.

6. We heard the learned Counsel for the Appellant and the learned Counsel for the Respondent. It is submitted by the counsel for the Appellant that the report of the Union Public Service Commission was not communicated to the Appellant before the final order was passed. Therefore, the Appellant was unable to make an effective representation before the disciplinary authority as regards the punishment imposed.

7. We find that the stand taken by the Central Administrative Tribunal was correct and the High Court was not justified in interfering with the order. Therefore, we set aside the judgment of the Division Bench of the High Court and direct that the disciplinary proceedings against the Appellant be finally disposed of in accordance with the direction given by the Tribunal in Paragraph 6 of the order. The Appellant may submit a representation within two weeks to the disciplinary authority and we make it clear that the matter shall be finally disposed of by the disciplinary authority within a period of 3 months thereafter."

8. He has also relied upon a decision of the Hon'ble Supreme Court reported in ***(2011)4 Supreme Court Cases, 589, Union of India and Others Versus S.K.Kapoor***. Relevant paragraphs of the said case are reproduced as under:-

"8. There may be a case where the report of the Union Public Service Commission is not relied upon by the disciplinary authority and in that case it is certainly not necessary to supply a copy of the same to the concerned employee. However, if it is relied upon, then a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice. This is also the view taken by this Court in the case of S.N. Narula v. Union of India and Ors. Civil Appeal No. 642 of 2004 decided on 30th January, 2004.

9. It may be noted that the decision in S.N. Narula's case (supra) was prior to the decision in T.V. Patel's case (supra). It is well settled that if a subsequent co-ordinate bench of

equal strength wants to take a different view, it can only refer the matter to a larger bench, otherwise the prior decision of a co-ordinate bench is binding on the subsequent bench of equal strength. Since, the decision in S.N. Narula's case (supra) was not noticed in T.V. Patel's case (supra), the latter decision is a judgment per incuriam. The decision in S.N. Narula's case (supra) was binding on the subsequent bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court."

9. We have considered the submissions of learned counsel for the petitioner and also the law laid down by the Hon'ble Supreme Court in the cases cited by the learned counsel for the petitioner and find that opposite parties have not supplied the copy of the advice of the Public Service Commission, which is in violation of principles of natural justice. Therefore, we are of the view that the punishment order on account of aforesaid fault cannot sustain. The petitioner has already attained the age of 82 years. In these circumstances, we allow the writ petition and set the impugned order of punishment directing the opposite parties to release all the post retiral dues including the revised pension to the petitioner.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2016

BEFORE

THE HON'BLE OM PRAKASH–VII, J.

Criminal Appeal No. 1401 Of 2013
&
Criminal Appeal No. 1255 of 2013

Jabir & Ors. **...Appellants**
Versus
State of U.P. **...Respondent**

Counsel for the Appellants:
Rajesh Kumar Pal, P.K. Singh, Yogesh Kumar Singh, Rajiv Gupta, Dileep Kumar, Rajrshi Gupta, Shristi Gupta

Counsel for the Respondent:
Govt. Advocate, Shri Z.K. Hasan, A.G.A.

Procedural History:
Appeals under Section 374 Cr.P.C. against the judgment and order dated 12.03.2013 passed by the Additional District & Sessions Judge, Court No. 3, Ballia in Session Trial No. 96 of 1999 (State of U.P. vs. Murtaza & Others), whereby the appellants were convicted under Sections 147, 148, 307, 333, 336, 504, 506 IPC read with Section 149 IPC and Section 7 Criminal Law Amendment Act and sentenced to various terms of imprisonment with fine.

Headnotes:

Penal Code, 1860 — Sections 147, 148, 307, 333, 336, 504, 506 read with 149 — Criminal Law Amendment Act, Section 7 —

Benefit of doubt — Suppression of genesis of occurrence — Failure to prove motive — Non-production of documentary evidence relating to earlier crime — Contradictions in medical evidence — Conviction unsustainable.

Where the prosecution case rested upon the alleged presence of police personnel at the place of occurrence in connection with another crime (Crime No. 45 of 1999), but no documentary evidence was produced to substantiate registration or particulars of such crime, and material contradictions existed regarding arrest of accused, time of medical examination and preparation of injury reports, and where the alleged weapons were not produced before the Court, the prosecution was held to have suppressed the origin and genesis of the occurrence.

Merely because the injured witnesses were police personnel, their testimony could not be discarded; however, in absence of credible corroboration and in view of material inconsistencies, the prosecution failed to establish guilt beyond reasonable doubt.

Reliance placed on **Kailash Gour v. State of Assam**, wherein it was held that benefit arising from faulty investigation must go to the accused.

The trial court erred in holding that motive and manner of occurrence were proved beyond reasonable doubt.

Result:

Both Criminal Appeal No. 1401 of 2013 and Criminal Appeal No. 1255 of 2013 **Allowed**.

Conviction and sentence dated 12.03.2013 set aside.

Appellants Jakir, Kadir, Jabir and Shivnath Singh acquitted of all charges.

Bail bonds cancelled. Accused in custody directed to be released forthwith, if not wanted in any other case.

Case Law Discussed:

Kailash Gour v. State of Assam

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

1. Since these criminal appeals have been heard at length and are being decided by a common judgment and order on merits, the Criminal Misc. 2nd Bail Application No. 47366 of 2014 filed on behalf of the applicants/appellants in Criminal Appeal No. 1401 of 2013 has become infructuous and the same is dismissed as having become infructuous.

2. Now the court proceeds to decide the present criminal appeals.

3. These criminal appeals have been preferred by the accused/ appellants against the judgement and order dated 12.3.2013 passed by the Additional District & Sessions Judge, Court No.3, Ballia in Session Trial No. 96 of 1999 (State of U.P. vs. Murtaza and others) convicting and sentencing the appellants Jakir and Kadir for the offences punishable under Sections 148, 307, 333, 336/149, 504, 506 IPC and 7 Criminal Law Amendment Act and fine was also imposed. Appellants Jabir and Shivnath Singh were convicted and sentenced for the offence under Sections 147, 307/149, 333/149, 336, 504, 506 IPC and 7 Criminal Law Amendment Act as also fine. All the sentences have been directed to run concurrently.

4. Since these criminal appeals have been filed against the same judgement and order, the same have been heard together and are being decided by a common judgment.

5. The facts of the case, as unfolded by the informant Devendra Dhar Dwivedi, Sub-Inspector, Police Station, Phephna in the First Information Report (in short 'F.I.R.'), are that on 16.3.1999 at about 22.30 p.m. the informant alongwith the police personnel, namely, constable 839 Ranjeet Singh, constable 540 Krishnanand Tiwari, constable 151 Rajesh Yadav, constable 744 Irshad Ahmad and constable 128 Dev Vrat Tiwari had gone to the house of accused Murtaza, who was wanted in case crime no. 45 of 1999, under Sections 457, 380 IPC, to trace/ search the accused Murtaza as also for looted property. As and when, on the road before the house of Murtaza, they were making enquiry about Murtaza, all of sudden, Murtaza son of Shakoor, Kadir son of Murtaza armed with farsa and Zakir son of Murtaza having bricks and stick and the neighbour Shivnath Singh son of late Ramdev Singh having bricks in his hand came out exhorting from the house of Murtaza, and hurling abuses said to kill the police personnel since they had arrested Nazir son of Murtaza in a case of theft. The informant and his companions withdrew themselves from the said place and came at the cemented road. In the meantime, they (accused persons), pelting the stone indiscriminately, began to beat the police personnel. The police personnel began to hide themselves with a view to escape from injury. All the above five persons, surrounding the constable Dev Vrat Tiwari with intention to kill, began to beat him. Murtaza, Kadir and Zakir with intention to kill him on his head and face beaten badly with sharp edged weapon due to which he received serious injuries and was fainted. When alarm was made, people rushed towards the place of incident and a voice also came towards police station, then the accused persons spared Dev Vrat Tiwari. He was serious. Police personnel had also received injuries of bricks and stone. Accused were habitual criminal and they threatened to kill the police personnel. They also exhorted that in future police personnel will not be spared. The above persons (accused) knowingly created hindrance in official work and caused injuries to the government servant. Jabir and Murtaza were apprehended and brought to the police station explaining the reasons for their arrest for the offence under Section 380/457 IPC and 4/25 Arms Act from the place of incident.

6. On the basis of the said written report (Ext. Ka-1), Chik - First Information Report (in short 'FIR') was registered on the same day at 22.45 hours at the concerned Police Station at Crime No. 46/99 under Sections 147, 148, 307, 333, 336, 504, 506 IPC and 7 Criminal Law Amendment Act. G.D. Entry (Ext. ka-6) was also made.

7. Injured Krishna Nand Tiwari was medically examined on 17.3.1999 at 5.30 p.m. Following injuries were found on his body:

"1. Red scabed abrasion 3 cm x 2 cm on the upper aspect of front of left shoulder joint.

2. Redish bluish contusion 3 cm x 2 cm on the lateral aspect of Rt arm in middle.

3. Redish bluish faint contusion 4 cm x 2.5 cm on the upper aspect of left gluteal region.

4. Swelling 4 cm x 3 cm on the right back of Rt arm above the Rt elbow."

8. According to the doctor, injuries were simple in nature.

9. Injured Rajesh Yadav was medically examined on 17.3.1999 at 5.15 p.m. Following injuries were found on his body:

"1. Redish blue contusion 4 cm x 2.5 cm on the lateral aspect of Rt forearm 10 cm below the Rt elbow joint.

2. Redish blue contusion 6 cm x 3 cm on the lateral aspect of left arm 7 cm about the left elbow joint.

3. Redish blue faint contusion 4 cm x 3 cm on the lateral aspect of Rt leg 15 cm below the Rt knee joint."

10. According to the doctor, injuries were simple in nature.

11. Injured Dev Vrat Tiwari was medically examined on 16.3.1999 at 11.50 a.m. Following injuries were found on his body:

"1. Incised wound 6 cm x 0.75 cm muscle deep on the Rt cheek about 1 cm in front of the R Ear. Fresh blood oozing.

2. Incised wound 5 cm x 0.75 cm x bone deep on the left side of the forehead above the L eyebrow - fresh blood.

3. Incised wound 2.5 cm x 0.5 cm x bone deep on the back side of occipital region of the skull - fresh blood.

4. Incised wound 1 cm x 0.2 cm x muscle deep - fresh blood on the middle phalanx of the left middle finger.

5. Incised wound 0.75 cm x 0.1 cm x muscle deep on the tarmental phalanx of the left index finger.

6. Incised wound 3 cm x 0.5 cm x bone deep on the R parietal region of the skull about 10 cm above the R ear - fresh blood."

12. Injuries were kept under observation. According to the Doctor, the injuries were caused by sharp object end.

13. Station Officer, P.S. Phephna proceeded to investigate the matter. He copied the chick FIR and G.D. in the case diary and also recorded statement of chik writer as well as the accused Murtaza and Zakir. He inspected the spot and prepared the site plan (Ext. ka-7) showing all the details in it. He also made search of accused persons. He also recorded statement of other witnesses on different dates.

14. After completing the investigation, charge-sheets (Ext. ka-9-10) against all the accused appellants were filed. Concerned Magistrate took the cognizance. The case being exclusively triable by the sessions court, was committed to the Court of sessions.

15. Accused/appellants appeared and charge under Sections 148, 307, 333, 504, 506, 336/149 IPC and 7 Criminal Law Amendment Act was framed in the trial court against Murtaza, Zakir and Kadir and under Sections 147, 307/149, 333/149, 504, 506, 336 IPC and 7 Criminal Law Amendment Act was framed against Jabir and Shivnath Singh. All the accused pleaded not guilty and claimed their trial.

16. Trial proceeded and in order to prove its case, the prosecution examined ten witnesses, wherein PW-1 C.P. Ranjeet Singh, PW-2 Constable 128 Dev Vrat Tiwari, PW-3 Bharat Bhushan Verma, PW-4 Constable 151 Rajesh Yadav, PW-5 retired S.I. Devendra Dhar Dwivedi, PW-6 Dr. Amod Kumar, PW-7 Dr. C.I. Raza, PW-8 Head Constable Krishna Avatar Singh, PW-9 Constable Meraj Ahmad Khan and PW-10 retired S.I. Vijay Nath Tiwari. In documentary evidence, the prosecution has filed written report (Ext. ka-1), injury reports of Krishnanand Tiwari (Ext. ka-2), Rajesh Yadav (Ext. ka-3), Dev Vrat Tiwari (Ext ka-4), first information report (Ext. ka-7), charge-sheet in case crime no. 46 of 1999 (Ext. ka-8) and charge-sheet in case crime no. 47 of 1999 (Ext. ka-9).

17. After closure of the prosecution evidence, statement of accused appellants under Section 313 Cr.P.C. was recorded. Accused Murtaza died during trial hence trial against him was abated during trial itself.

18. Accused persons in their statements under Section 313 Cr.P.C. denied the allegations levelled against them and stated that they are innocent and the whole prosecution story is false. Accused Zakir and Jabir have said that they are poor labourer. They were hired by police without any payment and when they refused, the police has concocted the present story against them. Accused Shivnath Singh has said that he was not present on the spot on the day of alleged incident.

19. After hearing the learned counsel for the prosecution and defence, the trial court has found that the prosecution has fully succeeded in bringing home the charges against the accused/appellants beyond reasonable doubt and the accused / appellants were convicted and sentenced, hence these appeals.

20. I have heard S/Shri Dilip Kumar and P.K. Singh, learned counsel for the appellants in both the appeals and Shri Z.K. Hasan, learned AGA for the State, and have gone through the entire record.

21. Castigating the impugned judgement and order, learned counsel for the appellants have submitted that the appellants are innocent and have been falsely implicated in the present case. Prosecution case has not been supported by any independent evidence. Medical evidence is also doubtful. Place of occurrence is in the vicinity of dense populated area but the prosecution case is not supported by any person of the locality. It was further submitted that the prosecution could not prove its case beyond reasonable doubt as the motive / reason to remain present of the prosecution witnesses on the spot was not established. Crime No. 45 of 1999 is said to have been lodged against the accused Murtza (deceased-non-appellant) but the evidence to this effect was not adduced before the court concerned nor the weapon said to have been used in the crime was produced by the prosecution. In absence of such evidence, the opinion formed by the court below is perverse and illegal. It was next submitted that the appellant Shivnath Singh has been implicated in this matter as the police bore enmity with him because Shivnath Singh was resisting/protesting the local police for their wrong doings. It was further submitted that there is contradictory statement of the witnesses on the point of arrest of Murtza (deceased-non-appellant) before starting of the present incident. The recovery is also false. The findings recorded by the trial court regarding injuries said to have been sustained by the police personnel are also against the fact and law. The impugned order suffers from infirmity and illegality warranting interference by this Court.

22. On the other hand, Shri Z.K. Hasan, learned AGA appearing for the State has submitted that co-accused Murtza (deceased-non-appellant) was wanted in Crime No. 45 of 1999. The local police had gone to the place of occurrence in search of Murtza (deceased-non-appellant) and the properties said to have been looted and when the police tried to apprehend Murtza, accused persons objected the police personnel and caused injuries to them. At this juncture, learned A.G.A. refered to the injury reports and submitted that the injuries found on the body of the injured could be caused by the weapon assigned to the appellants. Appellant Shivnath Singh has also participated in the matter and caused resistance to the public servants to deter the public duty. The findings recorded by the trial court in the impugned judgment and order is in accordance with the evidence available on record. It was next contended that the motive has been clearly established by the prosecution. Non-furnishing the G.D. entry relating to Crime No. 45 of 1999 will not be sufficient to discard the oral statement of the prosecution witnesses. It was further submitted that the statement of prosecution witnesses can also not be discarded merely on this ground that they are police personnel. The prosecution case is supported by medical evidence. Appellants were arrested on the spot. P.W.-2 Devbrat Tiwari has sustained serious injuries. Hence, in the circumstances, the impugned order does not suffer from any infirmity or illegality.

23. I have considered the rival submissions made by the learned counsel for the parties and have carefully gone through the entire record and evidence.

24. In the present matter, the trial court's findings are that the prosecution was able to establish the motive, place of occurrence, time of incident and participation of the accused persons beyond reasonable doubt. The first information report is not an anti-timed document. Laches said to have been occurred on the part of the Investigating Officer are not sufficient to discard the evidence of the injured witnesses. Thus, the charge framed against the appellants were found proved beyond reasonable doubt.

25. Before analyzing the findings recorded by the trial court in the impugned judgment and order with the submissions advanced by the learned counsel for the parties and also the evidence available on record, it will be useful to note the admitted facts between the parties, which are as under:

(i) Place and time of occurrence is not disputed.

(ii) Prosecution could not furnish documents / papers relating to crime no. 45 of 1999, said to have been registered at police station concerned against co-accused Murtza (deceased - non-appellant), in regard to which the prosecution witnesses claim their presence on the spot.

(iii) Prosecution case is that all the injured were medically examined on 16.3.1999 but the injury reports (Ext. ka-2 & 3) regarding Krishna Nand Tiwari and Rajesh Yadav indicates that medical examination was done on 17.3.1999.

(iv) On the spot, police personnel were armed with the weapons issued to them but said weapons were not used by them in the incident.

(v) Shivnath Singh is not family member of the other accused.

26. Now the court proceeds to deal with the submissions made by the learned counsel for the parties.

27. First and foremost question in the present matter is as to whether the prosecution was able to establish the motive / reason of the presence of the police personnel on the date and time at the place of occurrence.

28. Although I am oblivious of the fact that motive relegates into the back ground in a case of direct ocular testimony and is not of much significance, but where the motive is false and cooked up, then it assumes importance to test the veracity or other wise of the prosecution witnesses.

29. As is evident from the FIR and the statement of prosecution witnesses, the present incident took place when the local police had gone to the place of occurrence in connection with case crime no. 45 of 1999 under Sections 457, 380 IPC in search of accused Murtza but no documentary evidence to establish this fact as to whether crime no. 45 of 1999 was related to the offence stated by the prosecution witnesses has been filed. The present matter is related to crime

nos. 46 of 1999 and 47 of 1999. Thus, the burden to prove the time and date of the registration of crime no. 45 of 1999 was upon the prosecution. The trial court finding on this point is that motive / reason regarding the presence of the police personnel on the date and time at the place of occurrence was established by the prosecution beyond reasonable doubt. Since the prosecution could not adduce any documentary evidence on this point, then in absence of such evidence, the finding recorded by the trial court on the point of motive is not sustainable. In this matter, it cannot be said that on the basis of statement of eye account witnesses motive has no significance. There is specific plea of the prosecution regarding motive/ reason of presence of the police personnel on the date and time at the place of occurrence and the entire prosecution story rests on the motive taken by the prosecution. In the instant case, police personnel are said to have received injuries. One constable Dev Vrat Tiwari has received serious injuries but the manner in which the injuries were said to have been caused by the appellants to the police personnel are improbable and unbelievable. Several police personnel, present on the spot, were armed with revolver and rifle but they have not used the same in their defence rather they saved themselves by hiding. There is contradiction in the statement of PW-1, PW-2 and PW-3 on the point as to whether the accused Murtaza was apprehended before start of the present incident or not and also on the point of time of medical examination of the prosecution witnesses said to have sustained injuries in the present matter. PW-5 in the cross-examination has admitted that none of the accused was named in crime no. 45 of 1999. This fact also supports the submission raised by the learned counsel for the appellants. Hence, it appears that the prosecution has suppressed the origin and genesis of the incident as only one constable Dev Vrat Tiwari has received serious injuries in the matter. Injury reports said to have been prepared in regard to other injured are also not believable as there is contradictory statement of the prosecution witnesses regarding date and time of preparation of those reports. Further, PW-5 has not disclosed the name of the persons who rescued them. The weapon said to have been used in the crime was also not produced before the Court.

30. So far as the laches in investigation are concerned, the Apex Court in ***Kailash Gour and others vs. State of Assam, (2011) 13 Scale 549*** has held that:

".....That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the alter of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution....."

31. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, I am of the opinion that the conclusion taken by the trial court regarding motive and manner of committing the offence is not in accordance with law and the evidence available on record and the prosecution appears to have suppressed the origin and genesis of the occurrence due to which the documentary evidence regarding Crime No. 45/1999 was not produced. Thus, this Court is of the view that the prosecution has not been able to establish the guilt of the accused appellants beyond reasonable doubt. Hence, the Court is inclined to grant benefit of doubt to the accused appellants on the ground of rule of caution.

32. In view of the above discussions, we are of the opinion that the prosecution has failed to establish the guilt of the accused appellants Jakir and Kadir for the offences punishable under Sections 148, 307, 333, 336/149, 504, 506 IPC and 7 Criminal Law Amendment Act and accused appellants Jabir and Shivnath Singh for the offences punishable under Sections 147, 307/149, 333/149, 336, 504, 506 IPC and 7 Criminal Law Amendment Act beyond reasonable doubt and to the satisfaction of the judicial conscience of the court. So, the impugned judgement and order of conviction and sentence dated 12.3.2013, which has been sought to be assailed, call for and deserves, interference. The criminal appeals are liable to be allowed.

33. Accordingly, criminal appeal nos. 1401 of 2013 and 1255 of 2013 are allowed and the conviction and sentence imposed upon the accused appellants Jakir and Kadir for the offences punishable under Sections 148, 307, 333, 336/149, 504, 506 IPC and 7 Criminal Law Amendment Act and accused appellants Jabir and Shivnath Singh for the offences punishable under Sections 147, 307/149, 333/149, 336, 504, 506 IPC and 7 Criminal Law Amendment Act are set-aside as the accused appellants Jakir, Kadir, Jabir and Shivnath Singh are found not guilty for the aforesaid offences. They are acquitted of all the charges framed against them. Accused appellant(s) on bail need not surrender. Their bail bonds are cancelled and sureties are discharged. The accused appellants, who are in jail, be released forthwith in case they are not wanted in any other case / crime.

34. Copy of this judgement be also kept on the record of Criminal Appeal No.1255 of 2013.

35. Copy of this judgement alongwith lower court record be sent forthwith to the Sessions Judge, Ballia for compliance. Compliance report be sent to this Court.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 1500 Of 2016

Aaram Singh & Ors. **...Revisionists**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Revisionists:
Sri Vidit Narayan Mishra

Counsel for Opposite Parties:
Government Advocate

Criminal Procedure -- Section 227/228 Cr.P.C. -- Discharge -- Framing of Charge -- Standard of Proof -- Prima Facie Evidence -- Revisionists challenged the rejection of their discharge application by the Judicial Magistrate, Fatehgarh, District Agra, in Case Crime No. 136 of 2013 under Sections 147, 336, 427, 506, 323, 504 and 148 I.P.C. -- contended that they are innocent, falsely implicated as a counter blast of a murder case lodged by them against Opposite Party No. 2, there is inordinate delay in FIR lodged under Section 156(3) Cr.P.C. and no offence is made out -- Held: at the stage of framing a charge only a reasonable doubt in the mind of the court concerned is sufficient and courts are not required to see whether the evidence available on record is sufficient to prove the case of prosecution beyond reasonable doubt -- only prima facie evidence as available on record is to be considered at the initial stage -- framing of charge is a finding of fact and cannot be interfered in revision unless it suffers from patent illegality or infirmity.

Criminal Procedure -- Section 227 Cr.P.C. -- Framing of Charge -- Documents to be Considered -- Right of Accused to Produce Defence Material -- Held: at the time of framing charge, what the Trial Court is required to see and consider are only the police papers referred to under Section 173 Cr.P.C. and documents sent with it -- the accused cannot be permitted to produce documents to put forth his defence case for purpose of seeking discharge -- the expression 'record of the case' in Section 227 Cr.P.C. refers to the material produced by the prosecution and not by the accused -- probative value of the material on record cannot be gone into at the stage of framing of charges and the material brought on record by the prosecution has to be accepted as true at that stage.

Criminal Procedure -- Discharge -- Section 227 Cr.P.C. -- Grounds on Which Sessions Judge May Discharge -- Interference by High Court -- Held: the Sessions Judge has power to discharge the accused in the following circumstances: (A) where evidence produced is not sufficient; (B) where there is no legal ground for proceeding against the accused; (C) where the prosecution is clearly barred by limitation; or (D) where he is precluded from proceeding because of a prior judgment of the High Court -- an order of framing charge cannot be quashed merely because it does not contain reasons -- the High Court should not interfere at the initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons, which in law would amount to interdicting the trial against the accused persons.

Criminal Revision Dismissed -- Impugned order dated 25.03.2016 passed by the learned Judicial Magistrate, Fatehgarh, District Agra rejecting the discharge application of the revisionists in Case No. 46 of 2014, arising out of Case Crime No. 136 of 2013 under Sections 147, 336, 427, 506, 323, 504 and 148 I.P.C. upheld -- revision dismissed at the admission stage.

Case Law Discussed:
1. State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415
2. Soma Chakravarty v. State (through CBI), 2007 (2) SCC (Cri) 514
3. Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary and others, 2009 (1) SCC (Cri) 87
4. Omwati v. State, AIR 2001 SC 1507
5. Om Prakash Sharma v. C.B.I., AIR 2000 SC 2335
6. Niranjan Singh Karan Singh Panjabi v. Jitendra Bhimarj Bizza, AIR 1990 SC 1962
7. Kanti Bhadra Shah v. State of Bengal, AIR 2000 SC 522
8. State of J&K v. Sudarshan Khakkar, AIR 1995 SC 1954
9. Rukmani Narvekar v. Vijaya Satardekar, AIR 2009 SC 1013
10. Rajbir Singh v. State of U.P. and others, 2006 (55) ACC 308 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. This revision has been filed against the judgment and order dated 25.3.2016, passed by learned Judicial Magistrate, Fatehgarh, District Agra, in Case No. 46 of 2014, arising out of Case Crime No. 136 of 2013 (State Vs. Aaram Singh and others), under sections 147, 336, 427, 506, 323, 504, 148 I.P.C., whereby the court below has rejected the discharge application of the revisionists.

2. Heard learned counsel for the revisionists and learned A.G.A.

3. Learned counsel for the revisionists has submitted that the revisionists are innocent persons, who have no criminal history but they all have been falsely implicated in this case, which is a counter blast of Case Crime No. 65 of 2013 U/s 302 I.P.C. P.S. Daukee, District Agra, lodged by the revisionists against O.P. No. 2 and others for murder of their father. It is further contended that there is inordinate delay in lodging the FIR, which has been lodged with the aid of section 156(3) Cr.p.C. It has further been submitted that from the perusal of the entire evidence on record it appears that no offence is made out against the revisionists under Sections 147, 336, 427, 506, 323, 504, 148 I.P.C., therefore, the impugned order dated 25.03.2016, which has been passed without appreciating the evidence on record, be set aside.

4. Learned A.G.A. has vehemently opposed the aforesaid submissions and has submitted that in wake of the prima facie evidence available against the revisionists, the court below has rightly rejected the discharge application, moved by the revisionists, keeping in view the facts and circumstances of the case.

5. Considered the submissions.

6. At the stage of framing a charge only a reasonable doubt in the mind of the court concerned is sufficient and the courts are not required to see whether the evidence available on record is sufficient to prove the case of prosecution beyond reasonable doubt. Only prima facie evidence as available on record is to be considered by the court concerned at the initial stage of framing charges.

7. In ***State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415***, the Hon'ble Apex Court has held that at the time of framing charge, what the Trial Court is required to see and consider, are only the Police Papers referred to under Section 173, Cr.P.C. and documents sent with it. The accused cannot be permitted to produce documents to put forth his defence case for purpose of seeking discharge.

8. In ***Soma Chakravarty v. State (through CBI); 2007 (2) SCC (Cri) 514,*** it has been held by the Hon'ble Apex Court that at the time of framing of 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 at that stage. If on the basis of material on record the Court could form an opinion that the accused might have committed the offence it can frame the charge, though for conviction

the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. Whether, in fact, the accused committed the offence, can only be decided in the trial.

9. In ***Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary and others; 2009 (1) SCC (Cri) 87***, it has been held by the Hon'ble Apex Court that 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.

10. In ***Omwati v. State; AIR 2001 SC 1507***, the Hon'ble Apex Court has restricted the High Court from interfering by holding that the High Court should not interfere at initial stage of framing the charges merely on hypothesis, imagination and farfetched reasons, which in law amount to interdicting the trial against the accused persons.

11. Hon'ble Apex Court in ***Om Prakash Sharma vs. C.B.I. AIR. 2000 SC 2335,*** has held that at the stage of 227 of the Code of Criminal Procedure, it is not open to the Sessions Judge to weigh the pros and cons whether improbability and then proceed to discharge the accused holding the said statements existing in the case diary as unreliable.

12. Hon'ble Apex Court in ***Niranjan Singh Karan Singh Panjabi vs. Jitendra Bhimarj Bizza AIR 1990 SC 1962*** has held that the Court may for limited purpose sift the evidence as it canot be expected even in that inital stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

13. It is also settled position of law that at the time of framing charge the accused has no right to produce any material because the expression "record of the cases" in Section 227 Cr.P.C. refers to the material produced by the prosecution and not by the accused.

14. The Sessions Judge has the power to discharge the accused in the following circumstances;

A-where the evidence produced is not sufficient,

B- where there is no legal ground for proceeding against the accused,

C-where the proseuction is clearly barred by limitation, or

D-where he is precluded from proceeding because of a prior judgment of High Court.

15. In ***Kanti Bhadra Shah vs. State of Bengal AIR 2000 SC 522***, Hon'ble Supreme Court has held that the discharge order must contain reasons but an order of framing charge cannot be quashed merely because it does not contain reasons.

16. In ***State of J & K vs. Sudarshan Khakkar AIR 1995 SC 1954*** and in Rukmani Narvekar vs. Vijaya Satardekar, AIR 2009 SC 1013, it has been held that no weight is to be attached to the probable defence of the accused and at the time of framing of the charge, the Court has to confine its attention to documents referred to unde Section 173 Cr.P.C. only.

17. In wake of the aforesaid legal position and considering the facts and circumstances of the present case and the prima facie evidence available on record, this revision appears to have no force and it is liable to be dismissed.

18. The revision is accordingly dismissed at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2016

BEFORE

THE HON'BLE SATYENDRA SINGH CHAUHAN, J.
THE HON'BLE ANIL KUMAR, J.

Service Bench No.- 1555 Of 2012
&
Service Bench No.- 348 Of 2012

Ram Avadh & Anr. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Sanjay Kumar

Counsel for the Respondents:
C.S.C., Birendra Singh

Service Law – U.P. State Archives Service Rules, 1996 – Dying in Harness Rules, 1974 – Appointment – Relaxation – Assistant Director (Conservation) – Officiating charge of Deputy Director as well as Director – Promotion order dated 05.10.2012 – Appointment dated 28.09.1991 – Writ Petition No.5968 (SS) of 1991 – Judgment dated 08.02.1994 – Appointment of respondent no.4 has attained finality – Seniority – Inordinate delay – At such a belated stage – Principles of constructive res-judicata will apply – Controversy has been set at rest in the earlier judgment – Cannot be reopened – Failed to approach the Court promptly as contemplated under law – Neither the seniority, which has been settled, can be unsettled at such a belated stage – Both the writ petitions are devoid of merit and are accordingly dismissed.

Since common question of law and facts are involved in these writ petitions, therefore, the same are being decided by a common order. Writ Petition No.1555 (SB) of 2012 was filed challenging the promotion order dated 05.10.2012 passed in favour of respondent no.4. Facts, in short, are that the petitioner no.1 was initially appointed on the post of Technical Assistant (Sanskrit) after due advertisement and selection from

U.P. Public Service Commission, Allahabad vide order dated 29.03.1979. In due course of time, the petitioner no.1 was promoted on the post of Manuscript Officer vide order dated 06.05.1998. Similarly, petitioner no.2 was appointed on the post of Technical Assistant (History) in the State Archives, Department of Culture, U.P., in the similar manner vide order dated 09.07.1990 and he was promoted on the post of Regional Archives Officer vide order dated 29.07.1999. Both the petitioners are continuously working on the said posts since the date of their promotion. The service Rules pertaining to the selection, appointment and other service conditions of the petitioners were published in the year 1996, which known as 'U.P. State Archives Service Rules, 1996 (for short 'the Rules') by exercising power under proviso to Article 309 of the Constitution of India.(Paras 2-5)

Held: (Para 23-26)

1. A person should approach the Court well within time and if he does not come to the Court well within time and at the earliest reasonable possible opportunity and if there is inordinate delay in making the motion for a writ, the Court will be justified in not exercising the discretionary jurisdiction.

2. The case laws relied upon by the learned counsel for the petitioners are in different context and they could have been taken into consideration provided the petitioners would have approached this Court within reasonable time.

3. We, therefore, find that on both the counts, either in respect of challenging the seniority or in respect of challenging the appointment, petitioners have failed to approach the Court promptly as contemplated under law and, therefore, their claims at such a belated stage cannot be considered and neither the seniority, which has been settled, can be unsettled at such a belated stage.

4. Both the writ petitions are devoid of merit and are accordingly **dismissed**.

Case Law discussed: --

1. Raiwad Manojkumar Nivruttirao vs. State of Maharashtra and another,(2011) 9 SCC 798(Para 12)
2. State of Orissa and another vs. Mamata Mohanty, (2011) 3 SCC 436 (Para 12)
3. S. Jaffar Sahib vs. Secretary, A.P.P.S.C. and others, (1996) 11 SCC 753 (Paras 14, 20)
4. K.R. Mudgal and others vs. R.P. Singh and others, (1986) 4 SCC 531 (Paras 14, 21)
5. Tridip Kumar Dingal and others vs. State of West Bengal and others,(2009)1 SCC 768 (Paras 14,22)

(Delivered by Hon'ble Satyendra Singh Chauhan, J.)

1. Heard learned counsel for the petitioners and learned Standing Counsel as well as learned counsel for respondent no.4.

2. Since common question of law and facts are involved in these writ petitions, therefore, the same are being decided by a common order.

3. Writ Petition No.1555 (SB) of 2012 was filed challenging the promotion order dated 05.10.2012 passed in favour of respondent no.4.

4. Facts, in short, are that the petitioner no.1 was initially appointed on the post of Technical Assistant (Sanskrit) after due advertisement and selection from U.P. Public Service Commission, Allahabad vide order dated 29.03.1979. In due course of time, the petitioner no.1 was promoted on the post of Manuscript Officer vide order dated 06.05.1998. Similarly, petitioner no.2 was appointed on the post of Technical Assistant (History) in the State Archives, Department of Culture, U.P., in the similar manner vide order dated 09.07.1990 and he was promoted on the post of Regional Archives Officer vide order dated 29.07.1999. Both the petitioners are continuously working on the said posts since the date of their promotion.

5. The service Rules pertaining to the selection, appointment and other service conditions of the petitioners were published in the year 1996, which known as 'U.P. State Archives Service Rules, 1996 (for short 'the Rules') by exercising power under proviso to Article 309 of the Constitution of India.

6. After the death of Sri Javed Niyaz Beg, respondent no.4 being the wife of Sri Javed Niyaz Beg, submitted an application on 23.03.1990 before the Deputy Secretary, Appointment Section of the State Government and requested therein that since her husband was an officer of Provincial Civil Services of 1979 batch and at the time of death i.e. on 25.01.1986, he was posted as Deputy Secretary in Lucknow Development Authority, Lucknow, therefore, she may be given appointment as per her qualification. She also mentioned her qualification in the said application form.

7. The then Secretary of Appointment Section of the State Government issued a letter dated 28.03.1990 to the Vice Chairman, Allahabad Development Authority, Allahabad and requested therein that since the husband of respondent no.4 had died on 25.01.1986 while he was posted as Deputy Secretary in Lucknow Development Authority, Lucknow, therefore, she may be given appointment under the Dying in Harness Rules, 1974. As the respondent no.4 was residing at Allahabad, therefore, she was given appointment in Allahabad Development Authority, Allahabad vide order dated 04.05.1990 on the post of Junior Clerk.

8. The respondent no.4 thereafter moved an application on 13.05.1991 before the Appointment Secretary, which was processed in the Government and the Government thereafter, granted relaxation as contemplated under the Dying in Harness Rules, and appointed the respondent no.4 on the post of Assistant Director (Conservation). The respondent no.4 thereafter started functioning on the post in question when in the year 1991, Writ Petition No.5968 (SS) of 1991 was filed challenging the appointment of respondent no.4. The said writ petition was disposed of finally, by means of judgment and order dated 08.02.1994. In the said writ petition, a specific ground was taken regarding the objection raised by the petitioners in the present writ petitions.

9. The aforesaid writ petition has been disposed of and the appointment of respondent no.4 has attained finality and she continued to discharge her duties on the post in question, when in the year 2011, she was given officiating charge of Deputy Director as well as Director, which was challenged by way of Writ Petition No.348 (SB) of 2012.

10. The petitioners were fully knowing since the year 1991 that respondent no.4 was working in the department by virtue of her appointment under the Dying in Harness Rules, but they did not challenge the appointment of respondent no.4 at any point of time and it has been submitted by the learned counsel for the petitioners that when the chance of promotion of the petitioners came, then they realized that she was senior to them and as such, they cannot be promoted and so they proceeded to challenge the appointment of respondent no.4 in the year 2012 and also challenged her officiating promotion.

11. Submission of learned counsel for the petitioners is that the appointment of respondent no.4 was illegal and she could not have been appointed on the post in question under the Dying in Harness Rules. He also submits that the judgment rendered in Writ Petition No.5968 (SS) of 1991 was not in the knowledge of the petitioners and the petitioners did not challenge the appointment of respondent no.4 as they were not going to be promoted at the relevant time, but as and when the chance came in respect of their promotion, then they realized that they cannot be promoted on account of the fact that respondent no.4 was senior to them.

12. Further submission of learned counsel for the petitioners is that looking to the qualification and the post on which, respondent no.4 was appointed, she was appointed illegally and her appointment was illegal for all purposes. Learned counsel for the petitioners, in support of his submission, has relied upon the judgment of the apex court in the cases of ***Raiwad Manojkumar Nivruttirao vs. State of Maharashtra and another (2011) 9 SCC 798;*** and ***State of Orissa and another vs. Mamata Mohanty (2011) 3 SCC 436.***

13. Learned counsel for respondent no.4 as well as learned Standing Counsel submitted that the appointment of respondent no.4 was initially made in the Allahabad Development Authority, Allahabad on the post of Junior Clerk, but she was not satisfied with the said appointment as various widows of IAS and PCS Officers were appointed on higher posts and so she made a representation to the State Government and thereafter the Government processed the said representation of respondent no.4 and by exercising the power of relaxation as contemplated under the Dying in Harness Rules, proceeded to appoint respondent no.4 on the post of Assistant Director. Learned counsel further submits that the appointment of respondent no.4 cannot be challenged at such a belated stage. The petitioners were very well there in the department at the time of appointment of respondent no.4. The factum of appointment of respondent no.4 was in the knowledge of the petitioners, but they chose to keep quiet till 2012 and they have proceeded to challenge the appointment of respondent no.4 at such a belated stage.

14. Learned counsel for respondent no.4 has placed reliance upon the judgment of the apex court in the cases of ***S. Jaffar Sahib vs. Secretary, A.P.P.S.C. And others (1996) 11 SCC 753; K.R. Mudgal and others vs. R.P. Singh and others (1986) 4 SCC 531;*** and ***Tridip Kumar Dingal and others vs. State of West Bengal and others (2009) 1 SCC 768.***

15. We have heard learned counsel for the parties and perused the record.

16. The husband of respondent no.4 was appointed as a PCS Officer in the year 1979 and while in service, he died on 25.01.1986. The State Government thereafter took a decision to appoint respondent no.4 in Allahabad Development Authority, Allahabad on Class-III post, but respondent no.4 was not satisfied with the said appointment and so she made an application to the State Government stating various instances of various officers, whose wives have been appointed on Class-II post and, therefore, she also prayed that she may be given appointment accordingly on any Class-II or equivalent post.

17. The aforesaid application of respondent no.4 was processed in the Government and the matter was placed before the then Chief Minister, who granted relaxation on 17.09.1991. After grant of relaxation by the Government, the appointment letter was issued in favour of respondent no.4 on 28.09.1991. The appointment of respondent no.4 was thereafter challenged by means of Writ Petition No.5968 (SS) of 1991, which was disposed of vide order dated 08.02.1994. The challenge to the appointment of respondent no.4 stood finalized by means of the aforesaid judgment of the Division Bench of this Court. The petitioner did not choose to challenge the appointment of respondent no.4 and even if they want to challenge the said appointment, then they are estopped in view of the fact that a judgment has already been rendered by a Division Bench of this Court in Writ Petition No.5968 (SS) of 1991 and that has attained finality.

18. The argument of learned counsel for the petitioners that since the petitioners were not affected at the relevant time, therefore, they did not challenge the appointment of respondent no.4, cannot be accepted as they were very much there in the department and the factum of appointment of respondent no.4 was well within their knowledge and if they wished to challenge the said appointment, they could have done so at an early date, but since 1991, they have been waiting till 2012 and in the year 2012, they have challenged the appointment of respondent no.4 again by means of the present writ petitions.

19. The principles of constructive res-judicata will apply in the present case. The controversy has been set at rest in the earlier judgment, therefore, the same cannot be reopened by means of these writ petitions. Apart from it, challenge to the appointment and promotion cannot be entertained at such a belated stage.

20. Learned counsel for the petitioners has placed reliance upon the judgment of the apex court in the case of ***S. Jaffar Sahib*** (supra). In Para-4 of the said judgment, the apex court held as under:

"4. The appellant appeared in person in this Court and contended that appointments having been made contrary to the Rules of Reservation, the said appointments are invalid and inoperative. The appellant's right to be appointed was illegally taken away and therefore this Court should annul the appointment of the respondents forthright and direct reconsideration of the appellant's appointment. We are unable to accept this contention at this belated stage. As has been stated earlier the appellant challenged the appointment of the respondents before the Tribunal in the year 1987 and the Tribunal did not interfere with the

appointments made in the year 1981 and the said order became final not being challenged in any higher court. The appellant then filed second round of petition in the year 1990 which was rejected by the Tribunal on the ground of laches and the application for review stood dismissed on the ground that there is no error of law apparent on the face of the order which can be reviewed by the Tribunal. On the admitted facts that appointment of respondents to the post of Deputy Collector was made in the year 1981, an application before the Tribunal in the year 1990 could not have been entertained after lapse of 9 years. Then again there is an additional hurdle on the part of the appellant namely affected persons are not made parties to the proceedings. It is too well settled that without impleading a person as a party whose rights would be affected, no court/tribunal can pass any order against him. In the aforesaid premises we find no justification for our interference under Article 136 of the Constitution with the impugned order of the Tribunal. The appeal is accordingly dismissed but in the circumstances there will be no order as to costs."

21. Similar position was considered in the case of ***K.R. Mudgal*** (supra), wherein the seniority was sought to be challenged at a belated stage and the same was refused to be entertained. In Para-7, 8 and 9 of the said judgment, the apex court held as under:

"7. .....The facts of this case are more or less similar to the facts in R.S. Makashi v. I.M. Menon (1982) 2 SCR 69. In the said decision this Court observed at page 100 of the Reports thus: (SCC p.400, para 30)

In these circumstances, we consider that the High Court was wrong in overruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition insofar as it related to the prayer for quashing the said Government Resolution should have been dismissed.

8. We are in respectful agreement with the above observation.

9. We may also refer here to the weighty observations made by a Constitution Bench of this Court in Malcom Lawrence Cecil D'Souza v. Union of India, AIR 1975 SC 1269 at pages 413-414 of the Reports which are as follows: (SCC p.602, para 9)

Although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in pubic services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened

after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

22. Dealing with the similar issue, the apex court in the case of ***Tridip Kumar Dingal*** (supra), in Paras-59 and 60 observed as under:

"59. We are in respectful agreement with the following observations of this Court in P.S. Sadasivaswamy v. State of T.N. (1975) 1 SCC 152:

(SCC p.154, para 2)

"2. ..... 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 relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters."

60. From the facts, it is clear that written examination for the selection of Medical Technologists was taken as early as in August 1995 and list of more than 1000 candidates was published in June 1996. By now more than a decade has passed. The applicants who had never challenged the selection before the Tribunal, before the High Court and before us and have applied for the first time in the present proceedings which were instituted in 2005 by filing impleadment applications have thus accepted the position as prevailed in 1996. Qua them, therefore, the matter can be said to have been "settled". Initiation of proceedings at the instance of those candidates now will "unsettled the settled position".

23. A person should approach the Court well within time and if he does not come to the Court well within time and at the earliest reasonable possible opportunity and if there is inordinate delay in making the motion for a writ, the Court will be justified in not exercising the discretionary jurisdiction.

24. The case laws relied upon by the learned counsel for the petitioners are in different context and they could have been taken into consideration provided the petitioners would have approached this Court within reasonable time.

25. We, therefore, find that on both the counts, either in respect of challenging the seniority or in respect of challenging the appointment, petitioners have failed to approach the Court promptly as contemplated under law and, therefore, their claims at such a belated stage cannot be considered and neither the seniority, which has been settled, can be unsettled at such a belated stage.

26. Both the writ petitions are devoid of merit and are accordingly dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 1577 Of 1983
&
Criminal Appeal No.- 1586 Of 1983

Pramod & Ors. **...Appellants**
Versus
State Of U.P. **...Respondent**

Counsel for Appellants:
T.M. Rizvi, D.K. Tiwari, Sanjay Mishra

Counsel for Respondent:
A.G.A

Sexual Offences — Rape — Abduction — Sole testimony of prosecutrix — Credibility — Standard of proof — Discrepancies — Benefit of doubt — Sections 366 and 376, Indian Penal Code, 1860 — Section 228-A, IPC.

1. Sole testimony of prosecutrix — Reliability and credibility as the determinative test — No corroboration required if testimony inspires confidence: It is settled legal position that the sole testimony of a prosecutrix in a case of sexual assault can form the basis for conviction of the accused without corroboration on material particulars, provided the testimony is cogent, credible, and trustworthy. The prosecutrix of a rape case is not an accomplice after the crime. Her testimony must be appraised in the same manner as the testimony of any other witness. Only when the Court finds it difficult to accept the version of the prosecutrix at face value may it seek direct or circumstantial corroborative evidence. Minor contradictions and insignificant discrepancies are not sufficient grounds for rejecting the testimony of the sole prosecutrix if it is otherwise found trustworthy.

2. Glaring discrepancies — Failure of family members to report disappearance — Unexplained delay in lodging FIR — Contradictions between FIR, testimony and General Diary entry — Effect: Where the sole testimony of the prosecutrix is riddled with material discrepancies which are neither minor nor insignificant, the court cannot sustain the conviction. In the present case, the prosecutrix allegedly remained in confinement for approximately one and three-quarter months, yet neither her parents, her husband nor any family member lodged any report of her disappearance, nor did any of them appear before the trial court to corroborate even the initial part of the prosecution story. The FIR was recorded at 9:10 p.m. whereas the prosecutrix claimed she reached the police station at 7:00 a.m., creating an unexplained delay of nearly fourteen hours. The testimony of the Head Constable (PW-5) also contradicted the prosecutrix on the time of her arrival at the police station. Furthermore, the story set out in the First Information Report and that

recorded in the General Diary Entry (Ex Ka-9) were diametrically at variance with each other — the General Diary disclosed an additional accused (Chandrika Passi) and a larger number of persons involved, who had never been named in the FIR or during trial. Held, that such material contradictions, taken collectively, render the testimony of the prosecutrix unreliable.

3. Date of medical examination — Conflict between testimony of prosecutrix and prosecution witnesses — FIR discrepancy as to date: The prosecutrix stated that her medical examination was conducted on the same day as the lodging of the FIR (13.12.1980) and that her statement under Section 161, Cr.P.C. was recorded the next day (14.12.1980). However, PW-3 (Constable Jashvir Singh) and PW-2 (Dr. Nalini Gaur) both confirmed that the medical examination was performed on 14.12.1980, while the Investigating Officer (PW-1) stated that the victim's statement was recorded on 15.12.1980 as investigation was entrusted to him only on that day. These contradictions on material facts further corrode the credibility of the prosecution case.

4. Change of version — Introduction of new allegation of rape against accused not named in FIR: Where the First Information Report does not level any allegation of rape against a particular accused, and neither the investigation nor the chargesheet attributes such an act to him, but the prosecutrix for the first time during her deposition before the trial court implicates that accused by alleging rape, such a change of version constitutes a material and significant discrepancy that substantially undermines the credibility of the prosecutrix. In the present case, no allegation of rape was made against Appellant Pramod either in the FIR or during investigation, and accordingly no charge under Section 376 IPC was framed against him; however, the prosecutrix during her evidence alleged rape by all four accused persons including Pramod. This material improvement of the case at trial is a factor that must be weighed against the prosecution.

5. Juvenility of accused — Duty of trial court to hold inquiry — Non-compliance: Where the age of an accused at the time of the commission of the offence is brought into question during trial and there is a reasonable likelihood that one or more of the accused may have been a minor (juvenile), it is incumbent upon the trial court to conduct a proper inquiry into the age of such accused persons. In the present case, the trial court, having itself taken note of the minority of Appellant Mithelesh Kumar and awarded him a lesser sentence, was duty-bound to conduct a similar inquiry in respect of all appellants whose ages were disclosed during recording of statements under Section 313, Cr.P.C. The failure to hold such an inquiry was an irregularity.

6. Benefit of doubt — Acquittal — Prosecution failing to prove guilt beyond reasonable doubt: Where prosecution rests essentially upon the sole testimony of the prosecutrix, and that testimony is found to be unreliable on account of multiple material discrepancies — including failure of family members to report disappearance, contradictions between FIR, oral testimony and General Diary, unexplained delay in lodging of FIR, conflict regarding date of medical examination, and wholesale improvement of the case during deposition — the appellants are entitled to the benefit of doubt. Conviction and sentence recorded by the trial court set aside. Appeals allowed.

RESULT:

Both criminal appeals allowed. Conviction and sentence recorded by the 7th Additional Sessions Judge, Fatehpur vide judgment and order dated 07.07.1983 in Sessions Trial No. 513 of 1981 set aside. Appellants directed to be set at liberty if in jail and not wanted in any other case. Bail bonds cancelled and sureties discharged.

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Four appellants have filed these two separate appeals against the judgment and order dated 7.7.1983 passed by then 7th Additional Sessions Judge, Fatehpur in Sessions Trial No. 513 of 1981 (State versus Pramod and others) arising out of Case crime no. 250 of 1980, Police Station Thariyaon. District Fatehpur.

2. Both appeals stem from a common judgment and common evidence, therefore, both the appeals are being decided by a common judgment.

3. Appellant Pramod was convicted under section 366 Indian Penal Code (in short, IPC) and sentenced to 10 years rigorous imprisonment (in short, R.I.). Appellants Suresh Kumar alias Avadesh Kumar and Raghav alias Raghvendra Kumar were convicted under sections 376 IPC and sentenced to life imprisonment. Appellant Mithlesh Kumar was convicted under section 376 IPC and sentenced to 10 years rigorous imprisonment. Appellant Raghav alias Raghvendra was also convicted under section 366 IPC and sentenced to ten years R.I.

4. In view of Section 228-A of IPC, identity of victim of alleged rape is not being disclosed and she will be referred as prosecutrix only.

5. Prosecution story, in brief, is that prosecutrix, a married woman was living at her parental house with her parents in village Aurai, Police Station Thariyaon District Fatehpur at the time of incident. Her husband Prithivi Pal wrote a letter to her father expressing his inability to come to take his wife (prosecutrix). He asked that prosecutrix should be sent back to her matrimonial home at village Chaumauli, Police Station Dibiyapur, the then District Etawah now District Auraiya with some other arrangements. Appellant Pramod, a neighbour of prosecutrix's parental home and known person offered to take her to her matrimonial home to which her parents agreed.

6. Accused-appellant Pramod accompanied by prosecutrix left the village Aurai, Police Station Thariiyaon district Fatehpur. He took her to Rasoolabad Railway Station where accused-appellant Raghav alias Raghvendra also met them. They boarded the train. At Fatehpur railway station, Raghuvendra and Pramod disembarked from the train on the pretext of searching vacant place in other compartment. Pramod went to search vacant seats in other compartment. Suddenly train departed. Prosecutrix started crying but Raghav alias Raghvendra consoled her and promised to leave her at parental home next day because no other train was available on that day. He took her to a tubewell at 'Turab Ali Ka Purwa' belonging to one Muslim. A room (kothari) also existed on the tubewell wherein co-accused Mithelesh and Suresh, cousins of Raghvendra were living with their mother, who was also aunt (father's sister/Bua) of Raghvendra. Allegations are that both appellants Mithelesh and Suresh alias Avadesh Kumar confined the prosecutrix in kothari for 1 ¾ month and they repeatedly raped her despite her protest. She claims to have complained to the mother of Suresh alias Awadesh and Mithelesh but of no avail. It is further alleged that Raghvendra also subjected her to rape on his frequent visits to this kothari. It is alleged that this single room had a roof over which a tin shed stood pitched up as covering. Mithelesh and Suresh alias Awadesh used to keep the victim there. It is further stated that on one day, she managed to flee from his room

on the pretext of need to defecate. She managed to reach Kotwali Fatehpur. She lodged First Information Report (in short, FIR).She was sent to District Hospital for medical examination. A site-plan was prepared at her instance and later on she went to her parental home as her husband refused to keep her after this incident.

7. Sri Diwakar Singh (PW-2) was asked to conduct investigation. He conducted investigation and subsequent to investigation filed charge-sheet under sections 363, 366, 368, 376 IPC. The charge-sheets are on record as Ex Ka-3, Ex Ka-4 and Ex Ka-5. The trial Judge framed charges against Pramod Kumar under section 366 IPC, against Raghav alias Raghvendra under section 366, 376 IPC, against Suresh Kumar and Mithelesh under sections 376 IPC on 6.11.1982. Accused-appellants denied the charges and claimed to be tried.

8. Prosecution produced five witnesses, namely, PW-1 Diwakar Singh, PW-2 Dr. Nallini Gaur, PW-3 Constable Jashvir Singh, PW-4 Prosecutrix and PW-5 Head Constable Rajendra Bahadur Singh. Statements of accused persons under section 313 Cr.P.C were recorded wherein they denied all the allegations. They did not adduce any oral or documentary evidence in defence.

9. The trial Judge concluded that there is sufficient evidence against all the appellants, therefore, he convicted and sentenced the appellants, as aforesaid vide judgment and order dated 7.7.1983. This judgment is under challenge before this Court.

10. Heard Sri Rajiv Lochan Shukla for appellants Mithelesh, Suresh Kumar alias Avadesh Kumar and Raghav alias Raghvendra, Sri Shyam Sunder Misra for appellant Pramod and Sri Syed Ali Murtuza, learned Additional Government Advocate for the State.

11. Learned counsel for the appellants have submitted that in the present case, there is no corroboration of evidence of prosecutrix. Medical report does not inspire confidence. Testimony of prosecutrix is full of discrepancies and contradictions. They have also argued that such evidence should not be taken into consideration especially in the light of contradictions. They have further argued that prosecutrix was not taken away from her parental home and that she left her place of her own volition.

12. On the other hand, Sri Syed Ali Murtuza, learned AGA has submitted that testimony of victim should be treated at part with injured witness and that no corroboration is required to support the testimony of prosecutrix. He has further submitted that character of victim is certainly not in trial in this case.

13. We believe that as far as law is concerned, the testimony of prosecutrix does not require corroboration on material particulars. It is well settled legal position that sole testimony of prosecutrix can be relied for conviction of the accused provided such testimony is cogent and inspires confidence and accepted by court as such. We also believe that once testimony of prosecutrix inspires confidence and is found credible and trustworthy, her sole testimony is sufficient for passing conviction order against the accused. Only test is reliability and credibility of

witness. If sole testimony is sufficient to establish the guilt of the accused, then court can not acquit the accused merely because other independent witnesses are not available. We also believe that minor contradictions and insignificant discrepancies are not sufficient ground for rejecting the testimony of sole prosecutrix if otherwise found trustworthy. We also believe that prosecutrix of a rape case is not accomplice after the crime. Her testimony has to be appraised just as testimony of any other witness. But we also believe that if court finds, it difficult to believe the story of prosecutrix at its face value then it may seek direct or circumstantial evidence in support of her allegations. In the present case, out of five prosecution witnesses, four witnesses are merely formal witnesses. PW-5 Head Constable Rajendra Bahadur Singh recorded the FIR and entered it into G.D. No. 46 at 9:10pm. He admitted that prosecutrix reached at the Police Station at 9:10pm. PW-2 Dr. Smt. Nalini Gaur merely examined the prosecutrix and prepared medical reports. PW-3 Constable Jashvir Singh adduced link evidence saying that he took prosecutrix to Female Hospital for medical examination on 14.12.1980. PW-1 Sub Inspector Diwakar Singh conducted investigation and submitted charge-sheet against accused persons. If we ignore these four witnesses, then it will appear that prosecution has given only one witness, namely, prosecutrix (PW-4). Therefore, Court has no option but to examine the sole testimony of prosecutrix with critical care.

14. The prosecution story indicates that prosecutrix was wife of one Prithivi Pal. She had been living at her matrimonial home substantially but at the time of incident, she was living with her parents at Aurai, Police Station Thariyaon, District Fatehpur. It is alleged that husband could not come to fetch her on account of lack of time, therefore, he requested the parents of prosecutrix to make some other arrangement and then Pramod, accused-appellant entered into picture, who was neighbour of prosecutrix. Admittedly, they knew each other reasonably well. Pramod offered to accompany prosecutrix and parents agreed. Prosecutrix was abducted in between and kept at a tubewell of one Muslim at 'Turab Ali Ka Purwa'. She managed to free herself from there after 1 - 3/4 months.

15. There are several unanswered questions in the story of prosecutrix. First, prosecutrix lived for two months in single room. There was no toilet. In fact, during night, she was kept on roof top covered with a tin shed. If her story is true, then she was raped repeatedly by two real brothers, namely, Mithelesh and Suresh alias Awdesh. It is also stated that she was confined to this room where she was kept under guard, not only by these two accused persons but also by their mother. Learned counsel for the appellants has argued that it is rather inconceivable that a woman is being kept for two months with other woman and yet second woman did not render any help. We believe that this story may not be palatable to most people but such instances are not unknown, where parents have completely lost control over their children. But in our opinion, there are several uncomfortable and unanswered questions in the prosecution story.

16. The prosecutrix remained in kothari for almost two months with accused persons after her abduction yet no report of her disappearance was lodged either by her parents or husband. This is strange thing. Nobody questioned Pramod with whom prosecutrix had left for her matrimonial home. No answer is forth coming from prosecution. Similarly not a single member of her family

has supported the prosecution allegation. Her parents have not appeared in witness box. Two elder sisters of prosecutrix have not come forward to support the prosecution evidence. On the contrary, elder sister of prosecutrix has married the main accused Raghav alias Raghvendra subsequent to submission of charge-sheet. Prosecutrix (PW-4) has conceded this point in cross examination. She has admitted that she was not kept by her husband subsequent to this incident and that she is living with one Ram Krishana in matrimonial relationship though she has not been formally divorced by her first husband.

17. Prosecutrix has also admitted that her elder sister Suman alias Rooprani has married accused-appellant Raghav alias Raghvendra. She has conceded that she did have some differences with her sister Suman though she has denied the allegation that she has falsely implicated Raghav on account of jealousy with her sister Suman. The testimony of prosecutrix is full of significant discrepancies. The FIR says that she was repeatedly raped by appellants Mithelesh, Suresh and Raghav at the tube well at 'Turab Ali Purwa'. Initially no allegation was levelled against accused Pramod for committing rape upon prosecutrix. In fact, contents of FIR says that Pramod and Raghav Pandit disembarked from the bogey of train on the pretext of non-availability of space or over crowding. When Pramod went to look for a vacant compartment, the train left the station. Raghav Pandit allegedly lured and took her to tubewell at 'Turab Ali Ka Purwa' where she was kept under surveillance of co-accused Mithelesh, Suresh alias Awadesh and their mother. There is no allegation in the FIR that Pramod took her to 'Turab Ali Ka Purwa'. There is no allegation that he visited her at 'Turab Ali Ka Purwa' even once. During investigation also she stated the same thing, that is why trial Judge framed no charge under section 376 IPC against accused-appellant Pramod but her testimony creates some complication. During her testimony prosecutrix stated that both Pramod and Raghav Pandit took her to 'Turab Ali Ka Purwa' and confined her at tubewell there. She again changed her version by levelling allegation that all the four accused persons repeatedly raped her at tubewell. The role of Pramod is completely absent from FIR and original prosecution story after his departure for purported search for vacant compartment in the train. But in her evidence she levelled allegation of rape against all the four accused persons.

18. Subsequently, this witness also stated that one day she left her dwelling unit on pretext of need to defecate. There is no specific statement that here was no toilet in the room but examination of overall evidence would reveal that there was no separate toilet in that room. In fact, it was a single room which was covered by tin shed, meaning thereby that inhabitants of room had to go agricultural field every day for defecation. Learned counsel for the appellant has submitted that victim could have left earlier on the same pretext. She did not raise any alarm during her confinement at tubewell. At one place prosecutrix has admitted and site plan also indicate that there was a public path near the tubewell and one day infact, prosecutrix had some conversation with one woman, wife of one Khatik. The question is how the prosecutrix, who was completely confined in a room, became aware that particular woman is wife of khatik? Prosecutrix has also admitted that room where she was confined was surrounded by agricultural field, orchard and one pond. She has also admitted that this house belongs to a Muslim person. Learned counsel for the appellant has raised a valid question and this is a very pertinent question that under what circumstances prosecutrix did not get any opportunity for two months to contact any person or visit agricultural

field, orchard or pond or the owner of the tubewell. How come owner of the tubewell did not visit her room even once for such a long time. All these questions are reasonable and can not be ignored. Fact of the matter is that no explanation has been ever offered on behalf of prosecution.

19. Another significant discrepancy can be noticed in the testimony of prosecutrix. She has said that she managed to leave the place of her confinement at 4:00am in the morning. She has further stated that she reached Kotwali, at 7:00am. She has explained the delay of three hours by saying that she had to inquire the location of Kotwali from several persons. Now Chik report (Ex Ka-8) discloses that FIR was recorded on 13.12.1980 at 9:10pm(night). This entry and testimony of prosecutrix are totally contradictory. Not only this, PW-5 Head Constable Rajendra Bahadur Singh has also said that prosecutrix reached Police Station at 9:10pm (night). Prosecutrix says that she reached there in the morning at 7:00am yet report was lodged in the night at 9:10pm. This significant delay of almost 14 hours has not been explained by the prosecution. We may assume that the delay was caused by police officials but the testimony of Head Constable Rajendra Bahadur Singh (PW-5) contradicts the prosecutrix regarding time of her entrance in the Police Station. This witness says that prosecutrix reached Police Station at 9:10pm(night) on 13.12.1980. The question is why was this report lodged with this considerable delay ? If the prosecutrix had reached Police Station at 7:00am, then there was no reason for them to record the FIR at 9:10pm in the night. Prosecutrix has said that report was lodged on 13.12.1980, though at one place she even referred date of report as 12.12.1980. But even if it is accepted that the report was lodged on 13.12.1980, that situation is also inconsistent with other documents available on record. Prosecutrix has alleged that she was medically examined on the same day on which report had been lodged and that her statement was recorded next day by the Investigating Officer, meaning thereby that medical examination was conducted on 13.12.1980 i.e. date of report and her statement recorded on 14.12.1980 i.e. next day of FIR. This statement is not supported by record.

20. PW-3 Constable Jashvir Singh has claimed that he took prosecutrix to Female Hospital on 14.12.1980. Dr. Nalini Gaur (PW-2) has also admitted that prosecutrix was examined on 14.12.1980 at 10:45am. This is contrary to the statement of prosecutrix. Similarly, even the date of recording of statement of prosecutrix under section 161 Cr.P.C. is uncertain. The victim says that her statement was recorded next day of lodging of FIR while Investigating Officer Diwakar Singh says that statement of victim was recorded on 15.12.1980 as investigation itself was entrusted to him on the same day. Therefore, he could not have recorded statement of the victim prior to the entrustment of investigation. PW-1 Diwakar Singh has also disclosed that on 16.12.1980 the statement of mother of victim was recorded yet her mother has not been produced in evidence. Surprisingly, Investigating Officer did not record statement of victim's husband or any member of his family during investigation despite the fact that prosecutrix had allegedly been abducted while she was on way to her matrimonial home. Abduction took place at Railway Station and yet not a single statement of any railway employee was recorded. Admittedly, Investigating Officer did not even care to inquire whether prosecutrix was married or not ?

21. Learned counsel for the appellants has drawn the attention of this Court towards admission of prosecutrix where says that she lived with Awadesh alias Suresh, Mithelesh and their mother because she had been lured by them. The exact words used by her are as follows :

मैं अवधेश व मिथलेश व उनकी मां के पास इसलिए रूकी क्योंकि मैं इन लोगों के चक्कर में आ गई थी।"

22. Learned counsel for the appellant has argued that the aforesaid sentence discloses that the prosecutrix lived with aforesaid persons of her own volition on account of her unhappiness with her parents and sister Suman and that is why no report of her disappearance was lodged by parents. This suggestion of counsel for appellants can not ignored.

23. Oral testimony of prosecutrix is also inconsistent with site-plan (Ex Ka-1). Her statement is contradictory to the documentary evidence available on record. She has tried to give graphic description of place which does not find support from the evidence given by police. Prosecution did not care to produce Muslim man in whose room the prosecutrix lived for two months at 'Turab Ali Ka Purwa'. At one place prosecutrix admitted that no other person visited tubewell behind 'Turab Ali ka Purwa' where she was living with Suresh and Awadhesh yet she repeatedly said that she was raped by Raghav as well.

24. Learned counsel for the appellant has drawn attention of this Court toward extract of G.D.No. 46 recorded at 9:10pm on 13.12.1980 which has been proved by PW-5 H.C. Rajendra Bahadur Singh (Ex Ka-9). He has submitted that contents of G.D. reflects a different story. Ex Ka-9 discloses that during this period prosecutrix also lived with one Chandrika Passi who also allegedly subjected her to rape. But during the course of trial, name of Chandrika Passi was never mentioned. He was not even arrayed as an accused. The story surfaced from Ex Ka-9. First entry made in this G.D. is completely at variance with the contents of FIR and testimony of prosecutrix. The story of departure with Pramod with consents of parents is totally absent from this entry. Present story accuses four persons while entry made in Ex Ka 9 talks about as many as six persons. This document also talks of medical examination on the next day, contrary to assertion of prosecutrix that medical examination was done on the same day on which FIR was lodged.

25. The record further discloses that at least one accused namely, Awadesh was 15 years of age at the time of incident and therefore, the trial Judge sentenced him for 10 years R.I. only. In fact, trial Judge should have conducted inquiry regarding the age of accused. Pramod disclosed his age as 19 years, Raghav as 20 years, Mithelesh Kumar as 15 years and Awadesh as 18 years. These were disclosed at the time of recording of statement under section 313 Cr.P.C. The trial judge himself considered Mithelesh as minor, therefore, awarded him lesser sentence. Therefore, it was incumbent upon the trial judge to hold the enquiry ascertaining the correct age of all accused/appellants which he did not do. There was no attempt to take any further steps for consideration of plea of juvenality of the appellants.

26. This entire case depends upon solitary testimony of prosecutrix. It is true that solitary testimony of prosecutrix in a case of sexual assault can be the basis for conviction of accused,

provided found trustworthy. Facts of this case are rather strange. Of course, it is not necessary to provide supportive evidence in every case of sexual assault but in the instant case, there are several glaring discrepancies. A young married girl disappeared with a family friend for around two months and yet no report of disappearance was lodged by parents. There is nothing on record to even demonstrate that accused Pramod was ever questioned by the parents of the prosecutrix. Surprisingly even the husband of prosecutrix at whose request she had been dispatched with appellant Pramod did not inquire about her whereabouts. No report was lodged even by him. The discrepancies regarding timing of report, medical examination and other relevant facts have not been explained. Parents of prosecutrix at least could have supported the initial part of story of prosecution yet parents and husband of prosecutrix neither reported the matter to the Police nor appeared before the trial court to support her version. Even investigation has been performed in perfunctory manner. The testimony of prosecutrix is not reliable at all. The story given by her and story disclosed in G.D. No. 46 of 13.12.1980 Kotwali Fatehpur (Ex Ka-1) recorded at 9:10pm (Ex Ka-9) are diametrically opposite to each other. Thus, we have no hesitation in holding that appellants are entitled to the benefit of doubt as the prosecution has failed to prove its case beyond reasonable doubts. Hence, the conviction recorded by the trial court against the appellants as well as sentence awarded to them can not be sustained.

27. In the result, both appeals are allowed. The judgment and order dated 7.7.1983 passed by then 7th Additional Sessions Judge, Fatehpur in Sessions Trial No. 513 of 1981 (State versus Pramod and others) arising out of Case crime no. 250 of 1980, Police Station Thariyaon. District Fatehpur is set aside. Appellants be set at liberty, if in jail and not wanted in any other case. Their bail bonds are cancelled and sureties discharged.

28. Let a copy of the judgment be sent to trial court for compliance through Sessions Judge, Fatehpur within ten days. Concerned court shall report compliance within one month thereafter.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 1580 Of 2005

Radhika Oiul Industries **...Revisionist**

Versus

Commissioner Trade Tax, U.P. Lucknow **...Respondent**

Counsel for the Revisionist:
Kunwar Saksena

Counsel for the Respondent:
C.S.C.

U.P. Trade Tax Act, 1948 – Section 28A – Section 28B – Levy of penalty – Section 15A(1)(o) – Import of goods into the State – Goods merely transiting the State of U.P. – Authorization for transit of goods – First check post or barrier after his entry into the State – Statutory presumption – Failure to obtain the requisite form – Vehicle was apprehended before the first check post – Provisions of Section 28A did not apply – Levy of penalty clearly unsustainable and unjustified – Provisions of Section 28B were not infringed – Revision shall stand allowed – Orders are hereby set aside.

The challenge in the present proceedings is to a levy of penalty for alleged contravention of the provisions of Section 28A of the U.P. Trade Tax Act, 1948 [1 1948 Act] . A penalty has come to be imposed upon the revisionist in terms of the provisions of Section 15A(1)(o) of the 1948 Act. The case of the revisionist was that a tanker vehicle commenced its journey in the State of Rajasthan and was bound to the premises of a dealer namely Rama Phosphate Ltd. at Indore in the State of Madhya Pradesh. This vehicle is stated to have been intercepted near the Saiyan crossing just prior to the check post established by the Trade Tax authorities in the district of Agra. Since the goods were not accompanied with the documents required in terms of the provisions of Section 28A, they were detained. A notice to show cause was issued on 5 February 2000 calling upon the person in charge of the vehicle to establish cause as to why penalty be not imposed. A reply is stated to have been submitted on 7 February 2000 which, however, did not in the opinion of the authorized person commend acceptance. Accordingly a seizure order was passed and a subsequent penalty order came to be made on 30 March 2000. The revisionist took out a first appeal but the same did not meet any success. Constrained by the order of dismissal of its first appeal, it approached the Tribunal, which has while upholding the levy of penalty reduced the quantum thereof to Rs. 48,000/ being 12% of the value of the goods. It is against the said order that the instant revision has come to be instituted.(Paras 2)

Held: (Paras 6-7)

1. While it is true that the proceedings for levy of penalty were instituted with reference to clause (o) of Section 15A (1) alone, the case of the revisionist may be tested even on the pedestal of Section 28B. It becomes pertinent to note that for violation of Section 28B or its provisions a like penalty is provisioned for in clause (q) of Section 15A(1). The vehicle in question commenced its journey in the State of Rajasthan and is stated to have been apprehended just before the check post at Saiyan. The submission of the learned counsel for the revisionist that Saiyan was in fact the first check post which the revisionist would cross in its passage of transit is not disputed. Now it needs to be borne in mind that section 28B lays down the requirement of obtaining what may be called a transit pass. This is a document which the person in charge of the vehicle must obtain at the time of entry into the State and surrender upon exiting the State. The time at which this transit pass is to be obtained and surrendered is prescribed to be "the first checkpost or barrier after his entry into the State and deliver it to the officerincharge of the last checkpost or barrier before his exit from the State". The statutory presumption of a sale having occurred within the State or a violation of section 28B would come about only upon the failure on the part of the person to obtain the requisite form and declaration upon crossing the first check post or barrier which fell after his entry into the State. Here, the vehicle was apprehended before the first check post which fell upon entry into the State. It was not the case of the Department that the vehicle of the revisionist had crossed the Saiyan check post and was exiting the State of U.P. at which stage the goods were apprehended. The provisions of section 28B were therefore not infringed. Consequently, the question of a levy of penalty in terms of section 15A (1)(q) would also not arise. The Court therefore finds that the orders of the authorized officer, first appellate authority as well as the Tribunal are clearly unsustainable and arbitrary.

2. For the aforesaid reasons, this revision shall stand **allowed**. The orders dated 7 February 2000 and 30 May 2000 passed by authorized officer, 8 December 2000 passed by the first appellate authority as well as the order dated 3 March 2005 passed by the Tribunal are hereby set aside.

Case Law discussed:

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri M.M. Rai, the learned counsel for the revisionist and the learned Standing Counsel.

2. The challenge in the present proceedings is to a levy of penalty for alleged contravention of the provisions of Section 28A of the U.P. Trade Tax Act, 1948 [1 1948 Act] . A penalty has come to be imposed upon the revisionist in terms of the provisions of Section 15A(1)(o) of the 1948 Act. The case of the revisionist was that a tanker vehicle commenced its journey in the State of Rajasthan and was bound to the premises of a dealer namely Rama Phosphate Ltd. at Indore in the State of Madhya Pradesh. This vehicle is stated to have been intercepted near the Saiyan crossing just prior to the check post established by the Trade Tax authorities in the district of Agra. Since the goods were not accompanied with the documents required in terms of the provisions of Section 28A, they were detained. A notice to show cause was issued on 5 February 2000 calling upon the person in charge of the vehicle to establish cause as to why penalty be not imposed. A reply is stated to have been submitted on 7 February 2000 which, however, did not in the opinion of the authorized person commend acceptance. Accordingly a seizure order was passed and a subsequent penalty order came to be made on 30 March 2000. The revisionist took out a first appeal but the same did not meet any success. Constrained by the order of dismissal of its first appeal, it approached the Tribunal, which has while upholding the levy of penalty reduced the quantum thereof to Rs. 48,000/ being 12% of the value of the goods. It is against the said order that the instant revision has come to be instituted.

3. In order to appreciate the submissions advanced by Sri Rai, it would be first apposite to refer to the provisions of Section 28A and 28B of the 1948 Act, which read as follows:

"**28A. Import of goods into the State against declaration.** (1) Any person (hereinafter in this section referred to as the importer) who intends to bring, import or otherwise receive, into the State from any place without the State, any goods other than the goods exempt under clause (a) of Section 4 in such quantity or measure or of such value, as exceeds,

(a) (i) twenty kilograms in the case of foodgrains, cereals, pulses, soyabean, and all products thereof, and all raw materials including resin, rosin and oilseeds used for extracting oils of any kind; or

(ii) rupees fifty, in the case of other goods; or

(b) the quantity, measure or value notified by the State Government in that behalf, in connection with business, shall obtain the prescribed form of declaration, on payment of the prescribed fee, from the Assessing Authority having jurisdiction over the area where his principal place of business is situated or, in case there is no such place, where he ordinarily resides:

Provided that where the importer intends to bring, import or otherwise receive such goods otherwise than in connection with business, he may, at his option, in the like manner obtain the prescribed form of certificate.

(2) Where such goods are to be consigned by road,

(a) the importer shall furnish to the consignor the declaration inthe prescribed form in duplicate duly filled in and signed by him and the driver or any other personincharge of any vehicle carrying any such goods shall carry with him the copies of such declaration duly verified by the consignor in the prescribed manner together with such other documents as may be prescribed, and shall deliver one copy of such declaration,

(i) where such goods are brought by a road on which a checkpost or barrier is established under Section 28, to the officerincharge of such checkpost or barrier before crossing the checkpost or barrier, and

(ii) where such goods are brought by a road on which nosuch checkpost or barrier is established, to the officerincharge of the nearest checkpost or barrier established under the said section before transporting such goods further within the State;

and the other copy of the declaration and the remaining documents along with the goods to the importer or his agent,

(b) the officerincharge of the checkpost or barrier shall grant areceipt for the copy of declaration delivered to him and it shall not be necessary for the driver or the personincharge of the vehicle to deliver any copy of the declaration at any other checkpost or barrier that he may cross, if he shows such receipt to the officerincharge of such other checkpost or barrier;

(d) the importer shall preserve the other copy of the declaration and other documents delivered to him or to his agent under Clause (a) for such period as may be prescribed and produce them before the Assessing Authority whenever demanded by it within such period.

(3) Where such goods are consigned by rail, river, air or post, the importer shall not

(a) obtain or cause to be obtained delivery thereof unless hefurnishes or causes to be furnished to such officer, as may be authorised in this behalf, by the State Government, a

declaration in the prescribed form in duplicate duly filled in and signed by him for endorsement by such officer ; and

(b) after taking delivery, carry the goods away or cause the goods tobe carried away from the railway station, steamer or boat, station, airport or postoffice, as the case may be, unless a copy of the declaration duly endorsed by such officer is carried with the goods.

(4) Where such goods are brought into the State as personalluggage, the person bringing them shall carry with him the declaration in the prescribed form duly filled in and signed by the importer, and the importer shall submit the same for endorsement by the officer referred to in subsection (3) by the next working day.

(4A) Where any person intends to bring, import or otherwise receive into the State from any place without the State any goods referred to in subsection (1) otherwise than in connection with business and obtains the prescribed form of certificate, the provisions of sub-sections (2), (3) and (4) shall, mutatis mutandis, apply as if the word "certificate" were substituted for the word "declaration" used therein.

(5) The driver or other personincharge of any vehicle carrying anygoods referred to in the preceding subsection shall stop the vehicle at every such checkpost or barrier or, when so required by an officer authorised under subsection (2) of Section 13, at any other place, and keep it stationary for so long as may be considered necessary by the officerincharge of the checkpost or barrier or the officer authorised under subsection (2) of Section 13, as the case may be, and allow him to search the vehicle and inspect the goods and all documents referred to in the preceding sub-section, and shall, if so required, give his name and address and the names and addresses of the owner of the vehicle and of the consignor and the consignee of the goods.

(6).Where the officer making the search or inspection under thissection finds any person transporting or attempting or abetting to transport any goods to which this section applies without being covered by the proper and genuine documents referred to in the preceding sub-sections and if, for reasons to be recorded, he is satisfied, after giving such person an opportunity of being heard, that such goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under this Act, he may order detention of such goods.

(7) The provisions of subsections (2), (6) and (8) of Section 13Ashall mutatis mutandis apply to such detention, as they apply to seizure under that section.

(8) Nothing contained in this section shall be construed to imposeany obligation on any railway administration or railway servant or the post office or any officer of the post office, or to empower any search, detention or seizure of any goods while on a railway as defined in the Indian Railways Act, 1890, or in a post office as defined in the Indian Post Office Act, 1898.

28-B. Transit of goods by road through the State and issue of authorisation for transit of goods. When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in subsection (1) of Section 28A, passes through the State, the driver or other personincharge of such vehicle shall obtain in the prescribed manner an authorisation for transit of goods from the officerincharge of the first check-post or barrier after his entry into the State and deliver it to the officerincharge of the last checkpost or barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or personincharge of the vehicle:

Provided that where the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that goods have actually moved out of the State shall be on the owner or personincharge of the vehicle.

Explanation.For the purpose of this section, the hirer of the vehicle shall also be deemed to be the owner of the vehicle."

4. A perusal of Section 28A would establish that a person who intends to bring, import or otherwise receive goods, "**into the State"** from any place outside the State of U.P. is liable to obtain a declaration form as prescribed upon payment of the requisite fee. From the plain and unambiguous language of Section 28A, it is clear that the obligation which is placed in terms of its provision is upon a person who intends to bring import or otherwise receive goods into the State. Section 28A obviously, therefore, cannot apply to goods, which are merely transiting the State of U.P. on their journey onwards to another State.

5. The case of goods which enter the State of U.P. and transit the State onwards has in fact been taken care of and requisite provisions in respect of such eventuality provisioned for in Section 28B. Here the obligation which is placed is that the person carrying goods is required to obtain an authorization for transit of goods from the officer in charge of the first check post or barrier which falls after his entry into the State and surrender the same before he exits the State at the last check post failing which the provision raises a presumption that the goods have been sold within the State. While clause (o) of Section 15A (1) deals with the levy of penalty in a case where goods have been imported or transported in contravention of the provisions of Section 28A, clause (q) provides for a levy of penalty in case of an infraction of Section 28B.

6. The Tribunal has in the opinion of this Court while undertaking a labored exercise to uphold the levy of penalty clearly failed to bear in mind the fundamental facets of Sections 28A and 28B. While various faults have been found with respect to the quality of the documentation which was found to be accompanying the goods in question, the Tribunal has failed to bear in mind the primary ingredients for applicability of Section 28A. It does not at any place in its judgment record any reason to disbelieve the submission of the assessee that the goods were transiting the Sate of U.P. and were bound for Indore in the State of M.P. Obviously, therefore, there was no occasion for it being asserted or held that the goods in question were intended to be brought, imported or otherwise received into the State of U.P. Since in view of the above the provisions of

section 28A did not apply, consequently the levy of penalty in terms of clause (o) of Section 15A (1) was clearly unsustainable and unjustified.

7. While it is true that the proceedings for levy of penalty were instituted with reference to clause (o) of Section 15A (1) alone, the case of the revisionist may be tested even on the pedestal of Section 28B. It becomes pertinent to note that for violation of Section 28B or its provisions a like penalty is provisioned for in clause (q) of Section 15A(1). The vehicle in question commenced its journey in the State of Rajasthan and is stated to have been apprehended just before the check post at Saiyan. The submission of the learned counsel for the revisionist that Saiyan was in fact the first check post which the revisionist would cross in its passage of transit is not disputed. Now it needs to be borne in mind that section 28B lays down the requirement of obtaining what may be called a transit pass. This is a document which the person in charge of the vehicle must obtain at the time of entry into the State and surrender upon exiting the State. The time at which this transit pass is to be obtained and surrendered is prescribed to be ***"the first checkpost or barrier after his entry into the State and deliver it to the officerincharge of the last checkpost or barrier before his exit from the State"***. The statutory presumption of a sale having occurred within the State or a violation of section 28B would come about only upon the failure on the part of the person to obtain the requisite form and declaration upon crossing the first check post or barrier which fell after his entry into the State. Here, the vehicle was apprehended before the first check post which fell upon entry into the State. It was not the case of the Department that the vehicle of the revisionist had crossed the Saiyan check post and was exiting the State of U.P. at which stage the goods were apprehended. The provisions of section 28B were therefore not infringed. Consequently, the question of a levy of penalty in terms of section 15A (1)(q) would also not arise. The Court therefore finds that the orders of the authorized officer, first appellate authority as well as the Tribunal are clearly unsustainable and arbitrary.

8. For the aforesaid reasons, this revision shall stand **allowed**. The orders dated 7 February 2000 and 30 May 2000 passed by authorized officer, 8 December 2000 passed by the first appellate authority as well as the order dated 3 March 2005 passed by the Tribunal are hereby set aside.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 1909 Of 2012

Smt. Shilpi Srivastava ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite parties

Counsel for the Revisionist:

Manish Tiwari, Ashwini Kumar Awasthi, Vivek Prasad Mathur

Counsel for the Opposite parties:
Govt. Advocate, C.D. Mishra

This criminal revision has been filed for setting aside the order dated 28.04.2012 passed by the 6th Additional Sessions Judge, Gautam Budh Nagar in Sessions Trial No. 12 of 2011 (Case Crime No. 446 of 2008), under Section 306 I.P.C., Police Station Kasna, District Gautam Budh Nagar, whereby the revisionist has been summoned under Section 319 Cr.P.C.It is submitted by learned counsel for the revisionist that a criminal revision no. 542 of 2012 was filed by the opposite party no.2 before this Court against the order dated 25.01.2012 passed by the learned VIth Additional Sessions Judge, Gautambudh Nagar, whereby the application filed by the prosecution under Section 319 Cr.P.C., for summoning the revisionist under Section 306 I.P.C., was rejected. The said revision was disposed of by a detailed order dated 24.02.2012 with the direction to the Court below to consider the application of the prosecution after adducing of the evidence by the complainant, thereafter, the application under Section 319 Cr.P.C., be decided,It is further submitted that after passing of the order dated 24.02.2012, summoning order has been passed whereby the application under Section 319 Cr.P.C., has been allowed. Learned counsel for the revisionist further contends that a bare reading of the statements of P.W.2 and 3 as well as copy of the suicide note would go to show that no offence under Section 306 I.P.C., is made out against the revisionist, who is the wife of the deceased. It is thus contended that summoning of the revisionist under Section 319 Cr.P.C. is bad in law.I have gone through the nature of the allegations made in the application under Section 319 Cr.P.C. and oral evidence of the witnesses. It is alleged that the wife of the deceased Prabhat Srivastava has allegedly admitted premarital illicit relationship and due to this, the deceased Prabhat Srivastava was compelled to commit suicide. The learned Additional Sessions Judge while passing the impugned order has considered all the facts and circumstances of the case and has rightly summoned the revisionist under Section 319 Cr.P.C. In view of the above analysis, the impugned judgment and orders passed by both the courts below are perfectly legal and there are no illegality or perversity in the same.
The revision lacks merits and accordingly deserves to be dismissed.

Held: Para-

Case Law discussed:
Sanju alias Sanjay Singh Sengar Vs. State of M.P., (2002) 5 Supreme Court Cases 371, Netai Dutta Vs. State of W.B. (2005) 2 Supreme Court Cases 659 and State of Kerala and others Vs. S. Unnikrishnan Nair and others, (2015) 9 Supreme Court Cases 639.
Sarojben Ashwin Kumar Shah Vs. State of Gujarat and another 2011 (74) ACC 951 has considered the principles laid down in Michael Machado and another Vs. Central Bureau of Investigation and another (2000) 3 SCC 262=2000 (40) ACC 795 (SC).

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Imran Ibrahim holding brief of Sri Manish Tiwari, learned counsel for the revisionist, Sri Anand Kumar Tiwari, learned counsel for the opposite party no. 2 and learned A.G.A. for the opposite party no. 1.

2. This criminal revision has been filed for setting aside the order dated 28.04.2012 passed by the 6th Additional Sessions Judge, Gautam Budh Nagar in Sessions Trial No. 12 of 2011 (Case

Crime No. 446 of 2008), under Section 306 I.P.C., Police Station Kasna, District Gautam Budh Nagar, whereby the revisionist has been summoned under Section 319 Cr.P.C.

3. It is submitted by learned counsel for the revisionist that a criminal revision no. 542 of 2012 was filed by the opposite party no.2 before this Court against the order dated 25.01.2012 passed by the learned VIth Additional Sessions Judge, Gautambudh Nagar, whereby the application filed by the prosecution under Section 319 Cr.P.C., for summoning the revisionist under Section 306 I.P.C., was rejected. The said revision was disposed of by a detailed order dated 24.02.2012 with the direction to the Court below to consider the application of the prosecution after adducing of the evidence by the complainant, thereafter, the application under Section 319 Cr.P.C., be decided, copy of order dated 24.02.2012 is annexed as Annexure-7 to the affidavit accompanying the revision. It is further submitted that after passing of the order dated 24.02.2012, summoning order has been passed whereby the application under Section 319 Cr.P.C., has been allowed. Learned counsel for the revisionist further contends that a bare reading of the statements of P.W.2 and 3 as well as copy of the suicide note would go to show that no offence under Section 306 I.P.C., is made out against the revisionist, who is the wife of the deceased. It is thus contended that summoning of the revisionist under Section 319 Cr.P.C. is bad in law.

4. Learned counsel for the revisionist has relied upon three decisions of the Hon'ble Apex Court in the cases of ***Sanju alias Sanjay Singh Sengar Vs. State of M.P., (2002) 5 Supreme Court Cases 371, Netai Dutta Vs. State of W.B. (2005) 2 Supreme Court Cases 659 and State of Kerala and others Vs. S. Unnikrishnan Nair and others, (2015) 9 Supreme Court Cases 639***.

5. Learned counsel for the opposite party no. 2 and learned A.G.A. have opposed the submissions raised by the learned counsel for the revisionist and contended that there are ample evidence against the revisionist to summon the revisionist under Section 319 Cr.P.C., therefore, the revisionist has been rightly summoned.

6. I have gone through the nature of the allegations made in the application under Section 319 Cr.P.C. and oral evidence of the witnesses. It is alleged that the wife of the deceased Prabhat Srivastava has allegedly admitted premarital illicit relationship and due to this, the deceased Prabhat Srivastava was compelled to commit suicide. The learned Additional Sessions Judge while passing the impugned order has considered all the facts and circumstances of the case and has rightly summoned the revisionist under Section 319 Cr.P.C.

7. The above decisions relied upon by the learned counsel for the revisionist are based on different facts and they are not applicable in the present case.

8. The Apex court in the case of ***Sarojben Ashwin Kumar Shah Vs. State of Gujarat and another 2011 (74) ACC 951*** has considered the principles laid down in ***Michael Machado and another Vs. Central Bureau of Investigation and another (2000) 3 SCC 262=2000 (40) ACC 795 (SC)***. In para 16 their Lordships of the Apex Court has held as under :-

"16. The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this court is this:

(i) The Court can exercise the power conferred on it under Section 319 of the Code suo motu or on an application by someone.

(ii) The power conferred under Section 319 (1) applies to all Courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in section 319 does not exclude from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words , the said expression covers any person who is not being tried already by the Court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court.

(iv) The power to proceed against any person, not being the accused before the Court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word 'evidence' in Section 319 contemplates the evidence of witnesses given in Court in the inquiry or trial. The Court cannot add persons as accused on the basis of materials available in the charge-sheet or the case diary but must be based on the evidence adduced before it. In other words, the Court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the Court's although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The Court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the Court to the constraints imposed in Section 319 (4) that proceedings in respect of newly - added persons shall be commenced afresh from the beginning of the trial.

(viii) The court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion."

9. In view of the above analysis, the impugned judgment and orders passed by both the courts below are perfectly legal and there are no illegality or perversity in the same.

10. The revision lacks merits and accordingly deserves to be dismissed.

11. Dismissed.

12. Interim order, if any, stands vacated.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Revision No.- 2117 Of 2016

Nasaruddin @ Nahni & Ors. ...Revisionists
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Revisionists:
Mohd. Ayub

Counsel for Opposite Parties:
G.A

Code of Criminal Procedure, 1973 — Ss. 482, 397 | Indian Penal Code, 1860 — Ss. 307, 323, 34, 149 -- Revisional Court — Quashing of Summoning Order — Remand to Trial Court — Scope of Directions — Judicial Discretion of Trial Court — Direction to Appear Before Court — Legality

Code of Criminal Procedure, 1973 — S. 397 — Revisional Court — Power upon quashing summoning order and remanding matter to trial court — Direction to consider specific provisions of IPC (Ss. 34 and 149) amounts to interference with judicial discretion of trial court — Such direction erroneous and liable to be quashed — Trial court to pass fresh order independently in accordance with facts and evidence — Where a revisional court quashes a summoning order and remands the matter to the trial court with a direction to pass a fresh order in accordance with the evidence on record, any further direction by the revisional court to the trial court to consider specific factual observations made by it or to examine the applicability of particular provisions of law — in the present case Sections 34 and 149 IPC — would indirectly interfere with the judicial discretion of the trial court in passing such fresh order. The revisional court, having assigned the responsibility of passing a fresh order to the trial court in accordance with the facts of the matter, cannot simultaneously circumscribe or direct the exercise of that judicial discretion by dictating particular legal considerations. Held: The direction of the revisional court to pass the fresh order in the light of its factual observations and to specifically consider the applicability of Sections 34 and 149 IPC was erroneous and is quashed. The direction of the revisional court quashing the

summoning order dated 22.10.2014 and remanding the matter for a fresh order in accordance with evidence is however confirmed.

Code of Criminal Procedure, 1973 — Ss. 397 & 482 — Direction by Revisional Court to accused persons to appear before trial court — After quashing of summoning order no proceeding remains pending against accused — Accused not legally obliged to appear before any court in absence of pending proceeding — Direction to appear erroneous and liable to be quashed — Once the revisional court has quashed the summoning order passed against the accused persons and has remanded the matter to the trial court for a fresh consideration, no proceeding remains pending against those accused persons before the trial court. In the absence of any pending proceeding against them, the accused persons are under no legal obligation to appear before any court. A direction issued by the revisional court commanding the accused persons to appear before the trial court, in such circumstances, is without legal basis and erroneous. Held: The direction of the revisional court requiring the applicants to appear before the trial court was quashed.

Application disposed of accordingly.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for applicants learned AGA and perused the record.

2. In complaint case no. 85 of 2012 (Yaqoob Vs. Nasaruddin and Others) summoning order 22.10.2014 was passed by A.C.J.M., Court No. 4, Agra. By this order one accused Bhoora was summoned for offence u/s 307 IPC and other four accused including two ladies were summoned for offence u/s 323 IPC. Against this summoning order crl. revision no. 334 of 2015 (Yaqoob Vs. State of U.P.) was preferred by accused persons. This revision was allowed by the judgement dated 07.06.2016 of Additional District and Sessions Judge, court no.13, Agra. In operative portion of its judgement lower revisional court had quashed the summoning order dated 22.10.2014 passed by trial court, but also directed the trial court to consider evidences in light of observation in the judgement and consider as to whether provisions of section 34 or 149 of IPC would be applicable in this matter or not. In operative portion revisional court had also directed all accused persons (present applicants) to appear before trial court. This impugned order dated 7.6.2016 of revisional court is under challenge before this court u/s 482 Cr.P.C.

3. From perusal of record, this portion of direction of revisional court is found not erroneous by which summoning order dated 22.10.2014 passed against the applicants was quashed and direction was given to pass fresh order in the light of evidences. This portion of direction of lower revisional court is confirmed. But the giving direction to pass order in the light of factual observation made by revisional court and consideration of application of provisions of Sections 34 and 149 IPC is erroneous. When trial court has been assigned responsibility to pass fresh order in accordance with facts of the matter then any direction for considering any particular fact or particular law will indirectly interfere the judicial discretion of lower court. Therefore, this portion of direction of lower revisional court is hereby quashed.

4. It is also pertinent that when revisional court had quashed the summoning order dated 22.10.2014 passed against the applicants and remanded the matter before trial court, then in present matter there remain no proceeding pending against the applicants, therefore they were not legally obliged to appear in any court in absence of any proceeding against them. Therefore, the direction of revisional court regarding command to applicants to appear in trial court is also erroneous and is hereby quashed.

5. In view of the above this application is disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRASHANT KUMAR, J.

First Appeal From Order No.- 2225 Of 2016

U.P. State Road Transport Corporation ...Appellant

Versus

Smt. Vineeta Verma & Ors. ...Respondents

Counsel for the Appellant:
Mritunjay Mohan Sahai

Procedure:
Appeal under **Section 173 of the Motor Vehicles Act, 1988** against the award dated **05.03.2016** passed by the Motor Accident Claims Tribunal awarding compensation for death in a motor accident.

Citation:
Section 166 & Section 173, Motor Vehicles Act, 1988;
Order XLI Rule 33, Code of Civil Procedure, 1908.

Headnotes:
Motor accident—Death—Negligence—Credibility of eyewitness—Minor contradictions—Effect—Income assessment—Jewellery shop—Notional income—Non- pecuniary damages—Enhancement—Power of appellate court—Exercise of powers under Order XLI Rule 33 CPC—No cross-appeal by claimants—Maintainability.
Minor omissions or contradictions in testimony of eyewitnesses do not discredit their evidence when the occurrence and involvement of the offending vehicle stand proved. Presumption of notional income of a deceased running a jewellery shop cannot be said to be excessive in the absence of documentary proof. Compensation awarded under non-pecuniary heads must be just and reasonable and cannot remain static in view of inflation. Appellate court is empowered under Order XLI Rule 33 CPC to enhance compensation even in an appeal filed by the insurer, in the absence of a cross-appeal by the claimants, to do complete justice.

Case Law Discussed:
Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54;

Kalpanaraj and others v. Tamil Nadu State Transport Corporation, 2014 (3) TAC 707 (SC);
Mahant Dhangir v. Madan Mohan, AIR 1988 SC 54;
Delhi Electric Supply Undertaking v. Basanti Devi, AIR 2000 SC 43.

Result:
Appeal dismissed. Award modified by enhancing compensation to **Rs. 8,37,000/-** with **7% simple interest** from the date of application till actual payment. No order as to costs.

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Prashant Kumar, J.)

1. This appeal under Section 173 of the Motor Vehicles Act has been filed by the U. P. State Road Transport Corporation challenging the award dated 05.03.2016 awarding a sum of Rs.6,24,500/- as compensation on account of death of one Rajeev Kumar in an accident.

2. Claimants preferred an application under Section 166 of the Motor Vehicles Act, 1988 seeking compensation to the tune of Rs.26,00,000/- on the allegation that when Rajeev Kumar was going along with his wife, (claimant no. 2) for treatment to Government hospital, Bhogaon-Mainpuri at about 03 :00 PM he was hit by roadways bus bearing registeration no. UP 80-AB/9990. It was further pleaded that he was admitted in district hospital, Mainpuri but on account of serious injuries, he was referred to Agra and died in the way. It was also pleaded that deceased Rajeev Kumar was 22 years old and was having a jewellery shop in Bhogaon and was earning Rs.10,000/- per month.

3. Proceedings were contested by the appellant-Corporation by filing written statement denying the allegations. It was pleaded that accident took place with some unknown vehicle and the bus of the Corporation was wrongly involved in order to claim compensation.

4. Tribunal on the basis of the pleadings and evidence brought on record by the parties returned a finding that accident was caused by offending bus. To arrive at the said finding, tribunal relied upon the statement of P. W. '2', who was eye-witness of the accident. He proved the mode and manner of the accident and his testimony was unshakable in cross-examination. On the question of quantum, tribunal in the absence of any documents to establish the allegation that he was earning Rs.10,000/- per month presumed the income from the Jewellery shop to be Rs.4,000/- per month and looking into the age applied multiplier of 17 and after deducting 1/3rd towards personal expenses, determined the dependency of Rs.6,12,000/-. Tribunal also awarded a sum of Rs.2500/- towards funeral expenses, Rs.5000/- towards loss of estate and Rs.5000/- towards loss of consortium. In this manner, a total sum of Rs.6,24,500/- was determined as compensation, payable to the claimants.

5. Learned counsel for the appellant contends that there was contradiction in the statement of two witnesses, namely, P. W. '1' and P. W. '2', thus, the finding of the tribunal is against the

evidence on record. It is further pleaded that without there being any proof of income, presumption of Rs.4500/- per month as earning from the Jewellery shop is on extremely higher side.

6. We have considered the arguments advanced by the learned counsel for the appellant and perused the record.

7. From a perusal of the oral testimony of two witnesses filed on record, we do not find any such material contradiction to discard the testimony. Learned counsel for the appellant vehemently submitted that P. W. '1' in her statement stated that she also suffered injuries in the accident and became unconscious whereas this fact has not been stated by P. W. '2' in his statement.

8. In our considered opinion, this is not such a material contradiction so as to disbelieve the testimony. Both the witnesses have clearly stated that accident was caused by offending bus and they witnessed the accident. The involvement of the offending bus in the accident stands established by testimony of two witnesses and thus, even if P. W. '2' did not state about the injuries suffered by claimant no. 1, wife of deceased, the omission is not sufficient to discard his testimony.

9. In such view of the matter, argument advanced by the learned counsel for the appellant in this regard has no legs to stand and is not sustainable.

10. In so far as presumption of notional income of Rs.4500/- per month is concerned, tribunal found that it was established by cogent evidence that deceased was running a jewellery shop, the presumption of Rs.4500/- as income from the jewellery shop cannot be said to be on higher side by any stretch of imagination when a daily labour in the present time earns more than Rs.200/- per day. We do not find find income of Rs.4500/- from the jewellery shop to be on higher side. Thus, this argument of the learned counsel for the appellant is also without any force.

11. On the contrary, from a perusal of the impugned award, we find that only a sum of Rs.2500/- has been awarded towards funeral expenses, Rs.5000/- towards loss of estate and Rs.5000/- towards loss of consortium. The amount awarded by the tribunal under the non-pecuniary head is on extremely lower side. Admittedly, the deceased was aged about 22 years and the accident took place in 2009.

12. Hon'ble Apex Court in the case of ***Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54*** and ***Kalpanaraj and others vs. Tamil Nadu State Transport Corporation, 2014(3) TAC 707(SC)*** held that guiding principle for determining compensation is that it must be just and reasonable and the Court should not succumb to niceties or technicalities, in such matters while considering the issue of award of compensation under non-pecuniary damages such as loss of consortium, loss of love, care and guidance to children and funeral expenses. It has been observed in paragraph 17 as under:

"17. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic

issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in Santosh Devi. We may therefore, revisit the practise of awarding compensation under conventional heads: loss of consortium to thee spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2500 to Rs. 10,000 in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In Sarla Verma case, it was held that compensation for loss of consortium should be in the range of Rs. 5000 to 10,000. In legal parlance. "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection. etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United State of America, Australia, etc. English courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts awards at least rupees one lakh for loss of consortium."

13. Again in the case of **Kalpanaraj and others (supra)**, Hon'ble Apex Court raised compensation of Rs.30,000/- awarded towards loss of consortium and Rs.20,000/- towards loss of love and affection of the minor children to Rs.1,00,000/- each under the said heads finding the sum awarded to be on the lower side in the light of principles laid down in the case of Rajesh (supra).

14. In view of the aforesaid law laid down by the Hon'ble Apex Court, we feel that the claimants are entitled to be awarded a sum of Rs.25000/- towards funeral expenses, a sum of Rs.1,00,000/- to the respondent-wife towards loss of consortium and Rs.1,00,000/- towards loss of estate.

15. At this stage, learned counsel for the appellant vehemently contended that non-pecuniary damages have rightly been awarded in accordance with the Rule 220A of the Motor Vehicle Rules and the two judgements of the Hon'ble Apex Court in the Rajesh (Supra) and Kalpanaraj (Supra) are clearly distinguishable on the ground that they do not deal with a situation where Rule has been framed by the State for determination of compensation. It is also submitted that in an appeal filed by the Insurance Company, no order can be passed adverse to the appellant by increasing the amount of compensation without there being any cross-appeal by the claimants.

16. In so far as the first submission of the learned counsel for the appellant in respect of Rule 220A of the Motor Vehicles Rules is concerned, we do not find any reason to distinguish the aforesaid two judgements of the Hon'ble apex court on the ground that they do not deal with a situation where Rule was framed by the State for determination of compensation. Hon'ble Apex

Court has clearly ruled that main guiding principle for determining the compensation is that it must be just and reasonable and the court and tribunal are not required to frugal with regard to award compensation towards funeral expenses and other non-pecuniary damages.

17. The other argument advanced by learned counsel for the appellant that amount of compensation cannot be increased in an appeal filed by the Insurance Company in the absence of cross-appeal by the claimant, is also without any force.

18. Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not file any appeal or objection. Order XLI Rule 33 of the Code reads as under :

"33. Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [any may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]

[Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

19. The provisions of Order XLI Rule 33 C.P.C. was explained by the Hon'ble Apex Court in the case of **Mahant Dhangir v. Madan Mohan, AIR 1988 SC 54** in following words :

"The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine

all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

20. The same view has again been reiterated in a later decision by the Hon'ble Apex Court in the case *of* **Delhi Electric Supply Undertaking v. Basanti Devi, AIR 2000 SC 43.**

21. We are of the considered view that the conditions as laid down in provisions of Order XLI Rule 33 are satisfied in the present case. In Delhi Electric Supply Undertaking (Supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers.

22. Thus the argument in this regard made by the learned counsel for the appellant has no legs to stand and is not liable to be sustained.

23. In view of above facts and discussions, we are of the considered opinion that the claimants are entitled to be awarded a total sum of Rs.8,37,000/- along with 7% simple interest from the date of making of the application till the date of actual payment.

24. Accordingly, though the appeal filed by the appellant Insurance Company stands dismissed but the award stands modified to the extent directed above.

25. In the facts and circumstances, we do not make any order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 2227 Of 2013

Mahendra Prasad Ram **...Revisionist**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsel for Revisionist:
Rakesh Prasad, B.K. Pandey, Sher Singh

Counsel for Opposite Parties:
Govt. Advocate

Indian Forest Act, 1927 — S. 2(4) — Definition of 'Forest Produce' — Includes wild animal skins brought from a forest — Leopard/Panther skins constitute forest produce — S. 52 — Seizure of

vehicle used for transportation of forest produce — Vehicle amenable to seizure along with forest produce — Under Section 2(4)(b)(iii) of the Indian Forest Act, 1927, the definition of 'forest produce' expressly includes wild animals, their skins, tusks, horns, bones and all other parts or produce of animals, when found in or brought from a forest. In the present case, two full-size skins of a Leopard or Panther were recovered from a vehicle (Tata Indigo) intercepted at Allahabad. The vehicle was used for transportation of such forest produce. Held: The seized leopard/panther skins constitute 'forest produce' within the meaning of Section 2(4) of the Indian Forest Act, 1927, and the vehicle used for transporting the same is liable to seizure under Section 52 of the Act along with the forest produce.

Indian Forest Act, 1927 — Ss. 52-A and 52-D (as amended by U.P. Act 1 of 2001) — Exclusive Jurisdiction of Authorised Officer — Bar of Jurisdiction of Courts, Tribunals and other Authorities — Once proceedings under S. 52-A initiated, Criminal Court ceases to have jurisdiction to pass orders regarding release of seized vehicle — Order of release passed by A.C.J.M. without jurisdiction — Rightly set aside in revision — Section 52-D of the Indian Forest Act, 1927, as amended and applicable in the State of Uttar Pradesh with effect from 16.4.2001, provides that notwithstanding anything to the contrary contained in the Act, the Code of Criminal Procedure, 1973 or any other law for the time being in force, whenever any forest produce belonging to the State Government together with any vehicle is seized under Section 52(1), the Authorised Officer under Section 52-A or the State Government under Section 52-B shall have exclusive jurisdiction, to the exclusion of every other officer, court, tribunal or authority, to make orders with regard to the custody, possession, delivery, disposal or distribution of such property. In the present case, the Authorised Officer/Divisional Director, Social Forestry Division, Allahabad had initiated proceedings under Section 52-A(1) and had issued multiple notices to the vehicle owner — dated 19.6.2013, 29.1.2014, 5.3.2014 and 1.9.2015 — affording him ample opportunity to appear and submit his explanation, which he failed to avail. Held: Once proceedings under Section 52-A of the Indian Forest Act, 1927 were initiated by the Authorised Officer, the criminal court (A.C.J.M.) ceased to have jurisdiction to pass an order for release of the seized vehicle. The release order dated 9.1.2013 passed by the A.C.J.M., Court No. 10, Allahabad was without jurisdiction and was rightly set aside by the revisional court. Relied upon: State of West Bengal v. Sujit Kumar Rana, (2004) 4 SCC 129.

Indian Forest Act, 1927 — S. 52-D — Argument that case was not initially registered under Indian Forest Act — Not a ground to exclude application of S. 52-D — Authorised Officer having initiated proceedings under S. 52-A, bar of jurisdiction operates — Revision dismissed — The contention of the revisionist that the case was not initially registered under the Indian Forest Act, 1927 and therefore its provisions do not apply, was not accepted. The relevant consideration for the operation of the bar of jurisdiction under Section 52-D is not the initial registration of the case but the initiation of proceedings by the Authorised Officer under Section 52-A of the Act. Since the Authorised Officer had duly initiated such proceedings and issued successive notices to the vehicle owner, the bar of jurisdiction under Section 52-D was attracted and the criminal court had no jurisdiction to entertain or allow the release application in respect of the seized vehicle. The impugned order dated 30.7.2013 of the Special Judge (E.C. Act)/Additional Sessions Judge, Allahabad setting aside the release order was found to suffer from no illegality or infirmity. Held: Criminal revision dismissed; no interference warranted.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. The revisionist Mahendra Prasad Ram has made the following prayers:-

".....to allow this revision and may graciously be pleased to set aside the judgment/ order dated 30.7.2013 passed by the revisional court Special Judge (E.C. Act)/ Additional Session

Judge, Allahabad in Criminal Revision No. 48 of 2013, State of U.P. vs. Mahendra Prasad Ram in Case Crime No. 175/2012 under Sections 9/49(1) A/ 49(II)51/52 of The Wild Life (Protection) Act, 1972, under Sections 429/379/411/120B I.P.C., under Section 10/15 Animal Cruelty Act and under Section 52 of Indian Forest Act, 1927, Police Station- Attarsuiya, District- Allahabad.

It is further prayed that this Hon'ble Court may be pleased to direct the respondent nos.2 and 3 to release the said Vehicle Tata Indigo No. U.P.64 R-1963 in favour of the registered owner Mahendra Prasad Ram in compliance of release order dated 9.1.2013 and 21.1.2013 passed by Additional Chief Judicial Magistrate, Court No.10, Allahabad in Case Crime No. 175 of 2012, Police Station- Attarsuiya, District- Allahabad."

2. The matrix of the facts in narrow compass are as follows:-

"On 14.12.2012 at about 12:10 p.m., Sub-Inspector Rakesh Kumar Tiwari, Out Post-Meerapur, Police Station- Attarsuiya, District- Allahabad along with his police team intercepted the car No. U.P.64 R-1963 (Tata Indigo) and recovered two full size skins of Leopard or Panther near Gol Park, Attarsuiya, District- Allahabad. On interrogation, it was found that the name of car driver was Mahboob S/o Saleem R/o Gurai, Chaska Tola, Police Station- Robersganj, Sonbhadra. Two other persons travelling on vehicle fled away. Car driver revealed his name and informed that they have come to sell the skin of Leopard or Panther from Sonbhadra. The case was registered under Sections 9/49(1) A/ 49(II) 51/52 of The Wild Life (Protection) Act, 1972 and under Section 429 I.P.C. Car driver/ accused person Mahboob was arrested. The skin of the Leopard was sealed separately and a separate report was sent to the Range Forest Officer, (City), Allahabad. Later on, applicant Mahendra Prasad Ram moved an application for release of the aforesaid vehicle Registration No. U.P.64 R-1963 in Case Crime No. 175 of 2012 under Section 429 I.P.C. and under Sections 9/49(1) A/ 49(II) 51/52 of The Wild Life (Protection) Act, 1972. The release application was allowed vide order dated 9.1.2013 by the Court of learned A.C.J.M., Court No.10, Allahabad."

Aggrieved by this order dated 9.1.2013 (supra) of the learned A.C.J.M., Court No.10, Allahabad, State of U.P., the revisionist preferred criminal revision before the learned Sessions Judge, Allahabad which was admitted on 28.1.2013 and operation of the impugned order dated 9.1.2013 passed by learned A.C.J.M., Court No.10, Allahabad in Case No. Nil of 2012 in Case Crime No.175 of 2012, by which release application of opposite party has been allowed by the court below, it was ordered by the learned Sessions Judge, Allahabad "Operation of the impugned order shall remain stayed, if not already executed."

3. This criminal revision No.48 of 2013 (State of U.P. vs. Mahendra Prasad Ram) was finally decided by the learned Special Judge (E.C. Act) Additional Sessions Judge, Allahabad by it's order dated 30.7.2013 by which the criminal revision was allowed and impugned order dated 9.1.2013 passed by the learned A.C.J.M., Court No.10, Allahabad in release application No. Nil of 2012 State of U.P. vs. Mahendra Prasad Ram was set-aside.

4. Learned counsel for the revisionist has relied upon the following rulings:-

"State of West Bengal vs. Sujit Kumar Rana LAWS (SC)-2004-1-110

State of M.P. vs. Madhukar Rao LAWS (SC)-2008-1-66

Ravi Pratap Singh vs. State of U.P. and another - Criminal Misc. Writ Petition No. 2191 of 2007 (2007) RD-AH 3208 (26 February 2007)"

5. Learned counsel for the revisionist has argued that initially the case was not registered under Indian Forest Act, 1927, hence it's provisions do not apply.

6. In the counter affidavit of K.S. Yadav, Range Forest Officer, Allahabad, it is mentioned that under Section 52 (A) (1) of Indian Forest Act, 1927, the opposite party no.2 issued notice dated 19.6.2013 to vehicle owner Mahendra Prasad Ram calling upon him to submit his explanation within a period of one month but he refused to receive the notice. Thereafter, vide official letter dated 1951 T.C./22/10 dated 29.1.2014 a second notice was issued to vehicle owner in which it was stated specifically that the vehicle owner should appear on 12.2.2014 in the office of Prabhagiya Vaniki Sa. Va. Van Prabhag, Minto Park Allahabad at 11:00 A.M. and submit his defence/ explanation but in pursuance to aforesaid notice the aforesaid owner did not appear as indicated in the notice.

7. Similarly, notices dated 5.3.2014 and 1.9.2015 were issued to the vehicle owner to appear in the office of O.P. No.2 on dates 19.3.2015 and 15.9.2015 respectively to submit his explanation but the vehicle owner did not appear on the dates fixed.

8. Thus, it is evident that authorised officer/ Divisional Director Social Forestry Division, Allahabad, initiated proceedings under Section 52-A of Indian Forest Act, 1927 and has given ample opportunity to the vehicle owner which he did not avail. Section 52-D of Indian Forest Act, 1927 in verbatim is quoted as below:-

"*52-D. Bar of jurisdiction in certain cases*. - Notwithstanding anything to the contrary contained in this Act or in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, whenever any forest produce belonging to the State Government together with any tool, boat, vehicle cattle, rope, chain or other article is seized under sub-section (1) of Section 52, the authorised officer under Section 52-A or the State Government under Section 52-B shall have jurisdiction, to the exclusion of every other officer, court, Tribunal or authority, to make orders with regard to the custody, possession, delivery, disposal or distribution of the property. [Vide U.P. Act 1 of 2001, S.7 (w.e.f. 16-4-2001)]."

9. Section 2(4) of Indian Forest Act, 1927 in verbatim is quoted as below:-

"**2. Interpretation clause.** - In this Act, unless there is anything repugnant in the subject or context,-

(4) "forest-produce" includes –

(a) the following whether found in, or brought from, a forest or not, that is to say:-

timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark lac, mahua flowers, mahua seeds, kuth (Ins. by Act 26 of 1930, S.2) and myrabolams, and

(b) the following when found in, or brought from a forest, that is to say:-

(i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees,

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts of produce of animals, and

(iv) ....."

10. The meaning of the Authorised Officer as given under Section 2 Interpretation clause of Indian Forest Act, 1927 in State Amendments of Uttar Pradesh is as follows:-

"**Uttar Pradesh**.- In its application to the State of Uttar Pradesh, in Section 2, for clause (1) the following clauses shall be substituted, namely:-

(1) "authorised officer" means an officer authorised under sub-section (1) of Section 52-A"

and in Section 52-A of Indian Forest Act, 1927, procedure of seizure has been described.

11. As discussed above, Authorised Officer/ Divisional Director Social Forestry Division, Allahabad in exercise of power vested under Section 52-A(1) of Indian Forest Act, 1927 has initiated the procedure of seizure.

12. Following judgment of Supreme Court is relevant in the present context:-

"State of West Bengal and others vs. Sujit Kumar Rana (2004) 4 SCC 129

Criminal Appeal Nos. 453 and 454 to 459 of 1997

decided on 20.01.2004"

13. Hence, impugned judgment and order order dated 30.7.2013 passed by the learned Special Judge (E.C. Act)/ Additional Sessions Judge, Allahabad, in Criminal Revision No. 48 of 2013 (State of U.P. vs. Mahendra Prasad Ram) suffers from no illegality or infirmity and therefore, no interference is warranted at this stage.

14. Resultantly, in view of the above analysis, this instant criminal revision is liable to be dismissed.

15. The criminal revision is, accordingly, **dismissed**.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No.- 2389 Of 2016

National Insurance Co. Ltd. ...Appellant
Versus
Smt. Vidyawati Devi & Ors. ...Respondents

Counsel for Appellant:
Rajeev Ojha

Counsel for Respondents:
S.D.Ojha.

Motor Vehicles Act, 1988 – Section 173; Code of Civil Procedure, 1908 – Order XLI Rule 33; U.P. Motor Vehicles Rules, 1998 – Rule 220A (as amended w.e.f. 26.09.2011); Indian Penal Code, 1860 – Sections 279, 338, 427, 304-A.

1. Motor Vehicles Act, 1988 – Section 173 – Motor Accident – Involvement of Offending Vehicle – Correction of Registration Number in Charge-Sheet – Effect of.

Where the First Information Report was lodged against an unknown vehicle and the registration number of the offending vehicle mentioned in the charge-sheet was subsequently corrected by the Investigating Officer upon seeking permission from the competent court after detection of a clerical/typographical error, such correction does not cast doubt on the involvement of the offending vehicle in the accident. When the occurrence of the accident and the identity of the offending vehicle stand duly proved by the unshaken testimony of an eye-witness who had noted the registration number of the vehicle at the spot, a mere

arithmetical or clerical error in the charge-sheet that was duly corrected through proper legal process cannot be made the basis for holding that the offending vehicle was not involved in the accident.

2. Motor Vehicles Act, 1988 – Compensation – Notional Income – Skilled Worker – Mason – Quantum.

In the absence of documentary evidence to prove the income of the deceased, the Tribunal is empowered to fix notional income on the basis of the nature of work performed by the deceased. Determination of notional income of Rs. 4,500/- per month (i.e., Rs. 150/- per day) for a deceased skilled mason in the year 2013 is neither excessive nor unreasonable, having regard to the general rise in the price index and wages of skilled labour. Courts must take judicial notice of prevailing wage rates and must not demand strict documentary proof in motor accident compensation cases.

3. Motor Vehicles Act, 1988 / U.P. Motor Vehicles Rules, 1998 – Rule 220A – Future Prospects – Self-Employed Person – Addition of 50% – Permissibility.

Rule 220A of the U.P. Motor Vehicles Rules, 1998, as amended with effect from 26.09.2011, provides for addition towards future prospects without drawing any distinction between salaried employees and self-employed persons. Accordingly, 50% of the notional income is mandatorily to be added towards future prospects in the case of deceased below the age of 40 years regardless of the nature of his employment. This position is also in conformity with the principles enunciated by the Supreme Court in Rajesh & Others v. Rajbir Singh & Others, (2013) 9 SCC 54, as affirmed by the three-Judge Bench in Munna Lal Jain & Another v. Vipin Kumar Sharma & Others, 2015 (3) TAC 1 (SC). The pendency of a reference on this issue before a larger Bench does not affect the binding efficacy of the aforesaid decisions unless and until a contrary judgment is rendered by the larger Bench.

4. Code of Civil Procedure, 1908 – Order XLI Rule 33 – Power of Appellate Court – Enhancement of Compensation in Appeal Filed by Insurance Company – Maintainability Without Cross-Appeal.

The power conferred upon an appellate court under Order XLI Rule 33, C.P.C. is wide and discretionary. The appellate court can pass any decree or make any order which ought to have been passed or made, even in favour of respondents who have not filed any cross-appeal or objection. The only constraints are: (i) that the parties before the lower court should also be before the appellate court; and (ii) the question raised must properly arise out of the judgment of the lower court. When compensation awarded under conventional heads such as funeral expenses, pain and suffering, and loss of estate is clearly inadequate and below the minimum prescribed by the Supreme Court, the appellate court is not only empowered but duty-bound to enhance the same even in an appeal filed solely by the insurance company, in the interest of complete justice.

5. Motor Vehicles Act, 1988 – Non-Pecuniary Damages – Conventional Heads – Funeral Expenses – Pain and Suffering – Loss of Estate – Enhancement.

In light of the principles laid down by the Supreme Court in Rajesh & Others v. Rajbir Singh & Others, (2013) 9 SCC 54, and Kalpanaraj & Others v. Tamil Nadu State Transport Corporation, 2014 (3) TAC 707 (SC), compensation under conventional heads must be just and reasonable and must be periodically revisited to account for inflation. Amounts of Rs. 5,000/- towards pain and suffering, Rs. 2,500/- towards funeral expenses, and Rs. 5,000/- towards loss of estate, being grossly inadequate, were enhanced to Rs. 25,000/-, Rs. 50,000/-, and Rs. 25,000/- respectively, enhancing the total compensation from Rs. 7,01,000/- to Rs. 7,88,500/- along with simple interest @ 7% per annum from the date of application till actual payment.

Result: Appeal dismissed. Award modified and compensation enhanced from Rs. 7,01,000/- to Rs. 7,88,500/- with interest @ 7% p.a. No order as to costs.

Cases Referred:

1. Rajesh & Others v. Rajbir Singh & Others, (2013) 9 SCC 54 – Applied.

2. Munna Lal Jain & Another v. Vipin Kumar Sharma & Others, 2015 (3) TAC 1 (SC) – Applied.
3. Kalpanaraj & Others v. Tamil Nadu State Transport Corporation, 2014 (3) TAC 707 (SC) – Applied.
4. Mahant Dhangir v. Madan Mohan, AIR 1988 SC 54 – Referred.
5. Delhi Electric Supply Undertaking v. Basanti Devi, AIR 2000 SC 43 – Referred.
6. National Insurance Company v. Smt. Pushpa Devi & Others, 2015 (9) SCC 166 – Distinguished.
7. Shashikala & Others v. Gangalakshmamma & Another, 2015 (2) T.A.C. 867 (S.C.) – Distinguished.

(Delivered by Hon'ble Krishna Murari, J.
&
Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Rajeev Ojha, learned counsel for the appellant and Sri S. D. Ojha appearing for the claimant-respondents.

2. This appeal under Section 173 of the Motor Vehicles Act has been filed by the National Insurance Company challenging the award dated 16.04.2016 passed by the Motor Accident Claims Tribunal/Additional District Judge (Court no. 8), Azamgarh awarding a sum of Rs.7,01,000/- along with 7% interest as compensation on account of death of one Dhananjay in a motor accident.

3. Claim petition was filed by the mother of deceased seeking compensation to the tune of Rs.44,27,000/- on the allegation that on 05.12.2013 when deceased Dhananjay was coming back home on motorcycle bearing registration no. UP-45-C/3782 along with Shashank Singh after visiting some relatives in village Katra at about 04:30 PM near Singhpur Pulliya, Mahendra Jeep No. UP-50-F/4254, which was being driven rashly and negligently, hit the motorcycle from behind which caused grievous injuries to Dhananjay and he died on spot. Driver of the motorcycle died while being taken to Sadar hospital for treatment. It was further pleaded that deceased was skilled mason and was earning about Rs.13,000/- per month.

4. Proceedings were contested by the owner and driver of the offending vehicle by filing written statement denying the allegation. It was pleaded that vehicle has wrongly been roped in the accident in connivance with Police. It was further pleaded that vehicle was insured by the National Insurance Company and in case there is any liability to pay the compensation, the same is that of insurance company. Insurance company also contested the proceedings by filing written statement denying the allegations made in the claim petition.

5. On analysis of the pleadings and evidence, both oral and documentary, produced by the parties, the tribunal returned a finding that accident was caused due to rash and negligent driving of the offending Mahendra Jeep which resulted in death of Dhananjay. That finding has been recorded by the tribunal on the basis of oral evidence of P. W. '2' Virendra Kumar Singh, who was eye-witness of the accident. He stated that on the fateful day he was going back home on his motorcycle and was moving behind the motorcycle on which deceased was travelling, he saw the offending Jeep, which was being driven rashly and negligently, hit the motorcycle from behind. He

categorically stated that accident took place before him and was a result of rash and negligent driving of the offending vehicle. He also stated that after hitting the motorcycle, driver along with Jeep fled away from the scene. In cross-examination, he stated that he saw the number of offending jeep though he did not know the name of driver. Eye-witness not only corroborated the mode and manner of the accident but his testimony was unshakable during cross-examination and thus, the tribunal rightly placed relied upon him in recording the finding on issue no. 1. Tribunal further found that driver of offending jeep was having a valid driving license and was duly insured with the insurance company and was having all valid documents.

6. On the question of quantum, in the absence of any documentary evidence to prove the income, tribunal presumed notional income of Rs.4500/- per month and since the deceased was unmarried after deducting 1/2 towards personal expenses determined the monthly income for the purpose of compensation Rs.2250/-. On the basis of date of birth mentioned in the driving license of the deceased, tribunal determined the age 24-25 years and accordingly after applying multiplier of 17 determined the loss of dependency to the tune of Rs.4,59,000/-. Tribunal also awarded 50% of the annual income towards future prospects, Rs.5000/- towards pain and suffering, Rs.2500/- towards funeral expenses and Rs.5000/- towards loss of estate. In this manner, total compensation of Rs.7,01,000/- was determined by the tribunal.

7. Learned counsel for the appellant contends that first information report was lodged against an unknown vehicle and when the claim petition was filed, number of vehicle was mentioned as UP-32-Z/1370 and in the charge-sheet submitted against the driver of the offending jeep, number was mentioned as UP-50-F/4252. It is submitted that later on number of the offending jeep in the charge-sheet was changed from UP-50-F/4252 to UP-50-F/4254 and thus, there was serious doubt about the involvement of the offending vehicle in the accident.

8. In reply, learned counsel for the claimant-respondents submitted that on account of typographical and clerical mistake wrong registration number of the offending vehicle was mentioned in the charge-sheet which was lateron corrected by the Investigating Officer after seeking permission from the court and accordingly incorporated the amendment in the case diary.

9. On analysis of the finding recorded by the tribunal, we find that first information report of the incident was registered on 05.12.2013 against an unknown vehicle which was registered as case crime no. 321 of 2013, under Sections 279/338/427/304-A IPC, Police Station Jahanaganj, Azamgarh. The driver of the offending vehicle was arrested and later on he obtained bail. However, when charge-sheet was submitted due to inadvertent clerical mistake, the number of offending vehicle was mentioned as UP-50-F/4252. However, subsequently when the said mistake was detected, Investigating Officer made an application before the court concerned seeking permission for amendment in the charge-sheet and accordingly the correct number UP-50-F/4254 was mentioned. Tribunal found the aforesaid fact to be well supported from the case diary. Once the accident was found to be proved by testimony of eye-witness who also disclosed the number of offending vehicle merely because by clerical mistake incorrect registration number was mentioned

in the charge-sheet which later on was corrected cannot lead to conclusion that offending vehicle was not involved in the accident.

10. In such view of the mater, we do not find any force in the argument advanced by the learned counsel for the appellant in this regard.

11. Second argument advanced on behalf of the learned counsel for the appellant is that amount of compensation awarded is highly excessive and there was no evidence that the deceased was earning Rs.4500/- per month. It is also submitted that 50% of the income towards future prospect could not have been added because deceased had was not in any permanent employment but was a self employed person. Both the aforesaid arguments advanced are totally devoid of merits. It is a matter of common knowledge that with the rise in price index, there has been considerable increase in the wages of salaried as well as self employed person. For a mason, who performs a skilled job an average income of Rs.150/- per day in the year 2013 when accident took place can, by no stretch of imagination, be said to be on higher side.

12. In so far as addition of 50% towards future prospects is concerned, the same is also not liable to be sustained. Rule 220A introduced by way of amendment in the U.P. Motor Vehicles Rules, 1998 with effect from 26.9.2011 providing that 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 of age : 20% of the salary,

(iv) When wages not sufficiently proved : 50% towards inflation and price index.

13. The aforesaid Rule does not carve out any distinction between salaried and self employed person. Further grant of future prospects by adding 50% of the income is in conformity with the principles laid down by the Hon'ble Apex Court in the case of ***Rajesh & others vs. Rajbir Singh & others, (2013) 9 SCC 54***. The same has been affirmed by another three Judge Bench of the Hon'ble Apex Court in the case of ***Munna Lal Jain & another vs. Vipin Kumar Sharma & others, 2015 (3) TAC 1 (SC).***

14. It is no doubt correct that issue with respect to grant of future prospects has been referred to a larger Bench for adjudication in the case ***of National Insurance Company v. Smt. Pushpa Devi & others, 2015(9) SCC 166*** and ***Shashikala and others vs. Gangalakshmamma and another, 2015 (2) T.A.C. 867 (S.C.)***. But equally settled is the proposition that unless an adjudication by a larger Bench is pronounced, the judgement, which has been referred, does not loose its efficacy and continues to have all the binding force. In such view of the matter, the view

taken by the three Judges Bench of the Hon'ble Apex Court in the case ***of Munna Lal Jain (supra) and Rajesh (Supra)*** still holds good. Thus, addition of 50% income towards future prospects awarded by the Tribunal cannot be faulted with.

15. At this stage, Sri S. D. Ojha, learned counsel for the claimant-respondents submitted that amount awarded by the tribunal towards funeral expenses, pain and suffering and loss of estate is too meagre and is liable to be enhanced.

16. A perusal of the award goes to show that tribunal has awarded a sum of Rs.5000/- towards pain and suffering, Rs.2500/- towards funeral expenses and Rs.5000/- towards loss of estate.

17. Countering the aforesaid argument advanced on behalf of the claimant-respondents, learned counsel for the appellant submitted that amount of compensation cannot be increased in an appeal filed by the insurance company in the absence of cross appeal or objection filed by the claimant-respondents. Since no cross appeal or objection has been filed by the claimant seeking enhancement of compensation, the Court has no power to enhance the same in an appeal filed by the insurance company.

18. Order XLI Rule 33 of the Code of Civil Procedure prescribing the power of court of appeal clearly provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made as the case may require, and this power may be exercised in favour of all or any of the respondents or parties though they may not have filed any cross appeal or objection. Order XLI Rule 33 of the Code reads as under :

"**33. Power of Court of Appeal** - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [any may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]

[Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

19. The provisions of Order XLI Rule 33 C.P.C. was explained by the Hon'ble Apex Court in the case **of Mahant Dhangir v. Madan Mohan, AIR 1988 SC 54** in following words :

"The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 Order 41 have been put in wide terms to enable the appellate Court to pass any

order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

20. The same view has again been reiterated in a later decision by the Hon'ble Apex Court in the case of **Delhi Electric Supply Undertaking v. Basanti Devi, AIR 2000 SC 43.**

21. We are of the considered view that the conditions as laid down in provisions of Order XLI Rule 33 are satisfied in the present case. In Delhi Electric Supply Undertaking (Supra) the Hon'ble Apex Court has observed that when circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the court cannot be found wanting when it comes to exercise its powers.

22. Thus the argument in this regard made by the learned counsel for the appellant has no legs to stand and is not liable to be sustained.

23. Hon'ble Apex Court has laid down the principles to be followed while awarding compensation under non-pecuniary damages, such as loss of consortium, loss of love, care and guidance to children and funeral expenses. In the case of ***Rajesh and others v. Rajbir Singh and others, (2013) 9 SCC 54*** and ***Kalpanaraj and others vs. Tamil Nadu State Transport Corporation, 2014(3) TAC 707(SC)*** Hon'ble Apex Court has held that guiding principle for determining compensation is that it must be just and reasonable and the Court should not succumb to niceties or technicalities, in such matters while considering the issue of award of compensation under non-pecuniary damages such as loss of consortium, loss of love, care and guidance to children and funeral expenses. It has been observed in paragraph 17 as under:

"17. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in Santosh Devi. We may therefore, revisit the practise of awarding compensation under conventional heads: loss of consortium to thee spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2500 to Rs. 10,000 in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In Sarla Verma case, it was held that compensation for loss of consortium should be in the range of Rs. 5000 to 10,000. In legal parlance. "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection. etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United State of America,

Australia, etc. English courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the court awards at least rupees one lakh for loss of consortium."

24. The same view has been reaffirmed in the case of **Kalpanaraj and others (supra**). In the said case, Hon'ble Apex Court raised compensation of Rs.30,000/- awarded towards loss of consortium and Rs.20,000/- towards loss of love and affection of the minor children to Rs.1,00,000/- each under the said heads finding the sum awarded to be on the lower side in the light of principles laid down in the case of Rajesh (supra).

25. In view of the aforesaid law laid down by the Hon'ble Apex Court, we feel that the claimants are entitled to be awarded a sum of Rs.50,000/- towards funeral expenses, another sum of Rs. sum of Rs.25,000/- for pain and suffering and Rs.25,000/- towards loss of estate.

26. In view of the above, we are of the considered opinion that compensation awarded to the claimants is liable to be raised by a sum of Rs.1,00,000/- and they are entitled to be awarded a total sum of Rs.7,88,500.00 as compensation along with simple interest at the rate of 7% per annum from the date of making application till the date of actual payment. The amount already paid to the claimant shall be adjusted. Interest payable shall also be calculated accordingly.

27. As a consequence of the aforesaid facts and discussions, appeal filed by the insurance company stands dismissed but the award stands modified to the extent directed above.

28. In the facts and circumstances, we do not make any order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.
THE HON'BLE ALOK KUMAR MUKHERJEE, J.

Criminal Appeal No.- 2461 Of 1983

Rajpal Singh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:

Keshav Sahai, Brijesh Sahai, P.N. Misra

Counsel for Respondent:
A.G.A

Murder — Circumstantial Evidence — Disclosure Statement — Recovery of Corpse — Medical Evidence — Cause of Death — Identification of Deceased — Conduct of Witnesses — Last Seen Theory — Benefit of Doubt — Acquittal — Sections 302 and 411, Indian Penal Code, 1860.

1. Circumstantial evidence — Principles governing conviction — Chain of circumstances must be complete and conclusive — Circumstances must be incompatible with innocence: Conviction based on circumstantial evidence can be sustained only when the chain of circumstances is complete in all material particulars and is fully established by plausible and satisfactory evidence. The circumstances so proved must be consistent only with the hypothesis of the guilt of the accused and incompatible with his innocence. Where the circumstances are not individually established by reliable evidence, the chain is broken and the accused is entitled to the benefit of doubt. In the present case, the prosecution relied on: (i) last seen evidence, (ii) recovery of corpse and money at the instance of the accused pursuant to a disclosure statement, and (iii) motive — being the greed for money. Held, none of the links in the chain were satisfactorily proved; prosecution failed to establish guilt beyond reasonable doubt; conviction set aside.

2. Medical evidence — Cause of death — Highly decomposed corpse — Contradictory post-mortem opinion — Uncertainty regarding hyoid bone fracture ante-mortem or post-mortem — Ligature mark — Inconsistency in testimony of doctor — Effect on prosecution case: Where the dead body of the deceased was in a highly decomposed (putrefied) condition such that the doctor could not ascertain the cause of death, the age of the deceased, or find any external mark of injury, and where the doctor's opinion of death by strangulation was based solely on fracture of the hyoid bone and thyroid cartilage, but the doctor was unable to definitively state whether such fracture occurred ante-mortem or post-mortem, the medical evidence fails to conclusively establish that homicide was committed. The evidentiary value of such vague and uncertain medical testimony is minimal. Further, where the doctor stated in his autopsy report that a ligature mark was found around the neck of the deceased but later in cross-examination conceded that no such ligature mark was found, such material self-contradiction renders his testimony unreliable and incapable of forming a sound basis for conviction.

3. Identification of deceased — Corpse in putrefied and unrecognizable condition — Identification by clothes — Son and wife not summoned for identification — I.O. having no record of clothes worn by deceased — Fatal infirmity: Where the corpse of the deceased was so badly decomposed that proper autopsy could not be performed and even the age could not be determined, identification of the body solely on the basis of clothes and articles worn at the time of the deceased's disappearance — without summoning the only son (informant) or the wife of the deceased for identification — constitutes a serious and fatal infirmity in the prosecution case. The infirmity is further compounded where the Investigating Officer himself admitted that he had no record of the clothes worn by the deceased at the time of his disappearance, thereby negating the basis of such identification. The failure to secure identification by the nearest family members, particularly when the sole son resided barely 200 yards from the place of arrest of the accused, is inexplicable and raises serious doubt about the identity of the dead body.

4. Disclosure statement — Recovery of corpse and money — Recovery witness contradicting informant — Presence of informant at time of recovery denied — Inquest report — Absence of informant's thumb impression despite his categorical claim — Credibility of recovery: Where the informant (son of the deceased) categorically claimed in his deposition that he was present at the time of recovery of the dead body and that he had affixed his thumb impression on the inquest report as a witness,

but the inquest report on record did not bear his thumb impression — it being signed by five other named witnesses — and where the Investigating Officer (PW-6) and the recovery witness (PW-5 Sukhey) both categorically denied the presence of the informant at the time of recovery of the corpse and of the currency notes, such stark contradiction between the informant's claim and the documentary record seriously undermines the prosecution case. A witness who makes a false claim of having been present at a crucial stage of investigation must be treated as an unreliable witness.

5. Last seen theory — Evidence of PW-2 (Puttan Khan) — Contradictory versions regarding time of conveying information to family of deceased — Conduct of witness remaining silent despite knowledge of disappearance — Effect: The last seen theory in a case of circumstantial evidence requires credible and consistent evidence of the witness who claims to have last seen the deceased in the company of the accused. Where PW-2 (Puttan Khan) gave contradictory versions — first saying he had informed the family of the deceased about the last sighting on the very next day, and then retreating to say he had informed them only after 5-6 days — and where no explanation was offered for remaining silent for such a period despite admittedly knowing about the disappearance of the deceased the very next day, the conduct of the witness does not inspire confidence. Such unexplained conduct and inconsistency is a factor that substantially reduces the evidentiary value of the last seen testimony.

6. Conduct of witnesses — Neighbours knowing of disappearance — Failure to inform family or police for several days — Non-production of material witness (Sharafat, owner of sugar cane field where body was found) — Adverse inference: Where prosecution witnesses (PW-3 Maqsood and PW-4 Mahavir), admittedly residing in the immediate vicinity of the deceased — within a distance of a mere 2-4 paces — failed to inform the family of the deceased of the presence of the accused near the Bankhandi temple for 4-5 days without adequate explanation, their testimony does not inspire confidence. The casual explanation that they were 'busy in personal work' is not a satisfactory explanation in the context of the disappearance of a neighbour. Further, the failure to produce Sharafat — the owner of the sugar cane field from which the body was recovered, whose statement was recorded during investigation — as a prosecution witness, particularly in view of the defence's specific case that the body was found on information by Sharafat and not by the accused, creates a material gap in the prosecution case. Non-production of a material witness whose statement is on record may, in appropriate cases, give rise to an adverse inference against the prosecution.

7. FIR — Contradictions between FIR and testimony of informant (PW-1) — Claim of frequent visits of accused contradicted by informant's own deposition — Unexplained delay of six days in lodging FIR — Effect on credibility of prosecution case: Where the FIR alleged that the accused had been visiting the residence of the informant frequently for 12-13 days before the incident, but the informant himself testified on oath that the accused had visited his residence for the very first time on the date of the incident (15.09.1982), there is a manifest and irreconcilable contradiction between the FIR and the sworn testimony which goes to the root of the motive alleged by the prosecution. Furthermore, where no satisfactory explanation was given by the informant for the delay of six days in lodging the FIR despite being fully aware of the disappearance of his father on the very day of the incident and of the identity of the person with whom the deceased had last left, such unexplained delay substantially impairs the reliability of the prosecution's case.

8. Benefit of doubt — Acquittal — Prosecution failing to establish complete chain of circumstantial evidence — Lingering doubt as to guilt of accused: In a case resting entirely on circumstantial evidence, where the prosecution has failed to satisfactorily establish motive, the identity of the deceased, the cause of death, or the recovery of the corpse and money beyond reasonable doubt through credible and consistent evidence, and where the testimony of nearly all prosecution witnesses suffers from material discrepancies and their conduct is inherently improbable, the accused is entitled to the benefit of

doubt. Conviction and sentence recorded by the trial court set aside; accused acquitted of charges under Sections 302 and 411, IPC.

RESULT:
Criminal Appeal allowed. Judgment and order dated 12.10.1983 passed by the then Sessions Judge, Budaun in Session Trial No. 131 of 1983 (State v. Rajpal Singh) arising out of Crime No. 152 of 1982 under Sections 302 and 411 IPC, Police Station Islamnagar, District Budaun set aside. Appellant Rajpal Singh acquitted of charges under Sections 302 and 411 IPC and directed to be set at liberty unless required in any other case.

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Appellant Rajpal Singh stood charged under sections 302 of the Indian Penal Code (in short "IPC"). Learned Sessions Judge convicted the appellant under sections 302 and 411 IPC and sentenced him to undergo rigorous imprisonment for life and two years respectively vide judgement and order dated 12.10.1983 in Session Trial No. 131 of 1983 (State v. Rajpal Singh) arising out of Crime No. 152 of 1982, Police Station (P.S.) Islamnagar, District Budaun.

2. The prosecution case is that deceased Sunder Singh was a resident of Islamnagar, District Budaun. Informant Mahendra Singh (P.W.-1), is the son of the deceased. Accused/appellant Rajpal Singh is the husband of elder sister of wife of informant Mahendra Singh. He was a resident of village Raheria, Police Station Wazirganj, District Badaun. It is alleged that deceased Sunder Singh had sold some of his property for Rs. 13,000/-. Accused/appellant Rajpal Singh was aware of this fact. On 15.09.1982 at about 11.00 A.M. deceased Sunder Singh and accused/appellant Rajpal Singh together left the house of the informant for depositing a sum of Rs. 2000/- in the Bank. It is stated that accused/appellant Rajpal Singh alone returned to the house of deceased Sunder Singh at about 4.00 P.M. and immediately left saying that he is going to the village Chhapra of his sister. Sunder Singh did not return till late in the night, therefore, the family was alarmed. On the following morning, informant Mahendra Singh contacted accused/appellant Rajpal Singh (brother-in-law, Sarhu of the informant) at his residence at village Raheria. Rajpal Singh explained that deceased Sunder Singh had left him at Bus Station, Islamnagar saying that he was going towards village Sithauli.

3. Informant Mahendra Singh and accused/appellant Rajpal Singh contacted one astrologer, who initially predicted the death of Sunder Singh and thereafter at the signal of Rajpal Singh told them that Sunder Singh would return in 4-5 days.

4. Sunder Singh did not return even after 4-5 days, therefore, informant Mahendra Singh lodged an First Information Report (F.I.R.) on 21.09.1982 at about 4.10 P.M. at Police Station Islamnagar, District Budaun disclosing above mentioned facts and expressing his suspicion that his brother-in-law (Sarhu) Rajpal Singh had probably killed his father for the greed of Rs. 2000/-.

5. Investigating Officer (I.O.) Mahi Lal (P.W.-6), apprehended accused/appellant Rajpal Singh at the Bus Station, Islamnagar. On interrogation, the appellant allegedly admitted the

commission of murder of deceased Sunder Singh and offered to take the police to the place where body of the deceased Sunder Singh was lying and also where he had concealed Rs. 2000/- grabbed from the deceased and he also informed that he has buried Rs. 2000/- near the temple of Bankhandi. On this disclosure, the I.O., took accused to the sugar cane field of one Sharafat, where at the instance of accused/appellant Rajpal Singh, the corpse of deceased Sunder Singh was recovered on 22.09.1982 at about 11.00 A.M. Recovery memo of the corpse of the deceased is available on record as Exhibit Ka-3. Thereafter, appellant took the police and the witnesses to a place near Bankhandi temple and at his pointing out a small plastic bag was recovered containing Rs. 2000/-, from below the bricks at about 3.00 P.M. on the same day. Recovery memo is available on record as Exhibit Ka-10. Further investigation revealed presence of some witnesses, who had last seen the deceased in the company of the accused/appellant and other witnesses, who had seen the appellant near Bankhandi temple on the same date. Finding sufficient evidence against the accused/appellant, I.O., submitted charge sheet against the accused/appellant under sections 364/302/394 and 201 IPC.

6. The then Sessions Judge, Budaun framed charges under sections 302 and 411 IPC against the accused/appellant Rajpal Singh on 13.06.1983. the accused denied both the charges and claimed to be tried. During course of trial, prosecution adduced evidences of P.W. -1 Mahendra Singh (informant), P.W.-2 Puttan Khan, P.W.- 3 Maqsood, P.W.-4 Mahavir, P.W.-5 Sukhey, P.W.-6 Sub Inspector Mihi Lal, P.W.-7 Teekam Singh and P.W.-8 Dr. RD Abhi. Accused was examined under section 313 of the Code of Criminal Procedure. He denied all the allegations. He claimed that he had been falsely implicated on account of perceived illicit relationship between wife of Mahendra Singh and accused.

7. Accused did not adduce any oral or documentary evidence in his defence. The Trial Judge concluded that there is satisfactory evidence against accused/appellant, which conclusively establish beyond reasonable doubt the complicity of appellant in the murder-in-question, therefore, the appellant was held guilty under sections 302 and 411 IPC and accordingly sentenced vide impugned judgement and order dated 12.10.1983.

8. Heard Sri Ram Babu Sharma, learned counsel for the appellant and Sri Syed Ali Murtaza, learned AGA for the State.

9. It is evident that there is no direct evidence against accused/appellant Rajpal Singh. The prosecution case is based purely on circumstantial evidence.

10. Learned counsel for the appellant has submitted that there is no evidence to conclusively establish that deceased Sunder Singh was murdered. His dead body was found in a sugar cane field. The I.O., and the recovery witnesses have disclosed that the dead body of the deceased was lying in the sugar cane field in highly decomposed condition. The I.O., could not even ascertain the age of the deceased because of the decomposition of corpse. P.W. 8, Dr. RB Abhi could not even ascertain the cause of death on account of putrefaction of the dead body. However, he later on opined that because the hyoid bone and thyroid cartilage were found

fractured, therefore, there was a possibility that the deceased had been strangulated prior to his death.

11. The doctor also stated that ligature mark was found around the neck of dead body. The same doctor also divulged in cross-examination that no ligature mark was found. He also admitted that a person can also die on account of suffocation without fracture of bone of neck. Strangulation also results in breakage of hyoid bone. Unfortunately, the doctor could not give definite opinion whether the hyoid bone was broken prior to the death of the deceased or after the death of the deceased. The testimony of P.W.-8, Dr. RB Abhi is not clear regarding the cause of the death. Body of the deceased was so putrefied that he could not find any mark of injury on the person of the deceased and also failed to ascertain the age of the deceased. The entire suspicion regarding strangulation is based on the fracture of the hyoid bone and thyroid cartilage but unfortunately, the doctor could not definitely ascertain that the fracture of bone of the neck took place prior to the death of the deceased or after the death of the deceased. His testimony is very contradictory regarding presence of ligature mark also. Autopsy report indicate that ligature mark was found around the neck of the deceased but in his cross examination he conceded that he did not find any ligature mark around the neck of the deceased. In fact, prosecution evidence discloses that identification of the deceased was primarily done on the basis of clothes worn by the deceased at the time of departure from his house. We believe that it cannot be conclusively said that the deceased was murdered in the light of vague and uncertain testimony of doctor.

12. The first circumstance relied upon by the prosecution is based on the evidence of P.W.-1 Mahendra Singh. He says that deceased Sunder Singh left the residence along with accused/appellant Rajpal Singh on 15.09.1982 for depositing Rs. 2000/- in the Bank. At about 4.00 P.M. Rajpal Singh came back alone to the residence and left immediately saying that he had to visit Chhapra, the village of his sister. P.W.-1 Mahanedra Singh had admitted that he was not present when Rajpal Singh alone came back to his residence. Fact of the matter is that there is no specific averment by the informant that he was present when deceased Sunder Singh and accused/appellant Rajpal Singh departed from his residence at about 11.00 A.M. The story of sole arrival of Rajpal Singh in the evening entirely depends on the hearsay evidence of P.W.-1 Mahendra Singh. In the absence of any specific averment that deceased Sunder Singh and accused/appellant Rajpal Singh together left in the morning at about 11.00 A.M. for depositing the money in the Bank in the presence of Mahendra Singh, this part of story can only be assumed. The story of simultaneous departure of deceased and accused is also based on rather weak evidence. Mahendra Singh, could have specifically mentioned that both accused/appellant and deceased left his residence in the morning in his presence but he has not said this. Even if, it is assumed that deceased and accused/appellant left the residence in the morning together, it is evident that there is no evidence on record to demonstrate that accused /appellant Rajpal Singh again came back in the evening at about 4.00 P.M. because this time it has been specifically stated by Mahendra Singh that he was not present at 4.00 P.M. at his residence.

13. Now the question is who informed him of sole arrival of accused/appellant Rajpal Singh at about 4.00 P.M. in the evening? He has not even disclosed the name of that person, who

had given this information to him. This information is essential, as informant was not present at that time.

14. P.W.-1 Mahendra Singh has also not given any reasonable and satisfactory explanation for lodging of the F.I.R., after one week. His father disappeared on 15.09.1982 with considerable amount of money. He was aware of the person, with whom the deceased had left. This witness has stated that he contacted Rajpal Singh on the following day. He insists that some person had also seen them and yet no information was given to the police regarding disappearance of his father by Mahendra Singh for one full week. He waited for almost six-seven days for lodging the F.I.R. Thus there is no satisfactory explanation for lodging of F.I.R., with considerable delay.

15. The testimony of P.W.-1 Mahendra Singh does not inspire confidence on account of several discrepancies. He has also not disclosed the name of the astrologer, who had informed him that his father would be coming back within 4-5 days. This astrologer has not been arrayed as witness nor has the astrologer been produced as witness during the course of trial. Interestingly, P.W.-1, Mahendra Singh i.e., son of the deceased says that after the arrest of Rajpal Singh, the body of the deceased was discovered in his presence and that the inquest report was also prepared in his presence. He claimed that he put thumb impression upon the inquest report as a witness. He categorically denied the suggestion that he did not witnessed the discovery of the dead body of his father or that he did put thumb impression on the inquest report. He again claimed that he was present at the time of discovery of the dead body. On the contrary, inquest report, exhibit Ka-4, does not contain the thumb impression of the informant. The inquest report was signed by five witnesses namely; Sardar Saheb, Preetam Singh, Jabbar Ali, Hamid Ali, Miya Jan Khan. There is no reference of presence of P.W.-1 Mahendra Singh during the discovery of the dead body of the deceased. The question is why informant Mahandra Singh (P.W.-1) is claiming his presence at the time of discovery of the dead body of the deceased? and also why he is insisting that he had signed the inquest report? P.W.-6 I.O. Mihi Lal, has not supported this claim of Mahendra Singh. P.W.-6 Mihi Lal has stated that Rajpal Singh was arrested on the Bus Station, Islamnagar, Budaun at about 10.00 A.M. in the morning on an information furnished by one informant in the presence of Maqsood and Mahavir. As soon as the accused/appellant was arrested, he offered to show the places where he had allegedly thrown the dead body of Sunder Singh and buried Rs. 2000/-. I.O. gathered two witnesses namely, Sukhey and Ram Kumar and took them to the sugar cane field of Sharafat. The dead body was allegedly recovered at the instance of the accused/appellant. In fact, the evidence of the I.O., discloses that the statement of Sharafat was recorded though Sharafat has not been produced during the course of trial. In our opinion Sharafat was very important witness. The dead body was recovered from his sugar cane field. He would have been in a very good position to disclose or to give evidence regarding recovery of body of the deceased. It is pertinent to point out, that defence has claimed that body of the deceased was recovered from the sugar cane field of Sharafat on the information given by Sharafat or somebody on his behalf and thereafter Rajpal Singh was implicated on account of prior tensions of the family. In this scenario the testimony of Sharafat would have been very relevant.

16. Coming back to the testimony of P.W.-6 I.O. Mihi Lal, it is pertinent to point out that he has specifically denied the necessity of summoning of Mahendra Singh (P.W.-1) at the time of recovery of the dead body for identification purpose. A question was asked and he specifically stated that there was no necessity for summoning of Mahendra Singh for identification of the dead body of his father. It is relevant to point out that informant Mahendra Singh (P.W.-1) is the sole son of deceased Sunder Singh. Admittedly, both of them were living together peacefully. One married sister lived probably in district Moradabad, therefore, refusing to summon the only son of the deceased for identification purpose is very strange and surprising, especially in view of the fact the corpse of deceased was putrefied beyond recognition.

17. The I.O., has explained that the identification of the sole son was not required because several persons had identified the body of the deceased, though admittedly, this fact has not been mentioned in the case diary. In paragraph no. 11 of his testimony the I.O., has reiterated that apart of police personals and two witnesses, no other person was present at the Bus Station, Islamnagar, Budaun at the time of the arrest of the accused/appellant Rajpal Singh. He has even denied the presence of any of the shop keepers or even the rickshaw pullers. Though he has admitted that the son of deceased lives merely 200 yards away from the place of arrest of the accused/appellant.

18. In this connection, the testimony of P.W.-5 Sukhey is also important. P.W.-5 Sukhey stated that he was asked by police to witness the discovery of body of the deceased. He was also present at the time of recovery of Rs. 2000/-. This witness in paragraph 7 of his testimony has specifically asserted that at the time of the recovery of the dead body only accused/appellant Rajpal Singh, I.O., Police Constable and one Panditji were present. No other person was present. He has again reiterated that even at the time of recovery of currency notes, only two witnesses i.e., one constable, one Sub Inspector (I.O.) and the accused/applicant were present. No other person was present and yet this does not explain the claim of the informant Mahendra Singh, son of the deceased that he was also present at the time of recovery of the dead body and he had in fact, signed the inquest report but this fact is not admitted either to by P.W.-5 Sukhey Lal or P.W.-6 Sub Inspector Mihi Lal (I.0.). There Is virtually no record of presence of the informant Mahendra Singh at the time of the recovery of the dead body of the deceased or at the time of alleged recovery of currency notes.

19. Prosecution has relied heavily on the testimony of P.W. -2 Puttan Khan. His name has been mentioned by P.W.-1 Mahendra Singh as well. Prosecution says that Puttan Khan had seen the deceased in the company of accused/appellant at Islamnagar Bus Station, 4-6 days prior to the recovery of the dead body while he was sipping tea at the Bus Station, Islamnagar, Budaun. In the story of circumstantial case, the evidence of Puttan Khan is very important because Puttan Khan had allegedly last seen the deceased in the company of accused on 15.09.1982 and subsequent to that the deceased could not be found till the discovery of his body. We believe that conduct of Puttan Khan is rather surprising. He saw accused Rajpal Singh in the company of the deceased on 15.09.1982. He has admitted in paragraph 3 of his evidence that he became aware of the disappearance of deceased Sunder Singh on the very next day. He further specified that he had informed wife of Sunder Singh i.e. mother of informant Mahendra Singh and Mahendra Singh

himself, about this incident though he later on tried to wriggle out of this by saying that he had furnished this information after 5-6 days. Now we can again evaluate his both versions. If P.W.-2 Puttan Khan informed the family of the deceased including son of the deceased i.e. informant Mahendra Singh regarding the presence of the deceased in the company of accused/appellant Rajpal Singh, then the question is why was this fact not communicated to the police ? and why was the other story of visiting astrologer for finding the whereabouts of deceased created ? If the second version is correct i.e., the information was furnished by Puttan Khan after 5-6 days, then it begs the question why he remained silent for 5-6 days despite the admitted knowledge of disappearance of Sunder Singh on the very next day. He has not furnished any explanation for his silence for such a long period. These discrepancies, are very significant and they have not been explained by the prosecution and in our opinion non explanation of these discrepancies would adversely affect the prosecution case.

20. Two witnesses namely; P.W.-3 Maqsood and P.W.-4 Mahavir have deposed that they saw the accused appellant Rajpal Singh on the date of disappearance of the deceased near Bankhandi temple at about 3.00 P.M. This Maqsood also remained silent for pretty long time. He claims to live near the house of Sunder Singh. Admittedly, distance between two houses is merely 2-4 paces. Yet he did not give this information to family of the deceased for quite sometime. He claims that he was busy in his personal work and that he gave this information after 4-5 days to Mahendra Singh and his family. He has very casually stated that he could not give this information because he was busy. We are afraid that this explanation is not sufficient. The conduct of P.W.-3 Maqsood does not inspire confidence. Similarly, the testimony of P.W.-4 Mahavir is also not very trustworthy. He is virtually neighbour of the deceased Sunder Singh and still he did not inform the family of the deceased regarding unusual presence of accused/appellant Rajpal Singh near the Bankhandi temple.

21. P.W. 3 Maqsood, P.W.-4 Mahavir and P.W.-5 Sukhey all have claimed that they knew accused/appellant Rajpal Singh because of their relationship with deceased Sunder Singh. Evidence discloses that Rajpal Singh was a frequent visitor to the residence of informant Mahendra Singh at Islamnagar. F.I.R., exhibit Ka-1 also claims that Rajpal Singh had been visiting the residence of the informant quite frequently at least since the sale of property of the deceased Sunder Singh.

22. Now coming back to the testimony of informant Mahendra Singh, P.W.-1 son of the deceased, this claim appears to be dodgy. P.W. -1 Mahendra Singh is the real brother-in-law (Sarhu) of accused/appellant Rajpal Singh. P.W.-1 Mahendra Singh has very categorically stated that he had no visiting relationship with accused/ appellant Rajpal Singh at all. He has denied the suggestion of strain in the relationship with accused but very plainly testified that Rajpal Singh visited his residence for the first time on 15.09.1982 i.e., the day of disappearance of his father Sunder Singh. Meaning thereby, that the story given by other witnesses that Rajpal Singh had been frequently coming to Islamnagar on account of relationship with informant Mahendra Singh is false. Similarly, the claim of Mahendra Singh in F.I.R., that Rajpal Singh had been visiting their residence for last 12-13 days, insinuating that the accused/appellant suddenly started calling upon them because of his greed for Rs. 13,000/-, which deceased Sunder Singh had acquired after sale of

his property, in contrary to his evidence on oath wherein he has conceded that accused/appellant Rajpal Singh came to his residence for first time on 15.09.1982 i.e., the day of disappearance of Sunder Singh. Not only that, Mahendra Singh has also stated that he had visited the residence of Rajpal Singh for the first time on the following day in order to enquire about his father. The village of Rajpal Singh was not nearby. Admittedly, his village is about 14-15 Koss (about 44 Kms to 45 Kms). The incident occurred in the year 1982, when means of communication and existence of road network in rural Uttar Pradesh were virtually non existent, especially in smaller districts. Record discloses that body of the deceased was not identified by his son, Mahendra Singh. It was also not identified by any scientific method. The I.O., says that he got the deceased identified by other persons of the town. Evidence discloses that body of the deceased was in highly decomposed condition. In fact, proper autopsy could not be done. Cause of death could not be ascertained. Doctor failed to ascertain even the age of the dead body recovered. In these circumstances, stated identification of the corpse merely on the basis of clothes and the materials worn by the deceased was very risky, especially in the light of admission of I.O., that he did not have any record of clothes worn by the deceased at the time of his disappearance. Obviously, other people of the town were also not in a position to have the knowledge of clothes or other materials worn by the deceased at the time of the disappearance.

23. In these circumstances, it is strange that the police personnel did not prefer to get the body of the deceased identified either by the informant, the only son or the wife of the deceased. Record further discloses that there was a well nearby the place of recovery of the deceased. Learned counsel for the appellant has submitted it would have been much easier for the accused to dump the body in the well instead of leaving it in open field.

24. Learned counsel for the appellant has also argued that if the claim of informant Mahendra Singh is accepted that Rajpal Singh had visited his residence for the first time on the date of the incident i.e., 15.09.1982 then Rajpal Singh could not have been aware of the sudden acquisition of money by deceased, Sunder Singh. He has further argued that it is highly surprising that the informant allowed his father to go to the local Bank with a person, who was visiting them for the first time while his major and sole son was available at the residence. Even if Mahendra Singh, himself was not present at the time of departure of his father, he could have been summoned by his father for accompanying him.

25. Learned AGA has opposed the appeal but could not contradict the points raised by the appellant's counsel.

26. We have carefully examined all the materials on record. Circumstantial evidence available on record is not satisfactory. There are vast discrepancies between the statements of the witnesses. There are contradictions between the contents of the F.I.R., and the testimony of the witnesses. There is no logical and satisfactory explanation to wait for six days to lodge the F.I.R., regarding the disappearance of the father of the informant despite the fact that son became aware of the disappearance of his father on the same day. Evidence of Puttan Khan, Mahavir and Sukhey also do not inspire confidence. Attempt to manufacture and create evidence is palpable. We have a

lingering doubt about the veracity of virtually all witnesses. We believe that the circumstances referred to by the learned Sessions Judge have not been established by plausible and satisfactory evidence. In addition to that the circumstances themselves are not sufficient to conclusively establish the guilt of accused beyond all reasonable doubt. In our opinion, the prosecution has not been able to establish either the motive on the part of the accused/appellant Rajpal Singh for committing the crime or the discovery of corpse of the deceased and recovery of money on the basis of so-called disclosure statement of Rajpal Singh. We have no hesitation to hold that prosecution has failed to prove its case beyond all reasonable doubt.

27. We believe that prosecution has failed to prove the guilty mind and the guilt of the accused. There are various doubts and suspicious circumstances which have dislodged the chain of the circumstantial evidence. On the basis of such weak evidence, judgement of trial court, convicting the appellant is not sustainable. We, therefore, believe that the accused Rajpal Singh is entitled to benefit of doubt. We, accordingly, set aside the conviction and sentence of accused/appellant Rajpal Singh and acquit him of charges levelled against him under sections 302 and 411 IPC.

28. The appeal, accordingly, is allowed. The judgement and order dated 12.10.1983 passed by the then Sessions Judge, Budaun in Session Trial No. 131 of 1983 (State v. Rajpal Singh), arising out of Crime No. 152 of 1982, under sections 302 and 411 IPC, Police Station Islamnagar, District Budaun is set aside. Appellant Rajpal be set at liberty unless required in any other case.

29. Copy of this order be sent to the court concerned for compliance within fifteen days from today. Thereafter, concerned court shall report compliance within one month.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Matters Under Article 227 No.- 2706 Of 2016

Vinod Kumar **...Petitioner**

Versus

Naresh Chandra Sharma (Since Deceased) & Ors. **...Respondents**

Counsel for the Petitioner:
Anand Prakash Srivastava

Counsel for the Respondents:

Civil Law — U.P. Act No. 13 of 1972 — Section 2(2) — Explanation 1 — date of completion of construction — newly constructed building — exempted from the operation of Act — no report — no record of assessment — date of occupation of the building by the tenant — shop in question given on rent on 05.11.1989 soon after its construction — date of occupation taken as date of completion of construction — eviction orders — no illegality or perversity — writ petition dismissed.

The eviction suit was filed before the Judge Small Causes Court, Bulandshahar on the ground that the shop was let out for running general merchandise business but without permission of the landlord the defendants started business of battery manufacturing. Moreover, the plaintiff did not want to continue the tenancy hence a notice to quit was served upon the petitioner through counsel by registered post. The defendants neither paid rent nor vacated the shop in question and, therefore, the ejectment suit was filed with the relief to deliver possession to the plaintiff/landlord. (Para 2)

The suit was decreed by the Small Causes Court (JSCC) on the ground that the tenancy is not protected by the provisions of U.P. Act No. 13 of 1972 as the shop in question is a new construction exempted from the operation of the Act in view of section 2(2) of the Act. The petitioner was found in default and that there was no dispute regarding service of notice to quit and, therefore, the suit was decreed. The finding recorded by the J.S.C.C was upheld in revision.(Para 3)

Challenging the eviction orders, the main submission of learned counsel for the petitioner is that the Courts below had erred in considering the date of completion of the construction of building as 04.08.1989 on the basis of a house tax assessment receipt which was filed by the landlord. In support of his submission, the landlord filed sanctioned map paper No. 25-C and house tax receipt paper No. 24 C to submit that the shop in question is a new construction and therefore, exempted from the operation of Act. There was no document of first assessment of the shop in question. The sanctioned map could not have been relied upon to conclude that it was a new construction made in the year 1989. The conditions as laid down in Explanation 1 of Section 2 (2) to conclude the date of construction of the building do not exist in the present case and as such no definite conclusion could have been drawn in this regard.(Para 4)

Held: (Paras-11-17)

In the instant case, the landlord came out with the clear case that the building was constructed after the map was sanctioned on 04.08.1989. In respect of this fact, he filed a house tax assessment receipt wherein the date of construction was entered as 04.08.1989. Though there was nothing on record to establish the date of first assessment of the shop in question, however, in view of the admission of the tenant that the shop in question was given to him on rent at the rate of the Rs.300/- on 05.11.1989, soon after its construction, it can be safely concluded that the shop in question was constructed in the year 1989. It is a case where there is no report or the record of assessment, the fourth date as provided in explanation 1 of section 2 (2), therefore, would come into play and the date of completion of construction would be the date of occupation of the building by the tenant which is 05.11.1989 as admitted to him.

Moreover, the map sanctioned on 04.08.1989 has been also brought on record to establish that the construction had commenced in the year 1989. The tenant admitted that he had occupied the shop in question soon after its construction.

Learned counsel for the petitioner has placed reliance upon the judgment of this Court in the case Gopal Dass Vs. Bal Kishan Dass reported in 2013 All. CJ 639 which is of no help to him as in the said case this Court was dealing with a different issue.

Considering the above referred material on record, this Court is of the view that the date of occupation of the shop in question was rightly taken into consideration as the date of completion of construction by the Court below in absence of any report or record of assessment in view of the provisions of Explanation 1, section 2(2) of the Act, so as to operate exemption under the Act, 1972.

There is no illegality or perversity in the eviction orders passed by the Court below.

No other point has been pressed.

The writ petition is devoid of merits and hence **dismissed**

Case Law discussed:

1.Shafiq Ahmad Vs. 1st Additional District and Sessions Judge, Bijnor & Ors.,2003(1)JCLR299 (All) (Para 5)
2.Madan Mohan Sharma Vs. Ashok Kumar Kaushik, 2013 (1) ADJ 313 (Para 9)
3.Om Prakash Vs. Dig Vijendrapal Gupta, AIR 1982 SC 1230 (Para 9)
4.Gopal Dass Vs. Bal Kishan Dass, 2013 All CJ 639 (Para 13)

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

1. This writ petition arises out of the judgment and order dated 11.08.2015 passed by the Judge Small Causes Court, Bulandshahar in S.C.C case No.19 of 2011 (Naresh Chandra Sharma Versus Vinod Kumar) and also the Revisional Court order dated 11.02.2016 passed in J.S.C.C Revision No. 16 of 2015 (Naresh Chandra Sharma vs. Vinod Kumar.

2. The eviction suit was filed before the Judge Small Causes Court, Bulandshahar on the ground that the shop was let out for running general merchandise business but without permission of the landlord the defendants started business of battery manufacturing. Moreover, the plaintiff did not want to continue the tenancy hence a notice to quit was served upon the petitioner through counsel by registered post. The defendants neither paid rent nor vacated the shop in question and, therefore, the ejectment suit was filed with the relief to deliver possession to the plaintiff/landlord.

3. The suit was decreed by the Small Causes Court (JSCC) on the ground that the tenancy is not protected by the provisions of U.P. Act No. 13 of 1972 as the shop in question is a new construction exempted from the operation of the Act in view of section 2(2) of the Act. The petitioner was found in default and that there was no dispute regarding service of notice to quit and, therefore, the suit was decreed. The finding recorded by the J.S.C.C was upheld in revision.

4. Challenging the eviction orders, the main submission of learned counsel for the petitioner is that the Courts below had erred in considering the date of completion of the construction of building as 04.08.1989 on the basis of a house tax assessment receipt which was filed by the landlord. In support of his submission, the landlord filed sanctioned map paper No. 25-C and house tax receipt paper No. 24 C to submit that the shop in question is a new construction and therefore, exempted from the operation of Act. There was no document of first assessment of the shop in question. The sanctioned map could not have been relied upon to conclude that it was a

new construction made in the year 1989. The conditions as laid down in Explanation 1 of Section 2 (2) to conclude the date of construction of the building do not exist in the present case and as such no definite conclusion could have been drawn in this regard.

5. Reliance is placed upon the judgement of this Court in the case of **Shafiq Ahmad Vs. 1st Additional District and Sessions Judge, Bijnor & Ors. reported in 2003 (1) JCLR 299 (All)** in support of his submission that the Court below had illegally concluded that the constructions were made in the year 1989 without examining the relevant evidence for deciding the question of date of construction of the building keeping in view the principles laid down in various decisions of this Court.

6. Having heard learned counsel for the parties and perused the record, before dealing with the submission of learned counsel for the petitioner regarding the date of construction as per Explanation 1 of section 2(2) for concluding a building to be a newly constructed building, it would be apt to go through the provisions as contained thereunder:-

(a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time:

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants;

(b) "construction" includes any new construction in place of an existing building which has been wholly or substantially demolished;

(c) where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition;"

7. A careful perusal of section 2 (2) and its explanation shows that four different dates for the purpose of determination as to whether the newly constructed building is exempted or not have been given therein which are as follows:-

a. the date on which the completion of the building is reported to the local authority.

b. the date on which the completion of building is otherwise recorded by the local authority having jurisdiction.

c. the date on which the assessment of property tax is first made.

d. in the absence of any such report/record or assessment, the date on which the building was actually occupied.

8. The Explanation further provides that, in a case where for the first three categories the dates are available then the earliest of three dates will be the date of completion of the building. The fourth date i.e. the date of occupation will be the date of completion of building only in case, where the first three dates are not available.

9. Deeming clause as contained in the Explanation to section 2(2) has been interpreted by this Court in the case of **Madan Mohan Sharma Vs. Ashok Kumar Kaushik** reported in **2013 (1) ADJ 313** wherein placing reliance upon the judgment of the Apex Court in **Om Prakash Vs. Dig Vijendrapal Gupta, AIR 1982 SC 1230** it has been held that the date of occupation can be taken to be the date of completion of construction only where there was no report or record of the completion of the construction or no assessment thereof. In a case where the date of first assessment is available, only that would be the date of completion of the construction and the date of occupation of building during the period anterior to the first assessment was of no significance whatsoever.

10. Having gone through the settled legal position in this regard, this Court is of the opinion that the date of completion of construction of a building has to be ascertained strictly in the light of the dates given in Explanation 1 to section 2 (2) of Act 1972 and there is no scope of deviation in any manner.

11. In the instant case, the landlord came out with the clear case that the building was constructed after the map was sanctioned on 04.08.1989. In respect of this fact, he filed a house tax assessment receipt wherein the date of construction was entered as 04.08.1989. Though there was nothing on record to establish the date of first assessment of the shop in question, however, in view of the admission of the tenant that the shop in question was given to him on rent at the rate of the Rs.300/- on 05.11.1989, soon after its construction, it can be safely concluded that the shop in question was constructed in the year 1989. It is a case where there is no report or the record of assessment, the fourth date as provided in explanation 1 of section 2 (2), therefore, would come into play and the date of completion of construction would be the date of occupation of the building by the tenant which is 05.11.1989 as admitted to him.

12. Moreover, the map sanctioned on 04.08.1989 has been also brought on record to establish that the construction had commenced in the year 1989. The tenant admitted that he had occupied the shop in question soon after its construction.

13. Learned counsel for the petitioner has placed reliance upon the judgment of this Court in the case **Gopal Dass Vs. Bal Kishan Dass** reported in **2013 All. CJ 639** which is of no help to him as in the said case this Court was dealing with a different issue.

14. Considering the above referred material on record, this Court is of the view that the date of occupation of the shop in question was rightly taken into consideration as the date of completion of construction by the Court below in absence of any report or record of assessment in view of the provisions of Explanation 1, section 2(2) of the Act, so as to operate exemption under the Act, 1972.

15. There is no illegality or perversity in the eviction orders passed by the Court below.

16. No other point has been pressed.

17. The writ petition is devoid of merits and hence dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE AMAR SINGH CHAUHAN, J.

Criminal Revision No.- 2807 Of 2008

Ram Babu Kurmi **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Revisionist:
Sri Amit Kumar Singh, Sri U.K. Verma

Counsel for Opposite Parties:
Government Advocate, Sri A.K. Pandey, Sri Pradeep Kumar, Ms. Pratibha Patel

Criminal Procedure -- Section 227/228 Cr.P.C. -- Framing of Charge -- Standard -- Grave Suspicion Sufficient -- Victim's Rights at Charge Stage -- Held: charge can be framed even on the basis of grave suspicion -- the impugned order speaks clearly that the injury was caused on the basis or ground that the victim belongs to the Scheduled Caste community -- two persons sustained firearm injuries on hip and thigh which may be fatal to life -- there is eyewitness account and motive assigned against the revisionist -- there is sufficient ground for presuming that the accused has committed the offence as alleged -- framing of charge is a finding of fact which cannot be interfered in revision -- at the stage of discharging an accused or framing charge, the victim does not participate in the proceedings but his rights are also to be taken care of, and the Judge must give reasons if he is dropping or diluting any serious charge so as to inform the prosecution as to what went wrong with the investigation.

Criminal Revision Dismissed -- Impugned order dated 14.07.2008 passed by the Additional Sessions Judge/Special Judge (SC/ST Act) rejecting the discharge application and framing charges under Section 307 I.P.C. and Section 3(2)(5) of the SC/ST Act upheld -- revision dismissed -- interim order, if any, vacated.

Case Law Discussed:
1. Dinesh v. State of Rajasthan, 2006 SCC 771
2. Masumsha Hasanasha Musalman v. State of Maharashtra, 2000 (4) A.C.C.
3. Ram Das and others v. State of Maharashtra, AIR 2007 SC 155
4. Rajbir Singh v. State of U.P. and others, 2006 (55) ACC 308 (SC)
5. Ravindra Nath v. State of U.P., ACC 2000 (40) 762
6. R.S. Misra v. State of Orissa and others, AIR 2011 SC 1103

(Delivered by Hon'ble Amar Singh Chauhan, J.)

1. Revisionist, Ram Babu Kurmi has preferred this criminal revision against the order dated 14.7.2008 passed by the Additional Sessions Judge/ Special Judge, (SC/ST Act) in Special Session Trial No. 33 of 2008 (State Vs. Ram Babu Kurmi), Case Crime No. 162 of 2008 under Section 307 IPC and 3(2)(5) SC/ST Act P.S. Kotwali, District Fatehpur whereby the learned Special Judge rejected the discharge application filed by the revisionist and has framed the charges under Sections 307 IPC and 3 (2) (5) SC/ST Act.

2. Prosecution story in nutshell is that the revisionist, Ram Babu Kurmi along with Upendra Kurmi who were armed with country made pistol (Katta) hit fired upon the complainant and one Rajendra Kumar when they were going on cycle to village Malaka at 9:00 p.m. Ram Babu Kurmi fired upon the first informant Jagdish Varma and such fired by Upendra had hit Rajendra Kumar. Both injured were suffered from fire arm injuries on hip and thy respectively. On this report FIR was registered in a Crime No. 162 of 2008 under Section 307 IPC and 3(1) (10) SC/ST Act. After investigation charge sheet was submitted against the revisionist under Sections 307 IPC and 3(2)(5) SC/ST Act by the police. Revisionist has moved the application under Section 227 Cr.P.C. for discharge on 1.7.2008 on the ground that no offence under Section 307 IPC and 3(2)(5) SC/ST Act is disclosed and in absence of necessary ingredients, no offence is made out even if entire prosecution evidence is taken at its face value. Learned Special Judge after hearing the application rejected the application on 14.7.2008. Feeling aggrieved, the revisionist has filed this revision.

3. I have heard learned counsel for the revisionist, learned AGA and perused the record.

4. It is submitted by the learned counsel for the revisionist that charge sheet was illegally submitted against the applicant under Section 307 IPC and 3(2)(5) SC/ST Act although no offence is made out in absence of the necessary ingredients attracting the Section 3(2)(5) SC/ST Act. The court below without applying its judicial mind and without considering the facts and evidence on record had illegally taken cognizance. No offence under Section 3(2)(5) of SC/ST Act is made out as to attract the provisions of the said section, the sine quo non is that the victim should be a person who belongs to schedule caste and that offence is committed only on basis or ground that victim is

member of the schedule caste. Moreover none of the injury sustained by the injured person namely Jagdish and Rajendra were dangerous to life and are upon non vital parts. It is further submitted that the case of the applicant is squarely covered by Apex Court judgment given in case of **Dinesh Vs. State of Rajasthan reported in [2006 SCC 771]** and **Masumsha Hasanasha Musalman Vs. State of Maharashtra reported in 2000 (4) A.C.C**. in which it has been held that in order to attract section 3(2)(5) of SC/ST Act offence against person belonging to schedule caste should be committed against him only on the basis that such a person belongs to schedule caste.

5. In support of his contention, learned counsel for the revisionist also relied upon a judgment of Hon'ble Apex Court **Ram Das and others Vs. State of Maharashtra [AIR 2007 SC 155]** in which the Apex Court observed that mere fact that victim happened to be a girl belonging to schedule caste does not attract provisions of Act.

6. Learned AGA submitted that the case law relied upon by the learned counsel for the revisionist do not help to the accused because two persons have sustained fire arm injury on hip and thy which may be fatal to the life. Impugned order shows that offence has been committed against informant on the ground that such person is a member of scheduled caste. The accused has caused the fire arm fatal injuries to the victim on the ground that such person is a member of scheduled caste community.

7. The case in hand, charge has been framed under Section 307 and 3 (2)(5) SC/ST Act. The Hon'ble Apex Court in the case of **Rajbir Singh Vs. State of U.P. and others [2006 (55) ACC 308 SC]** held that charge can be framed even on the basis of the grave suspicious. In this case two persons have sustained fire arm injury on hip and thy which may be fatal to the life. There is eye witness account and motive also assigned against the revisionist. There is sufficient ground for presuming that accused has committed the offence as alleged. Impugned order speaks clearly that the injury was caused on the basis or ground that the victim belongs to the scheduled caste community. Prima facie, there is sufficient ground to frame the charge against the revisionist. Framing of charge is finding of fact which cannot be interfered in revision as had been observed by another Bench of this Court in **Ravindra Nath Vs. State of U.P. [ACC 2000 (40) 762]**.

8. The Hon'ble Apex Court in the case of **R.S. Misra Vs. State of Orissa & others [AIR 2011 SC 1103]** observed that at the stage of discharging an accused or framing charge, the victim does not participate in the proceeding. Rights of the victim are also to be taken care as also that of accused. The responsibility lies on the shoulder of the Judge. Therefore Judge must give reasons, if he is dropping or diluting any charge, a serious one. It is also necessary for the reason that the order should inform the prosecution as to what went wrong with the investigation.

9. Having considered the legality, propriety and correctness of the order, impugned order does not suffer from any illegality or infirmity and therefore, revision is liable to be dismissed as having no merit.

10. In view of the aforesaid, this revision is dismissed.

11. The interim order, if any, is vacated.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Appeal No.- 2816 Of 1985

Daddul @ Dadulli **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Sri V.B. Rao, Sri D.S. Tewari, Sri Shashwat Shukla, Sri Rajeev Lochan Shukla, Sri Vikram Bahadur Singh, Sri Ashwani Kumar Pandey

Counsel for Respondent:
Sri Rajeev Gupta, Km. Meena, Sri B.A. Khan (DGA), Sri Rahul Asthana

Murder -- Section 302 read with Section 149 I.P.C. -- Rioting with Deadly Weapons -- Section 148 I.P.C. -- Evidence -- Eyewitnesses -- Interested Witnesses -- Relatives -- Appellant Daddul @ Dadulli was an active member of the gang of co-accused Raja -- gang stopped the road construction work by the contractor and when deceased Keshav facilitated the resumption of work, Raja along with appellant committed murder of both Keshav and his father Babu Lal by firing gunshots -- PW-1 is the brother of the deceased Keshav and son of the deceased Babu Lal; PW-3 is cousin brother of PW-1 -- defence assailed their testimony as interested and partisan witnesses -- Held: merely because PW-1 and PW-3 are members of the same family and are relatives of the deceased is not a sufficient reason to discard their evidence if the same is trustworthy -- mechanical rejection of evidence of family members would lead to failure of justice -- courts must assess whether the testimony of a relative witness is reliable and natural, and not reject it merely on account of relationship -- evidence of interested witnesses, if otherwise credible, carries full evidentiary weight. (Paras 8-11)

Murder -- Section 302 I.P.C. -- FIR -- Promptness -- Ante-Time Allegation -- Discrepancy in Direction in Chik FIR and Carbon Copy -- Defence contended that inconsistency in the direction of the scene of occurrence in the Chik FIR (shown as North-East) versus its carbon copy (South-West) and inquest reports indicated that the FIR was ante-time -- Held: apparent discrepancy in the description of direction in the Chik FIR and its carbon copy, though attractive at first blush, has no ultimate bearing when the Investigating Officer has satisfactorily explained the discrepancy in his deposition -- prompt lodging of FIR within a short time of the occurrence and the named accused who was well-known to the informant fortify the prosecution version -- the FIR is not ante-time. (Paras 9-10)

Evidence -- Contradictions and Discrepancies -- Duty of Courts -- Minor Discrepancies -- Appreciation of Evidence -- Held: undue importance should not be given to minor discrepancies which do not shake the basic version of the prosecution case -- entire evidence must be evaluated by excluding

exaggerated portions as witnesses naturally keep adding embellishments to their testimony -- if a witness is otherwise trustworthy, his evidence should not be disbelieved -- if a major portion of the evidence is found deficient and the residue is sufficient to establish guilt, courts must separate the grain from the chaff -- the maxim falsus in uno falsus in omnibus has no application in India and a witness cannot be branded as a liar on account of any single false or exaggerated statement. (Paras 12-14)

Murder -- Motive -- Enmity arising from Road Construction -- Common Object -- Held: motive behind the offence was the enmity of co-accused Raja, arising from the refusal of the deceased Keshav to stop road construction work which Raja sought to prohibit for extracting extortion from the contractor -- the deceased Keshav's help to the contractor in continuing the work was taken as a challenge to the authority of Raja and his gang -- motive is amply established from the FIR, oral testimony and consistent narrative of both eyewitnesses -- in a case of direct evidence with named accused, existence of a clear motive lends additional strength to the prosecution case. (Paras 8-9)

Criminal Appeal Dismissed -- Conviction of appellant Daddul @ Dadulli under Section 302 read with Section 149 I.P.C. and sentence of life imprisonment, and conviction under Section 148 I.P.C. with sentence of 2 years rigorous imprisonment, both running concurrently, as awarded by the then Additional Sessions Judge, Karvi (District Banda) in Sessions Trial No. 478 of 1983, confirmed -- bail of appellant cancelled -- appellant directed to be taken into custody to serve out the sentences -- entire record sent to Court of Sessions Judge, Chitrakoot for compliance. (Para 15)

Case Law Discussed:
1. Ramesh Harijan v. State of Uttar Pradesh, (2012) 5 SCC 777
2. Kathi Bharat Vajsur and another v. State of Gujarat, AIR 2012 SC 2163

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. We have heard Sri Rajeev Lochan Shukla, Sri Vikram Bahadur Singh, Sri Ashwani Kumar Pandey, learned counsel for the appellant and Sri Rajeev Gupta, Km. Meena, Sri B.A. Khan, learned A.G.A. and Sri Rahul Ashthana, brief holder for the State.

2. This criminal appeal has been preferred by the appellant-Daddul @ Dadulli against the judgment and order of the then Additional Sessions Judge, Karvi (District-Banda) dated 11.10.1985 in Sessions Trial No. 478 of 1983 (Case Crime No. 169 of 1983), Police Station- Karvi (District-Banda), under Sections 147, 148, 302 and 149 I.P.C., convicting the appellant-Daddul @ Dadulli under Section 302 I.P.C. read with Section 149 I.P.C. and sentencing him to undergo life imprisonment and under Section 148 I.P.C. sentencing him to undergo rigorous imprisonment for 2 years with a direction that both the sentences would run concurrently.

3. The written F.I.R. in narrow compass is enumerated as below:-

4.The informant Brij Mohan son of Babu Lal, resident of Rajauli, Police Station-Karvi, handed over a written F.I.R. dated 4.7.1983 signed by him to Kotwal of Kotwali, Karvi mentioning therein that his brother Keshav @ Bawa son of Babu Lal was going to Pasandahar because his father Babu Lal was ploughing the fields there. At about 5:30 P.M. when his brother Keshav reached near his village, at that time, absconder Raja son of Bihari Lal Brahmin resident of his

village along with his companions Daddul Brahmin, resident of Parsaunja, Police Station Pahari and Mustari Ahir, resident of village Sardhuwa, Police Station Rajapur and two more men met and caught hold of the deceased Keshav and tied his hands with 'Angauchha' and forcibly tried to drag him away. His brother raised alarm. The informant Brij Mohan along with his cousin brother Surajbhan son of Ram Asre and his brother Brij Bhukhan, who was working in the fields near the well, ran to rescue his brother. Raja with his rifle and his companions with their firearms fired at Keshav, the brother of the informant. His brother fell down there and died. Raja and his companions fired upon them. On hearing the alarm raised by the informant and his brothers, the father of the informant, Babu Lal leaving the plough rushed towards the spot whereupon the accused Raja along with his companions fired at the father of the informant, as a result, the father of the informant collapsed near 'Batasi Mahua'. Thereafter, Raja along with his companions fled away towards 'Budha Semarwar'. Even though Raja had stopped one Shukla from constructing the road, the brother of the informant started constructing the road, owing to which, he killed his brother Keshav. The informant went the police station after leaving the villagers near his brother and father.

5. Learned counsel for the accused-appellant Daddul @ Dadulli has advanced his arguments on the following points:-

(a) The F.I.R. is ante-timed.
(b) Presence of the witnesses at the scene of occurrence is doubtful.
(c) The prosecution has not produced any independent witness.
(d) Since the accused-appellant Daddul @ Dadulli was an accused of murder case of one police constable, was falsely implicated by the police.
(e) The first informant was known to the present accused-appellant.

6. The prosecution has produced following oral evidence:-

PW-1 Brij Mohan (informant), PW-2 Dr. P.N. Dwivedi, PW-3 Surajbhan and PW-4 Inspector CBCID, Gorakhpur S.K. Malik, the Investigating Officer of the case.

7. The prosecution has produced following documentary evidence:-

(1) Written report (Exhibit Ka-1), (2) Postmortem report of the deceased Keshav (Exhibit Ka-2), (3) Postmortem report of the deceased Babu Lal (Exhibit Ka-3), (4) Inquest report of the deceased Keshav (Exhibit Ka-4), (5) Form No. 33 (Exhibit Ka-5), (6) Copy of the chik F.I.R. (Exhibit Ka-6), (7) Challan Nash (Exhibit Ka-7), (8) Photonash (Exhibit Ka-8), (9) Chitthi of A.P.O., Karvi (Exhibit Ka-9), (10) Chitthi of Medical Officer, Karvi (Exhibits Ka-10 and Ka-11), (11) Inquest report of Babu Lal (Exhibit Ka-12), (12) Form No. 33 (Exhibit Ka-13), (13) Copy of the F.I.R. (Exhibit Ka-14), (14) Challan Nash (Exhibit Ka-15), (15) Photonash (Exhibit Ka-16), (16) Chitthi of Medical Officer, Karvi (Exhibits Ka-17 and Ka-18), (17) Chitthi of A.P.O., Karvi (Exhibit Ka-19), (18) Fard memo of one pair of Hawai Chappal (Exhibit Ka-20), (19) Fard memo of one Angauchha (Exhibit Ka-21), (20) Fard memo of bloodstained soil (Exhibit Ka-22), (21) Fard

memo of simple soil (Exhibits Ka-23 and Ka-24), (22) Fard memo of bloodstained soil (Exhibit Ka-25), (23) Fard memo of one Angauchha (Exhibit Ka-26) (24) Fard memo of one bullet of 12 bore and two bullets of rifle (Exhibit Ka-27), (25) Site plan (Exhibit Ka-28), (26) Charge-sheet (Exhibit Ka-29), (27) Chik F.I.R. (Exhibit Ka-30), (28) Copy of G.D. No. 31 (Exhibit Ka-31), (29) Special report (Exhibit Ka-32).

8. Learned counsel for the accused-appellant has drawn our attention towards following cross-examination of PW-1, Brij Mohan:-

""ददुल राजा का सगा चचेरा भाई है। ददुल के पिता का नाम मैं नहीं जानता परसौजा में रहता है। राजा के बाबा का नाम नहीं बता सकता। राजा के पिता तीन भाई थे। रामनाथ, बाबू लाल, वा बिहारी लाल थे। इन तीनों में से कोई भी ददुल का पिता नहीं है।"

`मैं ददुली को घटना के पहिले से पहचानता था। चूंकि हमेशा राजा के साथ रहता था इसलिए उसे पहचानता था।"

'केशव कुवों पर बैठा था जब मुलजिमान आये थे करीब 10 मिनट पहिले से बैठा था। सुपारी खा रहा था केशव जब जा रहा था व कुँवा के पास पहुँचा तब मुलजिमान आये थे। मैंने रपट में कुवों में बैठकर सुपारी खाने वाली बात नहीं लिखाई थी।"

वदुली गीनर एकनाली बच्चूक लिये था यह बात मैने अपनी रिपोर्ट में लिख दी थी। यदि यह बात मेरी रिपोर्ट में नहीं लिखी तो में इसकी कोई वजह नहीं बता सकता। मैंने दरोगा जी को अपने बयान में बताया था कि दहुली ग्रीनर एकनाली बन्दूक लिये था यदि दरोगा जी ने मेरे बयान में नहीं लिखा हो में इसकी कोई वजह नहीं बता सकता।"

9. Thereafter, learned counsel for the accused-appellant has further referred to the following cross-examination:-

"राजा, मुश्तरी व ददुली ने केशव को मारा था। बकिया तीन आदमी हमारी ओर फायर कर रहे थे। तीन आदमी ने मेरे भाई ददुली को मारा यह बात मैंने रपट में लिख दी थी।

10. "In the cross-examination of this witness PW-1, Brij Mohan, it has also been categorically pointed out by the learned counsel for the accused-appellant that there is material discrepancy in the ocular testimony of PW-1 Brij Mohan vis-a-vis the testimony of his cousin brother PW-3 Surajbhan, which creates doubt in the prosecution story.

11. PW-1 Brij Mohan in his cross-examination has testified as follows:-

"जब मुलजिमान ने केशवः के ऊपर फायर किया था तब मैं कुवे से थोड़ा आगे था। वहीं से खड़े खड़े घटना देखते रहे। जिस स्थान से खड़े खड़े घटना देखी थी उसे दरोगा जी को दिखा दिया था व बयान में बता दिया था यदि उन्होंने नकशा नजरी में तथा मेरे बयान में नहीं लिखा तो मैं इसकी कोई वजह नहीं बता सकता। हम लोग रास्ते में खड़े थे। हम लोग हल्ला मचा रहे थे केशव के ऊपर कुल 5-6 फायर हुये थे फायर केशव के आगे से किये गये थे जब मुलजिमान ने उसे मारा वह गिर पड़ा तब हम लोग भाग खड़े हुये। केशव के ऊपर दो हाथ की दूरी से तीन आदमी ने फायर किया। 2. हाथ की दूरी पर खड़े थे। भागकर हम लोग सिधुला के मकान की उत्तरी दीवार की आड़ में खड़े हो गये। उस जगह का ध्यान नहीं है कि दरोगा जी को दिखायी थी या नहीं। यह भी ध्यान नहीं है कि दरोगा जी को अपने बयान में बता दिया था या नहीं। यदि दरोगा जी ने नक्शा नजरी में वह जगह न दिखाई हो और मेरे बयान में न लिखी हो तो में कोई वजह नहीं बता सकता।

12. The following portion of the cross-examination of PW-1, Brij Mohan has been pointed out in support of the arguments advanced by the learned counsel for the accused-appellant to create doubt in the prosecution story:-

"तहरीर मैंने खुद अपने हाथ से लिखी थी। मैं कक्षा 5 तक पढ़ा हूँ। 4-7-83 के आगे जो बृजमोहन लिखा हुआ है प्रदर्श क 1 में वह मेरे हाथ के बनाये हुए मेरे दस्तखत है। प्रार्थी के आगे जो बृज मोहन लिखा हुआ है वह मेरे साले फक्कड़ का लिखा हुआ है तहरीर प्रदर्श क 1 पूरी मेरे हाथ की लिखी नहीं है। फक्कड़ के हाथ की लिखी है जिसको मैंने बोल कर लिखाया था। यह बात सही है कि तहरीर प्रदर्श क-1 मैंने अपने हाथ से नहीं लिखी। मैंने ऊपर इसी अदालत में यह बयान दिया है कि तहरीरी मेरे हाथ की खुद लिखी है। मेरा यह बयान गलत है जो मैने अदालत के सामने दिया है कि तहरीर मैने अपने हाथ से खुदः लिखी थी। मैने दरोगा के सामने भी यही बयान दिया था कि तहरीर मैने लिखकर थाने में दी थी। दरोगा के सामने भी यह मेरा बयान गलत था।"

13. Learned counsel for the accused-appellant has also further drawn our attention towards the contradictions, omissions and discrepancies in the cross-examination of PW-3, Suraj Bhan.

मैं कक्षा 4 तक पढ़ा हूँ। कतल के पहिले मेरा कोई परिचयः ददुली से नहीं था केवल नाम सुनता था। मुझको उसी दिन लोगों ने बताया था कि कतल में ददुली भी था। ददुली से मेरा कभी आमना सामना नहीं हुआ। दद्ली को मैं शक्ल से नहीं जानता था। यह कहना गलत है कि मैंने कोई घटना नहीं देखी और पुलिस के दबाव से झूठी गवाही दे रहा हूँ।

14. Learned counsel for the accused-appellant has vehemently argued that the alleged special report (Exhibit Ka-32) is a waste paper and has no evidentiary value. No signature(s) of any senior Police/ Executive Officer (s) has/have been appended to it. It does not contain the time of its dispatch from the Police Station- Karvi.

15. PW-1 Brij Mohan and his cousin brother PW-3, Suraj Bhan have given the vivid descriptions of the incident as well as scene of occurrence. They are the ocular witnesses.

16. It would not be out of place to reproduce their examination-in-chiefs.

PW-1 Brij Mohan:-

हम 5 भाई थे। इनमें एक भाई केशव का कत्ल हो गया है, इस चार भाई जिन्दा है। मेरे पिता जी 3 भाई थे। जिनके नाम राम आसरे, शिवनाथी क बाबू लाल है। राम आसरे के दो लड़के हरी मोहन सूरजमान। शिवनाथी के एक भीं लड़का नहीं है। मैं राजा रगौली को अच्छी तरह जानता हूं। राजा रगौली परसौना के रहने वाले थे। हमारे गाँव में इसका ननिहाल था। राजा रगौली 6 भाई थे जिनमें 5 भाई जिन्दा है। राजा मार डाला गया। इनके नाम शिवः प्रताप बड़क भइया लाल, छोटकू व चुनवादः है।

हमारी खेती गाँव में चारो तरह है। पसंदाहार गाँव के उत्तर है। करीब 17-18 महीने की बात है जब मेरे पिता व भाई का कत्ल हुआ था। करीब 5 1/2 बजे शाम का समय था बरवक्त घटना सूर्य डुबा नहीं था। मेरे पिता जी उस समय पसंडाहार में खेत जोत रहे थे। मेरा भाई केशव उनके पार जा रहा था। मैं. मेरा भाई भूषन व चचेरा भाई सूरजमान धान की गोडाई कर रहे थे। गोडाई हम गॉव के पास कर रहे थे खेत में मकई बोई हुई थी। इस खेत के डाड़ में कुवा है। खेत व गाँव के बीच से एक रास्ता उत्तर की ओर जाता है। मेरा भाई केशव इसी रास्ते से जा रहा था। जब मेरा भाई कुवा के पास आया तो वहाँ पर राजा दद्दल व मुश्तरी व आदमी अज्ञात आ गये। इनमें से ददुल हाजिर अदालत है। ये पांचों आदमी बन्दूकें लिये थे। राजा राइफल लिये था ददुली दो या एक नाली 12 बोर मुश्तरी दो नाली बन्दूक लिये थे व दो अन्य भी एक नाली बन्दूक लिये थे। राइफल केवल राजा लिये थे। इन लोगों ने मेरे भाई को भाई की ही साफी से हाथ पीछे करके बाँध दिये। तथा उत्तर की ओर लेकर चल दिये। मेरा भाई गोहार मार रहा था। मैंने भूषन व सूरजभान ने हल्ला मचाया व छुड़ाने को दौड़े थे तो वदुल के पहिले मेरे भाई को गोली मार दी फिर सामने गोली मारी व हमारी तरफ फायर किये तो हम

लोग भागे हम लोगों की गोहार तथा फायरों की आवाज पर गाँव का कोई नहीं आया। हार की ओर से पिता जीं हल छोड़कर इसी तरफ आये। पाँचों मुलजिमान पिता जी की तरफ गये कः पिता जी के ऊपर फायर किया जो उनके लगा वह बतासी महुवा के पेड के नीचे गिर पडे वः मर गये। मेरा भाई जिस जगह हम लोग काम कर रहे थे वहाँ से 200 कदम उत्तर था। तथा भाई से मेरे पिता जी 400 कदम की दूरी पर थे। मेरा भाई व मेरे पिता जी घटना स्थल पर ही मर गये थे उनके शरीरो से गोलियों की चोटों से खून निकला था। दद्दल परसीजा का रहने वाला है यह राजा के साथ रहता था।

जब कर्वी से राजापुर रोड घटना के एक साल पहिले बन रही थी राजा ने उसका काम बन्द करा दिया था। इस सड़क को बाँदा के शुक्ला ठेकेदार बनवा रहा था। राजा उससे पैसा माँग रहा था कि पैसा दो तब काम करो। शुक्ला ने मेरे भाई केशव से कहा तो उसने काम शुरू कस दिया। घटना के 1-1/2-2 महीना पहिले काम शुक्ल करा दिया था। इसी रजिश के कारण मारा था। घटत्ता। के बाद मुलजिमान सडक 2 लेसरवार की तरफ नाग गये। कत्ल होने के बाद भी नेर भाई व पिता जी के पास कर के मारे कोई नहीं पहुँचा। ने अपने घर बालों को लाश तकाकर घर आया व स्पट लिखी। गवाह की रिपोर्ट तहरीरी पढ़कर सुनाई नहीं कहा कि यह वही तहरीर है जिसको मैंने घर में लिखा था। यह मेरे लेख व हस्ताक्षर में है इस प्रदर्श क-1 डाला गया। इस तरहीर को लेकर मैं थाने गया था व इसी के आधार पर रिपोर्ट लिखी गई मुझको रपट की नकल थाने से मिली थी रिपोर्ट करने के बाद पुलिस वाले मेरे साथ-साथ आये थे। जब घर पहुंचे तब रात हो गई थी।"

Recalled for Re-examination in Chief

"घटना के समय मेरे भाई केशव अंगौछा बनियान, अन्डर बियर, तहमत जनेऊ एक छल्ला कमशः प्रदर्श 1ता 6 पहने हुये था। यह एक सील बण्डल रूबरू खोला गया जिसमें निकले थे पिता बाबू लाल एक अदद अंगौछा, पंचा, बन्डी जनेऊ पहने हुऐ था जिनमें कमशः प्रदर्श 7 ता 10 डाले गये।

PW-3 Surajbhan:-

मेरा नाम सूरज भान एस०/ओ० राम आसरे उम्र 28 वर्ष खेती, सा० रगौली थाना कर्वी ने बहल्फ बयान किया कि-

मैं हाजिर अदालत मुलजिम ददुल को जानता हूँ। यह परसौजा गाँव का रहने वाला है। घटना के समय हमारे गाँव रगौली में राजा के साथ रहता था। राजा के साथ मुश्तरी ददुल व और कई लोग थे।

हमारे गाँव के पास सड़क का काम चल रहा था। उस काम को बांदा का एक ठेकेदार काम करवा रहा था उसको राजा रंगीली ने रोक दिया था कि यह सड़क नहीं बनवाना है। केशव ने कहा कि तुम सडक बनवाओं तब सड़क बनने लगी थी। सड़क बनवाने में राजा को बुरा लगा।

केशव व केशव के बाप का कत्ल 4.7.83 को हुआ था। 5-1/2 बजे शाम का समय था। मैं ब्रज मोहन व बृज भूषण गाँव के पास धान के पेड़ की गुड़ाई कर रहे थे। बाबू लाल पसन्दा हार में खेत जोत रहा था। केशव घर से पसन्दाहार जा रहा था। जब वह कुवे के पास पहुँचा तो वहाँ पर राजा ददुल मुश्तरी व दो आदमी और आये। ये सब लोग बन्दूक लिये थे हाजिर अदालत ददुल भी मौजूद था इन लोगों ने केशव को पकड़ लिया व पीछे हाथ बांधकर केशव को साफी से उत्तर की ओर चल दिये। तब केशव ने गोहार मारा। हमी लोग बचाने दौड़े। तब हमारे उपर भी फायर करने लगे व केशव को मार दिया केशव को सभी लोगों ने मार दिया। ददुल ने भी मारा था केशव वहीं मौके पर मर गया। जब हमारे उपर फायर किया था तब हम लोग भाग चले थे। हल्ला गोहार सुनकर बाबूलाल हल बन्द कर के उधर को ही आने लगे। मुलजिमान केशव को मार कर उसी तरफ के भागे जिधर से बाबू लाल आ रहा था। जब मुलजिमान भाग रहे थे तब हम लोग भी उन्हीं के पीछे गये। राजा आदि ने बाबू लाल को भी मार दिया। ददुली ने भी फायर किया था। फायर लगने से बाबूलाल मी मर गये। ये बतासिन महुवा के पेड के नीचे मर गये। इसके बाद मुलजिमान बूढा सेमरवार की तरफ चले गये। बृज मोहन रिपोर्ट करने चला आया हम लोग लाश के पास खड़े रहे पुलिस गयी थी। पुलिस ने हमारे सामने घटना स्थल से एक जोड़ हवाई चप्पल, एक अदद अंगोछा साफी व खून आलूद मिट्टी लिया था। इनकी फर्द बनायी थी। पढ़कर सुनाया था उनको सर्व मोहर किया था उस पर मैने व गोविन्द ने दस्तखत बनाये थे। जो कमश प्रदर्श क-20 लगायत क-27 डाला गया। मेरे सामने केशव व बाबू लाल का पंचायतनामा हुआ था उस पर मैने भी अपने दस्तखत बनाये थे।"

17. PW-1, Brij Mohan and PW-3, Suraj Bhan have narrated the motive behind the alleged crime. This fact has been consistently deposed by the above mentioned witnesses as well as mentioned in the F.I.R. that the accused-appellant Daddul @ Dadulli was an active member of the gang of Raja. Raja had demanded extortion money from the contractor Shukla. When Shukla failed to do the same, he was prohibited to conduct the work. Since the deceased Keshav had continued to execute the work of the road, Raja bore enmity with the deceased, as a result, Raja (since dead) along with accused-appellant Daddul @ Dadulli committed ghastly crime of murder of Keshav @ Bawa and Babu Lal.

18. There appear no reason for false implication of the accused-appellant by the informant since the accused-appellant could not show even an iota of evidence of previous enmity between the informant Brij Mohan and the accused-appellant Daddul @ Dadulli.

19. Prompt lodging of the F.I.R. fortifies the prosecution version. The time of the alleged incident is 5:30 P.M. The distance of police station from the scene of the occurrence is 9 km. The alleged incident occurred in the month of July. During this month, there is sufficient day-light till around 7:00 O'clock in the evening.

20. There is named F.I.R. against the accused-appellant Daddul @ Dadulli, as he was well known to the informant, the accused-appellant used to visit the village of the informant to meet the co-accused Raja (now dead).

21. Learned counsel for the accused-appellant has vehemently argued that in the chik F.I.R. (Exhibit Ka-30), the direction of the scene of the occurrence from the police station has been written North-East, whereas in its carbon copy (Exhibits Ka-6 and Ka-14) it is written as South-West. The same is the case with the inquest reports (Exhibits Ka-4 and Ka-12) namely of Keshav @ Bawa and Babu Lal. This has been repeated in the copy of G.D. (Exhibit Ka-31). At the first blush, the argument of the learned counsel for the accused-appellant that the F.I.R. is ante-time, appears to be attractive but on close scrutiny, it is of no avail, because PW-4 Inspector S.K. Malik, the Investigating Officer of the case has deposed in his examination-in-chief as below:-

दिनांक 4.7.83 व 7.8.83 के बीच में थानाध्यक्ष कर्वी था। यह मुकदमा मेरी मौजूदगी में थाना हाजा में कायम हुआ था। उस मुकदमें की विवेचना मैंने अपने हाथ में ली। दौरान विवेचना वादी मुकदमा बृज मोहन का बयान लिया। घटना स्थल में जाकर मृतको का पंचायतनामा Si. वीरेन्द्र सिंह ने मेरे निर्देशन में भरा था। दोनों मृतक केशव उर्फ बाबा वः बाबू लाल के शव विच्छेद हेतु कागजात तैयार किये थे। जो कमशः प्रदर्श क 5 लगायत क 11 वः प्रदर्श क-13 लगायत क-18 है। केशव का पंचायतनामा प्रदर्श क 4 व बाबू लाल का पंचायतनामा प्रदर्श क 12 है। दोनों लाशों को अलग अलग कपडो सील करके व दोनों के कागजात वास्ते शव विच्छेदन / कृष्ण दत्त वा / भरत सिंह को सौप दिया था। बाद पंचायतनाम में पंचान के बयानात लिये व घटना स्थल का निरीक्षण किया व नक्शा नजरी बनाया जो मेरे लेख वः हस्ताक्षर में है जिस पर प्रदर्श क-28 डाला गया। इस पर खसरा दर्ज है बलिहाज मौका सहीं है। केशव की लाश जहाँ पर मिली थी वहीं से एक अदद खोखा कारतूस एक अदद हवाई वप्पल एक अदद अंगीठा केशव के शरीर से लिया जिससे बदमाशों ने उसके हाथों से बाधा था। खून आलूद क सादी मिटटी अलग अलग डिब्बो में सील मोहर किया था। फर्द तैयार की थीं गवाहान के अलामात बनवाये थे। फर्द में मेरे हस्ताक्षर है जो प्रदर्श क 20 लगायत 23 है। इसी प्रकार बाबू लाल का शव जहाँ पर प्राप्त हुआ था वहाँ से सादी व खून आलूद मिटटी अलग अलग डिब्बों में सर्व मोहर की थी। एक अदद अंगौछा खून आलूद तथा तीन अदद कारतूस जिसमें एक अदद 12 बोर का 2 अदद राइफल सभी को पुलिस कब्जे में लेकर अलग अलग सर्व मुहर किया। फर्द तैयार की

गवाहान के अलामात बनवाये जो कमर्श प्रदर्श 24 लगायत प्रदर्श क 27 है। विवेचना के दौरान मैंने बृज मोहन चश्मदीद गवाहान तथा अन्य गवाहान के बयानात लिये बाद विवेचना उसे साबित होने पर मैंने अभियुक्त राजा व ददुली के खिलाफ आरोप पत्र प्रेषित किया जो मेरे लेख व हस्ताक्षर में है। इस पर प्रदर्श क-29 डाला गया। मेरे साथ एच.एम. ललई सिंह कोतवाली कर्बी में तैनात थे उनको लिखते एढते देखा है उनका लेख व हस्ताक्षर पहचानता हूँ। 4.7.83 को समय 7 बजकर 5 मिनट शाम को बृज मोहन पुत्र बाबू लाल जो निवासी रगौली थाना कर्वी की लिखित तहरीर प्रदर्श क-1 लेकर थाने आया था। उस समय का कार्य लेख प्रधान लेख के हाथ में था। उन्होंने तहरीर के आधार पर चिक संख्या 89 प्राथमिकी अंकित की थी उनके लेख व हस्ताक्षर में है। प्रदर्श क-30 डाला गया। चिक के आधार पर अभियुक्तगण के विरूद्ध अपराध पंजीकृत हुआ। जिसका विवरण रपट नं0 31 समय 195 पीएम रोजनामचा आम दिनांकित 4/7.83 थाना कोतवाली में अंकित है। असल जीडी मेरे सामने है जिसकी सही नकल पत्रावली में सम्मलित है इस पर प्रदर्श क-31 डाला गया जो ललई सिंह के लेख व हस्ताक्षर में है। इस मुकदमा से सम्बन्धित स्पेशल रिपोर्ट सी 390 जफीर अहमद के द्वारा भेजी गई थी जिसका विवरण रपट नं0 33 समय 20-30 पीएम रोजनामचा आम दिनांक 4.7.83 थाना कोतवाली में अंकित है। असल जीडी मेरे सामने है जिसकी नकल अपने हस्ताक्षर से दाखिल करता हूँ जिस पर प्रदर्श क-32 डाला गया।"

22. Although this G.D. is not available on the record but it is also true that no question has been put to shake the testimony of this witness in cross-examination in this regard.

23. This will have no shattering effect upon the prosecution version. The other contradictions e.g. regarding scribe of the written F.I.R. has been explained by PW-1 Brij Mohan and PW-3 Suraj Bhan. The rustic background of these witnesses should also be kept in mind. They are deposing after more than a year of the alleged incident. Their testimony found to be natural and trustworthy and not the result of tutoring. PW-2 Dr. P.N. Dwivedi who conducted the postmortem of the deceased persons Keshav and Babu Lal, has deposed on oath in his examination-in-chief which is as follows:-

"मेरा नाम डा० पी०एन० द्विवेदी M.O. I/C PH.C. पहाड़ी ने बहल्फ बयान किया कि:-

दिनांक 6.7.83 को मैं बहैसियत अधीक्षक संयुक्त राजकीय अस्पताल कर्वी था। उसी दिन मैने केशव व बाबू लाल निवासी रगौली थाना कर्वी बाप बेटों के शव का शव विच्छेदन किया था। केशव उर्फ बाबा का शव विच्छेदन एक बजे दिन मैं व बाबू लाल का शव विच्छेदन 3 बजे दिन में किया था। दोनो लाशों से सम्बन्धित कागजात एस आई कर्वी द्वारा 5.7.83 को शाम 6:15 बजे प्राप्त हुई।

<u>केशव का शव विच्छेदन</u>

केशव का शव सील बन्द हालत में प्राप्त हुआ था। उसकी लाश को कृष्ण दत्त व भारत सिंह लाये थे। शव की शिनाख्त की थी।

आयु लगभग 26 वर्ष थी। उसको मरे हुए दो दिन हो गये थे।

<u>वाहय परीक्षण</u>

औसत गठन का शरीर था। मृत्यु के बाद की अकड़न समाप्त हो चुकी थी। सड़न व कीड़े मौजूद थे। ऑखे बन्द थी आधा मुँह खुला हुआ था।

<u>मृत्यु के पूर्व आई चोटे</u>

(1) आग्नेयआस्त्र के प्रवेश का घाव 1 CM. गुददी से उपर जो 6 C.M. X 6 C.M. था। ऑते घाव से बाहर निकली थी। सामने से पीछे की ओर तथा उपर की ओर।

(2) अनेक आग्नेय आस्त्र के प्रवेश के घाव जो अलग अलग साइज के थे। सब से चोट 0.2 C.M. तथा 75 C.M. था। ये घाव चोट नं0 1 के आस पास 10 C.M. X 4 C.M. के क्षेत्र में थे।

(3) आग्नेय आस्त्र के प्रवेश के घावः 3. C.M. X 2 C.M. छाती के उपरी हिस्से में दाहिने निपिल से 2 C.M. बाहर की ओर। सामने से पीछे, नीचे तथा बाहर की ओर।

(4) आग्नेय आस्त्र की गोली थी निकास घावः 2 C.M. X 1-1/2 C.M. बाये तरफ पीठ में कन्धो से 18: C.M. नींचा।

आन्तरिक परीक्षा

Thoras की मित्तियों फटी हुई थी, चौथी तथा पाँचवी पसली दाहिने तरफ की टूटी हुई थी।

Plura फटा हुआ वः **Congested**

दाहिने फेफडा **Lacerated** & **Congested**

बाया फेफड़ा **Lacerated** & **Congested**

हृदय तथा **Pericardium Lacerated & Congested Peritonium Lacerated**

मित्तियाँ **Lacerated**

कूप में तीन चौथाई खून भरा था दाँत 16/16 थे।

छोटी आत गैस मौजूद थीं।

बड़ीं आत गैस तथा थोड़ा मल मौजूद था।

यकृत **Lacerated** & **Congested** पेशाब की थैली खालीथीं।

मेरी राय में मृत्यु रक्त साव तथा सदमा के कारण हुई जो कि मृत्यु के पूर्व आई हुई चोटो के कारण थी।

दौरान शव विच्छेदन मैने उसके शव से निम्नलिखित छर्रे प्राप्त हुये थे जो निम्न प्रकार हैं-

41 छर्रे तथा दो बैडिंग पीस प्राप्त हुये थे। वैडिंग पीस उरस कूपसे प्राप्त हुये थे। 2. छर्रे हृदय 10, 15 छर्रे यकृत से 7 छर्रे दाहिने फेफड़े से 5 छरें फेंफड़ से 6 छर्रे आमाशय से 2 छर्रे पीठ की खाल से 4 छरें गुददी के आस पास की खाल से प्राप्त हुये थे। एक सील बण्डल जिसमें 41 धातु के छरें तथा 2 बेडिंग पीस थे। एसआई कर्वी को साथ आये हुए सिपाही के साथ भेज दिया था। एक सील लिफाफा जिसमें कार्बन कापी पौस्टमार्टम रिपोर्ट 60/83 दिनांक 6.7 83 तथा एक तील बण्डल जिसमें एक बनियाइन, एक तहमत, एक अन्डर वियर एक जनेस एक चात का किल्ला एसआय कर्मी को साथ आये हुये सिपाही के साथ भेज दिया। एक सील लिफाफा जिसमे एक कार्बन कापी तथा एक मूल प्रति नं0 60/83 दिनांक 6:7.83 तथा 9 कागजात अधीक्षक जिला अस्पताल बाँदा को भेज दिये थे।

बाबुलाल के शव विच्छेदन

उम्र 70 वर्ष मरे हुये दो दिन हुये थे।

वाहय परीक्षण

अच्छे गठन का शरीर था। मृत्यु के बादः की अकड़न समाप्त हो चुकी थी। सड़न व कीडे मौजूद थे। आँख बन्द थी, मुँह खुला था जीम बाहर निकली हुई थी।

मृत्यू के पूर्व आई चोटे

(1) आग्नेय आस्त्र के प्रवेश का घाव 1-1/2 C.M. X 1-1/2 CM. चेहरे में दाहिने ओर दाहिने कान के बीच से 1C.M. अन्दर की तरफ direction from सामने से पीछ।

(2) गोली के निकलने का घाव 11C.M. x 4 C.M. सिर में पीछे की तरफ मस्तिष्क घाव से बाहर निकला था।

(3) खराश 3 C.M. x 2C.M. कानों के बाई ओर। बाई आँख की भी से 2 C.M. ऊपर।

(4) आग्नेय आस्त्र के प्रदेश का घाव पेट के नीचे भाग में तथा दाहिनी तरफ 8 C.M. नीचे गुददी से तथा बाहर की ओर। 1-2-1/2 C.M x 2 C.M. सामने से पीठ तथा ऊपर की ओर।

(5) आग्नेय आरत्र के निकास का घाव 1-1/2 C.M. x 1 C.M. पेट की दाहिनी तरफ तथा नीचे की ओर 5 C.M. फीवर बोन के ऊपर।

(6) खराश 1 C.M. x 1 CM पेट के बाई तरफ कूल्हे की हड्डी से 17 CM ऊपर।

(7) आग्नेय आस्त्र के प्रवेश का घाव 1-1/2 CM. x 1 C.M. पीठ में दाहिनी तरफ दाहिने पखोरे के जोड़ से 16. C.M. नीचे नीचे से आगे तथा नींचे की ओर।

(8) आग्नेय आस्त्र के प्रवेश का घाव 1 C.M. x 1 C.M. पीठ में दाहिनी तरफ तथा बीच में 9 C.M. रीड की हड्डी से दूरस दिशा पीछे से आगे तथा नीचे की ओर।

आन्तरिक परीक्षा।

खोपड़ी की दाहिनी तरफ की पैराइटल हड्डी तथा **occipital** हड्डी टूटी हुई थी।

झिल्लियों **Lacerated & Congested**

मस्तिष्क **Lacerated & Congested**

मस्तिष्क का **Base Fractured** था। उरस मित्तियों कटी हुई थी **8, 9, 10** पसलिया दाहिनी तरफ की टूट्टी हुयी थी। इसी प्रकार **11,12** बाये तरफ की पसली टूटी हुई थी।

Plura **Punctured** था।

पेट मित्तियाँ **Punctured Peritonium** फटी हुई थी कूप में **1-1/2** लीटर खून था।

दाँत ०/० थे।

आमाशय खाली था।

छोटी तथा बड़ी ऑत में मल तथा गैस मौजूद थी।

लीवर फटा हुआ था तथा कन्जेस्टेड था। दाहिनी गुर्दा कटा हुआ था। मूत्राशय खाली था।

मेरी राय में मृत्यु का कारण रक्तश्राव तथा सदमें के कारण था जो कि मृत्यु के पूर्व आई हुई चोटो के कारण था।

शरीर से दो धातु के छर्रे प्राप्त हुए थे जो कि दाहिने उरस की कूप से पाये गये थे।

एक सील्ड लिफाफा जिसमें एक कार्बन कापी पोस्ट मार्टम रिपोर्ट 61/83 दिनांक 6.7.83 तथा एक सील्ड बन्डल जिसमें एक पंचा एक बच्ची एक जनेऊ एस०आई० की के साथ में आये हुये सिपाहियों द्वारा भेज दिया गया था। एक सील्ड पैकेटः जिसमें दो धातू के छरें एस०आई० कर्वी के साथ आये सिपाहियों से भेज दिया गया था। एक सील्ड लिफाफा जिसमें कि एक मूल तथा एक कार्बन कापी नं0 61/83 दिनांक 67:83 तथा 9 संलग्नक के साथ अधीक्षक जिला अस्पताल बाँदा को भेज दिया था।

दोनों शव विच्छेदन आख्या वरवक्ता मुआइना तैयार की थी जो मेरे लेख व हस्ताक्षर में है इन पर कमश प्रदर्श क-2 कक-3 डाला गया।

केशव उर्फ बाबा के शव के साथ आये हुए 9 संलग्नक वा इसी प्रकार बाबू लाल के शव के साथ संलग्नक कागजात प्राप्त हुये थे। सभी का मैने अवलोकन किया था नम्बर डाले थे हस्ताक्षर बनाकर अस्पताल की मोहर लगाई थीं।

केशव के शव से सम्बन्धित संलग्नक पचायतनामा दो वर्क प्रदर्श क4 फार्म नं033 प्रदर्श क-5 नकल चिक एफ०आई०आर० प्रदर्श क-6 वालान नाश प्रदर्श क-7 नक्शा नाश प्रदर्श क-8 चिठठी एपीओ प्रदर्श क-9 चिठठी दो किता एमओं कीं प्रदर्श क-10, क-11 तथा बाबू लाल के शव के सलग्नक पचायतनामा दो वर्क प्रदर्श क 12 फार्म न० 33 प्रदर्श के 13 चालान नाश प्रदर्श क-15, फोटो नाश पदर्श क-16 दो किता चिठठी एमओ आई सी कर्वी प्रदर्श क-17, क-18 चिठ्ठी एपीओ प्रदर्श क-19 है। दोनों मृतकों की मृत्यु दिनांक 4.7.83 को 5-1/2 शाम होना सम्भव हैं और दोनों मृतकों की चोटे तत्काल मृत्यु के लिये परियाप्त थी।

24. We see no reason to disbelieve the testimony of PW-2 Dr. P.N. Dwivedi. The oral evidence of Dr. P.N. Dwivedi fully supports the prosecution version.

25. The medical evidence of Dr. P.N. Dwivedi, who conducted autopsy, found that the death of Keshav and Baboo Lal had taken place due to ante-mortem injuries caused by gun shot. The pellets were also found in the corpses of both the deceased persons while conducting their postmortem.

26. PW-4 Inspector S.K. Malik, the Investigating Officer of the case has also supported the prosecution version and has proved the prosecution papers.

27. No cogent reason could be pointed out by the learned counsel for the accused-appellant for false implication of the accused-appellant Daddul @ Dadulli under the influence of the local police. It is most improbable that in such type of ghastly crimes where brother and father of the informant have been murdered, any would falsely implicate an innocent person and spare the real culprits.

28. The manner, mode and method of crime reveals that Raja (now dead) who was also mentioned as co-accused in the charge sheet, had a criminal history of 25 heinous criminal cases registered against him whereas the present accused-appellant Daddul @ Dadulli has criminal

history of two criminal cases of heinous crime including the present one. To unleash the reign of terror in the local area, so that nobody could muster courage to raise his head against the accused persons who are mentioned in the written F.I.R. (Exhibit Ka-1), this barbaric crime has been committed in a daredevil fashion.

29. It is pertinent to mention here that the charge sheet was filed against Raja @ Raja Lal and Daddul @ Dadulli as absconder(s) in this criminal case.

30 The main motive behind this diabolical (wicked) crime was to avenge the insult caused by the deceased Keshav to co-accused Raja (now dead). The main bone of the contention was construction of road by one person mentioned as 'Shukla' in the F.I.R., who was prohibited to conduct the construction of road by the co-accused Raja. The deceased Keshav helped 'Shukla' for construction of that road. Raja and other co-accused took it as a challenge to defy their authority. This was the paramount cause to take revenge by the accused persons.

31. This is a case of direct evidence where the accused persons were named in the F.I.R.

32. We are of the view, the mere fact that PW-1 Brij Mohan and his cousin brother PW-3 Surajbhan are the members of the same family-tree and cousin brothers, due to this, they are interested witnesses being relatives; is not a reason to discard their evidence, if there evidence is trustworthy. Mere mechanical rejection of their evidence would invariably lead to the failure of justice.

33. Sri Rajeev Gupta, learned A.G.A. has placed reliance on a decision in the case of ***Ramesh Harijan Vs. State of Uttar Pradesh, (2012) 5 Supreme Court Cases 777*** in support of his arguments. In the above cited case, it has been held that:-

"C. Criminal Trial - Appreciation of Evidence - Contradictions, inconsistencies, exaggerations or embellishments - Duty of courts - Reiterated - Held, it is duty of court to unravel the truth under all circumstances - Undue importance not to be given to minor discrepancies which do not shake basic version of prosecution case - Entire evidence must be evaluated by excluding exaggerated version as witnesses keep adding embellishments to their testimony - If a witness is otherwise trustworthy, then his evidence should not be disbelieved - If major portion is found to be deficient and residue is sufficient to establish guilt of accused, then courts must separate grain from chaff - It has to be appraised in each case as to what extent evidence is admissible - If courts consider some portion of evidence as insufficient or unworthy, it does not mean as a matter of law that entire evidence must be disregarded in all respects"

"E. Criminal Trial - Appreciation of Evidence - Credibility of witness - Maxim falsus in uno, falsus in omnibus - Inapplicability and effect of, if applied - Principles reiterated - Held, maxim falsus in uno, falsus in omnibus has no application in India and a witness cannot be branded as a liar - Falsity of witness or material particular at

some portion would not ruin testimony from beginning to end - If that maxim is applied then in all the cases it is to be feared that administration of criminal justice would come to a dead stop"

"G. Criminal Trial - Proof - Proof beyond reasonable doubt - Meaning of, and duty of court while applying principle of reasonable doubt - Reiterated - Held, reasonable doubt is not an imaginary trivial or merely possible doubt - It is a fair doubt based upon reason and common sense - Doctrine of benefit of doubt particularly in every case must not nurture fanciful doubts or lingering suspicion, thus destroying social defence- Courts must give paramount importance to ensure that miscarriage of justice is avoided.

34. In the case of ***Kathi Bharat Vajsur and another Vs. State of Gujarat, AIR 2012 SC 2163,*** it was held by Hon,ble Supreme Court that when medical evidence was in consonance with principal part of oral/ocular evidence thereby supporting prosecution story. Then, there was no question of ruling out ocular evidence merely on ground that there were some inconsistencies or contradictions in oral evidence - When an eyewitness behaved in a manner that perhaps would be unusual, it was not for prosecution or Court to go into question as to why he reacted in such a manner - There was no fixed pattern of reaction of an eyewitness to a crime - When faced with what was termed as 'an unusual reaction' of an eyewitness, Court must only examine whether prosecution story was in anyway affected by such reaction - If answer was in negative, then such reaction was irrelevant - Unusual behaviour of injured eyewitness, would not in anyway, aid Appellants to punch a hole on to prosecution story.

35. No other points have been raised before us by the learned counsel for the accused-appellant.

36. In the light of the above discussions, we find that this criminal appeal is liable to be dismissed on merits.

ORDER

(i) This criminal appeal is dismissed on merits.

(ii) The accused-appellant Daddul @ Dadulli was enlarged on bail, his bail and bail bonds are cancelled and sureties are discharged.

(iii) The accused-appellant Daddul @ Dadulli shall be taken into custody to serve out the sentences awarded to him.

38. Let the entire record of this case be sent back forthwith to the Court of the Sessions Judge, Civil and Sessions Court, District Chitrakoot for necessary compliance.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 2868 Of 2015

Anuj @ Prasoon Shukla ...Revisionist
Versus
State Of U.P. & Anr. ....Opposite Parties

Counsel for the Revisionist:
Jitendra Kumar Yadav, Radhey Shyam Shukla

Counsel for the Opposite Parties:
Govt. Advocate, Sushil Pandey

Criminal law–Criminal Revision Juvenile Justice (Care and Protection of Children) Act — Section 12 — Bail — Juvenile in conflict with law — Reasonable grounds — Association with any known criminal — Moral, physical or psychological danger — Person's release would defeat the ends of justice — District Probation Officer report — Family feud and enmity — Father, uncles and grandfather accused persons — No control of the family members — Wicked crime — Serious nature — Ghastly crimes — Criminal tendencies — Larger interest of the society — Exception to the rule of bail — Revision under Section 397 Cr.P.C. — Findings of fact — Illegality, perversity or infirmity.

This criminal revision has been preferred against the impugned judgment and order dated 03.07.2015 passed by the learned Sessions Judge, Pilibhit in Criminal Appeal No. 40 of 2015-Anuj @ Prasoon Shukla through his guardian and natural mother Seema Shukla @ Reena Shukla Vs. State of U.P., under Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act), Police Station Sungarhi, District Pilibhit, by which the criminal appeal filed by the revisionist has been dismissed, and also against the order dated 29.05.2015 passed by the learned Juvenile Justice Board, Pilibhit in Case Crime No. 529 of 2015-State Vs. Anuj @ Prasoon Shukla, under Sections 147, 148, 149, 302, 452, 323, 504, 506 I.P.C., Police Station Sungarhi, District Pilibhit, by which the bail application of the "juvenile in conflict with law" presented through his guardian and natural mother Seema Shukla @ Reena Shukla has been rejected.(Para-2)

In short, as per the F.I.R. version, the informant Neelu Rupali Pandey on 06.03.2015 at about 12.20 P.M. presented a written application before the Officer Incharge Police Station Sungarhi, Pilibhit that on 06.03.2015 at about 11.45 A.M. in the noon when she along with her father Nirmal Mishra, mother Santosh Mishra and brother Mudit Mishra were present in their home, at that time, suddenly Devendra Shukla @ Mintu, Rahul Shukla @ Rinku both sons of Mahesh Shukla wielding knives in their hands, Triloki Nath Shukla @ Tillu, son of Mahesh Shukla wielding 'Gupti' in his hand, Anuj Shukla, son of Devendra Shukla, Mahesh Shukla son of Prabhu Dayal Shukla wielding knives in their hands, all resident of Nai Basti near Chhatari Chauraha, Police Station Pilibhit entered into the house of the informant and all with common intention to kill the father of the informant attacked him. Mahesh Shukla abused and said that he had lodged the report against his daughter

so he may not be spared. All the accused persons badly injured the father of the informant by causing injuries with knives and 'Gupti'. When the informant and her brother Mudit Mishra and mother tried to save her father, they have also beaten them. All the accused persons after giving them threat to their lives went away. Just before the incident, Mahesh Shukla had given threat to kill the father of the informant on telephone.(Para 3)

Held:(Paras- 17-20)

1. In revision under Section 397 Cr.P.C., the revisional court cannot analyze and interfere in the findings of fact of the lower courts and appellate jurisdiction is not available to the revisional court to interfere in the findings of fact recorded by the courts below.
2. In view of the above discussions, the impugned orders show that the courts below have considered the correctness, legality and propriety of the matter and did not act with any irregularity at the time of giving findings of fact relating to revisionist.
3. There is no illegality, perversity or infirmity in the impugned orders. The revision lacks merits and is liable to be dismissed.
4. The revision is, accordingly, **dismissed**.

Case Law discussed:

1.Monu @ Moni @ Rahul @ Rohit Vs. State of U.P., 2011 (61) ACR 2582 — (Para-8)
2.Mohit Vs. State of U.P. and another, 2013 (83) ALLCC 242 — (Para-8)
3.Virendra Vs. State of U.P., 2015 (1) ACR 629 — (Para-8, 15)
4.Shabbir Vs. State of U.P. and others, 2015 (88) ALLCC 161 — (Para-8)
5.Sonu Tomar Vs. State of U.P., 2015 (2) ACR 2284 — (Para-8)
6.Amit Yadav Vs. State of U.P. and others, 2016 (93) ALLCC 571 — (Para-8)
7.Om Prakash Vs. State of Rajasthan and another, (2012) 5 SCC 201 — (Para-9)
8.Essa @ Anjum Abdul Razak Memon (A-3) and others Vs. The State of Maharashtra, JT 2013 (6) SC 1 — (Para-16)

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Radhey Shyam Shukla, learned counsel for the revisionist, Sri Sushil Pandey, learned counsel for the opposite party no. 2 and learned A.G.A. for the opposite party no. 1.

2. This criminal revision has been preferred against the impugned judgment and order dated 03.07.2015 passed by the learned Sessions Judge, Pilibhit in Criminal Appeal No. 40 of 2015-Anuj @ Prasoon Shukla through his guardian and natural mother Seema Shukla @ Reena Shukla Vs. State of U.P., under Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act), Police Station Sungarhi, District Pilibhit, by which the criminal appeal filed by the revisionist has been dismissed, and also against the order dated 29.05.2015 passed by the learned Juvenile Justice Board, Pilibhit in Case Crime No. 529 of 2015-State Vs. Anuj @ Prasoon Shukla, under Sections 147, 148, 149, 302, 452, 323, 504, 506 I.P.C., Police Station Sungarhi, District Pilibhit, by which the bail application of the "juvenile in conflict with law" presented through his guardian and natural mother Seema Shukla @ Reena Shukla has been rejected.

3. In short, as per the F.I.R. version, the informant Neelu Rupali Pandey on 06.03.2015 at about 12.20 P.M. presented a written application before the Officer Incharge Police Station Sungarhi, Pilibhit that on 06.03.2015 at about 11.45 A.M. in the noon when she along with her father Nirmal Mishra, mother Santosh Mishra and brother Mudit Mishra were present in their home, at that time, suddenly Devendra Shukla @ Mintu, Rahul Shukla @ Rinku both sons of Mahesh Shukla wielding knives in their hands, Triloki Nath Shukla @ Tillu, son of Mahesh Shukla wielding 'Gupti' in his hand, Anuj Shukla, son of Devendra Shukla, Mahesh Shukla son of Prabhu Dayal Shukla wielding knives in their hands, all resident of Nai Basti near Chhatari Chauraha, Police Station Pilibhit entered into the house of the informant and all with common intention to kill the father of the informant attacked him. Mahesh Shukla abused and said that he had lodged the report against his daughter so he may not be spared. All the accused persons badly injured the father of the informant by causing injuries with knives and 'Gupti'. When the informant and her brother Mudit Mishra and mother tried to save her father, they have also beaten them. All the accused persons after giving them threat to their lives went away. Just before the incident, Mahesh Shukla had given threat to kill the father of the informant on telephone.

4. This F.I.R. was promptly lodged on 06.03.2015 at 12.20 P.M.

5. In the oral evidence Smt. Neelu Rupali Pandey (informant), daughter of late Nirmal Mishra, resident of Mandi Wali Gali Mohalla Ballabh Nagar, Police Station Sungarhi, Pilibhit deposed that seven years ago, she was happily married to Prakash Pandey in Bareilly. After some time, her husband developed inclination towards her Jethani Shilpi wife of Deepak Pandey to which she used to oppose. Since last two months, he had come to her parents' place. On 18.2.2015 her father-in-law, mother-inlaw, husband and Jethani Shilpi came to her parents' house and abused and intimidated her for which she has lodged a case in Case Crime No. 426 of 2015, under Sections 498A, 504, 506 I.P.C. and ¾ D.P. Act against her father-in-law Sudhir, mother-in-law Shakuntala, husband Prakash Pandey and Jethani Shilpi on 22.2.2015. Since the parental home of Shilpi situates at Chhatari Chauraha Pilibhit so family members of her Jethani Shilpi did not relish that incident. Thereafter this witness reiterated the F.I.R. version in her oral testimony and deposed that her father fell on the ground. She accompanied him in the injured condition to the police station for lodging the F.I.R. and thereafter from the police station along with one police constable she reached the hospital where her father died during treatment. It has also been mentioned that while deposing before the Juvenile Justice Board, the witness/informant Smt. Neelu Rupali Pandey started sobbing and weeping.

6. It is submitted by learned counsel for the revisionist that the impugned order dated 03.07.2015 passed by the learned Sessions Judge, Pilibhit and order dated 29.5.2015 passed by the learned Juvenile Justice Board, Pilibhit are illegal, unjust and wholly without jurisdiction. It is further submitted that the learned Magistrate has passed the impugned order in a routine and mechanical manner. The finding of the courts below that the revisionist would come in contact with known or unknown criminals is wholly illegal and against the material available on record. It is also submitted that the report submitted by the District Probation Officer, Pilibhit is cryptic and vague. The courts below have rejected the bail prayer of the revisionist solely on the basis of the

report of the District Probation Officer, Pilibhit that the father, uncles and grandfather of the revisionist, who are accused in Case Crime No. 529 of 2015, are in jail since 11.3.2015 and it appears that there is no control of his mother on him. No specific role has been assigned to the revisionist. It is next submitted that the impugned orders of the courts below are wholly illegal, unreasoned and based on surmises and conjectures and as such, the same are not sustainable in the eyes of law and liable to be set aside.

7. I have gone through the Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The relevant portion of Section 12 of the is quoted verbatim as follows:-

*"**12. Bail to a person who is apparently a child alleged to be in conflict with law-** (1) When any person, who is apparently a child and is alleged to have committed a bailable or nonbailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision."

8. In the context, I have also gone through the following judgments of this Court as well as of the Apex Court.

1. Monu @ Moni @ Rahul @ Rohit Vs. State of U.P., 2011 (61) ACR 2582.
2. Mohit Vs. State of U.P. and another, 2013 (83) ALLCC, 242.
3. Virendra Vs. State of U.P., 2015 (1) ACR 629.
4. Shabbir Vs. State of U.P. and others, 2015 (88) ALLCC 161.
5. Sonu Tomar Vs. State of U.P., 2015 (2) ACR 2284.
6. Amit Yadav Vs. State of U.P. and others, 2016 (93) ALLCC 571.

9. The Apex Court in the case of ***Om Prakash Vs. State of Rajasthan and another, (2012) 5 SCC 201*** has cautioned the Courts to be more sensitive in dealing with juvenile in cases of serious nature like sexual molestation, rape, gang-rape murder etc. The relevant extract of the said judgment in paragraphs 3 and 23 are being reproduced below in reference:-

"***3.** Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other*

grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

23. *….Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."*

10. In the order dated 3.7.2015 passed by the learned Sessions Judge, Pilibhit, it has been vividly mentioned that according to report of the District Probation Officer, the juvenile in conflict with law is a student of class XII.

11. Mixed reaction has been expressed about the family of the revisionist. It has been mentioned in that report that the alleged incident took place due to family feud and enmity and in the alleged incident, father, uncles and grandfather all are accused persons.

12. The learned Sessions Judge, Pilibhit has arrived at the conclusion that there was no control of the family members over the revisionist. Due to this, he along with his family members had committed this wicked crime and if released on bail; there are sure chances which would likely to bring the revisionist into association with known criminal or expose him to moral, physical or psychological danger.

13. The rider of the 'person's release would defeat the ends of justice' requires attention.

14. The 'juvenile in conflict with law' does not entitle him to be released on bail solely on the ground of his juvenility. The juvenile offenders who have criminal tendencies and have inclination and attraction to commit crime "at the drop of a hat", should be segregated and should not be integrated to set the shield of this benevolent legislation. It is of paramount importance to upkeep and safeguard the larger interest of the society. Due to this, exception to the rule of bail to a juvenile has also been included. A too liberal interpretation in the matters related to ghastly crimes would definitely result in defeating the ends of justice.

15. The relevant extract of the judgment in ***Virendra Vs. State of U.P., 2015 (1) ACR 629 para 23*** is quoted below:-

*"**23**. A citizen's claim to equality before the law is a claim of justice. Justice has been termed as the highest virtue. It has also been equated with fairness. Fairness connotes fairness to all i.e. equal treatment to all. Sense of injustice is a powerful human emotion. It is strongest when a person's own interests are harmed, but it also aroused in civilized people when they witness wrongs done to others. Ultimate object of every legal system is to secure justice which is at the centre of moral and social philosophy. The instinct for justice leads us to believe that right, and not might, is the true basis of society. The principles of justice that define duties and rights should be neutral with respect to compacting conception of good life. Defeat of ends of justice is bound to result in injustice which produces conflict within the individual and sets him at variance with himself and with all who are just. Injustice is inseparable from virtue which consist of ethics and justice in universal sense. Injustice in the particular sense is the injustice that causes harm to others. Virtue based approach connects justice to reflection about good life. This approach ensures that justice means giving people what they morally deserveallocating goods to reward and promote virtue. It is thus apparent that the concept of justice lies at the heart of moral philosophy where righteousness, fairness and truth are the basic values and it should include people from all walks of life. Therefore, it is safe to conclude that wellbeing of the community takes precedence over the liberty and preventing injustice would always be a pursuit of justice. Leaving society to live with persons of perverted nature would be an affront to the dignity of human beings and tends to promote anarchy and unrest in society which is sure to defeat the ends of justice."*

16. It would not be out of context to cite the paragraphs 376 and 377 of the extract of the judgment of the Apex Court in the case of ***Essa @ Anjum Abdul Razak Memon (A-3) and others Vs. The State of Maharashtra, through STF, CBI Mumbai and others, JT 2013 (6) SC 1,*** which are quoted below:

*"**376.** While dealing with such an issue, the court must not lose sight of the fact that meaning of "ends of justice" essentially refers to justice to all the parties. This phrase refers to the best interest of the public within the four corners of the statute. In fact, it means preservation of proper balance between the Constitutional/Statutory rights of an individual and rights of the people at large to have the law enforced. The "ends of justice" does not mean vague and indeterminate notions of justice, but justice according to the law of the land. (vide: **State Bank of Patiala and others v. S.K. Sharma MANU/SC/0438/1996: AIR 1996 SC 1669;** and **Mahadev Govind Gharge and others v. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka** MANU/SC/0597/2011: (2011) 6 SCC 321).*

***377.** Thus, the law has to be interpreted in such a manner that it develops coherently in accordance with the principles, so as to serve, even-handedly, the ends of justice."*

17. In revision under Section 397 Cr.P.C., the revisional court cannot analyze and interfere in the findings of fact of the lower courts and appellate jurisdiction is not available to the revisional court to interfere in the findings of fact recorded by the courts below.

18. In view of the above discussions, the impugned orders show that the courts below have considered the correctness, legality and propriety of the matter and did not act with any irregularity at the time of giving findings of fact relating to revisionist.

19. There is no illegality, perversity or infirmity in the impugned orders. The revision lacks merits and is liable to be dismissed.

20. The revision is, accordingly, **dismissed.**

21. Interim order, if any, is vacated.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2016

BEFORE

THE HON'BLE PRATYUSH KUMAR, J.

Criminal Appeal No.- 3025 Of 2015

Badshah @ Subhash **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
T.K. Mishra

Counsel for the Respondent:
Govt. Advocate

The instant appeal filed on behalf of accused-appellant under section 374(2) Cr.P.C., is directed against judgment and orders dated 4th April, 2012/10th April, 2012, whereby he was convicted under sections 363, 366 & 376 IPC and sentenced to undergo rigorous imprisonment of five years and to pay fine of Rs.5,000/-, rigorous imprisonment of seven years and to pay fine of Rs.7,000/-, rigorous imprisonment of ten years and to pay fine of Rs.10,000/-, respectively. On the above counts, in default of payment of fine, he was further directed to undergo six months' simple imprisonment, nine months simple imprisonment and one year's simple imprisonment. All the sentences were directed to run concurrently.

The appeal is dismissed. Conviction and sentence awarded by the impugned judgment and order are hereby affirmed. Since the appellant is in jail, he is directed to undergo the sentence awarded by the learned trial Judge. Period already undergone by him in the present case, shall be adjusted in accordance with provision contained in Section 428 Cr.P.C.

Held: Para-

Case Law discussed:
Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222];

Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659],
Ravindra Singh vs. State of U.P., 2016(93) ACC 690,
Krishna Kumar Malik vs. State of Haryana, 2011 (74) ACC 611,
Ramdas and others vs. State of Maharashtra, 2007 (57) ACC 471,
State of U.P. vs. Chhotey Lal, 2011 (73) ACC 429,
Maharasthra v. Chandraprakash Kewalchand Jain,
Punjab v. Gurmit Singh & Ors.,
Vijay @ Chinee v. State of Madhya Pradesh,

(Delivered by Hon'ble Pratyush Kumar, J.)

1. The instant appeal filed on behalf of accused-appellant under section 374(2) Cr.P.C., is directed against judgment and orders dated 4th April, 2012/10th April, 2012, whereby he was convicted under sections 363, 366 & 376 IPC and sentenced to undergo rigorous imprisonment of five years and to pay fine of Rs.5,000/-, rigorous imprisonment of seven years and to pay fine of Rs.7,000/-, rigorous imprisonment of ten years and to pay fine of Rs.10,000/-, respectively. On the above counts, in default of payment of fine, he was further directed to undergo six months' simple imprisonment, nine months simple imprisonment and one year's simple imprisonment. All the sentences were directed to run concurrently.

2. Heard Sri Awadh Bihari Pandey, learned counsel for the appellant, learned AGA for the State-respondent and perused the record.

3. The facts giving rise to the present appeal may be summarized as under:-

4. That on 2nd November, 2010, at 2.30 p.m. Pratap gave a written report at Police Station Transport Nagar, Meerut, stating therein that his daughter Anjali was aged about 13-14 years. On that day at about 8.30 a.m. she was enticed away by Badshah @ Subhash and taken to Military Farm where he committed rape on her.

5. At this Check FIR was scribed, Case Crime No.748 of 2010 was registered under section 376 IPC and investigation was entrusted to S.I. Ashok Kumar Sharma, who immediately began the investigation, examined the first informant, took into his possession clothes worn by the appellant. He also recorded statement of the victim, inspected the spot, got the victim medically examined and also took into possession clothes worn by the victim. After concluding the investigation, he submitted the chargesheet against the present appellant.

6. The appellant stood for trial before the Court of Session, where he was charged under section 376 IPC which he denied. Subsequently the appellant was further charged under sections 363 and 366 IPC to which he also denied. On these charges the appellant was tried, convicted and sentenced, as above.

7. On behalf of the appellant, in support of the grounds taken in the appeal, it has been submitted that the impugned judgment is illegal, based on surmises and conjectures. FIR was lodged with delay. Victim is aged about 16 years. After variation of two years, she should be treated major and the learned trial Judge has not appreciated her evidence in proper perspective and erroneously held the appellant guilty. The medical report does not support the factum of rape. There are contradictions in the statement of the victim, her statement under section 164 Cr.P.C. was not recorded. For these reasons, impugned judgment and orders are illegal and deserve to be set aside.

8. On behalf of the State-respondent, these arguments have been repelled. It has been submitted that findings recorded by the learned trial Judge are well substantiated from the record. There is no delay in lodging the F.I.R. The impugned judgment does not suffer from any infirmity and appeal is without merit.

9. In reference to my obligation as an appellate court hearing appeal against conviction, I would like to refresh my mind by recalling the observation made by the Apex Court in the case **of Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Crl) 222]**. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

10. In the case of **Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659]**, the Apex Court in para-5 of the report has given caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a

different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

11. Before examining the merits of the respective arguments, it is the duty of the appellate court to re-examine and re-assess the evidence adduced by the parties with the help of arguments advanced before me.

12. On behalf of the prosecution, in support of the charges, in the documentary evidence besides other papers, written report, Check FIR, recovery memo, copy of the report of the general diary, medical examination report, pathological report, supplementary report, site plan and chargesheet were filed. In the oral evidence, seven witnesses were examined. Brief summary of their testimonies is as under:-

13. Pratap P.W.-1, is the first informant and the father of the victim. He has reiterated the facts mentioned in the written report and further stated that after the occurrence appellant was caught by the passersby and he was taken to the police station. He has proved written report Exhibit Ka-2.

14. Victim P.W.-2 has stated that she does the work of house cleaning, 8-9 months ago at 8.30 a.m. she was going for her work. On her way she met the appellant, who asked her to accompany him. When the victim denied, he took her forcibly at the military farm adjacent to the railway line where he had forcible sexual intercourse with her. When he tried to rape her, she raised hue and cry, the appellant had closed her mouth. When appellant was taking her back after rape, several persons met them and caught the appellant. In the meantime, her father came and appellant was taken to the police station where FIR was lodged by her father.

15. Rakesh Sharma, P.W.-3, is the scribe of written report. He has proved arrest memo Exhibit Ka-3.

16. Dr. Anju Jodha, P.W.-4, is the doctor, who on 3rd November, 2010 at 12.40 p.m. medically examined the victim. According to her, her hymen was torned and healed, vaginal smear

was taken. She has proved medical examination report Exhibit Ka-4, pathology report Exhibit Ka-5 and supplementary report Exhibit Ka-6. According to her, no spermatozoa was found in the vaginal smear. According to her, no opinion about rape can be given. In the supplementary report, she has opined victim to be aged about 16 years.

17. Dr. Deepak Pant, P.W.5 is the radiologist. He has opined the age of the victim to be about 16 years.

18. Constable Rakesh Kumar, P.W.-6 is the scribe. He has proved Check FIR Exhibit Ka-8 and copy of the report of the general diary Exhibit Ka-9.

19. S.I. Ashok Kumar Sharma, P.W.-7 is the investigating officer. He gave details of the steps taken in the course of investigation. He has proved site plan Exhibit Ka-10, supurdginama Exhibit Ka-11, memo of taking clothes of victim Exhibit Ka-12 and chargesheet Exhibit Ka-13. He has identified the clothes material Exhibits 1 and 2.

20. Statement of the appellant was recorded under section 313 Cr.P.C., whereby he has denied the facts stated by the prosecution witnesses. According to him, wrong chargesheet had been submitted and he was falsely implicated. In the defence, no evidence was given.

21. On behalf of the appellant, the correctness of the impugned judgment has been assailed on various grounds. The first and foremost ground is that the learned trial Judge has not appreciated the evidence in proper perspective and erroneously believed the statement of the victim P.W.-2. This ground involves re-examination and re-assessment of the evidence not only of the victim P.W.-2 but all the evidence available on record. Since the star witness of the prosecution is victim P.W.-2, I have gone through her testimony in detail with meticulous care.

22. On behalf of the appellant, several cases have been referred to show that un-corroborated testimony of victim alone would not be sufficient to sustain the conviction of the appellant. They are as under:-

1. ***Ravindra Singh vs. State of U.P., 2016(93) ACC 690***- Reliance has been placed on Para 16 of the judgment wherein the Court has observed conduct of the victim and further discussed the circumstances wherein on the face value testimony of the victim should not be accepted.

2. ***Krishna Kumar Malik vs. State of Haryana, 2011 (74) ACC 611***- Reliance has been placed on Paras 15 to 23 of the report. In Para 23 of the report, the Hon'ble Apex Court after noticing the facts, that where several rooms were available, two persons committed rape on the victim in a room and four other remained sitting in that very room, names of the accused persons were not known to the victim, link evidence was not adduced, no injury was found on the private parts of the victim, her conduct in not raising alarm for help and her inability to identify the Kothi

where she was allegedly raped concluded that on the uncorroborated testimony of the victim, accused cannot be held guilty of the offence of rape and kidnapping.

3. ***Ramdas and others vs. State of Maharashtra, 2007 (57) ACC 471***- In Para 23 of the report, the Hon'ble Apex Court has observed that no doubt in a case of rape, conviction can be made solely on the testimony of the prosecutrix, provided Court is convinced about the truthfulness of her testimony and no circumstance exist to cast a shadow of doubt over her truthfulness.

4. ***State of U.P. vs. Chhotey Lal, 2011 (73) ACC 429***- The Hon'ble Apex Court after noticing various cases decided by it, has quoted with approval the observations made therein. These observations read as under:-

"19. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. ***In State of Maharasthra v. Chandraprakash Kewalchand Jain***, this Court at page 559 of the Report said:

"A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the

prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

20. In ***State of Punjab v. Gurmit Singh & Ors***., this Court made the following weighty observations at pages 394-396 and page 403:

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.... The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.... Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

21. In ***Vijay @ Chinee v. State of Madhya Pradesh***, decided recently, this Court referred to the above two decisions of this Court in Chandraprakash Kewalchand Jain5 and Gurmit Singh6 and also few other decisions and observed as follows :

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

22. The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and,

therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the leveling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge. This Court has repeatedly laid down the guidelines as to how the evidence of the prosecutrix in the crime of rape should be evaluated by the court. The observations made in the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat8 deserve special mention as, in our view, these must be kept in mind invariably while dealing with a rape case. This Court observed as follows :

"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical....." This Court went on to observe at page 225:

".....Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society

including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

23. The case law referred on behalf of the appellant reflects the correct legal position. In the case of Ravindra Singh (supra) in Para 11. This Court has noticed the legal position.

24. In Ramdas (supra) in Para 23 of the report, the Hon'ble Apex Court has stated the normal rule that the accused in criminal case can be convicted on the basis of sole testimony of the victim.

25. In view of principles laid down and deliberated up in all the cases referred above, it may be safely stated that if the evidence of the victim is reliable and trustworthy, without any suspicious circumstance, so as to cast a doubt on her truthfulness, a accused can be convicted on the sole testimony of the victim. Her testimony does not require corroboration from other evidence but as a rule of prudence, Court should subject her testimony with close scrutiny to find out whether or not her testimony suffers from any infirmity or inconsistency which may reflect against its trustworthiness.

26. Keeping in mind this principle, I propose to re-examine and re-appreciate the testimony of victim P.W.-2.

27. As soon as Court begins to examine the testimony of the victim, it is also required to determine her age for the reasons whether she was competent to be a consenting party of the sexual intercourse.

28. Pratap, P.W.-1, father of the victim, has stated that at that time victim was aged about 13-14 years. In the medical evidence, she was found to be aged about 16 years. On the basis of this opinion, the learned counsel for the appellant has submitted that addition of two years in the age of the victim should be made by the Court to support his argument. He has referred the case of

Chhotey Lal (supra). In Para 11 of the report, rather the Hon'ble Apex Court has disapproved addition of two years in the age opined by the doctor.

29. In view of observation made by the Hon'ble Apex Court, in Para 11 of the said case, I hold the age of the victim was 16 years. Thus, on the date of occurrence, victim was minor. She is an illiterate girl doing menial job. On behalf of the appellant, her testimony has been impeached on two grounds.

30. First ground is that in the examination-in-chief, she says that after raping her, appellant was bringing her back. They were intercepted by many persons who caught the appellant and beat him at the same time. Her father came there and took the appellant to the police station and lodged the First Information Report. In her cross examination, according to the learned counsel, she says that after the rape when she became conscious, she was being brought back by the appellant, near railway line her employer Pappu met them who brought her to the house and after two days, FIR was lodged.

31. On this inconsistent statement, it has been submitted that the victim was not raped. For this reason, she could not give consistent account of her coming back to the house. Indicated inconsistency between her two statements relate to events which are of post rape period. A young girl who was raped must be in a state of trauma, her sense of perception and memory would be at a standstill. Inability to narrate the post rape events does not discredit her testimony about the rape stated by the victim. For these reasons, I do not think these inconsistencies would diminish probative force of her statement.

32. The second ground for impeaching her testimony is the examination-in-chief, wherein she says she was taken to the side of railway line in the military farm and she was raped. In the cross examination, she has stated that she was raped in jungle near tubewell. On the strength of these two statements on behalf of the appellant, it has been submitted that had the victim being raped, she would not have fumbled about the place of occurrence.

33. I do not think the victim has changed the place of occurrence. Victim is an illiterate girl and agricultural fields are also referred by such persons as jungle. She does not say that she was raped inside the tubewell. Her assertion is that she was raped in the military farm. From perusal of the site plan Exhibit Ka-10, her description of the place of occurrence appears to be consistent. Military farm is adjacent to the railway line on the western side. She was raped in the field where crop of Bhindi was grown. When the appellant and the victim were intercepted by the persons searching for her, the appellant was caught near the bridge within the military farm. The victim has not been asked during the cross examination that in the military farm that there is no tubewell. Even this suggestion was not given to. For this reasons, I find the indicated inconsistency to be groundless.

34. Had the victim was not raped by the appellant, she would not have deposed against him. She had no enmity with the appellant. During cross examination, she had given reasons why

she could not raise alarm when she was raped by the appellant. Thus, her testimony about the occurrence is consistent. She is the victim, she knew the appellant and she had no reason to falsely implicate him. I find her to be trustworthy witness and her testimony inspires confidence of the Court.

35. The second point for consideration is whether there is any evidence to corroborate her testimony or her un-corroborate testimony is sufficient to sustain the conviction. The first piece of evidence which corroborates the testimony of the victim P.W.-2 is the arrest of the appellant. It is not in dispute that when the FIR was lodged appellant was handed over to the police. According to the victim P.W.-2, at the time of arrest, the public had beaten the appellant. On the remand file, medical examination report of the appellant finds place. The appellant was medically examined on the request of the investigating officer on 2nd November, 2010 and on his person six injuries were found.

36. On behalf of the prosecution, arrest memo Exhibit Ka-3 has been filed and proved to show that from the custody of first informant and several other persons, appellant was taken into custody in an injured state. I think these facts are un-controverted. They go to show that what the victim is deposing, is correct, therefore, from the public arrest of the appellant, statement of the victim P.W.-2 is duly corroborated.

37. On behalf of the appellant it has also been submitted that FIR has been lodged with delay. Occurrence had taken place at 8.30 a.m., FIR was lodged at 2.30 p.m. This ground was rejected by the learned trial Judge.

38. In the case of rape, some delay is natural. Victim has to be taken care of. She has to be consoled. She has to be asked what happen with her and when she regains some composer and becomes coherent only then FIR can be lodged. In spite of arrest of the appellant, family members of the victim had to calm down their daughter. They had to extract from her what happened with her and after satisfying themselves, they could have lodged the First Information Report.

39. Taking into consideration these facts, I think the learned trial Judge has rightly rejected the ground that delay in FIR creates a doubt about the truthfulness of the prosecution version. In my opinion, the indicated delay can be said to be a peculiar phenomena of rape cases and such phenomena cannot be made a ground to reject the testimony of the victim.

40. It is true that no spermatozoa was found from the vaginal smear taken during her medical examination and no external mark of injury was found on her person. Absence of injuries on her person is duly explained by the victim, where she says that before she was raped she was administered to stupefying drug. Absence of spermatozoa is not determinative that the victim was not raped vide **Narayanamma vs. State of Karnataka;(1994) 5 SCC 728**.

41. In view of above, from the perusal of entire evidence, I do not find any circumstance which may reflect against the truthfulness of the testimony of victim P.W.-2. The learned trial

Judge has appreciated evidence in correct legal manner. He has recorded findings of facts which are well substantiated from the record. The appeal has no substance and deserves to be dismissed.

42. The appeal is **dismissed.** Conviction and sentence awarded by the impugned judgment and order are hereby affirmed. Since the appellant is in jail, he is directed to undergo the sentence awarded by the learned trial Judge. Period already undergone by him in the present case, shall be adjusted in accordance with provision contained in Section 428 Cr.P.C.

43. Office is directed to communicate this order to the court concerned and to send back the record to the court below.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.07.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Misc. Bench No.- 3037 Of 2016

Santosh Kumar Sharma **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Lalit Kishore Pandey

Counsel for the Respondents:
Govt. Advocate, Anoop Kumar Misra

Headnote:
Repayment of loan obtained on the basis of a forged sale deed does not erase criminal liability. Where prima facie material shows that the accused fabricated and used a forged document to obtain bank loan, writ jurisdiction under Article 226 cannot be invoked for quashing the FIR. Equity does not favour a person indulging in forgery involving public money. Petition dismissed.
(Paras 11–19)

Case Law discussed:
State of Haryana vs. Ch. Bhajan Lal, AIR 1992 SC 604

Result: Petition dismissed.

(Delivered by Hon'ble Ajai Lamba, J.
&
Hon'ble Ravindra Nath Mishra- II, J.)

1. Order dated 4.3.2016 notices the gist of the issue raised by the petitioner. Order dated 4.3.2016 reads as under:-

1. This petition seeks issuance of a writ in the nature of certiorari quashing F.I.R./ Case Crime No.230 of 2014, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Vikas Nagar, District Lucknow.

2. Gist of the allegation against the petitioner is that so as to take loan for a house, the petitioner submitted forged sale deed/ documents to the bank as security.

3. Contention of learned counsel for the petitioner is that the allegations are without any relevant basis. The entire loan amount was repaid. No Dues Certificate has already been issued vide Annexure No.2 dated 8.5.2014. The documents submitted with the bank have already been returned. Thereafter on 4.8.2015, impugned criminal proceedings have been initiated.

4. We hereby issue notice to respondent no.3, returnable on 6.4.2016, to file his affidavit, including in context of contention of the learned counsel, noted above.

5. Investigating officer shall file his affidavit after verifying the document Annexure No.3 from Sub Registrar office. The investigating officer shall also conduct an inquiry as to whether Annexure No.3 is the document that was submitted as security to the bank.

6. List this case on 6.4.2016.

7. Arrest of the petitioner shall remain stayed till the next date of listing. Petitioner shall join investigation.

8. Petitioner shall furnish all the documents to the investigating officer, by way of Registered A.D. Post."

2. Contention of the learned counsel for the petitioner is that he has repaid the loan. No Dues Certificate has already been issued by the respondent no.4/the Bank, as is evident from Annexure No.2. The respondent-complainant Syndicate Bank has returned the papers to the petitioner. Thereafter, impugned criminal proceedings have been initiated. The proceedings be quashed.

3. This court vide above extracted order directed the investigating officer to verify document, Annexure No.3 i.e. the Sale Deed which had been pledged with the Bank for obtaining loan, from the Sub Registrar concerned.

4. In response to query of the court, counter affidavit has been filed on behalf of the investigating agency, in court, which is taken on record. In para 4 to 6, it has been made clear that the petitioner committed the offence. The petitioner deposited the original Sale Deed dated

12.5.2006 with Allahabad Bank, Indira Nagar Branch, Lucknow and on the basis of the said document pledged with the bank, loan in the sum of Rs.60 lacs has been obtained. The said original Sale Deed is still deposited with the Bank. Allahabad Bank has verified the said fact.

5. It has been further clarified that the petitioner manufactured a duplicate copy of Sale Deed dated 12.5.2006 and on the basis of the said document, obtained loan in the sum of Rs.15 lacs from Syndicate Bank/ the complainant Branch, Kalyanpur, District Lucknow. Under the circumstance, offence has been committed.

6. We have considered the rival contentions.

7. A perusal of the impugned F.I.R. Indicates that the petitioner Santosh Kumar Sharma obtained loan in the sum of Rs.15 lacs while pledging Sale Deed dated 12.5.2006 with Syndicate Bank. During scrutiny, it came to light that Sale Deed dated 12.5.2006 is a forged document.

8. It appears that the petitioner repaid the loan and therefore pleads that the impugned F.I.R. be quashed because money is not due to be paid in lieu of the loan obtained from the Bank.

9. In view of the facts and circumstances of the case, this Court is required to consider whether the petitioner has committed offence by pledging a forged Sale Deed of a property?

10. Forgery has been defined under Section 463 I.P.C., and the provisions read as under :-

"463. Forgery.-- Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

11. Sections 467, 468, 471 I.P.C. are to be read in context of the provisions of Section 463 I.P.C. extracted above. Investigation conducted by the investigating agency makes it evident that the petitioner manufactured a false document with intent to cause damage, and to support claim of the petitioner and title of the petitioner to cause the bank to part with the loan amount. Prima facie, therefore, it is evident that the petitioner did forge the Sale Deed which was pledged with the Bank to obtain loan. In case the petitioner had not pledged the sale deed, loan would not have been sanctioned and disbursed. Also in case the respondent Bank was informed that the original Sale Deed has been pledged with another Bank, then also the respondent Bank would not have sanctioned the loan. As a corollary it follows that offence under Sections 467, 468 and 471 I.P.C. have been committed.

12. Apparently, the petitioner utilised some stamp papers and manufactured Sale Deed dated 12.5.2006. The purpose of such manufacture appears to be that the petitioner did not want to

disclose to the complainant bank that he had obtained loan or was to obtain another loan from Allahabad Bank while pledging the same property/Sale Deed dated 12.5.2006.

13. It is evident that the original Sale Deed was pledged with the Allahabad Bank, while forged sale deed, which is an exact copy of the original, was pledged with the Syndicate Bank. Possibly, in case the petitioner had disclosed to the Syndicate Bank that the original Sale Deed had been pledged for obtaining loan from another bank, loan would not have been sanctioned and disbursed to the petitioner by Syndicate Bank. It is in prosecution of such modus operandi, eventually the petitioner forged a document and pledged it with the Syndicate Bank.

14. We find that neither equity nor law favours the petitioner. In such circumstances, the fact that the petitioner returned the loan amount would not be a circumstance sufficient to be taken into account to invoke the extraordinary writ jurisdiction to quash the impugned proceedings.

15. The issue of quashing of criminal proceedings has been considered in some depth by the Hon'ble Supreme Court in ***AIR 1992 SC 604 : State of Haryana and others versus Ch. Bhajan Lal and others.***

16. Hon'ble Supreme Court of India while taking notice of various judgments on the issue in ***Ch. Bhajan Lal's case (supra***), has summed up the conditions on the basis of which the proceedings can be quashed in the following terms (paragraph 108). The said para when extracted reads as under :

"108. 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 powers should be exercised.

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

17. Perusal of the counter affidavit furnished by the investigating agency establishes prima facie that offence of serious nature has been committed by the petitioner. In such circumstances, we find no reason to quash the proceedings.

18. The contention of learned counsel for the petitioner to the effect that the loan has been repaid therefore the proceedings be quashed, cannot be accepted in writ jurisdiction. Writ court is also a court of equity. Equity does not favour a person who indulges in fabrication of documents and illegal activities for profit purpose.

19. We are also of the considered opinion that prosecution of persons such as the petitioner is required to send appropriate message to the society so that others do not indulge in such criminal activities. Loan disbursed by a bank involves public money and the issue cannot be treated lightly. The petitioner so as to obtain loan on the basis of a manufactured document had criminal intent/mens rea. It is not an accidental act, rather a pre meditated criminal action.

20. In view of the above, this petition is dismissed.

21. Anything said hereinabove would not be considered a finding of fact. The investigation is going on. Let investigation be concluded and appropriate conclusion be drawn as is warranted on the basis of evidence collected.

22. Let a copy of this order be forwarded to the Senior Superintendent of Police, Lucknow by Senior Registrar of the Court so that effective investigation is concluded at the earliest.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Application U/S 482 No.- 3084 Of 2003

Satendra Kumar & Ors. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
I.K. Chaturvedi

Counsel for the Opposite Parties:
Govt.Advocate, B. Ram

Criminal law — Section 482 Cr.P.C. — quashing of proceedings — Sections 323, 504, 506 IPC — Section 3(1)(x) S.C./S.T. Act — calling by caste name — public view — charge sheet — cognizance — non-bailable warrants — without issuing summons — Section 73 Cr.P.C. — abuse of process of law — inherent powers — quashing refused — order issuing non-bailable warrants — process under Section 82 Cr.P.C. — liable to be quashed — application allowed partly.

Learned counsel for the applicants contended that the opposite party no.2 firstly lodged N.C.R. on 19.11.2002 with false allegations against applicants and on 5.12.2002 moved an application under sections 155 and 156 (3) Cr.P.C. for addition of section 2/3 S.C./S.T. Act with the allegations that despite the fact that the applicants called him with caste name and abused by naming mother-sister and beaten him, but despite making complaint with Senior Superintendent of Police and Deputy Inspector General of Police, Meerut Range through application for addition of offence under section 2/3 S.C./S.T. Act no action was taken; that on above application of opposite party no.2, the Magistrate concerned directed to register the case and the police of police station concerned converted the N.C.R. into case crime no.C-5 of 2002, under sections 323, 504, 506 IPC and Section 3(1)(x) S.C./S.T. Act; that above N.C.R. and F.I.R. have been lodged with false and baseless allegations; that the real fact is that the first informant being Gram Pradhan was making misuse of his office and so the applicants moved an application on 27.6.2002 to S.D.M., Meerut against his illegal acts of attempting to convert the nature of public land plot no.204, supported with affidavit of applicant no.1 at annexure no.9 and on the complaint so made by the applicants, vide order dated 18.12.2002 Annexure no.10, the District Panchayat Raj Adhikari stopped the operation of Gramnidhi Accounts 1,2 and 3 by the signatures of first informant, Bhoop Chandra opposite party no.2; that in order to counter blast, the above complaint, made against the first informant, he has lodged false complaint under N.C.R. and got it converted into F.I.R. by getting it added the offence under section 3(1)(x) S.C./S.T. Act; that the provisions of Section 3(1)(x) of S.C./S.T. Act, are not attracted in this case, as it is nowhere mentioned in the F.I.R. or application under section 156 (3) Cr.P.C. that "applicants are not members of scheduled caste or scheduled tribe and intentionally insulted or intimidated with intent to humiliate the respondent no.2 within public view" and so no

offence punishable under section 3(1)(x) of S.C./S.T. Act, is made out against the applicants; that since the allegation levelled in the report does not state that the applicants being not members of Scheduled Caste or Scheduled Tribe committed insult and intimidation to opposite party no.2 and the insult and intimidation was made with an intention to humiliate the member of the S.C./S.T. community, mere and in absence of such averments insult or intimidation, if any, would not attract the provisions of Section 3(1)(x) of the SC/ST Act; that the Investigating Officer without collecting sufficient evidence and without considering that the main ingredients, as required under the provisions of section 3(1)(x) of S.C./S.T. Act, is absent from the complaint made by first informant, has submitted charge sheet and the Magistrate concerned has taken cognizance without applying his mind to the facts of the case; that moreover upon submission of charge sheet, the Magistrate at the time of taking cognizance without issuing any summons, directly issued non bailable warrants, which is against the procedure prescribed by law; that in the circumstances, the impugned orders dated 18.2.2003 and 27.3.2003 of taking cognizance and issuing non-bailable warrants, respectively, as well as further proceedings in criminal case no.378 of 2003 (State Vs. Satendra and others), under sections 323, 504, 506 IPC and Section 3(1)(x) of S.C./S.T. Act, P.S. Jani, District Meerut pending before Special Chief Judicial Magistrate, Meerut are liable to be quashed. In support of his argument, the learned counsel for the applicant has relied on (2009) 1 SCC (Crl) 446.(Para-3)

Per contra, learned AGA submitted that the F.I.R. of opposite party no.2 a person of scheduled caste was not lodged under relevant sections rather case was registered at N.C.R. under influence of people of upper caste; that upon application of opposite party no.2 and order of the court, the case was rightly converted in case crime no. C-5 of 2002, under sections 323, 504, 506 IPC and Section 3(1)(x) S.C./S.T. Act and upon investigation and finding sufficient material evidence against the applicants, charge sheet was submitted, upon which cognizance has rightly been taken by the court concerned; that it is wrong to say that application does not contain the necessary ingredients of an offence, as required under provisions of section 3 (1) (x) S.C./S.T. Act; that undisputedly, the applicants are Brahamins being Sharma by caste and the first informant opposite party no.2 belongs to scheduled caste; that admittedly Brahamins do not fall under any of the categories in scheduled castes or scheduled tribes; that it has been clearly mentioned in F.I.R. that on 11.11.2002, the opposite party no.2 was going from village Thaulri to his village Basa Tikri and when he reached near Kosi Waley Peer at about 5:00 p.m., applicants, who were standing on the public way after calling him by caste name and abusing by the name of mother-sister committed marpeet with him, as he had refused to allot the land of "Land Management Committee", in favour of applicants; that admittedly applicants are Sharma by caste and belong to upper caste and since the opposite party no.2 belongs to scheduled caste, and was elected village pradhan, the applicants felt ill of the election of a member of scheduled caste, for the post of village pradhan of village Bhavi, and in order to interrupt in his smooth working as well as to harm and harass him, false complaints were moved by them against opposite party no.2; that on above complaints moved on behalf of applicants, the members of upper caste at Annexure no.9, an order was also obtained at Annexure no.10, without adopting any proceedings in accordance with rules; that on representation made by the villagers of village Bhavi, the Commissioner of Meerut Division, Meerut upon finding that without conducting any proceedings in accordance with rules, the village pradhan has been found guilty, he directed for inquiry in accordance with rules and prescribed procedure vide order at A-11; that in counter affidavit filed by opposite party no.2, papers filed at Annexure C.A.-2 show that complaints were made by people of village Bhavi (under Gram Panchayat Bhavi) to D.M. Meerut with its copies to S.D.M., Tehsildar and S.S.P., Meerut against the unlawful acts of the applicants and their associates of upper caste, against persons of scheduled caste; that since the applicants and their associates were interfering with the meeting of opposite party no.2 in Primary Pathshala Bhavi, as well as due to their interference with the working of Gram Panchayat and demand of money, the opposite party no.2 made complaints to B.D.O. and D.P.R.O. concerned of District Meerut on 8.4.2002 at C.A.-2; that after a period of two months from the above complaints at C.A.-2 against the applicants and their associates, the applicants moved false complaint against the alleged irregularities of opposite party no.2 and then committed the incident in question on 11.11.2002 on account of hate towards persons of schedule caste and scheduled tribes; that despite affording opportunity and granting no more time

for filing rejoinder affidavit on 27.4.2006, the applicants could not dare to file any rejoinder affidavit during last more than 10 years from 27.4.2006; that as per the averments made in N.C.R., that opposite party no.2 was going from village Thaulri to his village and when he reached near jungle ke peer, the applicants committed incident in question, which shows that the incident has taken place on the public way in public view and not in the forests; that from the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants; that issues of fact raised by this application are subject matter of jurisdiction of trial court and can be looked into only by trial court upon evidence before it and may not be decided in this application.(Para-4)

Held:Paras(13-15)

1.Considering the totality of facts, I find that only the order dated 18.2.2003 to the extent of issuing non-bailable warrants and order dated 27.3.2003, issuing non bailable warrants and process under section 82 Cr.P.C., are liable to be quashed and the application under section 482 Cr.P.C., is liable to be allowed partly to above extent and is liable to be rejected partly, for the prayer for quashing the cognizance order dated 18.2.2003 or for quashing the proceedings in criminal case no.378 of 2003 (State Vs. Satendra and others), under sections 323, 504, 506 IPC and Section 3(1)(X) of S.C./S.T. Act, P.S. Jani, District Meerut pending before Special Chief Judicial Magistrate, Meerut.

2.The application u/s 482 Cr.P.C. is **disposed of** accordingly with the observation that if the applicants appear before the Magistrate/Special Judge concerned and move applications for bail, the same shall be decided expeditiously in accordance with law.

3.Interim order, if any, stands vacated.

Case Law discussed:

1.Gorige Pentaiah Vs. State of Andhra Pradesh & others, (2009) 1 SCC (Cri.) 446 (Para-6) 2.R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866 (Para-7) 3.State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426 (Para-7) 4.State of Bihar Vs. P.P. Sharma, 1992 SCC (Cr.) 192 (Para-7) 5.Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, 2005 SCC (Cr.) 283 (Para-7)

(Delivered by Hon'ble Harsh Kumar, J.)

1. Heard Sri I.K. Chaturvedi, learned counsel for the applicants and learned AGA for the State.

2. The application u/s 482 Cr.P.C. has been moved for quashing the criminal proceedings in criminal case no.378 of 2003 (State Vs. Satendra and others), under sections 323, 504, 506 IPC and Section 3(1)(x) of S.C./S.T. Act, P.S. Jani, District Meerut pending before Special Chief Judicial Magistrate, Meerut.

3. Learned counsel for the applicants contended that the opposite party no.2 firstly lodged N.C.R. on 19.11.2002 with false allegations against applicants and on 5.12.2002 moved an application under sections 155 and 156 (3) Cr.P.C. for addition of section 2/3 S.C./S.T. Act with the allegations that despite the fact that the applicants called him with caste name and abused by naming mother-sister and beaten him, but despite making complaint with Senior Superintendent of Police and Deputy Inspector General of Police, Meerut Range through application for addition of offence under section 2/3 S.C./S.T. Act no action was taken; that on above application of opposite party no.2, the Magistrate concerned directed to register the case and the police of police station

concerned converted the N.C.R. into case crime no.C-5 of 2002, under sections 323, 504, 506 IPC and Section 3(1)(x) S.C./S.T. Act; that above N.C.R. and F.I.R. have been lodged with false and baseless allegations; that the real fact is that the first informant being Gram Pradhan was making misuse of his office and so the applicants moved an application on 27.6.2002 to S.D.M., Meerut against his illegal acts of attempting to convert the nature of public land plot no.204, supported with affidavit of applicant no.1 at annexure no.9 and on the complaint so made by the applicants, vide order dated 18.12.2002 Annexure no.10, the District Panchayat Raj Adhikari stopped the operation of Gramnidhi Accounts 1,2 and 3 by the signatures of first informant, Bhoop Chandra opposite party no.2; that in order to counter blast, the above complaint, made against the first informant, he has lodged false complaint under N.C.R. and got it converted into F.I.R. by getting it added the offence under section 3(1)(x) S.C./S.T. Act; that the provisions of Section 3(1)(x) of S.C./S.T. Act, are not attracted in this case, as it is nowhere mentioned in the F.I.R. or application under section 156 (3) Cr.P.C. that "applicants are not members of scheduled caste or scheduled tribe and intentionally insulted or intimidated with intent to humiliate the respondent no.2 within public view" and so no offence punishable under section 3(1)(x) of S.C./S.T. Act, is made out against the applicants; that since the allegation levelled in the report does not state that the applicants being not members of Scheduled Caste or Scheduled Tribe committed insult and intimidation to opposite party no.2 and the insult and intimidation was made with an intention to humiliate the member of the S.C./S.T. community, mere and in absence of such averments insult or intimidation, if any, would not attract the provisions of Section 3(1)(x) of the SC/ST Act; that the Investigating Officer without collecting sufficient evidence and without considering that the main ingredients, as required under the provisions of section 3(1)(x) of S.C./S.T. Act, is absent from the complaint made by first informant, has submitted charge sheet and the Magistrate concerned has taken cognizance without applying his mind to the facts of the case; that moreover upon submission of charge sheet, the Magistrate at the time of taking cognizance without issuing any summons, directly issued non bailable warrants, which is against the procedure prescribed by law; that in the circumstances, the impugned orders dated 18.2.2003 and 27.3.2003 of taking cognizance and issuing non-bailable warrants, respectively, as well as further proceedings in criminal case no.378 of 2003 (State Vs. Satendra and others), under sections 323, 504, 506 IPC and Section 3(1)(x) of S.C./S.T. Act, P.S. Jani, District Meerut pending before Special Chief Judicial Magistrate, Meerut are liable to be quashed. In support of his argument, the learned counsel for the applicant has relied on **(2009) 1 SCC (Crl) 446**.

4. Per contra, learned AGA submitted that the F.I.R. of opposite party no.2 a person of scheduled caste was not lodged under relevant sections rather case was registered at N.C.R. under influence of people of upper caste; that upon application of opposite party no.2 and order of the court, the case was rightly converted in case crime no. C-5 of 2002, under sections 323, 504, 506 IPC and Section 3(1)(x) S.C./S.T. Act and upon investigation and finding sufficient material evidence against the applicants, charge sheet was submitted, upon which cognizance has rightly been taken by the court concerned; that it is wrong to say that application does not contain the necessary ingredients of an offence, as required under provisions of section 3 (1) (x) S.C./S.T. Act; that undisputedly, the applicants are Brahamins being Sharma by caste and the first informant opposite party no.2 belongs to scheduled caste; that admittedly Brahamins do not fall under any of

the categories in scheduled castes or scheduled tribes; that it has been clearly mentioned in F.I.R. that on 11.11.2002, the opposite party no.2 was going from village Thaulri to his village Basa Tikri and when he reached near Kosi Waley Peer at about 5:00 p.m., applicants, who were standing on the public way after calling him by caste name and abusing by the name of mother-sister committed marpeet with him, as he had refused to allot the land of "Land Management Committee", in favour of applicants; that admittedly applicants are Sharma by caste and belong to upper caste and since the opposite party no.2 belongs to scheduled caste, and was elected village pradhan, the applicants felt ill of the election of a member of scheduled caste, for the post of village pradhan of village Bhavi, and in order to interrupt in his smooth working as well as to harm and harass him, false complaints were moved by them against opposite party no.2; that on above complaints moved on behalf of applicants, the members of upper caste at Annexure no.9, an order was also obtained at Annexure no.10, without adopting any proceedings in accordance with rules; that on representation made by the villagers of village Bhavi, the Commissioner of Meerut Division, Meerut upon finding that without conducting any proceedings in accordance with rules, the village pradhan has been found guilty, he directed for inquiry in accordance with rules and prescribed procedure vide order at A-11; that in counter affidavit filed by opposite party no.2, papers filed at Annexure C.A.-2 show that complaints were made by people of village Bhavi (under Gram Panchayat Bhavi) to D.M. Meerut with its copies to S.D.M., Tehsildar and S.S.P., Meerut against the unlawful acts of the applicants and their associates of upper caste, against persons of scheduled caste; that since the applicants and their associates were interfering with the meeting of opposite party no.2 in Primary Pathshala Bhavi, as well as due to their interference with the working of Gram Panchayat and demand of money, the opposite party no.2 made complaints to B.D.O. and D.P.R.O. concerned of District Meerut on 8.4.2002 at C.A.-2; that after a period of two months from the above complaints at C.A.-2 against the applicants and their associates, the applicants moved false complaint against the alleged irregularities of opposite party no.2 and then committed the incident in question on 11.11.2002 on account of hate towards persons of schedule caste and scheduled tribes; that despite affording opportunity and granting no more time for filing rejoinder affidavit on 27.4.2006, the applicants could not dare to file any rejoinder affidavit during last more than 10 years from 27.4.2006; that as per the averments made in N.C.R., that opposite party no.2 was going from village Thaulri to his village and when he reached near jungle ke peer, the applicants committed incident in question, which shows that the incident has taken place on the public way in public view and not in the forests; that from the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants; that issues of fact raised by this application are subject matter of jurisdiction of trial court and can be looked into only by trial court upon evidence before it and may not be decided in this application.

5. Before proceedings further, I find it proper to reproduce the provisions of section 3(1)(x) of S.C./S.T. Act and section 73 of Cr.P.C. as under :-

"Section 3. Punishments for offences of attrocities.-

(*1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-*

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

Section 73. Warrant may be directed to any person.-

(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non- bailable offence and is evading arrest."

It is settled law that if the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the applicant to face the criminal trial under the SC/ST Act would be totally unjustified leading to abuse of process of law. In para 6 of the judgment in the case of **Gorige Pentaiah Vs. State of Andhra Pradesh & others reported in (2009) 1 SCC (Cri.) 446**, the Apex Court has observed that:- -

"In the instant case, the allegation of Respondent 3 in the entire complaint is that on 27.05.2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3 (1)(x) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."

6. All the submissions made at the bar relate to the disputed questions of fact, which 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.**

7. Upon hearing learned counsel for the parties and perusal of record, I find that the names of applicants mentioned at the top of the application carries surname Sharma, which means Brahims by caste, which is undisputedly not a scheduled caste. There is no whisper in the application or affidavit given in support of application, that applicants are not members of upper caste rather are members of scheduled caste and without belonging to Brahmin caste, use Sharma as their surname, so there appears no need for any specific allegation regarding the accused-applicants being not a member of scheduled caste in the application under section 156(3) Cr.P.C.,

while the names of applicant-accused have been mentioned as Satendra Sharma and Aniruddha Sharma. In view of the facts of this case, the law laid down by the Apex Court in the case of **Gorige Pentaiah Vs. State of Andhra Pradesh and others (supra)**, has no application.

8. In view of the facts, the disputed defence of the accused-applicant cannot be considered at this stage and in this application, it may not be decided that whether applicants made false complaints against opposite party no.2, in order to counter blast the complaints of village people or the F.I.R. has been lodged as a matter of counter blast.

9. In view of the discussions made above, I have come to the conclusion that the applicants have failed to show any sufficient ground for exercise of inherent powers by this Court so as to prevent the abuse of process of any court or otherwise to secure the ends of justice and there is no sufficient ground for quashing the charge sheet, the cognizance order dated 18.2.2003 or the proceedings of criminal case no.378 of 2003 and the prayer in this respect is refused.

10. However, I find force in the contention made by applicants in respect of illegality in the order issuing non bailable warrants on the very first day of taking cognizance, without issuing summons and without the applicants having any knowledge of the proceedings. Section 73 of Cr.P.C. specifically provides that the Magistrate, may direct a warrant for arrest of any of escaped convict, proclaimed offender or of any other person, who is accused of a non-bailable offence and is evading arrest. There is nothing on record to show that summons were ever issued against the applicants since taking of cognizance on 18.2.2003 and they were evading their appearance before the court concerned. In view of the provisions, the subsequent order dated 18.2.2003, issuing non-bailable warrants fixing 27.3.2003 for appearance and repeating the same order on 27.3.2003 fixing 12.5.2003 and also issuing process under section 82 Cr.P.C., are wrong and illegal and if allowed, to stand may cause injustice to the applicants and the order issuing non-bailable warrants and process under section 482 Cr.P.C. are nothing, but abuse of process of court and are liable to be quashed.

11. Considering the totality of facts, I find that only the order dated 18.2.2003 to the extent of issuing non-bailable warrants and order dated 27.3.2003, issuing non bailable warrants and process under section 82 Cr.P.C., are liable to be quashed and the application under section 482 Cr.P.C., is liable to be allowed partly to above extent and is liable to be rejected partly, for the prayer for quashing the cognizance order dated 18.2.2003 or for quashing the proceedings in criminal case no.378 of 2003 (State Vs. Satendra and others), under sections 323, 504, 506 IPC and Section 3(1)(X) of S.C./S.T. Act, P.S. Jani, District Meerut pending before Special Chief Judicial Magistrate, Meerut.

12. The application u/s 482 Cr.P.C. is disposed of accordingly with the observation that if the applicants appear before the Magistrate/Special Judge concerned and move applications for bail, the same shall be decided expeditiously in accordance with law.

13. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Appeal No.- 3265 Of 2013

Bablu Saini @ Dinesh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Sri Sushil Shukla

Counsel for Respondent:
Government Advocate

Rape -- Section 376(2)(f) I.P.C. -- Sole Testimony of Prosecutrix -- Sterling Witness -- Standard of Proof -- Minor girl aged about 9 years allegedly raped by neighbour in midnight -- neither the FIR nor the examination-in-chief of PW-1 (mother/informant) contained any allegation of rape -- I.O. categorically stated that neither informant nor victim disclosed anything about rape during interrogation under Section 161 Cr.P.C. -- victim made statement about rape for the first time in her Section 164 Cr.P.C. statement recorded after one month -- statement of victim during trial further improved with new embellishments not found in earlier statements -- medical evidence did not support prosecution story as no injury or spermatozoa found on body of victim -- doctor found victim habitual to sexual intercourse -- defence witnesses being independent neighbours not found to have any reason to shield accused -- Held: in rape cases the solitary testimony of the prosecutrix may be sufficient to convict an accused but the quality of such testimony must be of 'sterling quality' which is absolutely trustworthy, unassailable, unblemished and consistent right from the initial statement to the statement before Court -- where the prosecution story is full of embellishments, discrepancies, contradictions and improvements and is not corroborated by medical evidence, the prosecution cannot be said to have proved the charge beyond reasonable doubt -- conviction not sustainable. (Paras 7-14)

Rape -- Section 376(2)(f) I.P.C. -- FIR -- Absence of Allegation of Rape -- Effect -- Held: the FIR is the earliest and most natural document recording the first version of the complainant about the occurrence -- where neither the FIR nor the examination-in-chief of the informant/mother contains any allegation of actual commission of rape and the I.O. has also confirmed absence of any such disclosure during investigation, the subsequent introduction of rape in Section 164 Cr.P.C. statement and trial testimony constitutes a material improvement fatal to the prosecution story -- such improvements erode the credibility of prosecution witnesses and the court should not act on such embellished testimony. (Paras 8-10)

Evidence -- Defence Witnesses -- Weight -- Independent Neighbours -- Held: defence witnesses who are independent neighbours of both the informant and the accused and who have no reason to shield the accused from a grave allegation of rape of a minor are entitled to weight -- their testimony cannot be brushed aside merely because they are defence witnesses -- their categorical denial that any incident took place combined with their statements about the informant's character present an alternative version supported by

cogent reasons -- courts must not mechanically reject defence evidence while evaluating the credibility of the prosecution story. (Paras 12-13)

Criminal Appeal Allowed -- Impugned judgment and order dated 29.06.2013 passed by the learned Additional Sessions Judge, Court No. 5, Kanpur Nagar in Session Trial No. 1236 of 2011 convicting and sentencing appellant under Sections 376(2)(f) and 506 I.P.C. set aside (Para 14)

Case Law Discussed:
1. Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21
2. Hem Raj v. State of Haryana, (2014) 2 SCC 395
3. Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92
4. Raju v. State of Madhya Pradesh, (2008) 15 SCC 133
5. Radhu v. State of M.P., (2007) 12 SCC 57

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Challenge in this appeal is to the judgment and order dated 29.6.2013 passed by learned Additional Sessions Judge, Court No. 5, Kanpur Nagar in Session Trial No. 1236 of 2011 (State Vs. Bablu Saini @ Dinesh), under Section 376(2)(f) and 506 I.P.C., P.S. Kidwai Nagar, district Kanpur Nagar, whereby the appellant has been convicted under the aforesaid sections and has been sentenced as follows :-

(I) For his conviction under Section 376(2)(f) he has been sentenced to Rigorous Imprisonment of 10 years with fine of Rs. 5000/- and in default of payment of fine to undergo imprisonment of 3 months.

(II) For his conviction under Section 506 I.P.C. he has been sentenced to Rigorous Imprisonment of one year with fine of Rs. 1000/- and in default of payment of fine to undergo imprisonment of one month.

2. Heard Sri Sushil Shukla, learned counsel for the appellant and learned A.G.A. representing the State. Perused the impugned judgment and lower court's record.

3. The prosecution case as unfolded during trial is that an F.I.R. was lodged on 8.5.2011 by Smt. Meena Devi (mother of the victim) at Police Station Kidwai Nagar, district Kanpur Nagar alleging that her minor daughter aged about 9 years was forcibly taken away by her neighbour in the midnight of 8/9.5.2011 at about 2.00 A.M. with bad intention of committing rape with her. When her daughter raised alarm she, her son Pawan and her husband Rajendra got awakened and saw the appellant Bablu Saini dragging her daughter towards his room. When she and her son challenged the accused, he left her daughter and threatened them with dire consequences if any report was lodged with the police.

4. On the basis of aforesaid F.I.R. the case under Section 376(2) and 506 of I.P.C. was registered against the appellant and was investigated. The police inspected the spot and prepared

the site plan. The I.O. recorded the statements of the witnesses and arrested the accused and after concluding the investigation submitted charge-sheet against the appellant.

5. The trial commenced and in the Sessions Court charges under Sections 376(2)(f) and 506 of I.P.C. were framed against the appellant.

6. The prosecution in order to prove the charges produced six witnesses in all. P.W. 1 is the mother of the victim. She is also the first informant, the victim herself is P.W. 2, Dr. Anjula Gupta, P.W. 3 is the lady doctor who had examined the victim, Head Constable Rajesh Kumar is P.W. 4, who had prepared the check F.I.R., Smt. Chandra Prabha Tripathi, P.W. 5 is the clerk of C.M.O. Office, Kanpur Nagar, who had given secondary evidence on behalf of C.M.O., Kanpur Nagar by identifying his signature on Ext. Ka. 6 which is age certificate of the victim and the Investigating Officer S.I. Rakesh Pratap Singh is P.W. 6.

7. After conclusion of the prosecution evidence the statement of accused-appellant under Section 313 Cr.P.C. was recorded in which he denied the entire allegations and stated that a false case has been lodged against him by the informant after tutoring her daughter because of property dispute with one Puttan Saini. He has further stated that the incident is said to have taken place in the mid night of 7/8.5.2011 at 2.00 A.M. and in the medical examination of the victim, which has been conducted on 8.5.2011 at 12.00 noon, no injury has been found by the doctor on the body of the victim. Moreover, the victim has stated that a lot of blood had oozed out from her private part during the occurrence. On the other hand the doctor has found the victim used to sexual intercourse.

8. In his defence the accused-appellant produced documentary as well as oral evidence. The list of five defence witnesses is as under:-

1. D.W. 1 Santosh Kumar Mishra,
2. D.W. 2 Ramesh Chandra Shukla,
3. D.W. 3 Akhilesh Kumar,
4. D.W. 4 Mool Chandra,

All these four witnesses are the neighbours of the informant and accused-appellant and

5. D.W. 5, Ramesh Saini is younger brother of accused-appellant.

9. According to defence, there was some dispute between Puttan Saini and the accused appellant. On the occasion of Holi some quarrel had also taken place between the accused-appellant and the informant's family, both of whom are neighbours. The defence witnesses have stated that the husband of the first informant is an unemployed person having no source of income and his wife (the informant) used to earn her livelihood by prostitution. On the other hand the accused-appellant is a man of character. He is a married person having a son aged about 11 years. After the quarrel the informant had threatened the appellant to implicate him in some false case. All the defence witnesses have stated that no such incident took place as alleged by the prosecution.

10. The trial court, after hearing both the parties, found the prosecution case trustworthy. Accordingly it held the appellant guilty and convicted and sentenced him as discussed earlier.

11. Aggrieved by the impugned judgment passed by the trial court, the appellant has moved this Court questioning the legality and correctness of the impugned judgment mainly on the following grounds:-

1. The learned trial court has passed the impugned judgment without correct appreciation of the evidence on record and has disbelieved the defence witnesses without any cogent reason.

2. The prosecution case does not find support with the F.I.R. because in the F.I.R. there is no allegation of rape and the informant has clearly stated that when she and her son challenged the accused, he left her daughter and ran away threatening them.

3. The I.O. (P.W. 6) has categorically stated that during interrogation the first informant/mother of the victim had not told anything about the commission of rape with her daughter by the accused.

4. It appears very strange that why the mother of the victim had gone all alone to the police station to lodge the F.I.R. and what was the reason that her husband and major son, despite the fact that both of them were present at their home at the time of occurrence, did not accompany her ? In support of this contention learned counsel for the appellant as drawn the attention of this Court to the statement of P.W. 4 who was the Head Moharrir of the police station concerned at the time of occurrence. He has prepared the check F.I.R and has made necessary entries in G.D. after registering the case. P.W. 4 has stated that the informant had come alone with the victim to the police station for lodging the F.I.R. Her husband or her major son had not accompanied her.

5. Learned counsel for the appellant has contended that it is very unfortunate, shameful and sad state of affairs that a minor girl of only 11 years has been found habitual to sexual intercourse by the doctor but only on this ground it cannot be held that the allegation of rape against the appellant has been successfully proved by the prosecution.

12. Per contra the submission of learned A.G.A. is that in cases of rape the sole testimony of the prosecutrix or the victim is sufficient to convict the accused and there is no need of any further corroboration because no one would falsely implicate any person at the cost of his family prestige and moreover involving a minor daughter.

13. I have given my thoughtful consideration to the arguments advanced from both sides. There is no doubt that as per settled legal position, in cases of rape, the solitary statement of the victim is sufficient to hold the accused guilty but at the same time the condition is that the quality of such solitary statement should be such which inspires confidence. It should be absolutely trustworthy, unblemished and of "sterling quality".

14. The Hon'ble Supreme Court in case of **Rai Sandeep Vs. State (NCT of Delhi); (2012) 8 SCC 21** has explained the words "sterling witness" as under :-

"In our considered opinion, the "sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness."

"Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a "sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

15. In **Hem Raj Vs. State of Haryana; (2014) 2 SCC 395** the Hon'ble Supreme Court has held :

"In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible, if it inspires total confidence, it can be relied upon even sans corroboration."

"Such weight is given to the proxecutrix's evidence because her evidence is on a par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinise it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it."

16. In **Sadashiv Ramrao Hadbe vs. State of Maharashtra; (2006) 10 SCC 92,** the Hon'ble Supreme Court has held:

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

17. Now, testing the statements of prosecutrix and the first informant on the touch stone of the above cited legal principle, it appears that P.W. 1, the informant who is the mother of the victim, has stated that when on 7/8.5.2011 at about 2.00 A.M. she heard the shrieks of her daughter, she got awakened and informed her husband and son. The sound of shrieks was coming from the house of appellant Bablu Saini. She saw that her daughter was not on the cot on which she was sleeping. She rushed to the door of Bablu Saini and saw him dragging her daughter inside his house for throwing her outside the house from his back door. She has further stated that at that time she did not raise any alarm because Bablu Saini had threatened to kill her. She has further stated that on the next evening on 8.5.2011 she went to police station to lodge the F.I.R. What she had dictated the police had written. She has proved the check F.I.R. as Ext. Ka. 1.

18. The aforesaid statement of the complainant recorded during her examination-in-chief shows that she has not stated anything about commission of rape as she has only stated that hearing the shrieks of her daughter, when she reached at the door, she saw the accused dragging her daughter towards his room for throwing her outside from his back door. Thus, neither in the F.I.R. nor in her examination-in-chief she (P.W. 1) has stated anything about commission of rape of her daughter by the accused. The record shows that she has been cross-examined at length on three dates by the defence counsel but it is strange that she has not stated a single word about the commission of rape by the accused with her daughter even during her cross examination. Her cross-examination shows that she has admitted that her husband and her son are unemployed and the daily house hold expenses are borne by her. She has also admitted that Puttan Saini and accused Bablu Saini are on inimical terms with each other. She has stated that except herself, all her neighbours use to sleep inside their house. She has further stated that her husband sleeps inside the house whereas she uses to sleep on the road. She has also admitted that she did not see the accused throwing her daughter in the street from the back door of his room. She has admitted that she did not go to police station immediately after the occurrence but she went to lodge the F.I.R. on the next evening at 8.00 P.M.. When she was contradicted with the F.I.R. version in which it has been stated that "when the accused was dragging her daughter towards his room and she, her husband and her son resisted the accused left her daughter". She stated that the aforesaid fact was rightly mentioned by her in the F.I.R.

19. Thus, clearly there is no allegation of rape either in the F.I.R. or in the statement of P.W. 1, the mother of the victim.

20. The I.O. (P.W. 6) has clearly stated that neither the complainant (mother of the prosecutrix) nor her father informed him anything about commission of rape of their daughter by the accused. The I.O. has further stated that neither the prosecutrix nor her family members had informed anything about accused threatening to them. The I.O. has also stated that neither the informant nor the victim during their interrogation under Section 161 Cr.P.C. had stated anything about the blood oozing out from private part of the victim or about any treatment of the victim Thus, the prosecution story does not find support with the case diary also.

21. It appears that for the first time during her statement recorded under Section 164 Cr.P.C. which has been recorded after one month of the occurrence, the victim has stated about rape. In her statement recorded under Section 164 Cr.P.C. she has stated that when she was sleeping with her mother outside her house, the accused-appellant lifted her and took her inside his house pressing his hand over her mouth. There he removed her clothes and committed rape with her. A lot of blood oozed out from her private part and her clothes were spoiled with blood. She has also stated that the accused threatened her by showing a knife and after beating her he threw her outside the house from back door.

22. However, when the victim was examined during trial as P.W. 2 she stated that the accused put his hanker chief on her mouth and took her to his room where he committed rape with her. She has further improved her statement by deposing that the accused had put some stupefying substance on the hanker chief due to which she became unconscious. She has further stated that before throwing her away in the street, the accused appellant had sprinkled water on her face due to which she regained her consciousness. She was contradicted with her statement recorded under Section 164 Cr.P.C. on this point and she stated that she had stated before the Magistrate that the accused had put hanker chief on her mouth but she could not assign any reason as to how in her statement under Section 164 Cr.P.C. the Magistrate had recorded that the accused had put her hand on her mouth. She has admitted that where the accused had thrown was a Pakki Gali but she has stated that she did not sustain any injury due to falling in the street. She has stated that her mother had taken her to some Shivpujan Clinic but the doctor had neither prescribed any medicine to her nor he examined her. She has stated that before this incident she never had sexual intercourse with any one. She has stated that when she had gone to the police station with her mother, she was wearing same clothes but has further stated that she had wore same cloth after getting those clothes washed and dried. She has also stated that she is unable to recollect whether her clothes were stained with blood or not. She has stated that her father found her in the street and took her back with him. She has further stated that on the next date of the occurrence she had gone to the school for appearing in the monthly test. The prosecutrix has also admitted the fact that a quarrel had taken place between her family members and accused appellant at the time of Holi. Though, the prosecutrix has stated that she never had sexual intercourse with any one before this occurrence but the doctor has found her habitual to sexual intercourse even at the tender age of 11 years. It is very sorry state of affairs but in the family background of victim as is evident from the evidence available on record, the possibility cannot be ruled out.

23. The aforesaid statements of the mother and the daughter (P.Ws. 1 and 2) who are the only two material witnesses in this case, clearly show that there is no convincing and cogent evidence against the accused appellant warranting his conviction. The statement of both the prosecution witnesses are full of embellishment, discrepancies, contradictions and improvement making the prosecution story highly doubtful. On the other hand the statements of defence witnesses appear to be natural and trustworthy. All the defence witnesses except D.W. 5 are independent witnesses who are neighbours of both the parties

i.e. the informant and accused. There appears no reason why a neighbour would shield the accused from such heinous and grave allegation like the rape of a minor. The defence witnesses have categorically stated that they never heard any shriek in the night of occurrence. They have also stated that the police had come to the place of occurrence. They had informed the police that no such incident had taken place. The neighbours have also stated that the informant is a lady of easy virtue and she uses to indulge in illegal acts for earning her livelihood. The medical evidence is an important piece of evidence in rape cases. However, in the present case medical evidence does not support the story of rape because the doctor has not found any injury or spermatozoa on the body of the victim.

24. In case **Raju vs. State of Madhya Pradesh; (2008) 15 SCC 133,** the Supreme Court has held as under:-

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In **Radhu Vs. State of M.P.; (2007) 12 SCC 57** the Hon'ble Apex Court has observed that:

"The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

26. Considering the aforesaid facts and circumstances and in wake of aforesaid judgments of Hon'ble Supreme Court, this Court is of the considered view that the impugned judgment dated 29.6.2013 is liable to be set aside and the appeal deserves to be allowed.

27. Accordingly, this appeal is **allowed** and the impugned judgment dated 29.6.2013 passed by the trial court is hereby set aside. The appellant is in jail. The appellant shall be released forthwith if not wanted in any other case.

28. Let a copy of this judgment be sent to the Chief Metropolitan Magistrate, Kanpur Nagar for immediate compliance.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.

Application U/S 482 No.- 3384 Of 2014

Arun Kumar **...Applicant**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Applicant:
Sri Vinay Saran

Counsel for Opposite Parties:
Government Advocate, Sri Apul Mishra

Criminal Procedure -- Section 173(8) Cr.P.C. -- Further Investigation -- Prior Permission of Magistrate -- Whether Police is required to seek prior permission of Magistrate before conducting further investigation under Section 173(8) Cr.P.C. -- Held: Section 173(8) Cr.P.C. does not mandate taking of prior permission from the Magistrate for further investigation -- carrying out further investigation even after filing of the charge-sheet is a statutory right of the Police -- however, it is always preferable as a matter of propriety and practical wisdom to seek prior permission from the Magistrate so that the court is kept in the loop and trial is not concluded before the supplementary report is submitted -- further investigation is the continuation of the previous investigation and not a fresh investigation or reinvestigation -- distinguished from reinvestigation which is prohibited without prior permission. (Paras 18-22)

Criminal Procedure -- Section 173(8) Cr.P.C. -- Further Investigation -- Permission Sought and Expressly Refused by Magistrate -- Effect -- Investigating Officer moved an application before the Chief Judicial Magistrate seeking permission for further investigation -- CJM, in light of acceptance of final report twice and revisional order affirming such acceptance, expressly rejected the application for further investigation vide order dated 17.09.2012 -- Police, in utter disregard to judicial discipline, proceeded to conduct further investigation and filed charge-sheets in violation of the said order -- Held: once permission for further investigation was sought and expressly declined by the Magistrate, the Police did not have any authority to continue the investigation -- subsequent investigation is illegal and vitiated -- charge-sheet dated 17.9.2013 filed pursuant to such unauthorised investigation is not sustainable -- compliance of a judicial order by the executive is not optional; no inferior court or executive authority is empowered to refuse to follow the mandate of a superior court. (Paras 24-28)

Criminal Procedure -- Further Investigation -- Distinction between Further Investigation and Reinvestigation -- Section 173(8) Cr.P.C. -- Held: 'further investigation' under Section 173(8) Cr.P.C. is the continuation of a previous investigation aimed at discovering further oral or documentary evidence -- its scope is restricted to supplementing the primary investigation and does not wipe out or override earlier investigation -- it is distinct from 'reinvestigation' or 'fresh investigation' or 'de novo investigation' -- reinvestigation without prior permission is necessarily forbidden while further investigation is not -- the

subsequent investigation must relate to the same offence and chain of events -- it cannot be used as a tool to introduce entirely new offences or convert bailable/non-cognizable charge-sheets into cognizable and non-bailable ones at the behest of an interested party. (Paras 18-19)

Criminal Procedure -- Section 482 Cr.P.C. -- Quashing of Charge-Sheet -- Civil Dispute Converted into Criminal Case -- Mala Fide Investigation -- Dispute between two brothers over ownership and possession of a flat allotted to applicant under para-military quota by C.G.E.W.H.O. -- Investigating Officer submitted final report finding no satisfactory evidence and concluding dispute was essentially civil in nature -- protest petition rejected twice by Chief Judicial Magistrate and revisional order affirmed the acceptance of final report -- thereafter, SSP ordered further investigation twice through different Investigating Officers -- second charge-sheet added Sections 392 and 452 IPC (cognizable and non-bailable) -- Held: dispute is essentially about title and possession of property which can only be adjudicated by a civil court -- criminal proceedings were a ploy to pressurize the applicant who, as a BSF employee, is posted at distant locations -- Police personnel themselves were not satisfied with the correctness of allegations yet became partisan at various stages -- the entire procedure reeks of malafide and arbitrariness -- criminal case was instituted with malafide intention of wreaking vengeance upon applicant due to private and personal grudge. (Paras 27-29)

Criminal Procedure -- Section 482 Cr.P.C. -- Power of High Court -- Scope -- Malafide Prosecution -- Held: where a criminal proceeding is manifestly attended with malafide 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, the High Court is justified in exercising the powers under Section 482 Cr.P.C. in quashing the charge-sheet -- Section 482 Cr.P.C. confers wide powers of inherent jurisdiction on the High Court to prevent abuse of the process of law and to secure the ends of justice -- such powers must be exercised sparingly and with circumspection to ensure that the process of the criminal court is not used as an instrument of oppression or harassment. (Para 28)

Application U/S 482 Cr.P.C. Allowed -- Charge-sheet dated 18.07.2013 under Sections 323, 504, 506, 427 IPC and additional charge-sheet dated 17.09.2013 under Sections 392, 452, 342, 323, 504, 506, 427 IPC arising out of FIR dated 23.01.2010, registered as Crime No. 33 of 2010, Police Station Sector-49, Noida, District Gautam Buddh Nagar, pending as Case No. 1383 of 2013 before Additional Chief Judicial Magistrate, Gautam Buddh Nagar, quashed in exercise of inherent jurisdiction under Section 482 Cr.P.C. (Para 30)

Case Law Discussed:
1. Vinay Tyagi v. Irshad Ali @ Deepak, 2013 SCC (5) 762
2. State of Andhra Pradesh v. A.S. Peter, (2008) I SCC (Cri) 427
3. Rama Chaudhary v. State of Bihar, (2009) 2 SCC (Cri) 1059
4. State of Haryana v. Bhajan Lal, 1990 Lawsuit (SC) 701

(Delivered by Hon'ble Bharat Bhushan, J.)

1. Two brothers, applicant Arun Kumar and respondent no. 2 Mritunjay Kumar are at each other's throat vying for possession of two bedroom flat bearing no. B-138, Kendriya Vihar, Sector-51, Noida, District Gautam Buddh Nagar resulting in civil as well as criminal litigation including present charge sheet dated 17.9.2013 under Sections 392, 452, 342, 323, 504, 506, 427 Indian Penal Code (in short, IPC) arising out of Case crime no. 33 of 2010, Police Station Sector-49 Noida, District Gautam Buddh Nagar.

2. Applicant seeks quashing of the aforesaid charge sheet and subsequent proceedings. The brief facts relating to the dispute are that applicant Arun Kumar is working in Border Security Force (in short, BSF) as an employee. He was allotted a two bedroom flat no. B-138, Kendriya Vihar, Sector-51, Noida, District Gautam Buddh Nagar by Central Government Employees Welfare Housing Organization (in short, (C.G.E.W.H.O.) under para-military quota in the year 1997. The possession of the flat was handed-over to the applicant in the year 1999. Applicant, his wife and two children started living in this flat. Since the applicant mostly remains outside on account of his onerous duty, he allowed his elder brother respondent no. 2 to stay in a portion of the aforesaid flat so that during his absence, his elder brother can take care of his family and manage the property while remaining portion was occupied by the applicant's family. Respondent no. 2 was unmarried till 2006.

3. It is stated that for day to day management of the property including telephone connection and power connection etc. a general power of attorney (in short, G.P.A.) and a Will was executed in favour of respondent no. 2. Respondent no. 2 got married in the year 2007. It is further stated that respondent no. 2 developed oblique interest in the property of the applicant and on suspecting the motive of respondent no. 2, applicant cancelled G.P.A. and executed a fresh Will in favour of his wife and children and duly intimated respondent no. 2. In fact, applicant also asked respondent no. 2 to shift to some other property because he required entire flat for growing family needs but Mritunjay Kumar respondent no. 2, instead of vacating the portion of the flat, which was in his possession, issued a legal notice dated 29.5.2007 through his Advocate, which was replied by counsel of the applicant on 28.7.2007. The crux of the dispute is that respondent no. 2 started claiming ownership right on the ground that money for acquisition of the aforesaid flat was supplied by the family especially parents and other brothers of the applicant and family settlement gave this property to respondent no. 2. His claim is that entire money for purchase of the aforesaid property was supplied by the parents, other brothers and respondent no. 2 and now after escalation in value of property, the applicant is trying to grab the property.

4. Applicant, on the other hand, says that the property was allotted to him as a part of his para-military employment and that respondent no. 2 does not have any right over the property. He further claims that no family settlement had been executed and entire family property is still intact without any division. In any case, he claims that his property can not become part of family settlement. The property is self-acquired, even if, some money was paid by their parents and other brothers that would not change nature of title of the property allotted to the applicant by C.G.E.W.H.O. Authority.

5. Apparently, civil litigation started between the parties . Criminal disputes also erupted. Applicant says that he went to Police Station for registration of the complaint against respondent no. 2 but Police initially refused to lodge the complaint but acknowledged it after a considerable delay and modification of the complaint, as suggested by the Police. After acknowledgment of the complaint, respondent no. 2 vacated the flat on his own.

6. It is further stated that on the same day, respondent no. 2 moved an application under section 156(3) Criminal procedure Code (in short, Cr.P.C.) levelling serious allegations against the applicant. The application alleges that applicant along with 5-6 miscreants assaulted respondent no. 2 and robbed his household goods and thereafter, forcibly threw him out of the disputed flat. It was also alleged that a cash amount of Rs. Two lacs and some jewelry was also pillaged by applicant and his companions. Respondent no. 2 claims that his report was not lodged by the Police, therefore, he sought and obtained direction from the court. This report was lodged as Case crime no. 33 of 2010 under sections 392,452,342,323,504,506, 427 and investigation was conducted. The Investigating Officer concluded that there was no satisfactory evidence in support of allegations and that dispute was essentially civil in nature. Thereafter, final report dated 12.10.2010 was submitted.

7. Respondent no. 2 filed a protest petition against final report dated 12.10.2010 and Chief Judicial Magistrate, Gautam Buddh Nagar after considering the entire material on record rejected the protest petition on 14.3.2011 and accepted the final report. This order of Chief Judicial Magistrate, Ghaziabad dated 14.3.2011, approving the final report was challenged by respondent no. 2 by filing Criminal Revision No. 93 of 2011 (Mritunjay Kumar versus State of U.P.). This criminal revision was allowed by Additional Sessions Judge, Ghaziabad vide order dated 17.8.2011 and consequently learned Magistrate was directed to pass fresh orders after considering the report dated 6.6.2010 prepared by Sri Sudhir Kumar, Superintendent of Police (Transport), Meerut. The matter was again considered by Chief Judicial Magistrate, Ghaziabad and this time a detailed order dated 22.9.2011 was passed wherein he considered all the materials as had been directed by the revisional court. Learned Chief Judicial Magistrate again rejected the protest petition dated 25.2.2011 and accepted the final report by this order dated 22.9.2011. This order was again challenged by filing Crl. Revision No. 278 of 2011 (Mritunjay Kumar versus State of U.P.). This time revisional court rejected the criminal revision and affirmed the order dated 22.9.2011 passed by the Chief Judicial Magistrate vide judgment and order dated 18.5.2012.

8. After rejection of this criminal revision against the acceptance of final report dated 12.10.2010, an application was moved before the then Senior Superintendent of Police (in short, S.S.P), Gautam Buddh Nagar on 24.7.2012 for ordering further investigation under section 173(8) Cr.P.C. and S.S.P. Gautam Buddh Nagar with alacrity ordered further investigation on same day without taking into consideration two earlier orders of Chief Judicial Magistrate accepting final report and revisional order dated 18.5.2012 affirming such acceptance.

9. Investigating Officer S.I. Girish Kumar moved an application before Chief Judicial Magistrate, Gautam Buddh Nagar and sought permission for further investigation. The Chief Judicial Magistrate considered the request in the light of acceptance of final reports twice and revisional order dated 18.5.2012 affirming such acceptance and rejected the application vide order dated 17.9.2012 (Annexure-10 to the application). The said order passed by the Chief Judicial Magistrate, Gautam Buddh Nagar is reproduced below:-

" संबंधित पत्रावली का अवलोकन से विदित है कि अंतिम आख्या दिनांक 22/9/2011 को स्वीकार की जा चुकी है। जिसकी निग्रानी भी दिनांक 18/5/2012 को निरस्त की जा चुकी है। अतः अब अग्रिम विवेचना की अनुमति अन्तर्गत धारा 173 (8) दं० प्र०सं० प्रदान किया जाना न्यायोचित नहीं है। प्रा० पत्र निरस्त किया जाता है। "

Sd/- CJM

10. The aforesaid rejection order did not deter Police personnel in utter disregard to the judicial order dated 22.9.2011 passed by Chief Judicial Magistrate, revisional judgment dated 18.5.2012 of Sessions Court and refusal of permission for further investigation vide order dated 17.9.2012. Investigating Officer continued to investigate the dispute and filed charge sheet against the applicant bearing no. 147 of 2013 under sections 323, 504, 506, 427 IPC.

11. This charge sheet was submitted before Additional Chief Judicial Magistrate II, Gautam Buddh Nagar whereupon learned Magistrate took cognizance and case was registered as Criminal Case No. 1683 of 2013. It appears that matter did not rest there. Senior Superintendent Of Police, Gautam Buddh Nagar again ordered further investigation on 10.8.2013 but this time, investigation was entrusted to some other Investigating Officer of different Police Station. Police official working at the Police Station Sector-39 Noida, was given responsibility for further investigation despite submission of the charge sheet dated 18.7.2013. This time permission of learned Magistrate was not even sought. The matter was further investigated pursuant to direction of S.S.P. Gautam Buddh Nagar and another charge sheet dated 17.9.2013 under sections 392, 452, 323, 504, 506, 427 IPC was submitted, meaning thereby that new charge sheet also contained two new sections, namely, sections 392 and 452 IPC making the charge-sheet under cognizable and non-bailable offences. This second charge sheet dated 17.9.2013 and subsequent proceedings are under challenge before this Court on behalf of applicant.

12. Heard Sri Vinay Saran, learned counsel for the applicant, Sri Apul Misra, learned counsel for respondent no. 2 and learned AGA for the State.

13. Learned counsel for the applicant claims that entire dispute essentially is of civil in nature and same has deliberately been converted into criminal case in order to grab the property of the applicant by taking benefit of the fact that applicant is mostly posted at distant place with poor connectivity. He further claims that stated G.P.A. agreement and Will can not transfer the title of the property in dispute to respondent no. 2, even if, it is assumed that some money was paid by their parents in order to facilitate the purchase of property. Learned counsel for the applicant has also submitted that two final reports have been submitted by various Investigating Officers and revision against them have been dismissed by the revisional court vide judgment and order dated 18.5.2012.

14. That learned counsel for the applicant has also argued that once an application was moved by Investigating Officer seeking permission from the Magistrate in order to commence further investigation under section 173(8) Cr.P.C., his further action must be in consonance with the order of the Magistrate. He has also drawn attention of this Court towards the application moved for further investigation which was dismissed but in gross violation and utter disregard of

the judicial order dated 18.5.2012, the further investigation was conducted. Learned counsel for the applicant has submitted that this course of action is not permissible in view of judgment of Apex Court in **'Vinay Tyagi versus Irshad Ali @ Deepak, 2013 SCC (5) 762.**

15. Learned counsel for the applicant has also argued that even after submission of charge-sheet under sections 323, 504, 506, 427 IPC, S.S.P. Gautam Buddh Nagar did not stop as charge-sheet had been filed in non-cognizable and bailable offences. Senior Superintendent of Police again ordered further investigation and this time further investigation was handed-over to different Police Station and this new Investigating Officer working out of Police Station Sector-39 Noida, Gautam Buddh Nagar filed another charge-sheet wherein sections 392, 452 IPC were added. Both these offences are non-bailable and cognizable offences. Learned counsel for the applicant has further claimed that he approached Senior Superintendent Of Police and new Investigating Officer, apprising them the pronouncement of Apex Court **in Vinay Tyagi's case (Supra)** etc., Copies of the aforesaid judgment was also served on both Senior Superintendent of Police as well as Investigating Officer yet no heed was paid and Investigating Officer in collusion with respondent no. 2 with malafide intention initiated second further investigation and submitted charge-sheet in much graver offences deliberately with oblique purpose.

16. Per contra, learned Additional Government Advocate and Sri Apul Misra, learned counsel for respondent no. 2 have claimed that further investigation under section 173(8) Cr.P.C. is statutory right of Police which does not requires permission from any Magistrate. In this connection, he has drawn attention of this Court to the provisions enshrined under section 173(8) Cr.P.C. which does not contemplate any prior permission of the Magistrate. Learned counsel for the applicant has further submitted that disputed property belongs to respondent no. 2. The name of applicant was used for allotment for the simple reason that no other person could have been allotted this property but entire money for it was paid by parents and brothers of the applicant. He further submits that he was in possession of the property at the time of incident and that he was thrown out of property with the help of anti-social elements by using force and that several household good and jewellery were plundered by the applicant and his companions. Learned counsel for respondent no. 2 has further claimed that judgment of Apex Court in **Vinay Tyagi's case (Supra)** is not applicable in the instant case as the same is against the express provisions of Section 173(8) Cr.P.C. He has further argued that even if it is assumed that prior permission of Magistrate is necessary, then absence of prior permission is an irregularity which has been cured subsequently by the Magistrate by taking cognizance on the supplementary charge sheet.

17. Before embarking to decide various arguments raised by learned counsel for the parties, it would be appropriate to dispose of one of the arguments of counsel for respondent no. 2 at the initial stage itself. Learned counsel for respondent no. 2 has claimed that judgment of Apex Court in **Vinay Tyagi's case (Supra)** is not applicable as the same is against the express provisions of section 173(8) Cr.P.C. This argument does not deserve to lengthy answer. The fact of the matter is that every statutory provision can be interpreted by the constitutional courts in a particular manner and once they are interpreted in a particular fashion, it is incumbent upon all the inferior court to follow such mandate. No inferior court is empowered to refuse to follow the mandate on the ground

that same is against the statutory provisions. If Vinay Tyagi's case(Supra) is applicable in the instant case, then same will apply with full vigor.

18. Before analyzing the facts of the instant case, it would be appropriate to recapitulate briefly the provisions of Cr.P.C. with regard to charge sheet and protest petition etc. The scheme entails that in pursuance of registration of FIR in cognizable offences, an investigation will be held and as a consequence of this investigation, a report under section 173(3) Cr.P.C. will be submitted. This report may result in exoneration of accused or finding that there is no sufficient evidence to proceed against any body resulting in submission of final report or closure report. But if the Investigation Officer is able to identify the perpetrators of crime and obtain sufficient material for their prosecution, then report is submitted in the form of charge-sheet for the trial. Section 173(8) Cr.P.C. provides that nothing shall be deemed to preclude further investigation after submission of charge sheet, meaning thereby that Incharge/Investigation Officer is not precluded from gathering further evidence. This additional evidence, oral or documentary, is required to be forwarded to the Magistrate with further report. The provisions contained under sub-sections (2) to (6) of Section 173 Cr.P.C. shall, as far as, may apply in relation to the report forwarded under sub-section (2) of section 173 Cr.P.C.

19. It essentially means that even when a charge-sheet or report under section 173(2) Cr.P.C. has been submitted, the Officer Incharge of the Police Station/Investigating officer can conduct further investigation in the matter and submit further oral as well as documentary evidence to the Magistrate and such report ordinarily will be known as supplementary report. The Apex Court in various decisions especially in **Vinay Tyagi's case (Supra**) has held that even Magistrate can order further investigation, meaning thereby that not only the officer in charge of the Police Station can commence further investigation, if required, even the Magistrate can order further investigation under section 173(8) of the Code. However, the Apex Court in **Vinay Tyagi's case (Supra)** has clearly held that further investigation is nothing but continuation of previous investigation. The Court held, thus :-

"10. The initial investigation is the one which the empowered police officer shall conduct in furtherance to registration of an FIR. Such investigation itself can lead to filing of a final report under Section 173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the court of competent jurisdiction in terms of Section 156(3) of the Code.

"Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a "further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as "supplementary report'. "Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the

primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a "reinvestigation', "fresh' or "de novo' investigation."

20. It is true that normally investigating agencies seek prior permission from the court for conducting further investigation though section 173(8) of the Code does not talk of prior permission from the Magistrate. Section 173(8) of the Code specifically authorizes the Police or Investigating agencies to conduct further investigation of its own. However, for practical purposes, it is always logical to seek prior permission. One of the reasons may be that if the court concerned is not kept in the loop, then trial may be over before supplementary report is submitted. Therefore, it is always preferable to seek prior permission of the Magistrate. But as far as interpretation of law is concerned, it is evident that Police is not required to seek prior permission of the Magistrate before conducting further investigation. Even the Apex Court has taken note of this fact that there is no specific requirement under the provisions of section 173(8) of the Code to conduct further investigation with the leave of the court. The Apex Court in **Vinay Tyagi's case (Supra)** has held thus:-

"26. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct "further investigation' or file supplementary report with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct "further investigation' and file "supplementary report' with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the Court to conduct "further investigation' and/or to file a "supplementary report' will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.

Such a view can be supported from two different points of view. Firstly, through the doctrine of precedence, as afore-noticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea exposition. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused."

21. The aforesaid observation of the court would indicate that there is no legal requirement to seek prior permission of the court though ordinarily permissions are taken or can be taken but

question is whether absence of permission would render the further investigation vitiated? I am afraid, this interpretation would be against the express provisions of Code. Apex Court has also held in **Vinay Tyagi's case (Supra)** that it is a matter of propriety for the Police to seek permission from the court.

22. The Apex Court **in 'State of Andhra Pradesh versus A.S.Peter (2008) I S.C.C. (Cri) 427**' has held that law does not mandate taking of prior permission from the Magistrate for further investigation. The Court has held thus:-

"9. Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the chargesheet is a statutory right of the police. A distinction also exists between further investigation and re- investigation. Whereas re-investigation without prior permission is necessarily forbidden, further investigation is not."

23. Similarly, the Apex Court in **'Rama Chaudhary versus State of Bihar (2009) 2 S.C.C. (Cri) 1059'** has held that normal permission from the Magistrate is not necessary for taking further investigation. The judgment reads as under :-

"15. Among other sub-sections, we are very much concerned about sub- section (8) which reads as under:-

"(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

A mere reading of the above provision makes it clear that irrespective of report under sub-section (2) forwarded to the Magistrate, if the officer in-charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. The above said provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of police report under sub-section (2) on completion of

investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

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24. It is, therefore, apparent that as far as legal position is concerned, Police is not precluded to conduct further investigation even without prior permission of Magistrate. But, in the instant case, situation is significantly different. Investigation was conducted initially and a final report dated 12.10.2010 was submitted concluding that there was no satisfactory evidence in support of allegation and dispute was essentially civil in nature. A protest petition was filed which was rejected by the Magistrate. Respondent no. 2 Mrityunjay Kumar was not satisfied with the order of the Magistrate, therefore, he filed criminal revision bearing Criminal Revision No. 93 of 2011 (Mrityunjay Kumar versus State of U.P.). Apparently, Sessions Judge came across a report prepared by Superintendent of Police (Transport), Meerut, which had not been considered by the Magistrate. It would not be appropriate for this Court to give its opinion regarding this order as same would show that Magistrate was required to decide the protest petition on the basis of available evidence on record and that he was not required to initiate fishing expedition. But whatever may be the reason, the Sessions Judge did allow the criminal revision directing the Magistrate to pass fresh orders after considering the report dated 6.6.2010 prepared by Sri Sudhir Kumar, Superintendent of Police (Transport),Meerut.

25. In pursuance of the aforesaid order of Sessions Judge, learned Chief Judicial Magistrate considered the entire material on record as has been directed by the revisional court and thereafter, again rejected the protest petition on 22.2.2011 and approved the final report by the same order.

26. This did not deter Mritunjay Kumar, he again filed a criminal revision dated 27.8.2011 but this time the Sessions Court rejected the criminal revision and affirmed the order of the Magistrate dated 22.9.2011. Now, situation took an interesting turn. After approval of final report and finding no support from the Magistrate and Sessions Court, Senior Superintendent of Police, Gautam Buddh Nagar stepped in. He ordered further investigation under section 173(8) Cr.P.C. with significant promptness. He did not take into consideration the two earlier orders of Chief Judicial Magistrate approving final report and revisional order dated 18.5.2012. Pursuant to the aforesaid order, the Investigating Officer sought permission from the Chief Judicial Magistrate for further investigation. Learned Magistrate considered the request in the light of acceptance of final report twice and revisional order dated 18.5.2012 affirming the said acceptance and rejected the application vide order dated 17.9.2012. The order has already been quoted in paragraph-9 of this judgment. There was no ambiguity in the order of the learned Magistrate but aforesaid rejection order did not deter the Police from conducting further investigation. They did not care that request

for permission had been rejected by the Magistrate. In utter disregard to judicial discipline, they refused to obey the order passed by the Chief Judicial Magistrate and not only continued further investigation but also filed charge-sheet under Sections 323,504, 506,427 IPC.

27. This charge-sheet did not satisfy Senior Superintendent of Police, Gautam Buddh Nagar, he again ordered further investigation vide order dated 10.8.2013 and entrusted the investigation to a different Police Officer working out of Police Station Sector-39, Noida. This time police did not care to seek permission of Magistrate and this second further investigation resulted in another charge-sheet dated 17.9.2013 wherein two new sections 392, 452 IPC were added, making this charge-sheet under cognizable and non-bailable offences. This sequence of event would indicate that some body was hell-bent upon prosecuting the applicant in grave offences. He/she was not satisfied by his prosecution under bailable and non cognizable offences. That person made sure that applicant, who is an employee of B.S.F., is prosecuted under cognizable and non-bailable offences. Question is whether investigation conducted by police without prior permission of the Magistrate is valid or not ? There is no doubt that section 173(8) Cr.P.C. does not talk about prior permission of the Magistrate even Vinay Tyagi's case (Supra) also does not mandate that further investigation without prior permission of the Magistrate is illegal or vitiated. But, in the instant case, the permission was indeed applied for and same was rejected by the Magistrate. No body asked the Police personnel to seek permission from the Magistrate but once they sought permission from the Magistrate and same was denied, there was no occasion for them to initiate further investigation in utter disregard and in violation of order of Magistrate dated 17.9.2012. Surprisingly, permission was sought and denied, yet investigation was conducted. In the instant case, several investigations have been conducted. First investigation resulted into final report. Second investigation resulted into charge-sheet under non-bailable and non-cognizable offences. The procedure laid down under Section 2(d) Cr.P.C. says in explanation annexed with this provision that a report made by Police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint and police officer by whom such report is made shall be deemed to be the complainant. But, this did not satisfy bigwigs of Police department and they again ordered investigation by a different officer and made sure that charge-sheet is filed under cognizable and non-bailable offences.

28. I have absolutely no doubt that once a permission was sought and declined, then Police department Gautam Buddh Nagar did not have any authority to continue the investigation. Subsequent investigation illegal and vitiated. The charge-sheet dated 17.9.2013 subsequent to this investigation, is not sustainable. The procedure adopted by the Gautam Buddh Nagar Police reeks of malafide and arbitrariness. The Apex Court in **State of Haryana versus Bhajan Lal 1990 Lawsuit (SC) 701** has held that where a criminal proceeding is manifestly attended with malafide 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, the High Court would be justified in exercising the powers under section 482 Cr.P.C. in quashing the charge-sheet.

29. A bare perusal of facts would reveal that dispute is essentially about a plot of land, title of which can not be adjudicated by the criminal court. Both brothers are fighting for ownership and possession of flat concerned. Rights over this flat will have to be decided by civil court. Invocation of jurisdiction of criminal court is merely a ploy to pressurize the applicant. It is admitted case that families of both the brothers were living in the same flat therefore, nobody can accuse other of looting or robbing goods enjoyed by both persons. In any case, Police personnel themselves were not satisfied with the correctness of allegations. Instead of advising the brothers to get the dispute adjudicated by a competent civil court, the Police personnel became interested in one brother or other at various points of time. It is my firm opinion that this criminal case is nothing but a ploy to put pressure for settling the civil dispute and that entire procedure is vitiated by mala fide. This criminal case was instituted with mala fide intention of wreaking vengeance upon the applicant due to private and personal grudge.

30. In view of the aforesaid discussion, the Application under section 482 Cr.P.C. is allowed. The impugned charge-sheet dated 18.7.2013 and additional charge-sheet dated 17.9.2013 under sections 392,452, 342, 323, 504, 506, 427 IPC arising out of FIR dated 23.1.2010 registered as Crime No. 33 of 2010 under sections 323, 342, 392, 452, 504, 506 IPC, Police Station Sector-49, Noida, District Gautam Buddh Nagar pending as case no. 1383 of 2013 before Additional Chief Judicial Magistrate, Gautam Buddh Nagar are quashed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2026

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3388 Of 2012

Ramchandar Agarwal **...Revisionist**
Versus
State Of U.P. **...Opposite party**

Counsel for the Revisionist:
Sri Vipin Kumar,

Counsel for the Opposite party:
A.G.A, Anil Tiwari

This Criminal revision has been preferred by the revisionist that a bare perusal of the application under Section 156(3) Cr.P.C. discloses commission of a cognizable offence but the court below has rejected the said application vide its order dated 4.9.2012 on the ground that this matter pertains to the disobedience of the injunction decree of the Civil Court and the decree holder has alternative remedy under Order 21 C.P.C. It is further contended that the learned Magistrate did not rightly considered the facts and circumstances of the case, therefore, the finding recorded by

the learned Magistrate is without application of mind and against the preposition of law. It is also submitted that the order passed by the learned Magistrate is erroneous and against the procedure of law on the face of record, as such, the same is liable to be set aside.On perusal of the record, it appears that there is a long drawn civil litigation regarding subject matter of the suit and the revisionist has also approached the Government of U.P. The impugned order suffers from no illegality or perversity. The revision lacks merits and deserves to be dismissed.

Held: Para-

Case Law discussed:
Lalmuni Devi (Smt.) Vs. State of Bihar and others, (2001) 2 Supreme Court Cases 17.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Vipin Kumar, learned counsel for the revisionist and learned A.G.A. for the State of U.P.

2. This Criminal revision has been preferred by the revisionist for setting aside the order dated 04.09.2012 passed by the learned Additional Chief Judicial Magistrate, Court No. 6, District Bareilly in Misc. Case No. 337 of 2012 (Ram Chandra Agarwal Vs. Umesh Pratap Singh and others).

3. It is contended by learned counsel for the revisionist is that a bare perusal of the application under Section 156(3) Cr.P.C. discloses commission of a cognizable offence but the court below has rejected the said application vide its order dated 4.9.2012 on the ground that this matter pertains to the disobedience of the injunction decree of the Civil Court and the decree holder has alternative remedy under Order 21 C.P.C. It is further contended that the learned Magistrate did not rightly considered the facts and circumstances of the case, therefore, the finding recorded by the learned Magistrate is without application of mind and against the preposition of law. It is also submitted that the order passed by the learned Magistrate is erroneous and against the procedure of law on the face of record, as such, the same is liable to be set aside.

4. Learned counsel for the revisionist has relied upon a decision of the Apex Court in the case of ***Lalmuni Devi (Smt.) Vs. State of Bihar and others, (2001) 2 Supreme Court Cases 17***.

5. So far as the decision relied upon by learned counsel for the revisionist is concerned, this citation pertains to the complaint case. Thus, it is not applicable in the instant matter.

6. On perusal of the record, it appears that there is a long drawn civil litigation regarding subject matter of the suit and the revisionist has also approached the Government of U.P. in this regard (Annexure-3 to the affidavit filed in support of the revision).

7. The judgment and order dated 12.10.2009 passed by the learned Additional Civil Judge (Senior Division) Court No. 1, Bareilly in Original Suit No. 246 of 2002, Ram Bharose Lal

Dharmarth Trust, Bareilly and another Vs. Nagar Nigam, Bareilly (Annexure-4 to the affidavit filed in support of revision) is a well discussed and elaborate judgment regarding subject matter of the suit.

8. All the facts have been discussed by the learned Additional Chief Judicial Magistrate, Court No. 6, Bareilly in the impugned order dated 04.09.2012 on the application moved under Section 156(3) Cr.P.C., Police Station Prem Nagar, District Bareily and thereafter discussing the subject matter of dispute has arrived at a right conclusion. The impugned order suffers from no illegality or perversity. The revision lacks merits and deserves to be dismissed.

9. Dismissed.

10. Interim order, if any, stands vacated.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 3683 Of 2014

Govardhan Singh **...Revisionist**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsels for the Revisionist:
Hemendra Pratap Singh, S.K. Pandey-II

For the Opposite Parties:
Govt. Advocate

Procedure:
Criminal Revision under Sections 397/401 Cr.P.C. challenging the order dated **18.10.2014** passed by the **Additional Sessions Judge, Court No.9, Mathura** in **S.T. No. 53 of 2013 (State v. Digambar & Ors.)**, whereby the application moved under **Section 319 Cr.P.C.** for summoning accused persons was rejected.

Issue:
Whether rejection of an application under **Section 319 Cr.P.C.** is justified when the proposed accused were **named in the F.I.R.** and **assigned specific roles** in the oral evidence of P.W.-1, supported by injury reports.

Headnotes:
The proposed accused persons were **specifically named in the F.I.R.** and their **active participation** was clearly reiterated in the **oral testimony of P.W.-1 (informant)**. The injury reports of the injured witnesses

further corroborate the prosecution version. The trial court, while rejecting the application under Section 319 Cr.P.C., **overlooked material evidence** and failed to apply the correct legal principles. The power under Section 319 Cr.P.C. is to be exercised where **strong and cogent evidence** appears against a person. The impugned order suffers from **legal infirmity** and cannot be sustained.

Legal Maxim:
A verbis legis non est recedendum — from the words of law, there must be no departure.

Case Law Discussed:
Hardeep Singh v. State of Punjab, Criminal Appeal No. 1750 of 2008, decided on 10.01.2014 (SC)
Sarabjit Singh v. State of Punjab, LAWS (SC)-2009-5-225
Ram Singh v. Ram Niwas, LAWS (SC)-2009-5-138

Result:
Criminal Revision **Allowed**.
The impugned order dated **18.10.2014** passed by the Additional Sessions Judge, Court No.9, Mathura is **set aside**.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. List has been revised. Sri Hemendra Pratap Singh, learned counsel for the revisionist, learned A.G.A. for the State of U.P. and Sri S.K. Pandey-II, learned counsel for the opposite parties no.2 and 3 are present.

2. This revision has been filed against the order dated 18.10.2014 passed by the learned Additional Sessions Judge, Court No.9, Mathura in S.T. No.53 of 2013 (State v. Digambar and others), under Sections 147, 148, 149, 307, 325, 323, 324, 504, 506/34 I.P.C. (Case Crime No.171 of 2010), Police Station Chhata, District Mathura, whereby the application moved by the revisionist under Section 319 Cr.P.C. for summoning the opposite parties no.2 to 4 to face the trial has been rejected.

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

4. After going through the F.I.R., it is that the alleged accused persons, namely, Manoj, Jiwan Lal and Mahender are named as accused persons. In the oral evidence of P.W.-1, Govardhan Singh also above named accused persons have been assigned the specific role in the alleged occurrence. The injury reports of the injured Babu Lal and Om Prakash also reveal the certain injuries which fortify the contention of the learned counsel for the revisionist.

5. Learned counsel for the revisionist has relied upon the judgement of the Supreme Court in **Criminal Appeal No.1750 of 2008 (Hardeep Singh v. State of Punjab),** dated 10.01.2014.

6. Learned counsel for the opposite parties has relied upon the judgements of the Supreme Court in **Sarabjit Singh v. State of Punjab, LAWS (SC)-2009-5-225** and **Ram Singh v. Ram Niwas, LAWS (SC)-2009-5-138**.

7. This is a case where the alleged accused persons were named in the F.I.R. and in the evidence of the informant, Govardhan Singh. The court concerned in the impugned order dated 18.10.2014 has discussed the evidence and the material available on record but it has oversighted the fact that the alleged accused persons were named in the F.I.R. and also assigned specific role during the commission of the crime and this has been reiterated in the oral evidence of P.W.-1, Govardhan Singh.

8. The legal maxim "A verbis legis non est recedendum" which means, "from the words of law, there must be no departure" has to be kept in mind. Thus, there must not be any other interpretation of Section 319 Cr.P.C.

9. The impugned order dated 18.10.2014 passed by the learned Additional Sessions Judge, Court No.9, Mathura suffers from legal infirmity and deserves to be set aside. Resultantly, revision is liable to be allowed.

10. The criminal revision is allowed. The impugned order dated 18.10.2014 passed by the learned Additional Sessions Judge, Court No.9, Mathura is hereby set aside.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE SHASHI KANT, J.

Criminal Revision No.- 3828 Of 2014

Balbeer **...Revisionist**
Versus
State Of U.P. & Ors. **...Opposite Parties**

Counsel for the Revisionist:
Vivek Kumar Singh, Mayank Yadav

Counsel for the Opposite Parties:
Govt. Advocate, Rajesh Yadav

Criminal law–Criminal Revision – Order dated 27.09.2013 – Application (98-Ka) under Section 319 Cr.P.C. – Rejected – Summoning of additional accused – Earlier application rejected – Prosecution witnesses not cross examined – Subsequent application – Delay of more than 8 years – Stage of recording statement under Section 313 Cr.P.C. – Enquiry into or trial of an offence – No limitation prescribed – Evidence recorded during trial – FIR named accused – No charge sheet filed – Complicity of proposed accused – Evidence of PW-1 Balbeer, PW-2 Kishanpal, PW-3 Ramveer and PW-4 Jogendra – Names, parentage and arms – Satisfaction – More than prima facie case – Short of satisfaction to an extent that evidence if goes unrebutted would lead to conviction – Pre-trial stage – Trial at final stage – Contradictory evidence – Medical evidence – Intention of

causing delay – Failure of justice – De novo trial – Section 319(4) Cr.P.C. – Application allowed – Order set aside.

It is submitted by learned counsel for the revisionist that:
While passing the impugned order, the Lower Court has not applied its judicial mind and passed an illegal order. The lower court has failed to consider that specific role has been assigned to the proposed accused. They were nominated in the FIR and all the witnesses examined by the prosecution i.e. complainant-revisionists P.W. 1 Balbeer, P.W. 2 Kishan Pal, P.W. 3 Ramveer and PW-4 Jogendra have also specified their roles in their respective statements recorded before the Trial Court.
Though earlier application filed by the complainant-revisionist under section 319 Cr.P.C. was rejected by the Lower Court but it will not affect the fate of the subsequent application moved by the complainant revisionist because earlier application was rejected on the ground that till that time cross examination of the complainantrevisionist was not started and other witnesses were also not examined. But now the witnesses of facts, P.W. 1,P.W. 2, P.W. 3 and PW-4 were examined and they were cross examined by the defence.
The delay which has been caused in moving the application is due to time consumed in the examination of the prosecution witnesses and their cross examination.
To buttress his arguments, learned counsel for the revisionist has placed reliance on a judgment in the case of Hardeep Singh Versus State of Punjab 2013(85) A.C.C. 313.
(Para-4-4.4)

Per contra, Sri Rajesh Yadav, learned counsel for O.P. Nos. 2 and 3, controverting the above submissions of the learned counsel for the revisionist urged that:
Admittedly, earlier application filed by the complainan trevisionist under section 319 Cr.P.C. was heard and rejected on merits vide order dated 3.8.2006.
After completion of the evidence of the prosecution, the case was fixed on 23.9.2013 for recording the statements of accused respondent under section 313 Cr.P.C. and subsequent to that second application under section 319 Cr.PC. has been filed for summoning of O.P. Nos. 2 and 3, which is not maintainable.
The Lower Court has passed a perfectly just and legal order, recording sufficient reasons for passing the same alongwith discussion of the relevant case laws as such there is no illegality or irregularity in the impugned order.
The revision lacks merits and is liable to be dismissed.
(Paras 5-5.4)

Held:(Paras- 28-32)

1. It is evident from the above referred evidence of prosecution that all the above prosecution witnesses have given evidence regarding complicity of proposed accused in the alleged crime with necessary details regarding their names, parentage and arms kept by them during alleged incident.

2. As the matter related to proposed accused is at the pretrial stage, therefore, it is not desirable to enter into detailed discussion and analysis of the prosecution evidence available against the proposed accused and record finding on merits of those. At this stage it will suffice to note that evidence of above referred prosecution witnesses PW-1, PW-2, PW-3 and PW-4 stood the test of requirement of recording satisfaction to the effect that there is sufficient evidence to proceed further, against the proposed accused.

3. A close scrutiny of the order impugned reveals that it is in the nature of final acquittal order without any regular trial of the proposed accused for the henious offence of murder, which is neither permissible nor sustainable in the eyes of law and if permitted to stand, will cause failure of justice.

4. For the reasons recorded above, this revision deserves to be allowed and is allowed accordingly. Order impugned dated

5. 27.09.2013 is set aside. Application (98ka) moved for summoning of opposite parties under Section 319 Cr.P.C. to face the trial is **allowed**. Lower court will take all necessary steps in this regard within two weeks from the date of filing of this order. However, it will be open to the Lower Court to decide whether proposed accused will be tried together with the original accused facing the trial or they will be tried separately as prescribed under Section 319(4) Cr.P.C.

6. It is made clear that this Court is not expressing any opinion with regard to the merits of the case and whatever observations have been made in this judgment are only for the purpose of deciding this revision. 33. No order as to costs.

Case Law discussed:

1.State of Assam Versus Abdul Halim, A.I.R. 1992 S.C. 2068 (Para-11)
2.Brijesh Kumar and another Versus State of U.P. and others, 2003 All.L.J. 52 (Para-12)
3.Amar Nath Versus State of Haryana, 1997 (4) SCC 137 (Para-13)
3.Radha Mohan Gond Versus State of Bihar, 2006 Cri.L.J. 3533 (Para-14)
4.Bholu Ram Versus State of Punjab and others, 2008 (9) SCC 140 (Para-15)
5.Hardeep Singh Versus State of Punjab and Others, 2014 (85) ACC 313 (Paras-16, 21)
6.Jogendra Yadav and Others Versus State of Bihar and Others (Para-17)
7.State of Madhya Pradesh Versus Rakesh Mishra, (2015) 13 SCC 8 (Para-18)
8.Harveer Singh and Others Versus State of U.P. and Another, Criminal Revision No. 3822 of 2007 (decided on 31.07.2015) (Para-19)
9.Pankaj Verma Versus State of U.P. and Others, Application U/S 482 No. 20458 of 2016 (decided on 15.07.2016) (Para-20)

(Delivered by Hon'ble Shashi Kant, J.)

1. Heard learned counsel for the revisionist, learned A.G.A. for the State and Sri Rajesh Yadav, learned counsel for Opposite Party Nos. 2 and 3.

2. Since, after exchange of counter and rejoinder affidavit pleadings are complete, therefore, with the consent of learned counsel for the parties this revision is being finally heard and decided.

3. This criminal revision under section 397/401 of Criminal Procedure Code, 1973 (In short 'Cr.P.C.') has been filed against the order dated 27.9.2013 passed by Additional Sessions Judge, Court No. 9, Budaun in S.T. No. 818 of 2003 - State Versus Rajendra and others, under sections 147,148,149,302 of Indian Penal Code, 1860 (In short 'I.P.C.'), whereby application (98-Ka) under section 319 Cr.P.C. filed by the revisionist for summoning of additional accused was rejected.

4. It is submitted by learned counsel for the revisionist that:

4.1 While passing the impugned order, the Lower Court has not applied its judicial mind and passed an illegal order. The lower court has failed to consider that specific role has been

assigned to the proposed accused. They were nominated in the FIR and all the witnesses examined by the prosecution i.e. complainant-revisionists P.W. 1 Balbeer, P.W. 2 Kishan Pal, P.W. 3 Ramveer and PW-4 Jogendra have also specified their roles in their respective statements recorded before the Trial Court.

4.2 Though earlier application filed by the complainant-revisionist under section 319 Cr.P.C. was rejected by the Lower Court but it will not affect the fate of the subsequent application moved by the complainant revisionist because earlier application was rejected on the ground that till that time cross examination of the complainant-revisionist was not started and other witnesses were also not examined. But now the witnesses of facts, P.W. 1,P.W. 2, P.W. 3 and PW-4 were examined and they were cross examined by the defence.

4.3 The delay which has been caused in moving the application is due to time consumed in the examination of the prosecution witnesses and their cross examination.

4.4 To buttress his arguments, learned counsel for the revisionist has placed reliance on a judgment in the case of **Hardeep Singh Versus State of Punjab 2013(85) A.C.C. 313.**

5. Per contra, Sri Rajesh Yadav, learned counsel for O.P. Nos. 2 and 3, controverting the above submissions of the learned counsel for the revisionist urged that:

5.1 Admittedly, earlier application filed by the complainant-revisionist under section 319 Cr.P.C. was heard and rejected on merits vide order dated 3.8.2006.

5.2 After completion of the evidence of the prosecution, the case was fixed on 23.9.2013 for recording the statements of accused respondent under section 313 Cr.P.C. and subsequent to that second application under section 319 Cr.PC. has been filed for summoning of O.P. Nos. 2 and 3, which is not maintainable.

5.3 The Lower Court has passed a perfectly just and legal order, recording sufficient reasons for passing the same alongwith discussion of the relevant case laws as such there is no illegality or irregularity in the impugned order.

5.4 The revision lacks merits and is liable to be dismissed.

6. I have given my careful consideration to the rival arguments raised by learned counsel for the parties and perused the record.

7. From perusal of impugned judgment and order dated 27.09.2013, passed on the earlier application of the revisionist under Section 319 Cr.P.C. it is clear that earlier application filed by the complainant revisionist was rejected on the ground that prosecution witness was not cross examined by the defence, but now that defect has been cured by examination and cross

examination of prosecution witnesses namely PW 1 - Balveer, PW 2 - Krishanpal, PW 3 - Ramveer and PW-4 Jogendra, as such rejection of earlier application of the complainant revisionist under section 319 Cr.P.C. will not affect the merits of second application of the complainant moved under section 319 Cr.PC. for summoning of O.P. Nos. 2 and 3.

8. In view of the above, now, only it has to be seen as to whether on the ground that the application of the complainant- revisionist moved under section 319 Cr.P.C. with delay of more than 8 years after rejection of earlier application at the stage of recording statement under Section 313 Cr.P.C. will preclude its filing. In other words, whether on the above grounds, aforesaid application under section 319 Cr.P.C. is not maintainable and liable to be rejected?

9. To find out the answer of above question, relevant legal provisions and case laws on the point is desired to be taken into consideration, which are being referred hereinafter.

10. Sections 227, 228 and 319 Cr.P.C. are relevant for the purpose of this revision, which read as under :

Section 227 Cr.P.C.

Discharge

*"**227**. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."*

Section 228 Cr.P.C.

Framing of Charge.

*"**228. (1)** If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -*

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offences in accordance with the procedure for the trial of warrant-cases instituted on a police report ;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

Section 319 Cr.P.C.

*"**319**. Power to proceed against other persons appearing to be guilty of offence*

1. Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

2. Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

3. Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

4. Where the Court proceeds against any person under Sub- Section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and 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."

11. In **State of Assam Versus Abdul Halim A.I.R. 1992 S.C. 2068**. Hon'ble Apex Court has set aside the decision of the Division Bench of the High Court of Guwahati in exercise of inherent jurisdiction and quashed the order of the learned Single Judge passed, in Criminal revision no. 155 of 1978 dated 12.12.1978. The order impugned in the above Criminal Revision was passed by the Sessions Judge of Nawagaon in Sessions Case No. 18(N)/74, during the trial of murder case, in exercise of the powers conferred under section 319 Cr.P.C., proposed five accused respondents before the Apex Court, were summoned to be tried together with four other original accused already committed by the magistrate to face trial under section 302/34 I.P.C. Non Bailable Warrants were also issued against proposed accused. However, keeping in view the fact that order of Sessions Judge was dated 23.9.1974 i.e. 18 years prior and status or the result of the Sessions case was also not available before the Court, the Hon'ble Apex Court has allowed the appeal with the direction not to proceed against the respondents.

12. In the case of Brijesh Kumar and another Versus State of U.P. and others 2003 All.L.J. At page 52 the Court in para 11 had held :-

"11. So far the prima facie evidence regarding involvement of the applicants in the offence is concerned there is evidence of Onkar Singh (P.W. 1) and Dalveer Singh(P.W. 5). These witnesses have stated the involvement of the applicants in the offence and corroborated F.I.R. Version. However, three other witnesses Jai Naraian(P.W. 2, Khajan Singh(P.W.3) and Udaiveer Singh(P.W.4) have not stated about the involvement of the applicants. But at this stage it cannot be said as to which of the witnesses are reliable and which are concealing the truth before the Court. The reliability of the witnesses shall be decided by the trial court at the appropriate stage. It is sufficient for purposes of this revision to observe that the two witnesses have stated about the involvement of the applicants and therefore there was sufficient ground for the learned session judge to summon the applicants under section 319 Cr.P.C."

13. In **Amar Nath Versus State of Haryana 1997 (4) SCC 137** it was held that:-

"13. The Apex Court has held that a person summoned as additional accused,when in the meantime trial of main case concludes, additional accused has to face trial because de novo trial has to be held qua him. The pointed question raised was that the additional accused could be tried only with the accused Who was being already tried and that if the trial qua the said accused has concluded, the additional accused cannot be tried pursuant to order passed under Section 319 of the Code. This view has been rejected and the Apex Court has held that even if trial of the accused who was being tried has concluded and that the power has been invoked under Section 319 and the additional accused has been summoned to stand the trial, the de novo trial shall be held and that in such a situation the summoning order shall not become inoperative.

14. The question had once again come up for consideration before the Apex Court as to what is the effect of conclusion of trial against the accused who was being proceeded with, when the order is passed under Section 319(1) for proceeding against newly added person. The Apex Court has observed in re : Shashikant Singh v. Tarkeshwar Singh (2002) 3 Rec Cri R 191 : (2002 Cri LJ 2806), as under :--

"8. The effect of the conclusion of the trial against the accused who was being proceeded with when the order was passed under Section 319(1) for proceeding against the newly added person, is to be examined in the light of Sub-section (4) of Section 319 which stipulates a de novo trial in respect of the newly added persons and certain settled principles of interpretation.

9. When a statute is passed for the purpose of enabling something to be done, and prescribes the way in which it is to be done, it may be either an absolute enactment or a directory enactment. The difference being an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get the real

intention of the legislature by carefully attending to the whole scope of the statute to be construed. (Craies on Statute Law, 7th Edn. pages 260-262).

10. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At that stage, the Court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of cross- examination of the newly added accused is mandate of Section 319(4). The words could be tried together with the accused in Section 319(1), appear to be only directory. Could be cannot under these circumstances be held to be must be. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court.

11. Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that to say some of the provisions may be disregarded without rendering invalid the things to be done, but others not. (Craies on Statute Law, 7th Edn. Page 266- 267).

12. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together the accused directly.

13. On facts, the court could not have intended while concluding the trial against Chandra Shekhar Singh, to nullify its earlier order directing issue of warrants against respondent No. 1. The construction to be placed on a provision like this has to commend to justice and reason. It has to be reasonable construction to promote the ends of justice. The words 'could be' tried together with the accused, in Section 319(1) cannot be said to be capable of only one construction. If it was so approach to be adopted would be different since the intention of the Parliament is to be respected despite the consequences of interpretation. There is, however, a scope for two possible constructions. That being the position, a reasonable and common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results of respondent No. 1 escaping the trial despite passing of all order against him on Court's satisfaction under

Section 319(1) and despite the fact that the proceedings against him have to commence afresh. In this view, the fact that trial against Chandra Shekhar Singh has already concluded is of no consequence insofar as respondent No. 1 is concerned.

15. The powers conferred under Section 319(1) of the Code are extraordinary powers and it enjoins upon the Court to summon a person not being the accused to stand trial if the Court is of the view that such person has committed the offence. The words "in the course of inquiry into, or trial of an offence" would only indicate that if the Court while conducting the trial comes to a conclusion that such other person also seems to be involved, summoning orders can be issued. The other word i.e. "tried together with the accused" have been qualified under Sub-section (4) of Section 319 i.e. the proceedings in respect of such person shall be commenced a afresh and the witnesses reheard. Thus, the trial of such person together with the accused stands qualified that even if the trial in respect of the accused has concluded, the additional accused can be tried. The powers of the Court have not been put into water tight jacket to be used with buts and ifs. The scope is much wider. It is obvious that the facts would be divulged only in the course of inquiry into, or when the trial has commenced and is going on qua the accused already named. The word"any person not being the accused" has also been interpreted that even if a person has not been proceeded against by the prosecution, though his name has occurred in the complaint/FIR, would not deter the power of the Court to proceed under Section 319. The scope of and object of the aforesaid provision is that if a fact is disclosed/divulged during the aforesaid stages, the Court would be competent to proceed against such person.

16. I am of the opinion that in the case at hand, the Magistrate has correctly summoned the petitioner to stand trial upon the basis of the facts which have been disclosed during the trial. The extraordinary powers which have been conferred upon the Courts by virtue of Section 319, cannot be allowed to be diluted by any buts and ifs and the rigor of any other procedural provision. The power is so explicit as the legislature did not want that any person who may be found guilty on the occasion when the evidence is disclosed before the Court should go scot free. A word of caution needs to be followed that the power has to be exercised cautiously and with an endeavour that no one should suffer unnecessarily. It is categorically required that the Court must apply its mind before invocation of extraordinary power. Once such power has been exercised, normally the process and procedure should be allowed to be followed."

14. In **Radha Mohan Gond Versus State of Bihar 2006 Cri.L.J. 3533** Patna High Court said as under :-

"6. Section 319 of the Code provides that such person summoned there under could be tried together with the other accused already facing trial. When this happens the proceedings in respect of such persons shall commence afresh and the witnesses reheard. In essence, the submission of the petitioners is that if powers under Section 319 Cr.P.C. have been exercised any person summoned there under must be tried along with other accused already facing trial and the entire trial must commence denovo with fresh examination in chief and cross-examination of the witnesses for the prosecution and the defence.

8. The emerging position in law thus is that the trial in respect of a person summoned under Section 319 of the Code had mandatorily to be commenced afresh denovo, it was not mandatory that such person be only tried along with other accused.

9. In view of the aforesaid discussion and the judicious reasons given by the court below separating the trial of the present petitioners from the other accused this Court finds no reason to interfere with the same. In any event, no prejudice shall be caused to the petitioners.

10. The petitioners have clearly been named by the victim in his deposition. This Court can do no better than rely upon a judgment of the Supreme Court in the case of Rakesh v. State of Haryana . The appellant therein had been summoned in exercise of powers under Section 319 Cr.P.C. in a case under Section 376 and other provisions. Their Lordships at paragraph 14 of the judgment held:

".....In our view, there cannot be a dispute that power under Section 319 is to be sparingly used. But that would not mean, that when a prosecutrix names three persons who were involved in the serious crime are not to be added as accused by exercise of such power."

11. The facts of this case reflects that the petitioners have been summoned on basis of the deposition of the victim of abduction who has named the petitioners as participants. The fact that they may not have been involved at the time of actual abduction but had met the abductors and given them arms whereafter the abductors proceeded with the victim, to this Court is not of much relevance at this stage."

15. In **Bholu Ram Versus State of Punjab and others 2008 (9) SCC 140** Hon'ble Apex Court has taken into consideration the time limit for filing application under section 319 Cr.P.C. and correctness or otherwise of evidence and held as follows :

"19. Section 319 of the Code empowers a Court to proceed against any person not shown to be an accused if it appears from the evidence that such person has also committed an offence for which he can be tried together with the accused.

.....

21. Sometimes a Magistrate while hearing a case against one or more accused finds from the evidence that some person other than the accused before him is also involved in that very offence. It is only proper that a Magistrate should have power to summon by joining such person as an accused in the case. The primary object underlying Section 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously. Justice and convenience both require that cognizance against the newly added accused should be taken in the same case and in the same manner as against the original accused. The power must be regarded and conceded as incidental and ancillary to the main power to take cognizance as part of normal process in the administration of criminal justice.

22. It is also settled law that power under Section 319 can be exercised either on an application made to the Court or by the Court suo motu. It is in the discretion of the Court to take an action under the said section and the Court is expected to exercise the discretion judicially and judiciously having regard to the facts and circumstances of each case.

23. In the instant case, an FIR was lodged against the appellant in August, 1986. ***But it was during the course of trial*** *that it came to light that signatures of respondent No. 2 were also taken and were sent for examination and a report was received showing that the signatures on the basis of which amount was withdrawn tallied with the signatures of respondent No. 2. The said report, however, was not filed by the prosecution. It was in these circumstances that the appellant made applications in 1994 and in 1996 under Section 319 of the Code requesting the learned Magistrate to join respondent No. 2 as accused and to summon him.*

24. The contention of the learned counsel for respondent No. 2 is that the power under Section 319 of the Code, cannot be exercised belatedly by the Court. Again, such order can be made only on the application by the Public Prosecutor or by some person other than the accused. In other words, an application under Section 319 cannot be filed by a person who is facing the trial.

25. We are unable to uphold the contentions. We have quoted Section 319 of the Code. It nowhere states that such an application can be filed by a person other than the accused. It also does not prescribe any time limit within which such application should be filed in the Court....."

16. A Constitution Bench of Hon'ble Apex Court consisting five Judges in **Hardeep Singh Vs. State of Punjab and Others [2014 (85) ACC 313],** has considered the various aspects of Section 319 Cr.P.C. for the purpose of summoning additional accused and framed five questions for its consideration.

16.1 In ***Hardeep Singh (supra)*** *Hon'ble Apex Court has considered the decisions rendered in the cases of Raghubans Dubey Vs. State of Bihar [1968 (5) ACC 69 (SC)]; State of U.P. Vs. Lakshmi Brahman and Another [1983 (20) ACC 161 (SC)]; Raj Kishore Prasad Vs. State of Bihar and Another [AIR 1996 SC 1931]; Moly and Another Vs. State of Kerala [2004 (49) ACC 103 (SC)]; State of Bihar Vs. Ram Naresh Pandey and Another [AIR 1957 SC 389]; Ratilal Bhanji Mithani Vs. State of Maharashtra and Others [AIR 1979 SC 94]; V.C. Shukla Vs. State through C.B.I. [AIR 1980 SC 962]; Union of India and Others Vs. Major General Madan Lal Yadav (Retd.) [AIR 1996 SC 1340]; "Common Cause" a Registered Society thr. Its Director Vs. Union of India and Others [AIR 1997 SC 1539]; In Re: Narayanaswamy Naidu Vs. Unknown [1 Ind Cas 228]; Sriramulu Vs. Veerasalingam [(1914) ILR 38 Mad. 585]; Dagdu Govindshet Wani Vs. Punja Vedu Wani [(1936) 38 Bom. LR 1189]; Gomer Sirda Vs. Queen-Empress [(1898) ILR 25 Cal. 863]; Sahib Din Vs. The Crown [(1922) ILR 3 Lah. 115]; Fakhruddin Vs. The Crown [(1924) ILR 6 Lah. 176]; Labhsing Vs. Emperor [(1934) 35 CrLJ 1261] and held in paragraph no. 43 as under :*

"43. .....as soon as the Court frames the charges, the trial commences, and therefore, the power under Section 319 (1), Cr.P.C. can be exercised at any time after the charge sheet is filed and before the pronouncement of judgment, ..."

(Emphasis supplied by this Court)

16.2 While considering the scope of word 'evidence' used in Section 3 of the Evidence Act, which defines meaning of word 'evidence'. Hon'ble Apex Court has discussed meaning of the word 'evidence' according to Tomlins Law Dictionary as well as decisions rendered in the cases of M/s Mahalakshmi Oil Mills Vs. State of A.P. [AIR 1989 SC 335]; Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others [(1990) 3 SCC 682]; P. Kasilingam and Others Vs. P. S.G. College of Technology and others [AIR 1995 SC 1395]; Hamdard (Wakf) Laboratories Vs. Dy. Labour Commissioner and Others [AIR 2008 SC 968]; Ponds India Ltd. (merged with H.L. Limited) Vs. Commissioner of Trade Tax, Lucknow [(2008) 8 SCC 369]; Feroze N. Dotivala Vs. P.M. Wadhwani and Others [(2003) 1 SCC 433]; Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri and Another [AIR 2011 SC 760]; Ameer Trding Corporation Ltd. Vs. Shapoorji Data Processing Ltd. [AIR 2004 SC 355]; Omkar Namdeo Jadhao and Others Vs. Second Additional Sessions Judge Buldana and Another [AIR 1997 SC 331]; Ram Swaroop and Others Vs. State of Rajasthan [AIR 2004 SC 2943]; Poda Narayana and Others Vs. State of A.P. [AIR 1975 SC 1252]; Sat Paul Vs. Delhi Administration [AIR 1976 SC 294]; State (Delhi Administration) Vs. Laxman Kumar and Others [AIR 1986 SC 250]; Lok Ram Vs. Nihal Singh and Another [AIR 2006 SC 1892]; Ramnarayan Mor and Another Vs. State of Maharashtra [AIR 1964 SC 949]; Sunil Mehta and Another Vs. State of Gujarat and Another [JT 2013 (3) SC 328]; Guriya @ Tabassum Tauquir and Others Vs. State of Bihar and Another [AIR 2008 SC 95]; Kishun Singh and Others Vs. State of Bihar [(193) 2 SCC 16]; Ranjit Singh Vs. State of Punjab [AIR 1998 SC 3148]; Lal Suraj @ Suraj Singh and Another Vs. State of Jharkhand [(2009) 2 SCC 696]; Rajendra Singh Vs. State of U.P. and Another [AIR 2007 SC 2786], and thereafter, held in paragraph nos. 68 and 69 as under

"68. .....Court should not exercise the power under section 319, Cr.P.C. on the basis of materials available in the charge sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. The word 'evidence' in section 319,Cr.P.C. contemplates the evidence of witnesses given in the Court.

69.....Therefore, for the exercise of power under section 319, Cr.P.C., the use of word 'evidence' means material that has come before the Court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the Court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under section 319, Cr.P.C."

16.3. Hon'ble Apex Court further held in paragraph no. 80 of the judgment as under :

"80. 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 coroboration 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."

*16.4 In **Hardeep Singh (supra)** Hon'ble Apex Court has also examined scope and meaning of the word 'evidence' used in section 319 Cr.P.C. i.e. Whether it is examination in chief only or also together with cross-examination? The Court relying upon the decisions in the cases of Rakesh Vs. State of Haryana [2001 (43) ACC 392 (SC)]; Ranjit Singh Vs. State of Punjab [AIR 1998 SC 3148]; Mohd. Shafi Vs. Mohd. Rafiq and Another [AIR 2007 SC 1899]; Harbhajan Singh and Another Vs. State of Punjab and Another [(2009) 13 SCC 608] and held in paragraph 85 of the judgment as under :*

"85. 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 recorded by the Court, in respect of complicity of some other person(s), not facing the trial in the offence."

*16.5 In **Hardeep Singh (supra)** Hon'ble Apex Court has also considered the question regarding degree of satisfaction required for invoking power under Section 319 Cr.P.C. While replying this question Hon'ble Apex Court has taken into consideration the decisions rendered in the cases of Pyare Lal Bhargava Vs. State of Rajasthan [AIR 1963 SC 1094]; Ram Singh and Others Vs. Ram Niwas and Another [(2009) 14 SCC 25]; Vikas Vs. State of Rajasthan [2013 (131) AIC 129 (SC)]; Rajendra Singh Vs. State of U.P. and Another [AIR 2007 SC 2786]; Mohd. Shafi Vs. Mohd. Rafiq and Another [AIR 2007 SC 1899]; Sarabjit Singh and Another Vs. State of Punjab and Another [AIR 2009 SC 2792]; Brindaban Das and Others Vs. State of West Bengal [AIR 2009 SC 1248]; Michael Machado and Another Vs. Central Bureau of Investigation and Others [AIR 2000 SC 1127]; State of Karnataka Vs. L. Munishwamy and Others [AIR 1977 SC 1489]; All India Bank Officers' Confederation etc. Vs. Union of India and Others [AIR 1989 SC 2045]; Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia [(1989) 1 SCC 715]; Stte of M.P. Vs. Dr. Krishna Chandra Saksena [(1996) 11 SCC 439]; State of M.P. Vs. Mohan Lal Soni [AIR 2000 SC 2583]; Dilawar Babu Kurane Vs. State of Maharashtra [AIR 2002 SC 564]; Union of India Vs. Prafulla Kumar Samal and Another [AIR 1979 SC 366]; Suresh Vs. State of Maharashtra [AIR 2001 SC 1375]; Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijjaya [AIR 1990 SC 1962]; State of Maharashtra Vs. Priya Sharan Maharaj [AIR 1997 SC 2041]; State of Bihar Vs. Ramesh Singh [AIR 1977 SC 2018]; Palanisamy Gounder and Another Vs. State, represented by Inspector of Police [(2005) 12 SCC 327] and replied the above question in paragraph no. 99 as under :*

"99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the Court not necessarily tested on the anvil of Cross-Examination, it requires

much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the Court should refrain from exercising, power under section 319, Cr.P.C. In section 319, Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being 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."

16.6 After considering various aspects of the matter in detail, Hon'ble Apex Court has replied various questions framed by it in paragraph no. 110, as under :

"110. We accordingly sum up our conclusions as follows :

Question Nos. I & III

Q.I What is the stage at which power under Section 319, Cr.P.C. can be exercised?

AND

Q. III Whether the word "evidence" used in section 319 (1), Cr.P.C. has been used in comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In Dharam Pal's 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.

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 enquiry can only be understood to be a pre-trial inquiry. Inquiries under sections 200, 201 and 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.

In view of 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 No. II

Q. II Whether the word "evidence" used in section 319(1), Cr.P.C. could only mean evidence tested by cross-examination for 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?

A. 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 No. IV

Q.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 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?

A. Though under section 319(4), 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 the 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 No. V

Q. 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?

A. 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 alongwith 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.

The matters be placed before the appropriate Bench for final disposal in accordance with law explained herein above.

Reference Answered Accordingly."

17. Hon'ble Supreme Court in **Jogendra Yadav and Others Vs. State of Bihar and Others [MANU/SC/0833/2015],** held in paragraph 11 as under :

"11. ..... In fact it may be noted that the mandate of Section 228, Code of Criminal Procedure, is that the Judge only need be of "opinion that there is ground for presuming that the accused has committed an offence...." before framing a charge. In fact this Court has held in ***Ajay Kumar Parmar v. State of Rajasthan*** *reported in MANU/SC/0795/2012 : (2012 12 SCC 406 that appreciation of evidence at the stage of Section 227 of the Code of Criminal Procedure, is not permissible (vide para 17). It is, therefore, clear that an order for addition of an accused made after considering the evidence cannot be undone by coming to the conclusion that there is no sufficient ground for proceeding against the accused without appreciation of evidence."*

18. Hon'ble Supreme Court in State **of Madhya Pradesh Vs. Rakesh Mishra (alongwith connected matter) [(2015) 13 SCC 8]**, held in paragraph 13, as under :

"13. Although we do not wish to comment on the merits of the case as this is the pre-trial stage, yet we are of the view that there exists sufficient material to make out a prima facie case against the accused. Therefore, these criminal appeals are allowed, the order passed by the High Court is set aside and the order of the Additional Sessions Judge framing charges is restored."

19. In **Criminal Revision No. 3822 of 2007 - Harveer Singh and Others Vs. State of U.P. and Another** (decided on 31.07.2015), this Court has held as under :

"The undisputed legal position is that at the stage of framing charge, the Court is required to see only prima facie evidence available on record and it has not to consider whether the prosecution is able to prove its case against the accused persons beyond reasonable doubt. At the stage of charge only a reasonable doubt in the mind of the Court with regard to complicity of the accused persons is sufficient.

(Emphasis laid by by this Court)

The Sessions Judge has the power to discharge the accused in the following circumstances;

A-where the evidence produced is not sufficient,

B- where there is no legal ground for proceeding against the accused,

C-where the prosecution is clearly barred by limitation, or

D-where he is precluded from proceeding because of a prior judgment of High Court.

In State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415, the Hon'ble Apex Court has held that at the time of framing charge, what the Trial Court is required to see and consider, are only the Police Papers referred to under Section 173, Cr.P.C. and documents sent with it. The accused cannot be permitted to produce documents to put forth his defence case for purpose of seeking discharge.

In Soma Chakravarty v. State (through CBI); 2007 (2) SCC (Cri) 514, it has been held by the Hon'ble Apex Court that at the time of framing of 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 at that stage. If on the basis of material on record the Court could form an opinion that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. Whether, in fact, the accused committed the offence, can only be decided in the trial.

In Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary and others; 2009 (1) SCC (Cri) 87, it has been held by the Hon'ble Apex Court that 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.

In Omwati v. State; AIR 2001 SC 1507, the Hon'ble Apex Court has restricted the High Court from interfering by holding that the High Court should not interfere at initial stage of framing the charges merely on hypothesis, imagination and farfetched reasons, which in law amount to interdicting the trial against the accused persons.

Hon'ble Apex Court in Om Prakash Sharma vs. C.B.I. AIR. 2000 SC 2335, has held that at the stage of 227 of the Code of Criminal Procedure, it is not open to the Sessions Judge to weigh the pros and cons whether improbability and then proceed to discharge the accused holding the said statements existing in the case diary as unreliable.

In Kanti Bhadra Shah vs. State of Bengal AIR 2000 SC 522, Hon'ble Supreme Court has held that the discharge order must contain reasons but an order of framing charge cannot be quashed merely because it does not contain reasons.

In State of J & K vs. Sudarshan Khakkar AIR 1995 SC 1954 and in Rukmani Narvekar vs. Vijaya Satardekar, AIR 2009 SC 1013, it has been held that no weight is to be attached to the probable defence of the accused and at the time of framing of the charge, the Court has to confine its attention to documents referred to unde Section 173 Cr.P.C. only.

In wake of the aforesaid legal position and considering the facts and circumstances of the present case and the prima facie evidence available on record against the revisionist, discussed in detail by the court below, the revision appears to have no force and it is liable to be dismissed."

20. **In Application U/S 482 No. 20458 of 2016 - Pankaj Verma Vs. State of U.P. and Others** (decided on 15.07.2016), this Court has held as under :

"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."

21. In the light of judgment of **Hardeep Singh (supra)** and above referred other decisions, the settled legal position emerges as follows :

21.1 The power under Section 319 (1) Cr.P.C. can be exercised at any time after the charge sheet is filed and before the pronouncement of judgment.

21.2 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, the Court need wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

21.3 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 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.

22. Adverting to the facts of this case, it appears from the perusal of record that the FIR of this case has been lodged on 16.6.2002 by the complainant/first informant Balbeer at Police Station Rajpura district Budaun, which was registered as case crime no. 111 of 2002 under sections 147,148,149,394,302 I.P.C. against 7 persons including the proposed accused Shishupal and Rajendra son of Ramji Lal.

23. After investigation, the Investigating Officer has filed charge sheet against 8 persons under section 147,148,149,302 I.P.C. No offence of robbery has been found during the investigation. The charge sheet has been filed against one Rajendra son of Hansraj. According to the complainant and witnesses, above Rajendra son of Hansraj has no concerned with the crime. The complainant has named accused Rajendra son of Ram Ji Lal, while, the Investigating Officer has found no role of named accused/proposed accused Shishupal and as such no charge sheet has

been filed against him. Charge sheet is also filed against two accused Omkar and Nem Singh who were not named in the FIR.

24. The case was abated against accused Rajeshewar due to his death on 29.09.2007 and file of accused Omkar was separated on 5.2.2010 after he has jumped out the bail. At present the Trial of the case is proceeding only against remaining accused, after recording of the evidence of the prosecution witnesses, case was fixed on 23.09.2013 for recording of evidence of formal witnesses/the statement of accused person under section 313 Cr.P.C. When application for summoning of the proposed accused Rajendra son of Ram Ji Lal, Shishupal has been moved by prosecution under section 319 Cr.P.C. earlier application for the same relief moved under section 319 Cr.P.C. was rejected vide order dated 03.08.2006, on the ground that the prosecution witnesses were not cross examined.

25. While passing the order impugned the Court below has observed that evidence of witnesses is contradictory to each other and even not supported by medical evidence. The application is highly belated and moved after eight years from the date of rejection of the earlier application; Prosecution has produced all the evidence and evidence of only formal witnesses had to be produced. Trial of the case is at final stage; Application appears to be filed with the intention of causing delay; as such there is no justification to summon the proposed accused to face the trial and there is no sufficient evidence on record to summon the accused.

26. It is clear from bare perusal of Section 319 Cr.P.C. that no limitation has been prescribed for filing of application to summon additional accused under this section. Hon'ble Apex Court has also held in para 25 of **Bholu Ram's case (supra)** that Section 319 Cr.P.C. also does not prescribe any time limit within which such application should be filed in the Court.

27. In the aforesaid Section only stage for filing the application is provided i.e. of "enquiry into", or "trial of", an offence. Though in the order impugned at page 3 it is mentioned that case was fixed on 23.09.2013 for recording statement under Section 313 Cr.P.C. and on page 4 it is mentioned that prosecution has completed its all evidence and only recording of evidence of formal witnesses remained. As such application for summoning additional accused under Section 319 Cr.P.C., has been filed at which stage, this is disputed due to above referred two contrary reference of stage of the case in the order impugned, but if it is presumed correct that above application has been filed at the stage of recording statement of accused persons under Section 313 Cr.P.C. after long delay of more than 8 years and with intention to cause delay in disposal of the case still it will not make any difference. Because Hon'ble Apex Court in **Hardeep Singh (supra)** held in paragraph 43 of the judgment that as soon as the Court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge sheet is filed and before the pronouncement of judgment, accordingly, the stage of recording statement under Section 313 Cr.P.C. is undoubtedly a course/stage of trial, which is a pre-condition for filing application under Section 319 Cr.P.C. So far as delay of 8 years in filing the application is concerned, that is also not material because as stated above, Section 319 Cr.P.C. prescribes no limitation for filing of application to summon additional accused.

27.1 Perusal of Annexure No. 3 to the affidavit filed in support of revision reveals that, complainant/first informant/PW-1 Balbeer has stated in his evidence that four years ago on 16th June, 2002, at 12.00 P.M. he, Ramveer, Jogendra, Kishanpal, Suresh, his father Siyaram and some labourers were working in Piperment/Mentha Factory, situated near Village - Jahanpur. There was 02 quintel, 13 Kg and 350 gms mentha oil filled in two canes and cash of Rs.5,000/- in the factory. Accused Lalaram S/o Dariaw, Sishupal S/o Raghuveer armed with rifle, Prem Singh S/o Mohkam Singh, Rajendra S/o Ramjimal, Harprasad S/o unknown and Rajeshwar S/o unknown armed with country made pistol (Tamancha) came there. Accused Rajendra exhorted for robbing the oil, all accused started to pick the oil, on protest accused Lalaram and Chandrakesh started firing shots, which hit his father Siyaram. All accused persons also fired from their respective fire arms. The first informant as well as other persons saved themselves by taking shield of wall. Hearing their cries, the witnesses Jagan, Ramawtar, Ramesh and other persons from the village reached there, saw the incident and challenged the accused persons on which accused fled away. The witnesses tried to chase the accused persons, but they could not be apprehended. His father died on the spot. He got the written report scribed by Tilak Singh and after hearing the same, he put his thumb impression on that and lodged the first information report by submitting the same to the Police Station. He had proved the written report as Exhibit 'ka-1'.

27.2 PW-2 Kishanpal and PW-3 Ramveer, other sons of deceased Siyaram, have also deposed the similar facts in their respective statements, which have been deposed by PW-1 Balbeer in his statement before the Court.

27.3 PW-4 Jogendra, has stated in his statement that about 11 years ago in the afternoon, they were drying fuel of mentha, Balbeer, Kishan and Ramveer were also present in the factory. There were canes of mentha oil and cash of Rs.5,000/- in the Madhaiya of mentha factory. Accused Chandrakesh, Lalaram, Shishupal, Premsingh, Rajendra and two other persons came there. They were armed with country made pistols and guns. He had run away, in the meantime all accused persons have murdered his father by firing from their respective fire arms. His father died on spot. There was indiscriminate firing. He is not aware that shot fired by which accused had hit his father. The witness recognised accused persons present in the dock of the Court. Balveer had lodged the report of incident. The Investigating Officer had quizzed him and he had told him about all details regarding the incident.

28. It is evident from the above referred evidence of prosecution that all the above prosecution witnesses have given evidence regarding complicity of proposed accused in the alleged crime with necessary details regarding their names, parentage and arms kept by them during alleged incident.

29. As the matter related to proposed accused is at the pre-trial stage, therefore, it is not desirable to enter into detailed discussion and analysis of the prosecution evidence available against the proposed accused and record finding on merits of those. At this stage it will suffice to note that evidence of above referred prosecution witnesses PW-1, PW-2, PW-3 and PW-4 stood the test of

requirement of recording satisfaction to the effect that there is sufficient evidence to proceed further, against the proposed accused.

30. A close scrutiny of the order impugned reveals that it is in the nature of final acquittal order without any regular trial of the proposed accused for the henious offence of murder, which is neither permissible nor sustainable in the eyes of law and if permitted to stand, will cause failure of justice.

31. For the reasons recorded above, this revision deserves to be allowed and is allowed accordingly. Order impugned dated 27.09.2013 is set aside. Application (98ka) moved for summoning of opposite parties under Section 319 Cr.P.C. to face the trial is allowed. Lower court will take all necessary steps in this regard within two weeks from the date of filing of this order. However, it will be open to the Lower Court to decide whether proposed accused will be tried together with the original accused facing the trial or they will be tried separately as prescribed under Section 319(4) Cr.P.C.

32. It is made clear that this Court is not expressing any opinion with regard to the merits of the case and whatever observations have been made in this judgment are only for the purpose of deciding this revision.

33. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 4025 Of 2015

Kripa Shanker & Ors. **...Revisionists**
Versus
State of Uttar Pradesh **...Opposite Party**

Counsel for the Revisionists:
Prashant Kumar Singh, Rajendra Prasad Shukla

Counsel for the Opposite Party:
G.A.

Procedural History:
Revision under Sections 397/401 Cr.P.C. against the judgment and order dated 13.10.2015 passed by the Additional Sessions Judge, Court No.2, Bhadohi-Gyanpur in Criminal Appeal No.22 of 2007, affirming the judgment and order dated 17.03.2007 passed by the Additional Chief Judicial Magistrate, Bhadohi-Gyanpur in

Case No.1143 of 2005 (State v. Jadawati Devi and others), arising out of Case Crime No.224 of 2001, under Sections 498-A, 326 IPC and Section 3/4 of the Dowry Prohibition Act, Police Station Aurai, District Sant Ravidas Nagar, Bhadohi.

Headnotes:

Dowry Demand – Attempt to Burn Bride – Conviction under Sections 498-A, 326 IPC and Section 3/4 D.P. Act – Scope of Revisional Jurisdiction

Where the victim sustained more than 60% burn injuries and medical evidence corroborated the prosecution case that kerosene was sprinkled and she was set ablaze inside her matrimonial home, and the testimony of the injured witness was consistent and supported by other prosecution witnesses, conviction recorded by the trial court and affirmed by the appellate court calls for no interference in revision.

Revisional jurisdiction being limited, re-appreciation of evidence is not warranted unless there is manifest illegality or perversity.

The prosecution having proved the case beyond reasonable doubt, affirmation of conviction by the appellate court is proper.

Result:

Revision dismissed.

Conviction and sentence affirmed.

Lower court record directed to be transmitted to the Sessions Judge, Sant Ravidas Nagar (Bhadohi) for compliance.

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. List has been revised. Sri Prashant Kumar Singh, learned counsel for the revisionists and learned A.G.A. for the State of U.P. are present.

2. The present criminal revision has been preferred against the judgement and order dated 13.10.2015 passed by the learned Additional Sessions Judge, Court No.2, Bhadohi -Gyanpur in Criminal Appeal No.22 of 2007 (Kripa Shanker and others v. State of U.P.), confirming the judgement and order dated 17.03.2007 passed by the learned Additional Chief Judicial Magistrate, Bhadohi-Gyanpur in Case No.1143 of 2005 (State v. Jadawati Devi and others), under Sections 498-A, 326 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Aurai, District Sant Ravidas Nagar, Bhadohi.

3. The facts narrated in the F.I.R. in narrow compass are as follows:-

"The informant-Jagnarayan Pathak presented a written application before the officer-in-charge, Police Station Aurai, District Sant Ravidas Nagar, Bhadohi regarding the alive burning of the daughter for the sake of dowry. Marriage of Nagina Devi, d/o Jagnarayan Pathak, r/o village Saraiya, Police Station Cheelh, District Mirzapur was solemnized with Ravi Shankar s/o Kripa Shankar, r/o village Babhnauti, Police Station Aurai, District Sant Ravidas Nagar with Hindu Customs. Seven sets of jewellery along with Rs.15,000/- cash was given as a dowry. Soon after the marriage, his daughter Nagina Devi was being tortured for dowry. In the intervening night of 2/3.10.2001, mother-in-law Jarawati Devi, father-in-law Kripa Shankar, husband Ravi Shankar, brother-in-law Pradeep Kumar and Jeth Manoj Kumar after confining her in the room sprinkled

kerosene upon Nagina Devi and set her ablaze. Nagina Devi raised alarm to save her life. Hearing that alarm, some anonymous person from the village informed Jagnarayan Pathak, informant/complainant father of Nagina Devi about the incident. In-laws ran away leaving Nagina Devi in a burnt condition. Informant Jagnarayan Pathak, his son Pappu and Subaas accompanied Nagina Devi to Government Hospital, Bhadohi. After primary treatment, she was referred to Kabir Chaura Hospital, Varanasi. Daughter of informant was still struggling with life and death."

4. On the above written information, case in crime no.224 of 2001, under Sections 498A, 326 I.P.C. and 3/4 D.P. Act was registered at Police Station Aurai, District Sant Ravidas Nagar.

5. After the criminal law was set in motion, the Investigating Officer investigated and submitted a charge-sheet against accused persons namely Kripa Shankar, Manoj Kumar, Dharmendra Kumar alias Ravi Shankar, Jarawati and Pradeep Kumar under Sections 498A, 326 I.P.C. and 3/4 D.P. Act.

6. Learned Additional Chief Judicial Magistrate, Bhadohi (Court No.6) framed the charges against the above-named accused persons under Sections 498A, 326 I.P.C. and 3/4 D.P. Act to which they pleaded not guilty and claimed to be tried.

7. At the trial, the prosecution in order to bring home the charge, examined P.W.-1 Jagnarayan Pathak, P.W.-2 Nagina Devi, P.W.-3 Lalti Devi, P.W.-4 Dr. Pravin Chandra Tiwari and P.W.-5 Constable Indrasan. Apart from adducing oral evidence, prosecution placed reliance upon a large number of documents. Accused persons chose not to adduce any evidence.

8. On consideration of the evidence on record, learned Additional Chief Judicial Magistrate, Bhadohi (Court No.6) found that the accused revisionists therein were guilty and imposed the sentence.

9. On appeal being preferred by the convicts, the learned Additional Sessions Judge, Court No.2, Bhadohi-Gyanpur gave the stamp of approval to the conviction and the sentence.

10 Learned counsel for the revisionists has submitted that both the courts below have faulted in accepting the evidence cited by the prosecution. It is also urged that the appellate court has been swayed away by the emotion. The approach as requisite under the criminal law has been flawed and the result is unwarranted affirmation of conviction.

11. Learned A.G.A. appearing for the State, in oppugnation, has contended that the learned trial magistrate as well as learned appellate court have analysed the evidence in a microscopic manner and found that the accused revisionists are guilty of the offence.

12. The injury report of Nagina Devi reveals that she was examined on 03.10.2001 at Rajabalwant Singh Hospital, Bhadohi and following injury was found on her body:-

"(i) Superficial to deep burn both lower limbs (front and back), whole of back and both fore arms and hand more than 60%."

13. Patient was in semi-conscious state. She was referred to Kabir Chaura Hospital, Varanasi. The cause of injury was burn severe in nature (more than 60%).

14. P.W.-4, Dr. Pravin Chandra Tiwari has deposed that this injury might be caused in the intervening night of 2/3.10.2001 by sprinkling kerosene and by thereafter burning.

15. .W.-1, Jagnarayan Pathak has supported the prosecution version and deposed in cross-examination that when he reached at the in-laws place of her daughter everyone has fled-away when he entered the house, he saw that his daughter was in a precarious condition.

16. P.W.-3 Lalti Devi w/o Jagnarayan Pathak has proved the demand of dowry by the accused revisionists.

17. P.W.-2 victim Nagina Devi has also supported the prosecution version and deposed that her husband Ravi Shankar was not demanding dowry but deposed that accused revisionist Jarawati set her ablaze, accused revisionist Pradeep sprinkled kerosene and accused revisionists Manoj Kumar and Kripa Shankar directed to set the victim Nagina Devi ablaze. She was set ablaze inside her in-laws house. This factum remained unexplained by the defence side.

18. Thus, acceptation of the direct evidence on record on proper scrutiny and analysis of proof, the prosecution case is proved beyond reasonable doubt. Consequently, the revision stands dismissed.

19. Dismissed.

20. Let the entire record of the lower court be sent to the court of the learned Sessions Judge, Sant Ravidas Nagar (Bhadohi) for compliance.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHASHI KANT, J.

Contempt Application (Criminal) No.- 46 Of 2015

Pradyumn Kumar Srivastava ...Petitioner
Versus
Sri Manoj Kumar Shukla ...Respondent

Counsel for the Petitioner:
Avanish Mishra

Counsel for the Respondent:
G.A., Manish Goyal

Contempt of Courts Act, 1971 – Ss. 2(c), 16 – Criminal contempt – Judicial officer – Allegations made in administrative/vigilance inquiry – Whether contempt – Scope –

Held, statements made by a judicial officer before a fact-finding authority in an administrative inquiry are part of in-house proceedings and cannot be treated as an act scandalising the court – Such statements are not made in discharge of judicial functions and hence do not attract S. 16 – For invoking S. 16, it must be established that the act complained of was done while acting judicially – Absent such requirement, contempt jurisdiction cannot be invoked (paras 15-17, 20-21) –

Mere allegations against a District Judge in such inquiry, even if adverse, do not amount to criminal contempt unless they are made publicly with intent to lower the authority of court (paras 17-18) – Application held misconceived.

Contempt – Scandalising court – Meaning – Distinction between contempt and fair criticism –

Held, scandalising the court involves scurrilous attack undermining authority of judiciary or public confidence in administration of justice – However, fair, temperate and bona fide criticism of conduct of a judge is permissible and does not amount to contempt (para 18) – Reliance placed on C. Ravichandran Iyer v. Justice A.M. Bhattacharjee and Sanjiv Rajendra Bhatt v. Union of India.

Advocates – Strike/Boycott – Interference with administration of justice – Criminal contempt –

Held, strike or boycott of court by advocates is per se illegal except in rare situations – Any act paralysing judicial proceedings amounts to direct interference with administration of justice and constitutes criminal contempt (para 27) –

Authorities followed: Common Cause v. Union of India; Indian Council of Legal Aid and Advice v. Bar Council of India; K. John Koshy v. Dr. Tarkeshwar Prasad Shaw; Mahavir Prasad Singh v. Jacks Aviation Pvt. Ltd.; Ex-Captain Harish Uppal v. Union of India.

Contempt proceedings – Abuse of process – Mala fide litigation – Costs –

Held, applicant, being Bar Association President, led boycott and was involved in incident of ransacking court and manhandling judicial officer – Present application found to be mala fide and a continuation of attempts to pressurize and malign the judicial officer – Filing of repeated proceedings without bona fides constitutes abuse of process (paras 23, 36-37) – Exemplary costs justified.

Result- Application dismissed with costs of Rs. 2,50,000/- – recoverable as arrears of land revenue in case of default (para 38).

Cases Cited

C. Ravichandran Iyer v. Justice A.M. Bhattacharjee (1995) 5 SCC 457
Sanjiv Rajendra Bhatt v. Union of India (2016) 1 SCC 1

Common Cause v. Union of India (1995) 5 SCC 511
Indian Council of Legal Aid and Advice v. Bar Council of India (1995) 1 SCC 732
K. John Koshy v. Dr. Tarkeshwar Prasad Shaw (1998) 8 SCC 624
Mahavir Prasad Singh v. Jacks Aviation Pvt. Ltd. (1999) 1 SCC 37
Ex-Captain Harish Uppal v. Union of India (2003) 2 SCC 4

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

1. Heard Sri Avanish Mishra, learned counsel for the applicant, Sri Syed Ali Murtza, Advocate, for Advocate General and Sri Manish Goyal, Advocate, for Registrar General of this Court.

2. This is an application filed by Pradyumn Kumar Srivastava under Section 16 of Contempt of Courts Act, 1971 (hereinafter referred to as "Act, 1971") read with Rule 4 of Chapter XXXV-E of the Allahabad High Court Rules, 1952 (hereinafter referred to as "Rules, 1952") so as to request this Court to take suo-moto action against opposite party Manoj Kumar Shukla, Additional District and Sessions Judge, Court No.3, Jalaun at Orai and to punish him under Section 12 of Act, 1971 for committing gross criminal contempt of his own Court on 20.11.2014 for obtaining signature of Court Moharrir Abir Singh under threat and for scandalizing Court of the then District Judge in his statement dated 26.11.2014 by levelling allegation of corruption against him.

3. Certain background facts given rise to the present proceedings may be stated as under :

4. The opposite party came to be posted at Jalaun at Orai and joined thereat on 15th March, 2014. He was designated as Special Judge, E.C. Act. On 23.04.2014, General Secretary on behalf of District Jalaun Bar Association, Orai (hereinafter referred to as "Bar Association") sent a letter to District Judge complaining against behaviour of opposite party and stated that members of Bar Association shall abstain from judicial work from 24.04.2014. Another letter dated 25.04.2014 was sent to Administrative Judge of Judgeship requesting that in the month of May and June, Court's time be made in morning from 6 A.M. to 1 P.M. instead of 10 A.M. to 5 P.M. and it was also said that opposite party was not working properly and advocates are abstaining his Court from 24.04.2014.

5. Subsequently Sri Pradhuman Kumar Srivastava came to be elected as President of Bar Association. A communication dated 18.10.2014 of Secretary, Bar Association was issued to Advocates that Court of opposite party shall be boycotted till he is transferred outside the District and said communication was also endorsed to District Judge. Vide letter dated 21.10.2014, it was forwarded by Sri Vinod Kumar Yadav, District Judge, Jalaun at Orai to this Court.

6. On 20.11.2014, following massage was received on the mobile of the then Administrative Judge of District Judgeship Jalaun at Orai from opposite party :

"Respected Lordship,

Today at 12.45 p.m. A
dvocate Pradumn Kumar Srivastava, President of Bar and his colleagues attacked on Court and beaten me and the D.J. is not taking any action.

M.K. Shukla, ADJ 3"

7. Thereupon Administrative Judge referred the matter to Chief Justice and also vide letter dated 20.11.2014 directed District Judge concerned to take appropriate action and inform immediately.

8. On 21.11.2014, Registrar General submitted note before Chief Justice as under :

"1. The under-signed made telephonic inquiries about the incident mentioned in the said letter, it was established that the said incident has taken place.

2. The lawyers of the Bar Association of District Jalaun at Orai were boycotting the court of Sri Shukla for approximately thirty days.

3. On 20.11.2014 Sri Shukla was sitting in the Court and a mob of lawyers had manhandled him though the District Judge telepathically informed the undersigned that two P.A.C. Personnel were posted there, but it appears that none had come to protect the officer.

4. That there appears serious lapses in making security arrangement for the safety of Sri Shukla."

9. Chief Justice thereupon ordered spot inquiry and this was conducted by Sri Virendra Kumar-II, Special Officer (Vigilance), High Court, Allahabad [hereinafter referred to as "S.O. (Vig.)"], who submitted his 94 pages report.

10. With regard to incident took place on 20.11.2014, statements of Court Reader, Orderly and a Class IV employee, were recorded by S.O. (Vig.), perusal whereof shows that at about 12.45 P.M., opposite party was sitting on the dais of Court. Several Advocates entered Court room, shouting slogans, thrown CPU of computer and pen-holder towards opposite party. Table glass and and pen holders were broken and files fell down and scattered. Due to ruckus created by advocates, opposite party got down from dais whereupon advocates gripped and dragged him out of Court in Varandah. In this ruckus some advocates also sustained injuries. In the process when advocates gripped opposite party and manhandled him, he also got indulged in scuffle.

11. S.O. (Vig.) for the purpose of inquiry formulated following three points :

"1. Whether Sri Pradhuman Kumar Srivastava, the President Bar Association, Jalaun at Orai along with his colleagues attacked on 20.11.2014 in the Court of Sri Manoj Kumar

Shukla, Special Officer (Gangster Act)/Additional District & Sessions Judge, Court No. 03, Jalaun at Orai and he was man handled by these advocates?

2. Whether the then District Judge Sri Vinod Kumar Yadav did nto provide proper security to Sri Manoj Kumar Shukla and provoked learned counsels to beat him up?

3. Whether on 20.11.2014 at about 12:30 Sri Manoj Kumar Shukla himself along with his gunner and ten constable of P.A.C. assaulted on the member advocates of delegations with kicks, fists and gun and constable of P.A.C. Beaten-up the learned acvocates with sticks and caused injuries to them while these advocates went to inform about the resolution passed in general meeting on 20.11.2014 at about 11:00 a.m.?"

12. After referring to the evidence collected by him, he has recorded his conclusions and findings as under :

*"**Conclusion :***

On the basis of above discussions and appreciation of the evidence of the witnesses, I have arrived at the following conclusions:-

E.W. 12 Sri Manoj Kumar Shukla, E.W. 48 Sri Shailendra Kumar Sharma, E.W. 37 - HCP 142 Sri Santosh Kumar Sachan, Pairokar of the police station Rampura, E.W. 31 - Sri Arvind Kumar Srivastava, Senior Prosecuting Officer, E.W.18 - Sri Ram Jiyawan Shukla and E.W. 26 - Sri Neeraj Mishra, Class-IV Employees have proved the incident dated 20.10.2014, stating that some advocates had arrived reached in the Court and thrown a bag towards the dais, which dropped between reader and the presiding officer. E.W. 48 - Reader has clarified this fact the learned advocates and the presiding officer had conversation in high volumes of voice, some senior advocates along with Court Moharir took these advocates and accused person out side the court, when the court was vacated by these persons, someone locked the court outside. After one hour this lock was opened by someone. E.W. 48 - clarified this fact that they were detained in the Court Room during this period. After opening of lock further dates were fixed in presence of accused persons.

The learned advocates have conveyed this fact that on 20.11.2014, a resolution was passed at about 11:00 a.m. in the general meeting of the District Bar Association, which was handed over at about 11:15 a.m. by the delegation of Bar Association to the District Judge, then the delegation informed the various courts about boycott and reached at about 12:30 p.m. At the court of Sri Manoj Kumar Shukla. Video recording made by him also shows time of recording on 20.11.2014 time at about 01:04:08. They have refuted this suggestion that delegation of the Bar association went straightway to the court of Sri Manoj Kumar Shukla, after visiting the chamber of the District Judge.

The learned advocates have stated that Sri Manoj Kumar Shukla has passed orders arbitrarily and illegally. He has insulted the litigants and learned advocates in the open court. They have quoted an example of his misbehave that Sri Manoj Kumar Shukla told a litigant in presence of Sri Devendra Ved, Senior Advocate, while he was conducting cross examination that why he has engaged learned advocate, he will cause damage to him and he would be convicted. On the same day, Sri Devendra Ved, sustained cardiac attack. The learned advocates have forwarded complaint written as well as oral regarding misbehave of Sri Manoj Kumar Shukla to the District Bar Association. The learned advocates have also clarified this fact that most of the learned advocates are not satisfied with the working of Sri Manoj Kumar Shukla.

Finding on Issue No.01.

The learned advocates entered in the Court room of Sri Manoj Kumar Shukla forcefully and attacked on 20.11.2014 at about 12:45 - 01:00 p.m. on him while he was sitting on the dias.

Sri Manoj Kumar Shukla has named Sri Pradhuman Kumar Srivastava, the president of the District Bar Association, Arvind Kumar Singh, Rajawat, Suresh Dixit, Raghunath Dass Bishnoi and Yusuf Ishtiyaq who abused him, shouted slogans and assaulted him by throwing CPU of computer, pen holder and beaten him up.

I have watched video recording produced by Sri Manoj Kumar Shukla. It revealed that Sri Pradhuman Kumar Srivastava, Advocate, E.W.1 the President and E.W. 02 Sri Arvind Kumar Gautam, Advocate, General secretary of the District Bar Association along with 10-15 advocates entered forcefully and created ruckus and ransacked the dais of the court of Sri Manoj Kumar Shukla E.W.1 - Sri Pradhuman Kumar Srivastava, Sri Gyanendra Singh Rajawat, E.W.-08 - Sri Suresh Dixit, E.W.43 - Sri Karma Kshetra Awasthi, Sri Aftab Ahmad, E.W.-4, Sri Udai Shanker Dwivedi, Sri Pankaj Gupta, Advocates sustained injuries in this incident dated 20-11-2014 is established, which shows they have participated actively in this incident. Therefore, proceeding of the contempt of the court of Sri Manoj Kumar Shukla should be drawn against these learned advocates.

E.W.36 - Constable No. 65 - Sri Abir Singh Court Moharir of the Court of Sri Manoj Kumar Shukla also sustained injuries, while he was trying to save Sri Manoj Kumar Shukla. He has also clarified this fact that only two P.A.C personnels armed with rifles were present at the point of time of incident dated 20-11-2014.

E.W.36 and E.W.15 - Sri Raj Kumar Segar, E.W. 16 - Sri Member Singh, P.A.C. Personnel, E.W.17 Sri Ramesh Chandra Bhadauria, Reader, E.W. 18 Sri Raj Jiyawan Shukla and E.W. 26 - Sri Neerj Mishra, Class IV Employees and E.W.31 - Senior Prosecuting Officer has proved this fact that no baton charge was made on the learned advocates and these employees tried to save Sri Manoj Kumar Shukla during the course of incident dated 20-11-2014.

E.W. 32 - Sri Girja Shanker Dwivedi and Sri E.W.34 - Sri Kamal Kant Kushwaha, have clarified this fact that on 20-11-2014, no baton charge was made on learned advocates only slap and fists were used during thrashing each other. E.W. 34 has stated that police personnels were not having sticks. E.W. 38 - Sri Ashok Kumar Mishra, Advocate has clarified this fact that Sri Manoj Kumar Shukla gripped and thrashed only one advocate E.W.47 - Sri Sanjeev Kumar Gurjar, Assistant Government counsel of the Court of Sri Manoj Kumar Shukla has also clarified this fact that Sri Manoj Kumar Shukla had abused learned advocates only, he did not see anyone to thrash each other. No F.I.R. Has been lodged yet and no injury report of any learned advocate has been produced before me, who sustained injuries in the incident dated 20.11.2014.

Finding on Point No.3

1. It is pertinent to mention here that on the basis of appreciation of evidence of the above mentioned witnesses and fact and circumstances narrated by them, it revealed that Sri Manoj Shukla after attack on him got down from the dais and abused learned advocates who entered in the court room. Meanwhile, advocates gripped him and dragged towards Varandah outside his court and manhandled and abused him also. Thus Sri Manoj Kumar Shukla has also provoked learned advocates and indulge in scuffle with those advocates.

***Work and conduct of Sri Manoj Kumar Shukla**.*

On persual of comments dated 17-04-2014, it is clearly established that Sri Manoj Kumar Shukla had protested against the then District Judge, because he was not satisfied with the allotment of his residence and shifting of his court room. Likewise, the then District Judge had discharged him from the responsibility as the Officer In- charge of Library and Nodal Officer of Computers. The reasons mentioned by him regarding the irregularities committed for the purchase of oil, toner of ink cartridge for computer printer and judgment paper and other stationery items and non availability of new edition of books at library, may likely be correct, even then it is inferred from the facts mentioned in this comments that Sri Manoj Kumar Shukla was not satisfied with the allotment of his official accommodation and shifting of his court.

The incident dated 24.04.2014 occurred at night at the guest house of Irrigation Department has been conjoined by Sri Manoj Kumar Shukla with the facts of recall of Civil Appeal No. 50 of 2012 - Smt. Khillan Devi Vs. State of U.P. which is not acceptable, because Civil Appeal No. 50 of 2012 was related to section 72 Excise Act, which could have only he heard by the District Judge as held by Hon'ble High Court, Allahabad and Uttranchal (Uttrakahnd) High Court.

On perusal of the documentary evidence produced by E.W. -40 - Sri Harnath Singh, Senior Advocate, it revealed that it may be possible that office bearer of the District Bar Association tried to pressurize Sri Manoj Kumar Shukla to obtain favorable orders n their favour and members advocate of their group. There is substance in the statement of Sri Manoj Kumar Shukla that he was pressurized by learned advocates, whose name has been mentioned by him in his statement of procure judicial order/judgment in their favour.

Therefore, on the basis of evidence of E.W. 40 Sri Harnath Singh, Senior Advocate, E.W.-45 Sri Raja Ram Chaturvedi and E.W. 46 Sri Rajesh Kumar, Advocate, it revealed that office bearer of the District Bar Association and some other advocates of their groups were not satisfied with the way of working of Sri Manoj Kumar Shukla and they could not be successful to pressurize him therefore, they carried on boycott the court of Sri Manoj Kumar Shukla from 18.10.2014.

Learned advocates have conveyed this fact that no complaint was received at the Bar Association that Sri Manoj Kumar Shukla has decided cases by receiving bribe. He is not a corrupt judicial officer.

I have perused the record of S.T. No. 114 of 2007 - Kuldeep Yadav Vs. State, on 17.10.2014 defence witness Sri Shailendra Singh, Rajendra Prasad, Rajesh Kumar and Satya Prakash were present before the trial court, but these defence witnesses were discharged by the learned counsel for the accused person, application 129 (kha) was allowed and dated 20.10.2014 was fixed for arguments. Therefore various opportunities for defence evidence was given by the trial court during the period 26.08.2014 up to 17.10.2014 and date 14.10.2014 was not the first date for adducing defence evidence.

On 22.11.2014 the Presiding Officer - Sri Manoj Kumar Shukla, heard the accused persons on the point of sentence and passed impugned judgment on 22.11.2014 therefore sufficient time to conduct the argument was given from 20.10.2014 up to 19.11.2014. There is no substance in the statement of E.W. 07 that sufficient time for evidence for adducing the defence evidence or to conduct the arguments on behalf of the accused person was not given. On the other hand, it revealed from perusal the record of S.T. No. 114 of 2007 that accused persons themselves did not cooperate during the course of the trial and did not avail opportunity for adducing evidence and to put forward argument.

E.W. - 5 Sri Govind Singh Gurjar, Advocate and other advocates have mentioned this fact that Sri Manoj Kumar Shukla has passed illegal orders and committed judicial dishonesty, therefore the learned advocates are agitated against him.

Learned advocates have mentioned this fact that Sri Manoj Kumar Shukla told that his relatives are Hon'ble Judges of Hon'ble High Court, hence none can take action against him. It is also conveyed /informed also that junior advocates has no courage to appear in the Court of Sri Manoj Kumar Shukla.

E.W. 39 has mentioned this fact that Sri Manoj Kumar Shukla, has performed his judicial work arbitrarily and illegally, he used unparliamentary languages with his subordinates employees and learned advocates against their dignity. He has corroborated this fact as stated by Sri Ashok Kumar Mishra E.W. 38 that Sri Manoj Kumar Shukla, slept in his chamber during the court hours. He has also clarified this fact that on 20.11.2014, if Sri Manoj Kumar Shukla, would have not got down from him dais and would not have directed constable of P.A.C. to detain and assault the learned advocates, then such an incident could not have occurred.

E.W. 39 has mentioned this fact on 20.11.2014, the learned advocates were agitated, because Sri Manoj Kumar Shukla, was not transferred from the judgeship and in general meeting of the District Bar Association, Jalaun, it was resolved that judicial work of all the Courts would be boycotted. E.W. 39 has proved that Sri Manoj Kumar Shukla himself provoked and participated in the incident dated 20.11.2014.

E.W. 43 has conveyed this fact that Sri Manoj Kumar Shukla, misbehaved with the junior advocates and insulted them every time. The junior advocates remained under fear that Sri Manoj Kumar Shukla, may conduct against their dignity any time.

Finding :-

1. Sri Manoj Kumar Shukla, had remained lying for seven to eight hours in his chamber. The employees of his Court have no courage to put up any case or application before him. Sri Shukla also misbehaved with his employees. He appears to be a patient of psychiatry, he at random agitated and conducted as such.

E.W. 38 found Sri Shukla talking with himself. Therefore support of medical treatment is required for him. It is in his interest that he should not continue further at the judgeship Jalaun at Orai.

Point in issue no.2.

On perusal of the above-mentioned documents produced by the Senior Administrative Officer, it is established that after incident dated 20.10.2014 up to the incident dated 20.11.2014 no specific security was ever provided by Sri Vinod Kumar Yadav, the then District Judge to Sri Manoj Kumar Shukla, ever then advocates were demonstrating and boycotted the judicial work of the court from 18.10.2014. The proper and adequate specific security should have been provided by the then District Judge to Sri Manoj Kumar Shukla, Additional District & Sessions Judge, Court No.03, Jalaun.

E.W. - 13 Senior Administrative Officer, has corroborated this fact that Sri Manoj Kumar Shukla informed the incident dated 20.10.2014 and 20.11.2014 to then District Judge, and the District Bar Association boycotted the judicial work of the court of Sri Manoj Kumar Shukla from 18.10.2014. He has specifically mentioned that the In-Charge District Judge, directed him on 20.10.2014 to open the lock of the court of Sri Manoj Kumar Shukla and no order was passed by him to provide security for him. He has mentioned this fact that the then District Judge made correspondence with the Senior Superintendent of Police and the District Magistrate to provide security to Sri Manoj Kumar Shukla, after of incident dated 20.11.2014.

Therefore, the then District Judge - Sri Vinod Kumar Yadav did not make this correspondence after the incident dated 20.10.2014 up to 20.11.2014 to provide proper and

adequate security to Sri Manoj Kumar Shukla. Even In-Charge Sessions Division had not taken any action on the report dated 20.10.2014 forwarded by Sri Manoj Kumar Shukla.

Although, this fact could not be verified that learned advocates after visiting the chamber of Sri Vinod Kumar Yadav, straightway went in the Court of Sri Manoj Kumar Shukla or on 19.11.2014 at about 04:00 - 05:00 p.m., office bearers of the District Bar Association met with Sri Vinod Kumar Yadav and during the course of this meeting, it was decided in the knowledge of Sri Vinod Kumar Yadav that ruckus would be created by the learned advocates on 20.11.2014 and he would be manhandled.

Findings :

On the basis of these facts and circumstances inference may be drawn safely that Sri Vinod Kumar Yadav, the then District Judge, Jalaun at Orai has facilitated learned advocates to carry on boycott of judicial work of his court, during the period from 20.10.2014 up to 20.11.2014 and to commit incident on these dates.

It is pertinent to mention here that the Registrar (Confidential) has informed me vide his letter dated 10.12.2014 that Sri Vinod Kumar yadav, the then District Judge, Jalaun at Orai has sent his letter no.409/XV dated 24.04.2014 and its subsequent letter no. 487/I dated 12.05.2014 against Sri Manoj Kumar Shukla, Special Judge (E.C.Act), Jalaun at Orai, which has been placed before Hon'ble Administrative Judge Jalaun at Orai through the office note dated 23.05.2014 and the concerned file is still under submission.

It is also informed thereafter Sri Vinod Kumar Yadav, the then District Judge, Jalaun at Orai has sent his another letter no. 638/XV dated 28.06.2014, furnishing therewith detailed inquiry report containing fifteen enclosures in continuation to his earlier letter no. 409/XV dated 24.04.2014 regarding misbehaviour and working style of Sri Manoj Kumar Shukla, Special Judge, Jalaun at Orai and disruption of work for his action, which has also been submitted before the Hon'ble the Administrative Judge - Jalaun at Orai on 11.07.2014. The concerned files are still under submission before the Hon'ble Administrative Judge, Jalaun at Orai for orders.

Therefore, I could not persuse the inquiry report dated 28.06.2014 and letter no. 409 dated 24.04.2014 submitted by Sri Vinod Kumar Yadav, the then District Judge, Jalaun at Orai, regarding misbehaviour and working style of Sri Manoj Kumar Shukla. The Senior Administrative Officer of the Judgeship Jalaun at Orai had also not provided to me copies of this inquiry report and letter during the course of inquiry at Judgeship Jalaun. Learned advocates conveyed me about this inquiry that their statements were recorded by the then District Judge, during the course of this inquiry.

The learned advocates had passed resolution on 27.11.2014 and withdrawn strike on resolution to conduct judicial work from 29.11.2014.

Work & Conduct of Sri Pradhuman Kumar Srivastava, the President of the District Bar Association, Jalaun :-

It is relevant to mention here that Hon'ble High Court, Allahabad in T.A. (Civil) no. 501 of 2014 - Applicant Krishna Dass @ Nanu Maheshwari Vs. Bhawan Dass & Ors. has been pleased to issue notice to Sri Pradhuman Kumar Srivastava, the Presdent "to file his reply clarifying as to in what circumstances and what capacity, he issued letter dated 20.09.2014 and shall also show cause as to why further action of professional misconduct and causing interference in administration of justice and thereby committing contempt of Court be not initiated against him."

The report is humbly submitted, accordingly.

With deep deference and profound reverence."

13. The applicant is Contemnor 1 in Criminal Contempt No.17 of 2015.

14. When we enquired from learned counsel for the applicant as to how Section 16 of Act, 1971 is attracted in the case in hand, he submitted that in the statement made by opposite party before the fact finding officer i.e. S.O. (Vig.), serious allegations were made against the then District Judge Vinod Kumar Yadav, which are all baseless and this amounts to a "criminal contempt" by opposite party. He further relied on statement of Court Maharrir, Abir Singh, stating that opposite party got signature on a written application and he is not aware what was written therein and submitted that this also amounts to contempt of own Court by opposite party liable for punishment under Section 16 of Act, 1971.

15. The aforesaid statements were not part of any judicial proceedings but on administrative side when Chief Justice directed for a fact finding inquiry, which was conducted by S.O. (Vig.) and statements relied by counsel for applicant were recorded by S.O. (Vig.) in his fact finding inquiry. With regard to allegations against District Judge, we need not go in detail to what has been said by opposite party for the reason that after assessing evidence collected by S.O. (Vig.), he has also recorded a finding that Sri Vinod Kumar Yadav, the then District Judge, facilitated learned advocates to carry on boycott of judicial work of Court of opposite party and he also failed to provide appropriate security to the opposite party. This is really a serious matter for the reason that District Judge is the highest authority at District level and it is his responsibility to look after safety, security and welfare of judicial officers posted in District i.e. in subordinate judiciary.

16. We required learned counsel for the applicant to tell us how aforesaid statements can be treated to be something done by opposite party while acting judiciously so as to attract Section 16 of Act, 1971. In reply he contended that a "criminal contempt" can be prosecuted against a Judicial Officer when he is not sitting in Court and similarly a statement made by a Judicial Officer even in administrative inquiry can be treated, if he is not acting judicially.

17. The submission is apparently misconceived and baseless. If any person makes scurrilous allegation against a Judicial Officer in public so as to lower down authority of Court or to scandalize conduct of such person, satisfy the definition of "criminal contempt" under Section 2(c) of Act, 1971 but if on administrative side, High Court is making an inquiry and statement has been made by a Judicial Officer giving reasons that he met a foul treatment in the hand of advocates of district and that conduct of advocates had tacit approval or encouragement from the head of District Judiciary i.e. District Judge, it is a in-house proceeding and not an attempt to scandalize the Court. Hence, by no stretch of imagination, can be brought within the ambit of 'criminal contempt', as defined under Section 2(c) of Act, 1971. The argument is thoroughly misconceived hence rejected.

18. In **C.Ravichandran Ayer Vs. Justice A.M.Bhattacharjee, 1995(5) SCC 457,** it was held that scandalising the Court would mean any act done or writing published, which is calculated to bring the court or Judges into contempt or to lower its authority or to interfere with due course of justice or legal process of the Court. Scandalising the Court is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific Judge, is a scurrilous attack on judiciary as a whole, which is calculated to undermine authority of Courts and public confidence in administration of justice. Contempt of Court is to keep blaze of glory around judiciary and to deter people from attempting to render justice contemptible in the eyes of public. A libel upon a Court is a reflection upon sovereign people themselves. Contemnor conveys to the people that administration of justice is weak or in corrupt hands. The fountain of justice is tainted. The judgments that stream out of that foul fountain is impure and contaminated. Scurrilous abuse of a Judge or Court, or attacks on personal character of a Judge, are punishable contempt. The punishment is inflicted, not for the purpose of protecting either the Court as a whole or individual Judges of Court from a repetition of attack, but for protecting public, and especially those who either voluntarily or by compulsion are subject to jurisdiction of the Court, from the mischief they will incur if authority of Court is undermined or impaired. It has also been held simultaneously that criticism of a judge's conduct or of conduct of a Court, even if strongly worded, is not a contempt provided that criticism is fair, temperate and made in good faith, and is not directed to personal character of a Judge or impartiality of a Judge or Court.

19. This has been followed recently in **Sanjiv Rajendra Bhatt Vs. Union of India (UOI) and Ors., 2016(1) SCC 1.**

20. However, in order to attract mischief of Section 16, it has to be shown that Presiding Officer has done something in his judicial capacity or while acting judiciously. Something, which a 'Criminal Contempt' under Section 2(c) of Act, 1971 otherwise in the context of Presiding Officer of a Court would not attract Section 16 unless it is further shown that it was done while acting judicially.

21. The statement made by opposite party to S.O. (Vig.) as also findings recorded by S.O. (Vig.) both will not attract Section 16 and, therefore, reference to Section 16 of Act, 1971 in the case in hand is thoroughly misconceived.

22. At this stage, learned counsel for applicant started making serious allegations against opposite party and placed report of Special Officer (Vig.) as also statement of advocates made before him including applicant himself.

23. Having gone through the entire facts we find that conduct of applicant is something, which is out of way so as to somehow or the other implicate opposite party and to malign him in one or other way. Firstly; after being elected as President of District Bar Association, Jalaun at Orai, repeatedly not only, Court of opposite party was boycotted but on 20.11.2014 a serious incident took place in his court caused by group of advocates led by applicant himself. In the present case, applicant is alleging that serious false allegations has been made by opposite party against the then District Judge. For the said purpose, it was open to District Judge to request this Court to take appropriate action against opposite party but applicant cannot hold brief of the then District Judge so as to cause damage to opposite party. In fact, this conduct fortifies inference drawn by S.O. (Vig.) that incident, which took place on 20.11.2014, in which applicant led group of advocates, was facilitated by the then District Judge.

24. Not only this but applicant, in order to achieve his object to implicate opposite party somehow or the other, filed an application before Advocate General under Section 15(1) of Act, 1971, which was rejected by him vide order dated 25.01.2016. Thereafter applicant filed Writ Petition No.5956 of 2006, which was dismissed by Division Bench vide judgment dated 08.3.2016. Then applicant filed Review Application No.96567 of 2016, which was also dismissed by Court vide judgment dated 06.04.2016. In the judgment dated 6.4.2016, certain facts were noticed by Court in paras 10 to 18, which read as under :

10. The report of Shailendra Kumar Sharma, Munsarim, Reader and Santosh, clerk sent to District Judge has also been referred to who informed that in the presence of some advocates and litigants in the Court, slogans were shouted and hindrance was made in the working of Court. The main gate of Court was locked out.

11. Special Officer (Vigilance) with regard to security of JO, has observed :

"On perusal of the above-mentioned documents, it is established that after incident dated 20.10.2014 up to the incident dated 20.11.2014 no specific security was ever provided by the District Judge to Sri Manoj Kumar Shukla, even then advocates were demonstrating and boycotted the judicial work of this court from 18.10.2014. The proper and adequate specific security should have been provided by the then District Judge to Sri Manoj Kumar Shukla, Additional District & Sessions Judge, Court No.03, Jalaun."

12. Two constables E.W. 15 and 16 also deposed before Special Officer (Vigilance) which is noted in report as under :

"E.W. 15 and 16 has mentioned this fact that the presiding officer was sitting on the dais of the court. The learned advocates had thrown the computer box (C.P.U.) and pen holder

towards the dais, table glass and pen holder were broken, rear side of the computer kept on the dais was also damaged.

E.W. 15 and 16 has stated that meanwhile Sri Manoj Kumar Shukla got down from the dais and learned advocates dragged him up to the gate/door out side of the Court, in the Varandah they thrashed and beaten up him. The constables tried to save Sri Manoj Kumar Shukla. The learned advocates beaten up them also."

13. Court Reader, Orderly and a Class IV employees have also stated before Special Officer (Vigilance) as under :

"....that at about 12:45 p.m. Sri Manoj Kumar Shukla was sitting on the dais of the Court, 08 to 10 advocates entered in the court, shouting slogans, had thrown the C.P.U. of computer and pen holder towards the presiding officer. Table glass and pen-holder were broken and files fell down and scattered. These employees has also clarified this fact that rear side of computer kept on the dais was also damaged.

E.W-17, 18 and 26 has conveyed this fact that meanwhile Sri Manoj Kumar Shukla got down from dais and learned advocates gripped him and dragged out of the court in the Varandah. They have also stated that two P.A.C. personnels and Court Moharir tried to prevent the learned advocates to enter the Court and to save Sri Manoj Kumar Shukla, the learned advocates and beaten him up also. These employees along with gunner could not prevent the learned advocates from conducting this misdeeds. The learned advocates thrashed and beaten up Sri Manoj Kumar Shukla." (emphasis added)

14. Special Officer (Vigilance) has further observed in his report as under :

"On perusal of this documentary evidence produced by E.W. -40- Sri Harnath Singh, Senior Advocate, it revealed that it may be possible that office bearer of the District Bar Association tried to pressurize Sri Manoj Kumar Shukla to obtain favourable orders in their favour and members advocate of their group. There is substance in the statement of Sri Manoj Kumar Shukla that he was pressurized by learned advocates, whose name has been mentioned by him in his statement to procure judicial order, judgment in their favour.

I have also recorded the statement of E.W.45 - ***Sri Raja Ram Chaturvedi, Advocate****, who has conveyed this fact that he is in legal profession since 1968.* ***He has mentioned this fact that way of working of Sri Manoj Kumar Shukla, Additional District Judge-III could not appease some member advocates of the District Bar Association. In his opinion Sri Manoj Kumar Shukla is an honest officer, he has not discriminated amongst the advocates."*** *(emphasis added)*

15. Special Officer (Vigilance) has drawn his inference as under :

*"....office bearer of the District Bar Association and some other advocates of their groups are not satisfied with the way of working of Sri Manoj Kumar Shukla and **they could not be successful to pressurize him therefore**, they carried on boycott the court of Sri Manoj Kumar Shukla from 18.10.2014." (emphasis added)*

16. The video recording details have also been noticed by Special Officer (Vigilance) as under :

"The date and time mentioned in the video recording is 20 Nov., 2014 at 01:04:08 PM IST. It is shown in the video that there are two pairokar of the court, court moharrir, two constables of PAC armed with rifle and gunner armed with stane gun was also present inside the court room. When, Sri Pradhuman Kumar Srivastava, the President District Bar Association, Jalaun along with at about 10-15 advocates forcibly entered into the court room, pairokars, Moharir and constables of PAC tried to prevent them but, failed.

Learned advocates ransacked the dais by throwing the CPU and pen holder towards the presiding officer. They created havoc and ruckus in the court room.

A.D.G.C. and S.P.O. are also sitting in the court room. The glasses of window panes are seen broken in the video."

17. Special Officer (Vigilance) has recorded finding after viewing video recording, as under :

"I have watched video recording produced by Sri Manoj Kumar Shukla. It revealed that Sri Pradhuman Kumar Srivastava, Advocate, E.W.1 the President and E.W. 02 Sri Arvind Kumar Gautam, Advocate, General Secretary of the District Bar Association along with 10 - 15 advocates entered forcefully and created ruckus and ransacked the dais of the court of Sri Manoj Kumar Shukla. E.W. 1 - Sri Pradhuman Kumar Srivastava, Sri Gyanendra Singh Rajawat, E.W. - - 8 - Sri Suresh Dixit, E.W. 43 - Sri Karma Kshetra Awasthi, Sri Aftaf Ahmad, E.W. - 4, Sri Udai Shanker Dwivedi, Sri Pankaj Gupta, Advocates sustained injuries in this incident. Hence their presence at the point of time of incident dated 20.11.2014 is established, which shows they have participated actively in this incident. Therefore, proceedings of the contempt of the court of Sri Manoj Kumar Shukla should be drawn against these learned advocates."

18. With regard to point no.3 also, Special Officer (Vigilance) has recorded findings as under :

*"It is pertinent to mention here that on the basis of appreciation of evidence of the above mentioned witnesses and fact and circumstances narrated by them, it revealed **that Sri Manoj Kumar Shukla after attack on him got down from the dais and abused learned advocates who entered in the court room. Meanshile, advocates gripped him and dragged towards***

Varandah outside him court and manhandled and abused him also. *Thus Sri Manoj Kumar Shukla has also provoked learned advocates and indulge in scuffle with those advocates."*

"On perusal of the documentary evidence produced by E.W. - 40 - Sri Harnath Singh, Senior Advocate, it revealed that it may be possible that office bearer of the District Bar Association tried to pressurize Sri Manoj Kumar Shukla to obtain favourable orders in their favour and members advocate of their group. ***There is substance in the statement of Sri Manoj Kumar Shukla that he was pressurized by learned advocates, whose name has been mentioned by him in his statement to procure judicial order / judgment in their favour."***

"Learned advocates have conveyed this fact that no complaint was received at the Bar Association that Sri Manoj Kumar Shukla has decided cases by receiving bribe. He is not a corrupt judicial officer."

(emphasis added)

25. Learned counsel for the applicant attempted to place before us extract of report, in which it has been observed by Special Officer (Vig.) that opposite party- Manoj Kumar Shukla used to rest in chamber in Court time, his behaviour with staff is not good and he does not maintain static mental status. We find from report that with regard to integrity, advocates' witnesses have clearly stated that opposite party is a clean officer. In this background, the entire chain of events and repeated attack on opposite party, particularly by applicant, since he became President of District Bar Association, shows that there is a constant endeavour and attempt on the part of applicant to victimize, demoralize and pressurize opposite party so that he could not dare to stand against applicant.

26. We may take a judicial notice of the fact that Jalaun at Orai is a Judgeship where most of litigation is on criminal side. It is a place in State of Uttar Pradesh where crime of severe nature used to be committed are in large number. At some point of time, it was heavily dacoity affected area. Basic facilities to Judicial Officers in District Judgeship are not good and Judicial Officers are under great stress thereat. We are refraining ourselves from making pointed observations, but S.O. (Vig.) in his report has also said much about conduct of the then District Judge and advocates for creating undue pressure on officers to pass orders in a particular manner.

27. Boycotting of Court of opposite party itself is a contempt for the reason that strike in any manner by advocates is impermissible. Repeatedly, Apex Court as well as this Court have held that a call of strike by advocates except of a rare occasion, is per se illegal. A call, which has the effect of paralysing judicial function ex facie, amounts to a direct interference in the administration of justice and is a 'criminal contempt' under Section 2(c) of the Act, 1971. The strike by Advocates disturbing Court proceedings has been held illegal in **Common Cause (A Registered Society) vs. Union of India and Others (1995) 5 SCC 511, Indian Council of Legal Aid and Advice vs. Bar Council of India (1995) 1 SCC 732, K. John Koshy vs. Dr. Tarkeshwar Prasad Shaw (1998) 8 SCC 624, Mahavir Prasad Singh vs. Jacks Aviation Private Ltd. (1999) 1 SCC 37 and Ex-**

Captain Harish Uppal vs. Union of India (2003) 2 SCC 45. The authorities of Apex Court in above these cases, support and lay down the above exposition of law.

28. In the present case, applicant led a group of advocates to create a ruckus in Court room when judicial proceedings were going on. Not only this, even court property i.e. computer CPU, pen-holders, window pans were damaged and even judicial officer was manhandled. The aforesaid conduct of applicant neither can be countenanced nor can be ignored nor can be tolerated for any reason whatsoever else it will give a very wrong massage to entire judiciary.

29. In State of Uttar Pradesh we have 75 district Judgeships and most Judgeships lack appropriate infrastructure and other facilities. In some District Judgeships, working conditions are so pitiable that it is really difficult to appreciate how Judicial Officer under such constraints can keep cool himself, apply mind and discharge judicial functions in an appropriate manner.

30. In fact, we commend and put on record our appreciation to such officers who, without raising any complaint about absence of working proper atmosphere, lack of basic facilities and other difficulties, still continue to devote themselves for service of justice. Population of State has multiplied many fold but number of Judicial Officers has not correspondingly increased. Without complaining about scarcity of Judicial Officer or Courts, what ever officers are available, quietly, calmly and peacefully they are concentrating on their work instead of raising any hue and cry. Had it been any other Executive branch, we would have witnessed frequent agitation etc. but to the credit of Judicial Officers of this State, we may put on record that in the last more than a century, we have never heard of any agitation by Judicial Officers complaining about their working conditions, lack of infrastructure, basic amenities and other facilities.

31. Though, very recently, Government has waken up to provide funds for infrastructure but fact is that even these activities are largely controlled by State Government and their agencies as a result whereof, whatever infrastructure is being raised, quality thereof is extremely poor. There are several districts in State of U.P., where facilities of good education, health etc. are not available, even at District Headquarters level and still our Judicial Officers, wherever posted, keep themselves busy in working diligently to decide cases and no complaint is made by them. Even workload has increased multi-fold and most Courts in State Subordinate Judiciary are loaded to the extent that number of cases, which would justify three or four Courts, are assigned to a single Court, yet these officers are functioning silently so as to give their best.

32. Though, of late, complaints are being raised that cases are taking longer time and this delay is defeating justice, but, on a deeper scrutiny, we find that real lapses are on the part of State Executive and prosecution in criminal cases but ultimate reflection unfortunately is cast on the Courts. New laws are being enacted everyday. People's awareness of their rights is giving birth to more litigation day-by-day but there is a complete apathy on the part of State Executive to take care of corresponding requirement of the institution of justice.

33. We find that Courts and their needs are the last priority and in fact has no priority in the eyes of Executive. The reason is also quite obvious. Various irregularities, corrupt activities and other deformities in Executive has caused a substantial loss of faith and confidence in them to the general public but still judiciary stands as a strong pillar sustaining faith and confidence of common men. When one loses all hopes elsewhere, he/she comes and knocks the doors of justice with full confidence of getting justice from the institution of administration of justice. Ways and means have been adopted by Executive time and again to shake this confidence of common man but all have failed and proved in vain. The common man still has a concretized confidence in the system of justice.

34. The slogan of 'justice delayed is justice denied' by referring to large number of pending cases is now another facet of this attempt on the part of a few. Nobody ever tried to scrutinize reasons for delay but by mere mentioning number of cases pending in Courts, everybody cries that cases are not being decided. The fact is that despite the problem of adequate Judges to man the Courts, number of cases, being decided by each Judge, surpass the number of cases decided by the same number of Judges in long past. More than 32 per cent Courts in the districts in State of U.P., against sanctioned strength, are continuously lying vacant for the last several decades. This is besides the fact that number of Courts have not been increased in regular manner looking to the need. Unfortunately, blame is one way traffic since Judges have no platform to defend themselves. They can answer and reply each and everything but their training, modesty and decorum restrain them and Executive and others, it appears are taking advantage of this self restraint, in persisted attack in the name of delayed justice.

35. Of late, some of the advocates, forgetting that they are officers of the Court, are trying to tarnish the image of the institution of justice in one or the other way. Those black sheep have to be identified and eliminated from the system, else, we ourselves shall be responsible for decay and damage to the institution of justice. We are under an obligation to take remedial corrective measures, and if need be, go for even surgery, so as to protect system, else history shall blame us for not reacting in time and probably it would be right in doing so. If we do not awake and act to meet the requirement of time, the next generations shall face disastrous consequences.

36. In this backdrop, we look into what actually has been attempted to be done at the Judgeship at Jalaun at Orai and whatever has been reported by S.O. (Vig.) after a fact finding inquiry, and find that really disturbing. It cannot be comprehended that a District Judge would have failed to take steps for providing proper security to his subordinate Judicial Officers, encouraging members of Bar to go to the extent of physical assault to a Judicial Officer. The applicant, in the present case, has gone to the extent of throwing his entire weight to some how or other, teach a lesson to the opposite party for not surrendering to the wishes of office bearers of Bar Association and showing courage to thwart their attempt of kneeling down him. The applicant has acted as a pivotal and next friend to guard interest of the then District Judge though has no cause of action in such matter. Various steps taken by him smack of clear malice in law and bias and show complete lack of bona fide on his part. Objectivity, impartiality and fairness, all is missing, in steps he has taken, including the application, which he has filed and up for consideration in these proceedings.

37. In the entirety of the facts and circumstances, we are satisfied that applicant is a person, who has not only acted with mala fide against opposite party by going to any extent but even otherwise is a mischievous person and his attitude, conduct and action constitute a serious apprehension for smooth and impartial functioning of judiciary. He is a person, who has filed this application, which clearly lacks bona fide and, therefore, it deserves to be dismissed with exemplary costs for the reason that he has tried to malign not only image of a Judicial Officer, whose integrity was not doubted even by advocates at District Judgeship at Jalaun at Orai, where the incident, as noticed above, took place but this also is likely to create a bad precedent, if not checked at this stage, and nipped at bud.

38. The application, therefore, is dismissed with costs of Rs.2,50,000/- (Rupees Two lakhs fifty thousand only). The cost shall be deposited by applicant within six months from today in District Treasury, Jalaun failing which District Magistrate concerned shall be entitled to recover the said amount as arrears of land revenue from applicant.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.07.2016

BEFORE

THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.
THE ANIL KUMAR SRIVASTAVA-II, J.

Criminal Appeal No.- 555 Of 1981

Ashok Kumar **...Appellant**
Versus
The State **...Respondent**

Counsel for the Appellant:
Mayank Mishra, U.P. Singh

Counsel for the Respondent:
Govt. Advocate

Penal Code, 1860 – S. 302 – Murder – Conviction – Ocular evidence –

Held, conviction justified where prosecution case proved by reliable eyewitnesses – PW-1 and PW-2 natural witnesses; their presence established and testimony consistent with medical evidence – Relationship of witness not a ground to discard evidence (paras 15-18, 25).

Evidence Act, 1872 – S. 134 – Sole witness –

Held, conviction can be based on testimony of a single reliable witness – It is quality and not quantity of evidence which is material (para 17).

Inquest report – Scope –

Held, inquest report is not substantive evidence – Minor discrepancies or delay in postmortem/inquest do not affect prosecution case (paras 20-21).

Motive – Direct evidence –

Held, in cases based on direct evidence, motive loses significance – Absence of motive not fatal when ocular evidence is reliable (para 26).

Result- Appeal dismissed – Conviction under S. 302 IPC affirmed – Bail cancelled (para 29).

Cases cited

Nand Kumar versus State of Chhatisgarh (2015) 1 SCC 766
Namdev versus State of Maharashtra (2007) 14 SCC 150
Sudip Kr. Sen and Others V. State of West Bengal and Others MANU/SC/0013/2016
Prithipal Singh and Ors. V. State of Punjab and Anr. MANU/SC/1292/2011 : (2012) 1 SCC 10
Vadivelu Thevar V. State of Madras AIR 1957 SC 614
Sunil Kumar v. State (Govt. of NCT of Delhi) (2003) 11 SCC 367
Namdeo V. State of Maharashtra (2007) 14 SCC 150
Bipin Kumar Mondal v. State of W.B. (2010) 12 SCC 91
Deny Bora V. State of Assam (2014) 14 SCC 22
Madhu alias Madhuranath and Another versus State of Karnataka (2014) 12 SCC 419
Pedda Narayana v. State of A.P. (1975) 4 SCC 153
Rameshwar Dayal v. State of U.P. (1978) 2 SCC 518
Kuldip Singh v. State of Punjab 1992 Supp (3) SCC 1
George v. State of Kerala (1998) 4 SCC 605
Suresh Rai v. State of Bihar (2000) 4 SCC 84
Munshi Prasad v. State of Bihar (2002) 1 SCC 351
Gopal Singh versus State of U.P. (1978) 3 SCC 327
Bhagwan Dass versus State of Rajasthan (1974) 4 SCC 781
Habib versus State of Uttar Pradesh (2013) 12 SCC 568
Subodh Nath and Another versus State of Tripura (2013) 4 SCC 122
Darbara Singh versus State of Punjab (2012) 10 SCC 476
Sanjeev versus State of Haryana (2015) 4 SCC 387

(Delivered by Hon'ble Anil Kumar Srivastava-II, J.)

1. Heard Shri U.P. Singh, learned counsel for the appellant and Shri Izhar Husain learned A.G.A. for the State.

2. Instant appeal has been preferred against the judgment of learned Sessions Judge Unnao dated 05.8.1981 in Session Trial No. 496 of 1980, State versus Ashok Kumar, under Section 302 I.P.C., case crime no. 279 of 1978, Police Station Achalganj, District Unnao whereby learned trial court has convicted accused appellant under section 302 I.P.C. and sentenced him to imprisonment for life.

3. According to the prosecution version, complainant Jag Mohan and deceased Ramadhin are real brothers. Litigation is pending between Ramadhin and Mahadeo, Raja Ram Pasi, Shiv Das Pasi, Ramesh Chandra Tewari. Proceeding under section 107 CrPC are also pending in the Court. Ramadhin has lodged a complaint under section 133 CrPC against Mahadeo and proceedings for removal of encroachment in the galiyara were pending in court. 11.9.1978 was fixed for hearing in that case. Ramadhin had gone to attend the case alongwith Sheo Charan and Mohan Nai. Since the opposite parties were trying to attack the Ramadhin, hence, as and when Ramadhin goes to Unnao complainant Jag Mohan used to go to the station to receive him.

4. On 11.9.1978 complainant Jag Mohan reached Rawatpur railway station at about 05.00 P.M. Train arrived at Rawatpur railway station at about sunset time. Complainant, his brother Ramadhin, Mohan Nai and Sheo Charan proceeded together for their village through left patri of Itauli minor canal. When they reached near the Har of Pancham where a trunk of tree was kept on the canal for the purpose of crossing it, accused Ashok Kumar also joined them. Ashok Kumar was behind Ramadhin. When they reached near the field of Bhabhuti Kori then Ashok Kumar fired two shots upon Ramadhin with pistol. Complainant alongwith Sheo Charan, Mohan got frightened and fled away when the accused again fired a third shot from his pistol. Complainant reached Bhadohi and narrated story. Thereafter he came on the place of occurrence alongwith some other people. Complainant gave the written report at the police station on 11.9.1978 at 11:45 PM which was recorded and case under section 302 I.P.C. was registered against the accused. Investigation was handed over to the Investigating Officer. Inquest proceedings began on 12.9.1978 at 09.00 A.M. and concluded at 11.30 A.M. Dead body was sent for postmortem which was conducted on 13.9.1978 at 03.00 P.M. Kurta baniyan Angauchha baton were collected from the dead body. Blood stained and plain earth was also collected from the place of occurrence. An empty cartridge and tikli were also recovered from place of occurrence. Statement of witness were recorded and site plan was drawn. Accused surrendered in court on 15.9.1978. After conclusion of the investigation charge sheet was filed against the accused.

5. Charge under section 302 I.P.C. was framed against the accused who pleaded not guilty and claimed trial.

6. In order to prove its case, prosecution has produced PW-1 Jagmohan brother of the deceased and complainant PW-2 Sri Mohan who is one of the persons who were accompanying the deceased to Unnao on the date of occurrence and was returning with him when the incident took place.

7. PW-3 Dr S.M. Tripathi had conducted the postmortem on the body of the deceased on 13.9.1978 at 03.00 P.M. and found following ante mortem injuries on the body :-

(i) Circular lacerated wound 1 " in diameter on the right side back in outer scapular region. Margins inverted. Blackening and charring present.

(ii) Circular lacerated wound 1" in diameter on right side back lower part of right scapular region, chest cavity deep. Margins inverted. Blackening and charring present.

(iii) Multiple abrasions in an area of 2" x 1/2" on left back scapular region.

(iv) Four cicculare lacerated wounds each 1/5" in diameter. Margins everted. No blackening or charring present on the chest 2" above the right nipple in an area of 2 1/2". It was exit wound of injury no.2.

On internal examination the trachea was found full of b lood and right lung was lacerated by shots. The stomach was empty but the small intestine contained digested food and the large intestine contained faecal matter. During postmortem 42 small pellets, two large pellets and two pieces of wadding were recovered from the body. In the opinion of the doctor death was caused due to shock and haemorrhage resulting from the injuries.

8. According to Dr. Injury no.1 and 2 were caused by firearm from a close range within three or four feet, injury no.4 was exit wound of injury no.2 while injury no.3 could have been caused by fall on some hard surface. According to doctor, duration of death was about two days.

9. PW-4 S.I. Ran Vijai Singh is Investigating Officer. In the statement under section 313 CrPC accused has stated that he has been falsely implicated in the case. Deceased was a hardened criminal who was involved in different cases. DW-1 Ramesh Chander is produced in defence who has stated that a Train No. 2 RC reached Tikli Rawatpur at 07.15 P.M. and departed at 07.18 P.M.

10. After conclusion of the evidence on the application of prosecution CW-1 B.N. Basak Station Master Bighapur Railway Station was produced who has stated that on 11.9.1978 Train No.2 RC arrived at Bighapur station at 06.45 PM and left at 06.55 P.M. A passenger train takes about 25 minutes time to reach Bighapur from Rawatpur Tikauli.

11. After appreciation of evidence on record learned trial court had given categorical finding that the prosecution has proved the case beyond reasonable doubt. Evidnece of witnesses is fully reliable. Accordingly learned trial court convicted and sentenced the accused appellant.

12. Learned counsel for the appellant argued that the prosecution has failed to prove the case against the accused beyond reasonable doubt. First information report is ante time and ante dated. No independent witness has been examined. Rather interested witnesses have been examined whose evidence could not be believed. It is further submitted that there was no motive for the accused to commit murder of the deceased. Prosecution story as narrated is fully unreliable. Deceased died during dead hours of night by some unknown person because he was a man of criminal nature and was hardened criminal, that is why inquest proceedings were conducted on the next day at 09.00AM and the postmortem was conducted on third day,i.e., 13.9.1978 at 03.00 P.M. It is further submitted that if there would have been any motive for accused to commit the murder

of the deceased then there was no reason to believe that deceased would walk with the accused on his side.

13. Per contra learned A.G.A. has submitted that the prosecution has successfully proved the case against the accused beyond reasonable doubt. Statements of PW-1 and PW-2 are fully reliable. There is no delay in lodging F.I.R. It is a case of direct evidence wherein there is no requirement to prove the motive. Nonetheless, motive is proved by the prosecution. There was sufficient light to identify the accused at the time of occurrence.

14. Before proceeding with the case we would like to deal with the medico legal aspect of the matter. Occurrence had taken place on 11.9.1978 at about 11:45 PM. Postmortem examination of the body of deceased was done on 13.9.1978 at 03.00 P.M. by PW-3 Dr. S.M. Tripathi. The two shots which hit the deceased were fired from a very close range. Right lung was completely lacerated. One of the shot had crossed the body through and through which was an exit wound of injruy no.2. According to Dr. Tripathi duration of death was about two days. Injury no.1 and 2 were caused by a firearm from a close range within three or four feet while injury no.4 was the exit would of injury no.2 From the nature of injuries it is clear that the deceased died due to gun shot injuries caused with intention to cause the death of deceased.

15. Now, it is to be seen as to whether the evidence of PW-1 Jag Mohan and PW-2 Sri Mohan is worth reliance and fully reliable or not. Learned trial court has given a finding that the evidence of these two witnesses is fully reliable. Learned counsel for the appellant argued that PW-1 is the real brother of the deceased who is an interested witness while the PW-2 Sri Mohan is a partisan and chance witness. Their evidence could not be relied upon.

16. Before dealing with these two witnesses, we would like to refer the relevant legal proposition on the subject. In ***Nand Kumar versus State of Chhatisgarh (2015) 1 SCC 766*** Hon'ble the Apex Court has held that evidence of eyewitnesses could not be disbelieved merely on the ground that they are the close relatives of the deceased. Hon'ble the Apex Court has referred in ***Namdev versus State of Maharashtra (2007) 14 SCC 150*** wherein it was held in para 38 that :-

"38..... it is clear that a close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinised 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."

17. If we examine the evidence of PW-1 Jag Mohan it is admitted that he is the real brother of the deceased. Definitely he is an interested witness but his evidence has to be scrutinized with caution. It is clear that at the time of incident Jag Mohan, Sri Mohan and one Sheo Charan were accompanying the deceased when accused also joined them. It has come in the evidence that there

was no independent witness present at the place of occurrence. Out of the three persons present prosecution has produced Jag Mohan and Sri Mohan. At this stage, we would like to infer that even if Sheo Charan is not produced by the prosecution it will not adversely affect the prosecution version because even if Sheo Charan would have been produced by the prosecution it could have just multiplied the number of witnesses. It is settled legal position that it is not the quantity but the quality of the evidence has to be looked into by the Court. On this point reference may be made to the pronouncement of Hon'ble Apex Court in the case of **Sudip Kr. Sen and Others V. State of West Bengal and Others** reported in **MANU/SC/0013/2016** and has observed in para 12 as under:-

"Observing that there is no impediment for recording conviction based on the testimony of a single witness provided it is reliable in Prithipal Singh and Ors. V. State of Punjab and Anr. MANU/SC/1292/2011 : (2012) 1 SCC 10, it was observed as under:

49. This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. [See Vadivelu Thevar V. State of Madras reported in AIR 1957 SC 614, Sunil Kumar v. State (Govt. of NCT of Delhi reported in (2003) 11 SCC 367, Namdeo V. State of Maharashtra reported in (2007) 14 SCC 150 and Bipin Kumar Mondal v. State of W.B. reported in (2010) 12 SCC 91]."

46. On this point reference may also be made to the pronouncement of Hon'ble Apex Court in the case of **Deny Bora V. State of Assam** reported in **(2014) 14 SCC 22** and has observed in para 14 as under:-

"As we find, the conviction wholly rests on the sole testimony of PW-14. It is well settled in law that conviction can be based on the testimony of a singular witness. It has been held in Sunil Kumar v. State (Govt. of NCT of Delhi) (2003) 11 SCC 367 that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration. The same principle has been reiterated in Namdeo V. State of Maharashtra reported in (2007) 14 SCC 150 by stating that it is open to a competent court to fully and completely rely on a solitary witness and record conviction, if the quality of the witness makes the testimony acceptable."

18. PW-1 Jag Mohan has stated that whenever Ramadhin used to go to Unnao in connection with his cases and used to return in the evening by train Jagmohan used to reach Rawatpur Tikauli Railway Station to receive him and to accompany him to home. This is because he was having an apprehension that something wrong may be done with Ramadhin as he was involved in number of cases. On the fateful day also Jag Mohan went to the railway station to receive Ramadhin. So far as question of Jag Mohan is concerned, it was a natural conduct that being the brother of the deceased he was seriously concerned about his well being. He was having full knowledge that certain criminal cases and other cases are pending against Ramadhin and he may be attacked by anyone if he is found all alone. This was the reason that Jag Mohan used to accompany the deceased whenever he goes to Unnao and returned in the evening by train. On the fateful day also Jag Mohan was not knowing that Sri Mohan and Sheo Charan were also accompanying the deceased in the train and they would also come back to their houses alongwith Ramadhin deceased. Hence, presence of Jag Mohan at the railway station is quite natural. Learned trial court has given a categorical finding that the train which was scheduled to reach Rawatpur Tikauli at 06.10 P.M. had reached by 06.15 PM or 06.20 PM. Learned trial court has also taken a judicial notice of the fact that on the fateful day as shown in the 'jantri' sunset time was 06.30 PM. It means that at the time of arrival of the train at the railway station sun was not set. Just after reaching at the station Jag Mohan alongwith Sheo Charan, Sri Mohan and deceased proceeded for village. It took about 20-25 minutes to reach at the place of occurrence, which means that they reached the place of occurrence at about 06.40 PM but even if the sun might have accordingly set at that time, there would be sufficient light to enable the witnesses to see and recognize the accused, particularly when he is also a resident of same village and had walked with them for about 150 paces before firing the shots from the pistol.

19. First information report was lodged on the same day at 11.45 PM while the distance of police station was six miles. According to PW-1, Jag Mohan after the incident he ran away from the place of occurrence and went to his village and again came back with villagers then he got the report scribed from Krishna Kumar Shukla and handed over the same at the police station. Inquest proceedings began on 12.9.1978 at 09:00 AM and concluded on 12.9.1978 at 11:30 AM. Thereafter, dead body was sealed and sent for postmortem which took place on next day at 03:00 PM. PW-4 Shri Ran Vijai Singh, Investigating Officer has stated that he was busy in the investigation of Case Crime No.278 under section 302, 201 I.P.C. When first information report was lodged at the police station. He was not present at the police station at that time. Papers of this case were handed over to him on 12.9.1978 at about 4 AM by Satyendra Kumar Shukla then he reached at the place of occurrence and recorded the statement of complainant and conducted the inquest proceedings. Hence there was no delay in conducting the inquest proceedings.

20. It is submitted by the learned counsel for the accused that there are some cuttings in the time of occurrence mentioned in the inquest report. Apart from it, in the inquest report distance of the police station from the place of occurrence is shown as ten kilometers while in the first information report it is mentioned as six miles. It is further submitted that the postmortem was conducted on the next day which shows that the report is ante time and ante dated. Attention is also drawn towards challan lash wherein also there are certain cuttings in the time of occurrence. We are

not impressed with the argument. Purpose of inquest report is very limited. It was held in Madhu alias Madhuranath and Another versus State of Karnataka, (2014) 12 SCC 419 that "*The object of the inquest proceedings is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what is the cause of death. More so, the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warran tbenefit of doubt to the accused." Same view was taken in Pedda Narayana v. State of A.P. (1975) 4 SCC 153, Rameshwar Dayal v. State of U.P. (1978) 2 SCC 518, Kuldip Singh v. State of Punjab 1992 Supp (3) SCC 1, George v. State of Kerala (1998) 4 SCC 605, Suresh Rai v. State of Bihar (2000) 4 SCC 84 and Munshi Prasad v. State of Bihar (2002) 1 SCC 351.*

21. Even if distance is mentioned in the kilometers in the inquest proceedings while in the chik F.I.R. Distance is mentioned in miles it does not make any room for doubt. Certain cuttings are also there which do not cast any shadow over merit of the matter. According to the postmortem report duration of death was about two days which coincides with the time of occurrence as alleged by the prosecution, hence, we do not find any force in the argument that first information report is ante-timed or ante-dated.

22. PW-1 Jag Mohan has given a very natural statement. He reached at the railway station to receive his brother who accompanied him alongwith Sri Mohan and Sheo Charan. On the way accused also joined them who was known to them. It has come in the evidence that accused is known to them. Parvesh is brother of accused and litigation was pending between deceased Ramadhin and Pravesh and others. Proceedings under section 107, 116 CrPC were also launched in that regard, hence, when Ashok Kumar was previously known to the deceased as well as witnesses and on the way he also joined them, there was nothing abnormal in it. All of a sudden Ashok Kumar fired a shot from his pistol on the back of deceased who was going ahead of him. Again a fire was shot and witnesses ran away from the place of occurrence. A third fire was also shot but it could not hit anyone. Theory of firing two shots by the accused finds full corroboration from the evidence of Dr. S.M. Tripathi PW-3 and postmortem report. Presence of PW-1 Jag Mohan at the place of occurrence is also fully corroborated and proved by the evidence on record.

23. At this stage, we examine the veracity of the statement of PW-2 Sri Mohan. We found that there was some inimical relationship between him and the accused but that was an old issue. Papers of enmity of PW-2 Sri Mohan with the accused have been filed which shows that Kamlesh Chandra brother of accused was a witness against Mahabir father of Sri Mohan in a case under section 183 Z.A. Act but the jdugment of that case shows that the case was between Mahadeo and Mahabir who were real brothers. In that case Kamlesh Chandra has deposed about the relationship of Mahadeo, Mahabir and their brother Beni Madhav who died issueless. Kamlesh Chandra has nowhere deposed anything against father of Sri Mohan.

24. Presence of PW-2 Sri Mohan at the place of occurrence is assailed on the ground that Hari Mohan brother of Sri Mohan was murdered. In that case deceased Ramadhin was an accused, hence, it is not possible that Ramadhin would accompany Sri Mohan. This argument does not find favour from the learned trial court. A perusal of the judgment of sessions trial no. 159 of 1964 State versus Mahadeo and others decided by second Additional Sessions Judge Unnao on 28.11.1964 shows that in that case the main role of murder was assigned to Mahadeo, the brother of Mahabir and Chaturbhuj and Jagdeo sons of Mahadeo and Sundar Bai wife of Mahadeo. Against Ramadhin the only allegation was that he was a friend and associate of Mahadeo and was present at the med of the field with a lathi. This incident took place in 1964 wherein all the accused were acquitted. Subsequently, proceedings under section 107, 116 Cr.P.C. were launched against Mahadeo and Ramadhin. Name of Sri Mohan finds place as a witness alongwith Ramadhin in the other party which was rival to the party of Mahadeo and his sons. Further in the police report dated 10.8.1978, exhibit kha-7 it is mentioned that Mohan, nephew of Mahadeo was murdered wherein Ramadhin and others were accused which was acquitted. In the proceedings under section 133 CrPC Ramadhin and Mahaveer father of Sri Mohan figured together as applicants against Mahadeo and his sons. It is clear that since 1976 when Ramadhin and Mahabir filed an application under section 133 CrPC jointly against Mahadeo and his sons, Ramadhin and Mahabir and his sons became friendly with each other. On the date of incident case under section 133 Cr PC was fixed under hearing. It was quite natural for Sri Mohan to accompany the deceased to Unnao, hence, presence of PW-2 Sri Mohan alongwith deceased cannot be doubted in any manner. His evidence is also fully reliable.

25. Presence of PW-1 Jag Mohan and PW-2 Sri Mohan at the place of occurrence is proved. Apart from this, direct evidence of murder committed by the accused is also on record in the shape of Statement of PW-1 Jag Mohan and PW-2 Sri Mohan. In **Gopal Singh versus State of U.P. (1978) 3 SCC 327**, it was held that :-

"11. ..... True, they were interested witnesses, related to the deceased. Far from undermining the circumstances of the case, it guaranteed the truth of their testimony. Being relations they would be the least disposed to falsely implicate the appellant, or substitute him in place of real culprit. In short, the murder charges had been proved to the hilt against the appellant."

39. Further in **Bhagwan Dass versus State of Rajasthan (1974) 4 SCC 781** it was observed in paragraph 11 of the Apex Court that:-

"11..... It is also difficult to believe that Chunki would spare the real assailant and falsely mention the name of the accused as a person who was responsible for the injuries caused to her and the three deceased persons. Chunki, it may be stated, has not been shown to have any animus against the accused."

Hence, we are of the view that the presence of prosecution witnesses at the place of occurrence is fully established. Their evidence is fully reliable.

26. Learned counsel for the accused argued that there was no motive for the commission of crime by the accused. It is a case of direct evidence. It is settled legal position that in a case of direct evidence motive loses its importance. It was held in **Habib versus State of Uttar Pradesh (2013) 12 SCC 568**, by the Hon'ble Apex Court that if there is direct and trustworthy evidence of witnesses as to the commission of offence, the motive part loses its significance. Ocular testimony of witnesses cannot be discarded only by reason of absence of motive, if otherwise, evidence is worthy of credence. In **Subodh Nath and Another versus State of Tripura (2013) 4 SCC 122**, it was held by the Hon'ble Apex Court that motive becomes relevant as an additional circumstance in a case where prosecution seeks to prove the guilt by circumstantial evidence only. But if there is direct evidence against the accused having committed offence, motive becomes irrelevant. Reference may also be made to **Darbara Singh versus State of Punjab (2012) 10 SCC 476**.

It was held in **Sanjeev versus State of Haryana (2015) 4 SCC 387** that "It is settled principle of law that, to establish commission of murder by an accused, motive is not required to be 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 crime. It is only either intention of 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."

27. Further learned trial court has given a categorical finding that there was sufficient motive for Ashok Kumar to commit the crime. Learned trial court has held that from the evidence exhibit kha-7 filed by the accused it appears that in the proceedings under section 107/ 116 CrPC Parmesh Chandra who is the brother of the accused is also one of the opposite parties alongwith Mahadeo, Sheo Dass, Raja Ram and others. Real dispute of galiyara was between Ramadhin and Mahadeo and his sons but the fact remains that from the defence evidence itself it is clear that proceedings under section 107/116 CrPC were also pending against the brother of the accused and deceased. Specific motive was alleged in the first information report in the document exhibit kha 7 filed by the accused which is copy of police report under section 107, 116 CrPC. It appears that the name of Parmesh Chandra Tewari who is brother of the accused is shown as one of the parties. Although the main dispute of Ramadhin regarding the galiyara was with Mahadeo and his sons but Parmesh Chandra brother of the accused Ashok Kumar was also arrayed in the party of Mahadeo in the proceedings under section 107/ 116 CrPC which was drawn up as a consequence of this dispute. It shows that there was a motive for the accused for commission of the crime.

28. Place of occurrence was mentioned near field of Bhabhuti Kori. In the site plan place of incident shown by letter 'A' which is on the Northeast side of the Itauli minor canal and towards South of the field of Bhabhuti. Investigating Officer has recovered the empty cartridges, tikli from the place of occurrence and prepared the recovery memo. No suggestion was given to the witness that the place of occurrence has been shown wrongly. We do not find any force in the argument that place of occurrence has been changed. There is a consistent evidence on record about the place of occurrence. Further defence in so many words has not changed the place of occurrence during

trial, rather it is said that the deceased was killed during dead hours of night by some unknown persons, hence, we are of the view that place of occurrence is also established.

29. After considering all the aspects and evidence on record, we are of the considered view that the prosecution has successfully proved the charges levelled agianst the accused beyond reasonable doubt. Learned trial court has rightly appreciated the evidence on reocrd. We do not find any illegality, in the impugned findings. Accordingly appeal is devoid of any merit and is liable to be dismissed and is accordingly **dismissed**. Accused is on bail. His bail is cancelled. He shall be taken into custody forthwith to serve out the sentence awarded by the learned trial court.

30. Office is directed to certify this order to the learned trial court to ensure compliance. Office is further directed to transmit the lower court record forthwith.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2016

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Sales/Trade Tax Revision No.- 699 Of 2006

M/S Som Distilleries & Breweries Ltd. Thru' Auth. Sign. **...Revisionist**
Versus
Commissioner Of Trade Tax U.P. **...Respondent**

Counsel for the Revisionist:
Nishant Mishra

Counsel for the Respondent:
S.C.

U.P. Trade Tax Act, 1948 – S. 28A(6) – Penalty – Non-production of Form-31 – Requirement of intent to evade tax – IMFL consignments imported with valid permits – Goods intercepted without Form-31 – Tribunal affirming penalty on ground of absence/subsequent submission of Form-31 – Validity –

Held, S. 28A(6) contemplates two conditions: (i) absence of proper documents, and (ii) satisfaction of authority that transportation was with intent to evade tax – While first condition stood satisfied, second was not established (paras 3-4) – IMFL being an excise-controlled commodity, its import, storage and movement are strictly regulated and once goods enter bonded warehouse, assessee loses control and cannot effect sale without permission (para 5) – Tax not leviable at stage of import but only upon clearance for sale, hence no occasion for evasion at interception stage (para 5) – Mere non-production or subsequent furnishing of Form-31 is a procedural lapse and does not ipso facto establish mens rea (paras 2, 5) – Tribunal erred in presuming evasion without material evidence – Penalty unsustainable.

Result: Revision allowed – Orders of authorities set aside.

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the revisionist and the learned Standing Counsel.

2. The challenge in the present revision is to assessment proceedings taken for the purposes of imposition of penalty by the assessing authority in respect of certain import of consignments of Indian Made Foreign Liquor (IMFL) by the revisionist. The imposition of penalty has been affirmed by the Tribunal in second appeal. The case of the revisionist was that it was engaged in the manufacture and sale of IMFL and its main unit of manufacture was in the State of Madhya Pradesh. For the purposes of effecting sale in the State of U.P., the revisionist is stated to have established a Bonded Warehouse. The IMFL upon deposit of import fee and under cover of import permits entered the State of U.P. The goods in question prior to being unloaded at the Bonded Warehouse are stated to have been intercepted when it was found that they were not accompanied by Form-31. On the basis of the above lapse proceedings for imposition of penalty were initiated against the revisionist. The assessing authority by an order dated 25 November 1998 imposed a penalty of Rs. 2,44,687/-. This was reduced by the first appellate authority in appeal to Rs. 1,30,500/-. This order of the first appellate authority was challenged before the Tribunal which has confirmed the same by its order dated 24 January 2006.

3. From a reading of the order of the Tribunal, this Court finds that what has primarily weighed with it while upholding the order of the first appellate authority is that admittedly the goods at the time of interception were not accompanied with Form - 31. The Tribunal recorded that insofar as the consignments which formed the subject matter of Appeal No. 431 of 2003 is concerned, Form - 31 was furnished subsequently. It has held that a deliberate attempt was therefore made in order to evade the payment of tax.

4. Section 28A enjoins any person who intends to bring, import or otherwise receive into the State from any place outside goods in such quantity or measure as may be prescribed, to be accompanied with a declaration which is to be obtained from the assessing authority. It is with reference to this provision that the rules require the revisionist to import the IMFL under cover of Form - 31. While the need and the purpose for which this form must necessarily be obtained is founded on the principle that the Department must have knowledge of taxable goods entering into the State, the issue which faces this Court is as to whether the failure on the part of the assessee to produce the Form -31 at the time when the goods were intercepted would necessarily entail the imposition of penalty. Admittedly the imposition of penalty shall stand governed by the provisions of sub-section (6) which reads as under:

"28A(6) Where the officer making search or inspection under this section finds any person transporting or attempting or abetting to transport any goods which this section applies without being covered by the proper and genuine documents referred to in preceding sub-sections and if, for the reasons to be recorded, he is satisfied, after giving such person an opportunity of being heard, that such goods were being so transported in an attempt to evade assessment or payment of tax due or likely to be due under this Act, he may order for detention of such goods."

5. As would be evident from a reading of the said provision when the officer making an inspection finds that any person is transporting or has attempted to transport goods without them being covered by proper and genuine documents and for reasons to be recorded he is satisfied that such goods were so transported in an attempt to evade an assessment or payment of tax he is empowered to then detain the goods. A reading of the said provision indicates that the revisionist in this case clearly falls within the mischief of the first part of sub-section (6) inasmuch as admittedly the goods were not accompanied by the documents which were mandated in terms of sub-section (1) of Section 28A. However, before imposition of penalty, the officer must also be satisfied that such goods were being so transported in an attempt to evade assessment and payment of tax. The finding on this score is liable to be recorded bearing in mind the special characteristics of the imported article which in this case is IMFL.

6. As noted above, what the revisionist sought to import into the State of U.P. was IMFL. It is not disputed that IMFL starting from the time of its production to its supply and distribution is a product which is controlled extensively by excise officers pursuant to the provisions of the U.P. Excise Act, 1910. It is pursuant to the special provisions which stand attached to commodities like IMFL that the import and export of such commodities from one State to another are circumscribed by the requirement of deposit of import fee and the obtaining of import permissions. The consignment in question is stated to have been duly accompanied with the import permit and is also stated to have reached the bonded warehouse. Once and the moment, the goods reach the Bonded Warehouse the assessee looses all control over the said commodities inasmuch as during the period of consignment these goods remain under the physical control of the excise department. A consignment of IMFL cannot be dispatched, moved or sold from a bonded warehouse without the permission and scrutiny of the excise officers. It is in light of these peculiar statutory restrictions which stand placed in respect of dealings in IMFL that this Court finds that the charge of an intent to evade payment of tax was not made out. Once the goods had duly been accounted for and had entered the bonded warehouse, the revisionist-assessee could have in no manner effected sale without the permission of the excise officers. It is also not disputed that the U.P. Trade Tax Act, 1948 did not levy a tax on the import of IMFL. The tax as is admitted by learned counsels would stand attracted only at the stage where the IMFL left the bonded warehouse for the purpose of sale. It therefore, cannot be countenanced that the officials of the Trade Tax Department would therefore have no knowledge or notice of a future movement of these goods. The issue of an intent to evade payment of tax, therefore does not arise. While it is true that Form - 31's were submitted in certain cases by the revisionist subsequently, bearing in mind the above, this Court finds that the imposition of penalty upon the revisionist would not be liable to be sustained.

7. This revision shall accordingly stand allowed. The orders of the assessing authority dated 25 November 1998, first appellate authority dated 7 April 2000 as well as the Tribunal dated 24 January 2006, are hereby set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2016

BEFORE

THE HON'BLE RAJAN ROY, J.

Service Single No.- 6627 Of 2006
&
Service Single No.- 4769 Of 2003

Om Prakash Srivastava **...Petitioner**

Versus

Hon'ble High Court Of Judicature Of Allahabad & Ors. **...Respondents**

Counsel for the Petitioner:
O.P. Srivastava, Manjive Shukla, Virendra Kumar Dubey

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

Service Law—Departmental Proceedings after Retirement—Article 351-A, Civil Services Regulations—Limitation— Departmental proceedings against retired employee can be instituted only in accordance with Proviso (a) to Article 351-A—Proceedings deemed to be instituted on date of issuance of charge-sheet—Charge-sheet issued after retirement and beyond four years of alleged incident barred—Mere decision to initiate proceedings prior to retirement irrelevant—Proceedings vitiated.
Departmental Enquiry—Proof of Misconduct—Standard of proof— Even in departmental proceedings, charges must be supported by tangible and credible evidence—Serious charge like forgery cannot be sustained on conjectures or suspicion—Absence of expert evidence, denial by concerned authority, or material linking delinquent renders findings perverse.
Departmental Enquiry—Procedural Fairness—Ex parte enquiry— Even where delinquent does not participate, enquiry must be conducted in accordance with law by fixing date, time and place and proving charges through evidence—Failure to follow basic procedure vitiates enquiry.
Disciplinary Authority—Duty to pass reasoned order— Final order must consider inquiry report, evidence and representation of delinquent—Non-speaking order without reasons and without consideration of reply unsustainable.
Service Law—Misconduct—Negligence vs. Forgery— Failure to obtain signatures on judicial order may constitute negligence—However, allegation of forgery requires strict proof—In absence of proof of forgery, major penalty unsustainable.
In Result— Impugned disciplinary proceedings and orders of pension cut quashed; respondents directed to release retiral dues-Writ petition dispose off.
Cases cited
Nand Kishore Prasad Vs State of Bihar and Ors.AIR 1978 SC 1277
Kuldeep Singh Vs. Commissioner of Police & Ors.(1999) 2 SCC 10
Sher Bahadur Vs. Union of India & Ors.(2002) 7 SCC 142
Bank of India Vs. Degalse Suryanarayana(1999) 5 SCC 762
Union of India Vs. H.C. GoelAIR 1964 SC 864
State of U.P. And Ors. Vs. Harihar Bholenath(2006) 13 SCC 460
Delhi Development Authority Vs. H. C. Khurana(1993) 3 SCC 196

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel, Shri Gaurav Mehrotra, learned counsel for the High Court and perused the records.

2. Both these writ petitions arise out of the same cause, therefore, they have been heard together and are being decided by a common judgment.

3. The petitioner herein is a retired employee of the High Court. In the year 1994 he is said to have been working as Ad-hoc Bench Secretary when an order dated 13.09.1994 is said to have been passed by the Division Bench of this Court in F.A.F.O. No. 50 of 1993. It is said that the said order after being transcribed could not be signed by the Hon'ble Judges who were part of the Division Bench and the file was sent as it is to the concerned F.A.F.O. Section. It is said that after 4-5 months of passing of the said order, the certified copy was applied by one of the parties to the case, whereupon the said file was sent by the F.A.F.O. Section to the Copying Section whereupon the omission of signatures was noticed by one Mr. Jai Kishan Soni copyist, who submitted a report in this regard. Based on his report, an explanation was sought from Mr. Rajiv Kamal, who was the in-charge of the F.A.F.O. Section and the petitioner who was the Ad-hoc Bench Secretary. Thereafter, it is said that a preliminary inquiry was ordered. In the preliminary inquiry which was conducted by the Joint Registrar (Listing) Shri S.K. I. Naqvi, the petitioner was exonerated. Inspite of it, subsequently on 09.03.1999, while the petitioner was still in service, an order was passed on the file by the competent authority taking a decision for initiation of a regular inquiry against the petitioner, but, it is an admitted fact that no charge sheet could be issued to him and he retired from service of the High Court on attaining the age of superannuation on 31.01.2000. More than two and half years after his retirement i.e. 08.10.2002 a charge sheet was served upon the petitioner, a copy of which is annexed as Annexure No. 3 to the writ petition No. 6627(S/S) of 2006. The said charge sheet contains the following charges:-

"(1) That you on 13.9.1994 posted/ acting as Bench Secretary, Court No. 1, Lucknow Bench, Lucknow being duty bound to obtain the signatures of the Hon'ble Judges of the Bench on the orders/judgments in dereliction of duty carelessly and negligently did not obtain signature of the Hon'ble Judges on the order dated 13.9.1994 in F.A.F.O. No. 50 of 1993 State of U.P. & Ors. Vs. Shitala Prasad Pandey even on 2.5.1995 when Mr. Rajiv Kamal, U.D.A. brought this file to you and drew your attention towards this, and thereby failed to maintain absolute devotion to duty and committed misconduct within the meaning of Rule 3 of U.P. Government Servant Conduct Rules, 1956.

Evidence which is proposed to be considered in support of the charge:

(1) Statement of Mr. Rajiv Kamal, U.D.A. Group Incharge, F.A.F.O. Section, Lucknow Bench, Lucknow.

(2) Statement of Mr. Jai Kishan Soni, L.D.A, Copying Section Pending, Lucknow Bench, Lucknow.

(3) Statement of Mr. G.P. Verma, Section Officer, Copying Section Pending, Lucknow Bench, Lucknow.

(4) Your own statement.

(2) *That on 2.5.1995 when you were posted/ acting as Bench Secretary, Court No. 1 Mr. Rajiv Kamal, U.D.A., Group Incharge, F.A.F.O. Section brought the aforesaid record to you and requested you to obtain signatures of the Hon'ble Judges on the order dated 13.9.1994, you did not obtain the signatures and asked Mr. Rajiv Kamal to come again on 4.5.1995. Later on the signatures of the Hon'ble Judges on the order dated 13.9.1994 were found to have been forged. You are prima facie responsible for forging the signatures of Hon'ble Judges on the order dated 13.9.1994 and thus, committed misconduct within the meaning of Rule 3 of U.P. Government Servant Conduct Rules, 1956.*

Evidence which is proposed to be considered in support of the charge:

(1) Statement of Mr. Rajiv Kamal, U.D.A. Group Incharge, F.A.F.O. Section, Lucknow Bench, Lucknow.

(2) Statement of Mr. Jai Kishan Soni, L.D.A, Copying Section Pending, Lucknow Bench, Lucknow.

(3) Statement of Mr. G.P. Verma, Section Officer, Copying Section Pending, Lucknow Bench, Lucknow.

(4) Your own statement.

Statement of above witnesses shall be recorded during the course of enquiry.

Statement of any other person acquainted with the facts of the case relevant to the enquiry may be recorded during the enquiry."

4. The first charge was of not getting the order dated 13.09.1994 signed by the Hon'ble Judges forming the Division Bench which was his duty. The second charge was more serious as it contained an allegation that subsequently, the forged signatures were made on the order dated 13.09.1994 for which he was responsible.

5. As the said charge sheet had been issued to the petitioner after his retirement and was in respect of an incident which took place more than four years earlier, therefore, assuming the applicability of Article 351A of the Civil Services Regulations to the employees or Officers of the

High Court, the petitioner herein challenged the same by means of Writ Petition No. 4769(S/S) of 2003 wherein no interim order was passed although counter affidavit was called for. On account of pendency of the said writ petition and the jurisdictional issue raised by the petitioner he did not participate in the Disciplinary Proceedings and the same were held Ex-parte.

6. It is trite that proceedings under Article 351A are to be held in the same manner in which a proceedings for dismissal of an employee are held, meaning thereby like a regular fulfledged proceeding which necessarily involves fixing date, time and place of inquiry with intimation to the delinquent. This was required to be done irrespective of the fact whether the delinquent had filed any reply to the charge sheet or not, unless of course he had admitted the charges which was not the case as no reply was submitted by him. Even in the event of non submission of reply to the charge sheet ex-parte proceedings were required to be held wherein the charges leveled against the petitioner were required to be proved on the basis of evidence based on the standard proof prevalent in a departmental proceeding. Specific averments have been made in paragraph 44 of the writ petition that no date, time and place of inquiry was communicated to the petitioner. In response, the opposite parties have stated in para 53 of the counter affidavit that as the petitioner did not demand any oral inquiry, therefore, the same was not provided.

7. Be that as it may, an inquiry report was submitted by the Inquiry Officer who was the Joint Registrar (Listing) at the relevant time, a copy of which is annexed as Annexure No. 11 to the writ petition. The Court has perused the said inquiry report. For convenience, the inquiry report is quoted herein below:-

"On the basis of these charges, Office memos fro service were issued to Sri Om Prakash Srivastava, Bench Secretary and Sri Rajeev Kamal. Sri Om Prakash Srivastava gave representations and moved applications that he has retired for the last 4 years. Therefore, enquiry can not be conducted against him. All the representations were forwarded to the Registrar General, High Court, Allahabad and every time I was directed to proceed with the enqiury. Therefore, I proceeded with the eqnuiry against Sri Om Prakash Srivastava, Bench Secretary exparte.

As regards the enquiry against Sri Rajiv Kamla, I recorded the statement of Sri J.K Soni and Sri Rajiv Kamla. Sri J.K. Soni in his statement stated that on 25-1-1995, he was L.D.A. In Lucknow Bench, Lucknow and remained there till December, 1995. On 25-1-1995 Copying application No. 513 dated 25-1-1995 was received in Copying Section for issuing Copying in F.A.F.O. No. 50/1993 on the Stay-application No. C.M.A No. 134(m)/1993 whereon the order was passed. When the file was received in the Copying Section, the order was not having the signatures of the Hon'ble Judges, Hon'ble Mr. Justice Brijesh Kumar and Hon'ble Mr. Justice I.P. Vasishth. Therefore, the file was sent back to Mr. U.K.Pathak, the then U.D.A. of the F.A.F.O. Section. When on 5-5-1995 the file was again received in the Copying Section, it was having the signatures of their Lordships, Hon'ble Mr. Justice Brijesh Kumar and Hon'ble Mr. Justice I.P. Vasishth. But these signatures were not tallying with the natural signatures of their Lordships and he stated that

he could not say that the signatures on the Order under enquiry were forged or true because he was not having the specimen of their Lordships in the Copying Section.

Sri Rajeev Kamal in his statement stated that since January 1995 to May 1995, he was L.D.A. in F.A.F.O. Section and he was dealing with Civil Revision matters and with the oral order of his Section Officer, he was also dealing with the records of F.A.F.Os. When Sri U.K.Pathak, was handing over the charge of F.A.F.A. Section, he did not reveal the fact that some files are pending with some shortcomings. In May 1995 a reminder was received from Copying Section with respect to Copying Application NO. 513 dated 25-1-1995 in F.A.F.O. NO. 50/1993 whereon a slip was attached with the noting "Signatures wanting". When he perused this file. Then, it was found that the signatures of Hon'ble Mr. Justice Brijesh Kumar and Hon'ble Mr. Justice I.P. Vasishth were missing on Stay Application C.M.A. No. 134(m)/1993. Therefore, on the same day at about 4.00/4.15 p.m., he went to the Bench Secretary of Court No. 1 for getting the signatures on the order under enquiry and he requested Sri Om Prakash Srivastava, Bench Secretary to get the signatures of the Lordships on the Order Under Rules 3 & 4 Sub Rule (8) of Chapter VIII of the High Court Rules as it is the duty of the Bench Secretary for getting signaturesof the Lordships on the orders where the signatures are missing or wanting. But Sri Om Prakash Srivastava, Bench Secretary told him to leave the file for getting the signatures of the Lordships and to get back the file on 4/5-5-1995 and on 4/5-5-1995 he got the file from the Bench Secretary Sri Om Prakash Srivastava after getting the signatures on the order under enquiry.

Though Sri Akhilesh Mehrotra, the then Police Superintendent, Crime Branch, C.B.C.I.D. has indicated the Bench Secretary Sri Om Prakash Srivastva and Sri Rajeev Kamal, the then L.D.A. For forging the signatures on the order under enquriy and Sri S.K.I. Naqvi, the then Joint Registrar(C) fixed the responsibility of forging the signatures on Mr. Rajeev Kamal but only witnesses available in the enquiry are Sri J.K.Soni and Sri Rajeev Kamal, the person who has been charged for forging the signatures, both these witnesses Sri J.K.Soni and Sri Rajeev Kamal in their statements have not admitted or given any statement with respect to the forging of the signatures by Mr. Rajeev Kamal. Otherwise, also Mr. Rajeev Kamal can not be believed to have the forged signatures of Hon'ble Judges because of may experience as Joint Registrar (Listing) whenever signatures are missing or left by the Hon'ble Judges, it is either Joint Registrar (Listing) himself or the Bench Secretaries to get the signatures of the Hon'ble Judges on the orders. The finding of Sri S.K.I. Naqvi, the then Joint Registrar (C) that because the shyness of juniors staff, Sri Rajeev Kamal must have the forged signatures of the Hon'ble Judges on the order under enquiry does not appear to be tenable. On the basis of my experience as Joint Registrar (Listing) I may say that Sri Om Prakash Srivastava, Bench Secretary, who was having the duty to get the signatures on the order in question, has avoided to cooperate with the enquiry in the garb that he has retired and therefore, no disciplinary enquiry can be proceeded with against him.

Therefore, I do not hold Mr. Rajeev Kamal guilty of forging the signatures on the order under enquiry. However, I hold Mr. Om Prakash Srivastava, Bench Secretary guilty of forging the signatures on the order in question."

8. On a very careful reading of the inquiry report, this Court does not find any evidence mentioned therein linking the petitioner to the second charge leveled against him i.e. having made forged signatures. There is nothing mentioned in the inquiry report that the order sheet was ever placed before the Hon'ble Judges whose signatures are said to have been forged nor that they had denied their signatures thereon. There is nothing mentioned therein about any expert opinion of a handwriting expert having been obtained for verifying the signatures from the specimen signatures of the Hon'ble Judges which are alleged to have been made subsequently on the order dated 13.09.1994 so as to support the charge of forgery, that too, by the petitioner. The only evidence discussed in the inquiry report is the statement of Rajeev Kamal that he had taken file after four or five months of passing of the order dated 13.09.1994 to the petitioner who was the then Ad-hoc Bench Secretary informing him about the omission about the signatures and that the petitioner had kept the file with him and when returned back the signatures of the Hon'ble Judges were there on the order dated 13.09.1994. Merely based on this an inference has been drawn against the petitioner and he has been found guilty of charge no. 2 also in addition to charge no. 1. Apart from it, there is no evidence discussed. First of all it has to be proved in the inquiry that the signatures of Hon'ble Judges were forged. Secondly it had to be ascertained as to who had forged it. In this case the first relevant fact itself was not proved. The only evidence which could be of some relevance is the statement of one J.K. Soni Copyist who had stated that signatures were not tallying with the natural signatures of their Lordships even he went on to state (as recorded in the Inquiry Report) that **"he could not say that the signatures on the order under enquiry were forged or true because he was not having the specimen of their Lordships in the Copying Section"**. Thus his statement does not prove forgery.

9. On a bare reading of the inquiry report, the casual manner in which the alleged inquiry has been conducted is writ large and hardly needs to be emphasised as the inquiry report itself has been quoted hereinabove. After submission of this inquiry report before the Disciplinary Authority, the same was furnished to the petitioner who at this stage submitted a detailed representation challenging the findings of the Inquiry Officer as also the charge sheet, a copy of the said representation is contained in Annexure No. 12 to the writ petition. A perusal of the same reveals that it is a detailed response to the show cause notice and the inquiry report, which was required to be considered by the Disciplinary Authority while passing the final order in the proceedings in question on the same analogy as is required in a proceeding to be done in the case of dismissal, under the Proviso (a) Clause 3 of Article 351A, but this has not been done.

10. Moreover the Court has no doubt that as far as the charge no. 2 is concerned, there was no evidence worth any credibility even in a departmental proceeding or a proceeding under Article 351A to link the petitioner directly to charge no. 2 and establish that the petitioner had forged the signatures of the Hon'ble Judges. These elements are not proved even based on the standard of proof applicable to such proceedings, as, even this standard does not permit mere suspicion to take the plea of tangible evidence at least linking the petitioner to the charge. Mere conjectures or surmises can not suffice, specially, in the facts of the present case. A serious charge such as forgery can not be held to be proved merely on a hunch. They have to be proved on the basis of tangible and credible evidence even in a disciplinary proceeding. Reference may be made in this regard to

the dictum of Supreme Court in the case ***Nand Kishore Prasad Vs State of Bihar and Ors. (paragraph 18)*** reported in ***AIR 1978 SC 1277; Kuldeep Singh Vs. Commissioner of Police & Ors. (paragraph 7, 8, 9)*** reported in ***(1999) 2 SCC 10; Sher Bahadur Vs. Union of India & Ors. (paragrph 7)*** reported in ***(2002) 7 SCC 142; Bank of India Vs. Degalse Suryanarayana (paragraph 11)*** reported in ***(1999) 5 SCC 762; Union of India Vs. H.C. Goel*** reported in ***AIR 1964 SC 864***.

11. As already noted hereinabove, the Inquiry Officer did not make any effort to ascertain as to whether the signatures in question were in fact made by the Hon'ble Judges or not. There is nothing to indicate that the Hon'ble Judges denied having made such signatures. There is no report of an expert showing that the signatures were not of the Hon'ble Judges and in fact appeared to be in the writing of the petitioner. Thus the findings of the Inquiry Officer and the impugned order based thereon are absolutely perverse and can not be sustained in law.

12. As far as Charge No. 1 is concerned, certainly it was the responsibility of the petitioner, as Bench Secretary, to get the order signed by Hon'ble Judges and having failed to do so he could have been made accountable but the moot point is could this be done after his retirement that too 8 years since the alleged incident took place. It is in this context that it is necessary to consider a fundamental issue raised by the petitioner at the very outset i.e. about the of applicability of Article 351A of the Civil Services Regulations to the case of the petitioner. Initially a feeble attempt was made by Sri Manjive Shukla, learned counsel appearing for the petitioner to contend that Article 351A was applicable to Government Servants, which the petitioner was not and there being no provision in the service Rules for undertaking any such proceedings after retirement the impugned order was not sustainable on this score, however, on reliance being placed by Sri Mehrotra on Rule 40 of the Allahabad High Court Officers and Staff (Conditions of Services and Conduct) Rules, 1976, he did not press the plea any further but proceeded to argue that even under Article 351A proceedings could not have been initiated in the year 2002 in respect of an incident which took place in 1994 in view of Proviso (a) to the said Article which puts a bar on such proceedings after retirement based on an incident more than 4 years old.

13. Shri Gaurav Mehrtra, learned counsel appearing for the High Court submitted that in fact a decision had already been taken on 09.03.1999 (when the petitioner was still in service) to initiate the Disciplinary Proceedings against him, therefore, the bar contained in Article 351A Proviso (a) was not attracted. In this regard he relies upon the judgment of the Supreme Court reported ***in (2006) 13 SCC 460; State of U.P. And Ors. Vs. Harihar Bholenath.*** To fortify his contention he relied upon the judgment of the Supreme Court rendered in the case of ***Delhi Development Authority Vs. H. C. Khurana reported in (1993) 3 SCC 196*** to contend that the Disciplinary Proceedings are deemed to have been initiated not from the date of issuance of charge sheet, but from the date a decision is taken to initiate such proceedings, therefore, the said principle will apply even to a proceeding under Article 351A.

14. With respect, the Court begs to differ, for the simple reason that Article 351A Proviso (a) itself prescribes the stage at which the departmental proceedings shall be deemed to have been

instituted i.e. when the charges framed against the pensioners are issued to him or if the officer has been placed under suspension from an earlier date, on such date, therefore, reliance place upon ***H.C. Khurana case*** (supra) and ***Harihar Bholenath's case*** (supra) is misplaced.

15. It is not the case of the respondents that the petitioner was placed under suspension, therefore, the irresistible conclusion based on the aforesaid provision is that the proceedings under Article 351A can only be deemed to have been instituted from the date of issuance of charge sheet which in the instant case is 08.10.2002 and is a date subsequent to the date of retirement of the petitioner, therefore, the bar contained in Article 351A Proviso (a) that such departmental proceedings if not instituted while the officer was on duty either before retirement or during re-employment shall not be instituted save with the sanction of the Governor nor shall be in respect of such event which took place not more than four years before the institution of such proceedings, shall apply. Obviously the 'Governor' here would mean the 'Chief Justice', as the provision is to be applied mutatis mutandis. The institution of proceedings as already stated hereinabove is to be deemed from the date of issuance of the charge sheet, therefore, passing of an order on 09.03.1999 deciding to initiate the Disciplinary Proceedings while the petitioner was in service, but, not issuing the charge sheet on the said date or any date prior to retirement, is rendered meaningless for the purposes of application of Article 351A. In view of the above, the respondents have not been able to jump the hurdle created by the bar contained in Proviso (a) to Article 351A.

16. It was contended by Shri Gaurav Mehrotra, learned counsel for the High Court that in matters of fraud, specially, forging of judicial orders, the plea raised by the petitioner based on the provisions contained in Article 351A would not apply. The Court would have considered this argument provided there was evidence to establish firstly that any such fraud or forgery had been committed secondly it had been done by the petitioner. Apparently, there is none, therefore, this plea is of no consequence.

17. Shri Gaurva Mehrotra, learned counsel for the High Court referred to a report of the C.B.C.I.D. relating to these very allegations against the petitioner but on a perusal of the charge sheet the Court finds that the said report is not mentioned therein as evidence in support of the charges. The inquiry report, though, it cursorily refers to the said report does not discuss its content, therefore, in these circumstances the said report can not be seen by this Court at this stage.

18. On a perusal of the final order dated 19.07.2006 forfeiting the pensionary benefits of the petitioner to the extent of 30%, the Court does not find any discussion of the charges leveled against the petitioner nor the evidence adduced in the inquiry, the findings of the Inquiry Officer as contained in the inquiry report, but, most of all, there is a complete silence about the representation submitted by the petitioner to the show cause notice dated 17.09.2005 raising his objections to the findings of the Inquiry Officer. The Disciplinary Authority was under an obligation to have taken into consideration the aforesaid material and after discussing the same should have recorded his reasons/ conclusion based thereon, which has not been done.

19. On a bare perusal of the final order dated 19.07.2006 it is an absolutely non speaking order, merely stating that "after perusing the inquiry report dated 17.09.2003, Hon'ble the Chief Justice has been pleased to pass an order on 15.07.2006 that Sri O.P. Srivastava, the then Bench Secretary is found guilty of grave misconduct for forging the signatures of Hon'ble Judges on the order dated 13.09.1994" which does not satisfy the requirements of law. The order of Hon'ble the Chief Justice dated 15.07.2006 is not on record and has not been provided to the petitioner.

20. The opposite parties have filed a counter affidavit but have not annexed the said order of the Hon'ble the Chief Justice, so as to establish that all the parameters referred herein above were considered and the requirements of law were satisfied while taking the impugned action. For convenience, the order dated 19.07.2006 is quoted herein below:-

"In the departmental enquiry pending against Sri Om Prakash Srivastava, the then Ad hoc Bench Secretary, High Court Lucknow Bench, Lucknow (retired on 31.1.2000) for forging the signature of Hon'ble Judges upon the order dated 13.9.1994 in F.A.F.O. No.50 of 1993- State of U.P. Versus Shitla Prasad Pandey, the Enquiry Officer held him guilty for forging the signatures on the order in question. After perusing the enquiry report dated 17.9.2003, Hon'ble the Chief Justice has been pleased to pass an order on 15.7.2006 that Sri O.P. Srivastava, the then Bench Secretary (Retired on 31.1.2000) is found guilty of grave misconduct for forging the signatures of Hon'ble Judges on the order dated 13.9.1994 in FAFO No.50 of 1993- State of U.P. Vs. Shitla Prasad Pandey. Accordingly he is punished with curtailment of 30% pensionary benefit in regard to pension not yet paid for, with cumulative effect."

21. Shri Gaurav Mehrotra, learned counsel for the High Court made a valiant attempt to defend the order impugned herein by referring to various paragraphs of the counter affidavit but in vain.

22. In view of the above, the proceedings itself could not have been held against the petitioner after his retirement in view of Proviso (a) to Article 351A of Civil Services Regulations.

23. For the reasons aforesaid, the impugned orders including the order dated 19.07.2006 and order dated 29.10.2011 ordering forfeiture of pensionary benefits to the extent of 30% and recovery thereof from the pension/ gratuity of the petitioner can not be sustained. The same are, accordingly, quashed.

24. The recovery of the amount in question had been stayed by this Court vide order 16.01.2012. The respondents shall proceed to release the due amount, if any, to the petitioner as per law, within a period of three months from the date a certified copy of this order is submitted.

25. Both these writ petitions are **disposed of** in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 6730 Of 2016

Jitendra Bahadur Singh ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Santosh Kumar Shukla

Counsel for the Respondents:
C.S.C., Nisheeth Yadav

Service Law—Selection—Reservation for Persons with Disabilities—Sub-categories—Eligibility— Candidate suffering from dual disability (one leg and one arm affected—OL & OA) cannot be denied selection merely on ground that no combined sub-category prescribed—Where candidate applied under one recognized sub-category (OL) and possesses valid medical certificate disclosing disability—Non-consideration despite securing marks higher than last selected candidate held arbitrary and unjustified.
Selection—Merit—Arbitrariness— Petitioner securing higher marks than last selected candidate in physically handicapped category entitled to consideration—Rejection on hyper-technical ground of classification unsustainable—Selection process must adhere to fairness and non-arbitrariness.
Precedent—Per incuriam—Concept—Applicability— Judgment cannot be treated as per incuriam merely for non-consideration of an irrelevant statutory provision—Doctrine applies only where decision rendered in ignorance of binding precedent or relevant statutory provision—Earlier Division Bench decision binding and followed.
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—S. 32—Scope— Provision enabling identification of posts for reservation does not justify exclusion of otherwise eligible candidate—Once categories demarcated, candidate cannot be denied appointment on artificial classification not contemplated in advertisement.
In Result— Writ petition allowed; respondents directed to treat petitioner as successful candidate under OL category and proceed for appointment.

Cases cited

Suryamani v. State of U.P. and others
Dhruv Kumar Singh v. State of U.P. and others
State of U.P. and another v. Synthetics and Chemicals Ltd. and another
V. Sudeer v. Bar Council of India and another
K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner has instituted this writ proceeding for issuance of a direction upon the respondent authorities to appoint him on the post of Uttar Pradesh Subordinate Agriculture Services, Grade-III (Technical Assistant Group 'C') under the general/ physically handicapped category within a stipulated period.

2. A brief reference to the factual aspects would suffice.

3. The Public Service Commission Uttar Pradesh, Allahabad (for short, the "Commission") has issued an advertisement on 22nd October, 2013 calling applications from the candidates for appointment to the posts of Uttar Pradesh Subordinate Agriculture Services, Grade-III (Technical Assistant Group 'C'), which is a Group 'C' post. The advertisement in question indicates that a total number of 6628 posts were advertised, out of which 253 posts have been identified for the physically handicapped persons. The petitioner, who is a differently-abled person, made his application in pursuance of the said advertisement. The petitioner appeared in the preliminary test and qualified it. Later on, he appeared in the written test, which was held on 01st May, 2015. The petitioner qualified the written test also and he was issued a call letter for interview, which he faced. It is stated that the petitioner has secured 245 marks, but he has not been selected.

4. The grievance of the petitioner is that he has not been selected on totally non-existent ground that his one leg and one arm are affected.

5. It is stated that in the physically handicapped category the cut off marks was 160 and the petitioner has secured 245 marks, thus he was entitled for selection. When the petitioner came to know that his marks is much higher than that of the last selected candidate under the physically handicapped category i.e. 160 marks, he moved an application on 04th September, 2015 before the respondents but no decision was taken thereon. It is further stated that the Medical Board headed by the Chief Medical Officer, Varanasi has examined the petitioner and on 27th May, 2008 it had issued him a certificate, which is on the record as annexure-15 to the writ petition. The certificate indicates that the petitioner is suffering from the post traumatic stiffness and there is stiffness in right hip, knee joint and right elbow. There is no dispute about the medical certificate submitted by the petitioner.

6. A counter affidavit has been filed on behalf of the respondents-Commission. The stand taken by the respondents is that a requisition was sent to the Commission on 20th August, 2014 for the said posts and the State Government has demarcated the disability for the physically disabled persons in sub-categories of OL, OA, PD & PB and the number of posts, which have been demarcated for each category of disability, has been mentioned in the advertisement. It is stated that in the said demarcation the total number of 253 posts, reserved for physically handicapped, has been distributed amongst physically handicapped persons in the following manner:

1. PB (Partially Blind) ---- 85

2. PD (Partially Deaf)---- 85

3. OL (One Leg Affected)--- 42

4. OA (One Arm Affected)--- 41

7. It is stated that the petitioner in his form has mentioned that he belongs to OL category. A copy of the application form of the petitioner is on record along with the counter affidavit as Annexure-CA-3. It is stated that at the time of preparation of result when the certificates were duly examined by the Doctors then it was found that the petitioner falls under the category 'OL + OA' jointly and there was no such sub-category for 'OL + OA' demarcated in the requisition dated 20th August, 2014 and for the said reason, the petitioner, who falls in the general category, has not been selected.

8. In the rejoinder affidavit the petitioner has denied the said fact. The petitioner has reiterated the stand taken in the writ petition. With regard to the statement made in the counter affidavit that 'OL & OA' was not demarcated, in paragraph-6 of the rejoinder affidavit the petitioner has stated that the categories OL & OA have been clearly demarcated in the advertisement. It is stated that the candidates, who have secured lesser marks i.e. 164, have been appointed, whereas the petitioner having secured 245 marks has been declared unsuccessful.

9. Learned counsel for the petitioner has relied on a judgement of a Division Bench of this Court in the case of **Suryamani v. State of U.P. and others, Writ-A No. 60634 of 2015**, decided on 07th December, 2015.

10. I have heard Sri S.K. Shukla, learned counsel for the petitioner, learned Standing Counsel and Sri Nisheeth Yadav, learned counsel for the Commission.

11. Learned counsel for the petitioner Sri S.K. Shukla submits that there is no dispute with regard to medical certificate submitted by the petitioner which indicates that the petitioner falls under the OL & OA category. The advertisement clearly prescribes OL, OA, PB & PD sub-categories and the posts have been demarcated among the said sub-categories. It is submitted that the facts of the present case and that of **Suryamani (supra)** are identical and similar. In the said case also, the sub-category of the petitioner therein was OL & OA. In the application form he had only submitted that he belongs to OL sub-category, however, along with the application form he had submitted a certificate, wherein both the disabilities i.e. OL & OA were mentioned. The Division Bench of this Court has considered the said issue and has recorded its finding in the following terms:

"Issue that has been raised is that, in the present case, certificate that has been so appended by petitioner and produced by him shows that his one leg and one arm (O.L. & O.A.) was not functioning. However in the declaration form that has been given by him, one leg was mentioned as physically affected. Petitioner during the course of hearing, in the prescribed format, Performa V has produced certificate dated 26.11.2015 issued by Medical Board, Basti wherein certificate has been issued, certifying that only one leg effected."

12. Learned counsel for the Commission Sri Nisheeth Yadav submits that the judgement of **Suryamani (supra)** is per incuriam as the Court has not considered the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, the "Act, 1995"). It is further submitted that under the said Act it is the State Government which has the power to demarcate and identify the physical disabilities. In the present case, no dual disability has been demarcated by the State Government. Hence, the petitioner's selection is invalid. No other submission has been made. Sri Yadav has relied on a judgement of a Division Bench of this Court in the case of **Dhruv Kumar Singh v. State of U.P. and others, Writ-A No. 67780 of 2015**, decided on 21st December, 2015, a copy of which has been filed along with the counter affidavit as annexure-4 to the counter affidavit.

13. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

14. It is a common ground that the petitioner is a differently-abled person. In response to the advertisement, he had submitted his application form as well as a medical certificate. The medical certificate is on the record which clearly indicates that his one leg and one arm are affected. This fact clearly shows that there was no misrepresentation on the part of the petitioner. He has declared himself that he has dual disability. The submission of learned counsel for the petitioner is that the petitioner has secured 245 marks and the last selected candidate under the physically handicapped category has secured 165, therefore, his non-consideration on the ground that he has dual disability is unjustified and arbitrary. I find that the submission of learned counsel for the petitioner is well founded.

15. Insofar as the submission of learned counsel for the Commission that the judgement of the Division Bench of this Court in **Suryamani (supra)** is per incuriam is concerned, the same Division Bench of this Court has considered the said judgement in another case in **Dhruv Kumar Singh (supra)**, wherein no submission was made on behalf of the Commission that the earlier judgement of the Court in **Suryamani (supra)** is per incuriam.

16. Law in respect of per incuriam has been considered by the Supreme Court. The Court may in this regard gainfully refer to the decision of the Supreme Court in the case of **State of U.P. and another v. Synthetics and Chemicals Ltd. and another, (1991) 4 SCC 139**. The relevant part of the judgement is extracted hereunder:

"**40**. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.1). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey2 this Court while pointing out the procedure to be followed when conflicting decisions are placed before

a bench extracted a passage from Halsbury' Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding."

17. The Supreme Court in **V. Sudeer v. Bar Council of India and another, (1999) 3 SCC 176**, has held that a non-consideration of an irrelevant provision can not make a decision per incuriam. Relevant part of the judgment reads as under:

"**26**. ....Shri Rao, learned Senior Counsel for the respondent-Bar Council of India tried to salvage the situation by submitting that the said decision was per incuriam on the ground that Section 24(3)(d) was not noticed. We have already held that Section 24(3)(d) is the provision which permits the Bar Council of India by exercise of the rule-making power to make an otherwise ineligible person eligible for enrolment and does not act in the reverse direction to make an otherwise eligible person ineligible. Once that conclusion is reached, Section 24(3)(d) becomes totally irrelevant for deciding the question whether the Rule impugned before the three-Judge Bench in that case could have been sustained by the Bar Council of India by taking resort to Section 24(3)(d). Non-consideration of such irrelevant provision, therefore, cannot make the ratio of the decision in the aforesaid case per incuriam..."

18. Recently the Supreme Court has considered the concept of per incuriam in **K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate, (2015) 4 SCC 1**.

19. In the present case the learned counsel for the respondents submits that earlier judgment is per incuriam because the Division Bench did not consider Section 32 of the Act, 1995. Section 32 of the Act, 1995 is an enabling provision. It provides that appropriate Government can identify the posts which can be reserved. In the case at hand, the State Government had already taken that exercise, therefore, in my view the submission of learned counsel is untenable.

20. From the law laid down by the Supreme Court mentioned above it is evident that the judgement in **Suryamani (supra)** cannot be considered to be per incuriam. A statement has been made at the bar that the Commission has neither filed any review application nor filed any special leave petition against the judgement of the Division Bench in **Suryamani (supra).** Hence, the submission of learned counsel for the Commission that the earlier judgement in Suryamani (supra) is per incuriam, is rejected on this ground also.

21. I have gone through the judgement of **Dhruv Kumar Singh (supra)** carefully. From the facts of the said case it is evident that the petitioner in that case had a disability in his both legs and in the advertisement therein dated 29th April, 2015 disability with both the legs affected was not advertised. Hence, the facts of the said case are clearly distinguishable and do not support the submission of learned counsel for the respondents. The judgement of **Dhruv Kumar Singh (supra)** also indicates that the same counsel for the Commission had argued the case of Dhruv Kumar Singh also but he did not raise issue of per incuriam before the Division Bench.

22. The next question which arises is that what relief can be granted to the petitioner.

23. Learned counsel for the petitioner has drawn the attention of the Court to the judgement of **Suryamani (supra)**, which clearly indicates that 27 posts are unfilled under physically handicapped category.

24. In view of the above, I find that the writ petition deserves to be allowed and it is accordingly allowed. A direction is issued upon the Commission to send the name of the petitioner to the State Government as one of the successful candidates in sub-category 'OL' under the physically handicapped category in accordance with law, expeditiously, preferably within six weeks from the date of communication of this order.

25. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.07.2016

BEFORE

THE HON'BLE AJAI LAMBA, J.
THE HON'BLE RAVINDRA NATH MISHRA-II, J.

Habeas Corpus Writ Petition No. - 7425 Of 2016

Mohini Gupta Thru Her Husband Dilip Sharma ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kaushal Kishore Tewari

Counsel for the Respondents:
Govt.Advocate, Rajiv Raman Srivastava

Constitution of India – Art. 226 – Habeas corpus – Detention in Nari Niketan – Major woman – Right to personal liberty –
Held, where detenue is major and has categorically stated that she acted of her own free will, continued detention in Nari Niketan is illegal.

Personal liberty under Article 21 cannot be curtailed merely on technical objections or pending criminal proceedings when no offence is made out (paras 10-11).

Habeas corpus – Scope –

Held, writ court is duty bound to protect personal liberty and cannot permit procedural technicalities to defeat fundamental rights.
Once illegal detention is established, court must order release (para 10).

Criminal law – Kidnapping/abduction – Consensual relationship –
Held, where statement under Section 164 Cr.P.C. shows that the girl voluntarily went with the person and was not induced, offence under Ss. 363/366 IPC is not made out (paras 2, 6, 11).

Right of major woman – Choice of residence –

Held, a major woman has absolute right to choose where and with whom she wishes to reside.
Confinement against her will violates her fundamental right to personal liberty (paras 11-12).

In Result- Petition allowed – Detention order quashed – Detenue directed to be released forthwith to go as per her free will.

Cases cited

Smt. Poonam Vs. State of U.P. and others Writ Petition No.156 (H/C) of 2015 decided on 17.9.2015
Smt. Seema Devi through her next friend Vs. State of U.P. and others Writ Petition (Habeas Corpus) No. 10006 of 2016 decided on 25.5.2016
Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others (2011) 1 SCC 694

(Delivered by Hon'ble Ajai Lamba, J.
&
Hon'ble Ravindra Nath Mishra-II, J.)

1. This petition seeks issuance of a writ in the nature of Certiorari quashing order of detention dated 19.6.2015, appended with the petition as Annexure-1. The petition also seeks issuance of a writ in the nature of Habeas Corpus directing respondent No.2-Superintendent, Women Protection Home, District Lucknow to produce the petitioner and set her free.

2. It has been pleaded on behalf of the petitioner that the petitioner got married to Dilip Sharma, the deponent of her free will. The petitioner has not been kidnapped. Offence has not been committed, however, respondent No.3 in abuse of process of the law and process of the Court initiated criminal proceedings vide Case Crime No. 0100 of 2015, under Sections 363 & 366 I.P.C., Police Station Ataria, District Sitapur. It has been pointed out that the petitioner has already attained the age of majority. The petitioner in her statement recorded under Section 164 Cr.P.C.(Annexure-5) has made it evident that she had not been induced by Dilip Sharma to go with him, rather she had gone of her will and got married to him. It has further been clarified that petitioner wants to live with Dilip Sharma.

3. Considering some discrepancy in age, this Court vide order dated 18.5.2016 directed respondent No.2 to produce the petitioner in K.G.M.U.Lucknow, so that her age could be determined by a Board of Doctors. Order dated 18.5.2016 reads as under:

"1. Shri Rajiv Raman Srivastava, Advocate has appeared on behalf of respondent no. 3. His power of attorney is taken on record.

2. Counter affidavit has been filed on behalf of the investigating agency. As per document Annexure CA-2 age of the petitioner has been found to be 16 years. According to Annexure CA-6, however, age has been found to be 18 years. Both the certificates have been issued on the basis of ossification test. While Annexure CA-2 is based on ossification test conducted on 16th June, 2015, Annexure CA-6 is based on ossification test conducted on 14th October, 2015.

3. There is a serious discrepancy. The issue is required to be resolved.

4. We hereby direct respondent no. 2 to produce the petitioner before Registrar, K.G.M.U., Lucknow. The Registrar, K.G.M.U., Lucknow shall ensure that a board of doctors is constituted for conducting ossification test of the petitioner. Medical age of the petitioner shall be determined and the relevant document shall be filed in this Court on or before the next date of listing. The petitioner be produced before the Registrar, K.G.M.U., Lucknow on 25th May, 2015.

5. List on 02.06.2016. ".

4. Report has been received from a Board of six doctors dated 25.5.2016. As per determination the petitioner has been found to be 18-19 years of age.

5. Learned counsel appearing for respondent No.3 has raised a technical objection to the effect that the petitioner has been confined in Nari Niketan vide an order passed by Additional Chief Judicial Magistrate, Court No.2, Sitapur and, therefore, writ in the nature of Habeas Corpus would not lie.

6. Learned counsel for the State admits that age of the petitioner is 18-19 years. Learned counsel for the State has further admitted the contents of statement given by the petitioner under Section 164 Cr.P.C. in which she does not support the prosecution case, rather, has stated that the petitioner took Dilip Sharma to Barabanki. The petitioner had not been induced. The petitioner has stated that she wants to go with Dilip Sharma. Learned counsel for the State, under the circumstances, admits that the petitioner had not been kidnapped.

7. We have considered the facts and circumstances emanating from the record, in context of the arguments addressed by learned counsels, as noted above.

8. In **'Smt. Poonam** Vs. **State of U.P. and others'** rendered by this Court in Writ Petition No.156 (H/C) of 2015 decided on 17.9.2015, the following has been held in relevant paragraphs:-

" 21- We are coming across a large number of cases in which parent/ parents of a girl do not accept marriage of choice of their daughter, on account of different reasons, be it the caste , financial conditions, social status or religion. Although, the girl elopes with the boy voluntarily, however, criminal proceedings are initiated with allegation of abduction, kidnapping or inducing the girl to get married. In most of such cases the complainant takes a ground that his

daughter is a minor. For showing that his or her daughter is a minor, school certificates are relied upon .

22- The facts and circumstances of the present case are required to be considered in context of the law , as noticed above. While considering the same, the Court is required to take into account the most Cherished Right of a citizen of the country, which is personal liberty.

23- As noticed above, various documents have come on record indicating different dates of birth/age of the petitioner. Be that as it may, there is a conflict between the age of the petitioner determined on the basis of school documents, and the age assessed through ossification test. The Court is required to lean towards the report furnished by the Doctor, on the basis of scientific tests. This is particularly so because liberty of the petitioner is required to be protected, it being most precious Constitutional Right of the petitioner.

24- Considering the law laid down by this Court in Shaheen Parveen's case (Supra), as noticed above, it becomes prima-facie evident that the petitioner had neither been abducted nor kidnapped or induced by Suneel Kumar Singh. Rather statement of the petitioner recorded under Section 164 Cr.P.C. indicates that the petitioner had gone with Bauwa alias Suneel Kumar of her free will and voluntarily. Prima-facie, therefore, this Court concludes that offence has not been committed in context of the petitioner. Surely, the petitioner is not an accused. Under the circumstances, we are faced with a situation wherein liberty of an alleged victim has been curtailed under the direction of the Magistrate.

25- Considering the law laid down by Hon'ble Supreme Court of India in Juhi Devi's case (Supra) as extracted above, it becomes evident that in such cases reliance can safely be placed on the opinion of the Doctors in context of age of the girl, when the age recorded in school certificate(s) is at variance.

26- We have considered that there is consistency in the results of medical/ossification test reports, whereas the basis of making entry in school record in regard to date of birth, is generally not brought on record. In the circumstances, so as to consider whether a person has attained age of majority/ age of discretion in cases such as the present one, it is safer to rely on medical /scientific / ossification test reports.

27- Perusal of the judgment rendered in Smt. Reena's case (Supra), as extracted above, shows that age cannot be held to be a relevant consideration, while considering Personal Liberty of a person. A person living in India has a Right to enjoy his or her liberty, as guaranteed by the Constitution of India. Any order which curtails or encroaches upon the liberty of such a person is required to be struck down, if it is not in accordance with procedure established by law.

28- Article 21 of the Constitution of India promises every citizen that he shall not be deprived of his life or personal liberty except according to procedure established by law. Petitioner not being an accused , it cannot be held that her personal liberty has been curtailed as

per procedure prescribed by law. This is particularly so because she apparently has attained age of discretion and has asserted her right to get married of her own choice.

29- While considering a petition filed for issuance of a writ in the nature of Habeas Corpus, the writ court is not required to go into the complexities of law, once it is made evident to the Court that personal liberty of a citizen has been curtailed. A writ court cannot contemplate any limitation on its power to deliver substantial justice. Equity justifies bending the Rules, where fair play is not violated , with a view to promote substantial justice."

(Emphasised by us)

9. In context of issuance of writ in the nature of Habeas Corpus and in context of personal liberty and its relevance and importance, we refer judgment dated 25.5.2016 rendered by this Court in Writ Petition (Habeas Corpus) No. 10006 of 2016, titled **"Smt. Seema Devi through her next friend Vs. State of U.P. and others"** in which following has been held in relevant paragraphs:-

"1. It is often said that "one realizes the value of liberty only when he/she is deprived of it".

xxxxx

19. A writ of Habeas Corpus is one of what are called the "extraordinary", "common law", or "prerogative writs", which were historically issued by the English Courts in the name of the monarch to control inferior courts and public authorities within the kingdom. The due process for such petition is not simply civil or criminal, because they incorporate the presumption of non-authority. The official who is the respondent must prove his authority to do or not to do something.

20. A writ of Habeas Corpus is known as "the great and efficacious writ in all manner of illegal confinement", being a remedy available to the meanest against the mightiest. It is a summons with the force of a court order; it is addressed to the custodian (a prison official for example) and demands that the prisoner be taken before the court, and that the custodian to present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his or her authority, then the prisoner must be released. Any prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of habeas corpus.

21. There can be no doubt that personal liberty is a precious right, therefore, the writ of Habeas Corpus provides a prompt and effective remedy against illegal detention. By this writ, the Court directs the person or authority who has detained another person to bring the body of the detenue before the Court so as to enable the Court to decide the validity, jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention of liberty or freedom of the prisoner or detenu.

22. Since issuance of the writ is in context of liberty of a citizen, we would like to highlight the essence, relevance, and importance of 'liberty'.

23. 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. 'Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit legal justification. The negative right constitutes the essence of personal liberty.

24. It is very difficult to define the term 'liberty'. It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term 'liberty' may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three facts, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

25. It can be found that 'liberty' generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to 'liberty' and freedom is lost. At the same time, 'liberty' without restraints would mean liberty won by one and lost by another. So 'liberty' means doing of anything one desires but subject to the desire of others.

26. Life and liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

27. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of a right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why 'liberty' is called the very quintessence of a civil existence. (Vide Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others : (2011) 1 SCC 694.

28. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

29. When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right that is to say, not to

act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the State, not to infringe that right. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right and if someone has threatened to violate it and the person whose right is so threatened resorts to Article 226 of the Constitution, the court is required to protect the right."

(Emphasised by us)

10. Considering the law on the issue, as extracted above, we are of the considered opinion that precedence is required to be given to the constitutional rights of a citizen, and not to technicalities. Liberty is the most cherished right of a citizen. If a person is deprived of the said right, ordinarily a Court of equity will not allow technicalities to stand in the way. Complexities of law cannot be employed to frustrate right to liberty of a person. Writ court cannot contemplate any limitation on its power to deliver substantial justice. It is in this view of the matter that we reject the contention of learned counsel for respondent No.3, who appears to be aggrieved against the conduct of her daughter, who has exercised her right against wishes of respondent No.3.

11. Considering the age of the petitioner (18-19 years) and her statement recorded under Section 164 Cr.PC., we are of the considered opinion that any further confinement of the petitioner in Nari Niketan would violate the right of the petitioner vested under Article 21 of the Constitution of India. We have also taken into account the fact that the petitioner merely exercised her right to go with Dilip Sharma. The petitioner admittedly has not committed any offence. The petitioner is merely a witness, rather the alleged victim, of an incident, therefore confinement of the petitioner, by any stretch of imagination is not justified in law or equity.

12. We are also of the considered opinion that a girl should be housed in Nari Niketan only as a last resort, in case she has no other place to live. Nari Niketan do not offer ideal conditions of living. In the case in hand, the petitioner has offered to live with Dilip Sharma.

13. Considering totality of the facts and circumstances of the case, we are of the view that the liberty of the petitioner has been curtailed by confining her in Nari Niketan. Consequently, we allow this petition and quash the order dated 19.6.2015 (Anneuxre-1) passed by the Additional Chief Judicial Magistrate (Court No.2), Sitapur.

14. We hereby direct respondent No.2-Superintendent, Women Protection Home, District Lucknow to release the petitioner forthwith to allow her to go as per her free will.

15. Let a copy of this order be released under the signatures of Bench Secretary of this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 9513 Of 1989

M/S D.C.M. Ltd. & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Rahul Mishra, Sudeep Kumar

Counsel for the Respondents:
S.C., H.N. Tripathi.

Criminal Procedure Code, 1973—Ss. 227, 228, 239 & 240—Framing of charge—Re-analysis of seized sample—Entitlement— No statutory or indefeasible right accrues to an accused to seek re-analysis of a seized sample after submission of charge-sheet and at the stage of framing of charge—Grant of such prayer depends on nature of commodity and stage of proceedings—Kerosene not shown to be perishable or susceptible to deterioration—Refusal to permit re-analysis at pre-trial stage justified. (Paras 6, 8)
Essential Commodities Act, 1955—Ss. 3 & 7—Kerosene (PDS)—Seizure and analysis—Right of defence— Accused retains right to challenge report of Public Analyst during trial under S. 293 CrPC—Absence of express provision for re-analysis in Control Order does not render procedure arbitrary—Re-analysis, if warranted, may be permitted at appropriate stage subject to judicial discretion and proof of prejudice. (Paras 7, 8)
Criminal Trial—Discharge—Scope of defence material— At stage of discharge, defence material is limited to unimpeachable documents of sterling quality capable of demolishing prosecution case—Principle in State of Orissa v. Debendra Nath Padhi does not extend to permitting collection of fresh evidence or re-analysis of seized samples—Reliance on Sadhan Sahkari Samiti Ltd. held misconceived. (Paras 9–11)
In Result— Application dismissed. (Para 13)

Cases cited

State of Orissa v. Debendra Nath Padhi(2005) 1 SCC 568

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

1. During pendency of writ petition, we are informed that petitioners 3, 6, 7, 8, 9, 10, 11, 15 and 16 have died long back and, therefore, writ petition has abated in respect of these petitioners including criminal proceedings initiated against them.

2. The proceedings in question as also the dispute in the present writ petition is now surviving only in respect of petitioners 1, 2, 4, 5, 12, 13 and 14 only.

3. Sri Prashant Chandra, learned Senior Advocate, assisted by Sri Rahul Mishra and Sri Sudeep Kumar, Advocates, have appeared for petitioners; Sri R.C. Yadav, learned Standing Counsel for respondent- 1; and, Dr. H.N. Tripathi, Advocate, has appeared for respondent-2.

4. About ten orders passed in a span of more than one and half decade have been challenged collectively in this writ petition. Order dated 26.10.1981 (Annexure 3) is passed by U.P. Water Pollution Board (hereinafter referred to as "Board") refusing consent to petitioner-1 for discharge of effluent on the ground that effluent discharged by petitioner is highly polluted and has not been properly treated and disposed of. The orders dated 27.03.1982 (Annexure-5), 07.02.1983 (Annexure-35B), 16.08.1984 (Annexure-35C), 25.06.1985 /10.07.1985 (Annexure-12), 06.05.1986 (annexure-31), 07.05.1987 (Annexure-33), 05.10.1987 (Annexure-34A), 10.02.1988 (Annexure-35A) and 10.04.1989 (Annexure-47) also refuse consent under Section 25/26 of Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as "Act, 1974") for subsequent years.

5. Petitioner has also prayed for issuance of a writ of certiorari quashing proceedings under Section 33 of Act, 1974 pending in Case No. 773 of 1989 in the Court of Special Chief Judicial Magistrate (Pollution Control), Lucknow. It has also prayed for quashing of complaint and further proceedings in Case No. 774 of 1989 under Section 44 of Act, 1974 pending in the Court of Special Chief Judicial Magistrate (Pollution Control), Lucknow.

6. Brief facts as borne out from writ petition are that petitioner-M/S Daurala Sugar Works (Distillery) is owned by M/s DCM Limited, Delhi having its registered Office at Kanchenjunga Building, 18, Barakhamba Road, New Delhi. Distillery was installed in the year 1943. There is rearrangement of Company 'DCM Limited' along with three other Companies, i.e., DCM Industries Limited, DCM Shriram Industries Limited and Shriram Industrial Enterprises Limited, approved by Delhi High Court vide order dated 16.04.1990 under Section 391-394 of Companies Act, 1956 (hereinafter referred to as "Act, 1956"). Daurala Sugar Works, Daurala is now a unit of M/s DCM Shriram Industries Limited, New Delhi with effect from 01.04.1990.

7. Since installation of Distillery, the Trade Effluent discharged by it is used to be consumed by nearby growers to irrigate their fields and for that purpose petitioner-company constructed a channel running in about five kilometers. This channel joins a drain (sewer) known as kali Nadi which is neither a river nor watercourse nor stream.

8. Parliament enacted Act, 1974 and State of U.P. framed Rules, namely U.P. Water (Consent for Discharge of Sewage and Trade Effluent) Rules, 1981 (hereinafter referred to as "Rules, 1981") which came into force on 30.03.1981. It constituted 'Board' for the purpose of giving effect to provisions of Act, 1974 and Rules framed by State Government. Sections 25 and 26 of Act, 1974 required a running Industry to obtain consent from Board for discharging 'Trade Effluent' in a stream or well or sewer or on land. State Government issued Notification dated

21.09.1981 specifying 31.12.1981 as the date on or before which consent application should be filed by existing industries. Board vide Notification dated 06.04.1983 laid down effluent standards for discharge in stream and on land. Board fixed BOD level at 100 MG per liter for existing Distilleries.

9. Petitioner-1 submitted application for consent of Board on 29.06.1981. Board declined consent vide letter dated 26.10.1981 and asked petitioner to submit fresh application with certain clarifications. Petitioner-1 replied queries vide letter dated 27.11.1981. Consent was again declined and documents were returned by Board vide letter dated 27.03.1982. Petitioner 1, however, was again permitted to file fresh application.

10. For the purpose of setting up "Effluent Treatment Plant", petitioner-1 made an application to Collector on 13.07.1981 requesting for allotment of 31.38 acres land in Village Daurala and Machri, adjacent to petitioner-Distillery which was taken by State Government under U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "UP Act, 1960"). Correspondence continued but petitioner could not get land as desired for setting up "Effluent Treatment Plant" whereupon petitioner made its own efforts with individual farmers and could get land in June' 1984 and June' 1985 measuring 18.43 acres.

11. On 07.05.1983 and 16.08.1984 similar orders were passed by Board rejecting petitioner's application for consent. Petitioner also moved application on 09.03.1985 to the Board requesting for grant of consent in which it also mentioned a time bound programme for setting up "Effluent Treatment Plant". Board however declined consent vide order dated 25.06.1985/10.07.1985. Petitioner-1, however, was permitted to continue with the plan of setting up "Effluent Treatment Plan". The standards fixed by Board vide Notification dated 06.04.1983 were very stringent and no proven technology was available to bring down distillery effluent to the prescribed standards, hence a lot of correspondence took place between Members and Office Bearers of All India Distillers' Association and Central Government etc. in which Distillers' Association all through made attempts to have implementation of such standards deferred and to allow Distilleries to install Treatment Plant in phases so as to reduce effluent upto the extent of 95 per cent, i.e., to bring down BOD upto 3000 to 4000.

12. Board issued a notice to petitioner under Sections 25 and 26 read with 44 of Act, 1974 with further advise to complete installation of "Effluent Treatment Plant".

13. Fifth time application was submitted by petitioner for consent on 04.01.1986. Since petitioner's unit continuously was running without consent under Section 25/26, Board filed application in March' 1986 under Section 33 of Act, 1974 before Chief Judicial Magistrate for a direction to petitioner-distillery to stop discharge of effluent. An ex-parte order was passed by Magistrate on 29.03.1986 restraining Distillery from discharging effluent in Kali Nadi. Petitioner filed objection and thereafter Magistrate passed order on 17.05.1986 suspending interim order dated 29.03.1986 and directing petitioner to submit progress report of "Effluent Treatment Plant" to

Board. It also directed petitioner-1 to ensure that it does not discharge polluted effluent without treatment and will try its best to bring polluted effluent near about standards prescribed by Board.

14. Petitioner's application dated 04.01.1986 for consent was declined by Board vide order dated 06.05.1986.

15. Sixth application was submitted seeking consent on 30.12.1986 which was also rejected on 07.05.1987. Next application seeking consent was filed by petitioner 1 on 12.06.1987 which was rejected by Board on 05.10.1987. Then further application was filed on 09.12.1987 which was rejected on 10.02.1988.

16. In the pending proceedings under Section 33, Magistrate passed an order on 31.08.1987 directing petitioner-factory to bring down pollution level in 'Trade Effluent' upto prescribed standard by 15.10.1987. On 09.09.1987, sample was taken and BOD content in the sample were found as 775 MG/Liter and 725 MG/Liter. Petitioner made all efforts to bring down BOD level but could not reduce BOD level as required, though it could be reduced by over 97 per cent.

17. Petitioner sought further time from Magistrate to bring down BOD standard as required. Magistrate did not extend time and passed stop order on 17.10.1987. Thereagainst, petitioners filed Criminal Revision No. 342 of 1987 before District Judge wherein initially an interim order was passed but ultimately revision was dismissed by Sri S.K. Samadhiya, 11th Additional District and Sessions Judge, Meerut. Thereafter, Chief Judicial Magistrate transferred aforesaid Criminal Case vide order dated 31.01.1989 to the Court of Special Judicial Magistrate, Pollution Control Board, Lucknow. Special Judicial Magistrate passed an order on 14.03.1989 directing Board to submit report by 15.04.1989 on the following aspects:

"i) Whether the Distillery of the petitioners' Company is in operation or not?

ii) Whether the order dated 26.9.98 of XIth Addl. Sessions Judge rejecting Revision of the petitioner has been challenged in the High Court and whether any stay order has been granted?

iii) What action has been taken by the Effluent Board on the directions of the orders of CJM dated 17.10.1987 and order of XIth Addl. Sessions Judge dated 26.09.1988?"

18. On 15.04.1989, Court passed following order:

''मुकदमा पेश हुआ। परिवादी पक्ष की ओर से विधि अधिकारी उपस्थित। विपक्षी की ओर से कोई नही बोला।

मुकदमा दिनांक 17.4.89 को अग्रिम आदेश हेतु पेश हो चूंकि इसी वाद से संबंधित मुकदमा दिनांक 17.4.89 को निर्धारित है।''

"The case presented. Legal Officer is present from complainant side. None responded on behalf of opposite party.

Put up this case on 17.04.1989 for further orders since another matter related to this case is fixed for 17.04.1989."

(English Translation by Court)

19. Proceedings are now going on, though once final order was passed by Magistrate, there was no occasion to continue with the same proceedings after transferring the same to Special Judicial Magistrate.

20. In the meantime, it is submitted that effluent sample taken on 17.11.1987 was analysed and report dated 07.12.1987 prepared by Industrial Toxicology Research Centre, Lucknow (hereinafter referred to as "ITRC") found BOD contents as under:

"1) BOD of inlct of secondary treatment : 10200 mg/ltr

2) BOD of outlet of secondary treatment : 875 mg/ltr

3) BOD of final discharge after dilution : 98.8 mg/ltr

21. Petitioner with huge investment and continuous efforts installed Treatment Plant and has been able to bring down pollutants level to optimum. There is no intentional and deliberate violation of Act, 1974 and Rules and Regulations framed thereunder as also the standards laid down by Board, hence, proceedings under Section 25, 26 and 33 of Act, 1974 are illegal. The prosecution lodged by Board is without any foundation and ignoring sincere endeavour on the part of petitioner-1 to treat Trade Effluent in the most effective manner for which it has also installed Treatment Plant after investing huge amount in consultation with experts available in the Country. The entire prosecution launched against petitioner is malicious and bad in law. Directors of Company have been made accused without specifying as to how they have any nexus with the act complained and therefore implication of all Directors of Company is illegal and bad. It is only with the purpose to harass them. The order passed by Magistrate directing all the accused to appear before him is without any application of mind. Petitioner-company has nominated vide Board of Directors' resolution dated 26.12.1984, Sri Gyanendra Kumar, Chief Engineer, Daurala Sugar Works as person in-charge of and responsible to Company for compliance and observance of provisions of Act, 1974 under due intimation thereof to the Board but still it has implicated all Directors of Company in a wholly arbitrary and illegal manner. Directors have exercised all due diligence with regard to installation of Effluent Treatment Plant and hence are not liable for imputation of any offence punishable under Act, 1974. Standard fixed by Board in 1983 were almost impossible to attain and out of 28 Distilleries in State of U.P., hardly a few distilleries have installed a Treatment Plant in both phases which show that it was not possible to run Distillery maintaining standard of Trade Effluent as prescribed by Board. Therefore, requiring petitioners to comply with a provision which is almost impossible is illegal and arbitrary. No person can be

required to do some thing which is impossible. It is said that before rejection of application for consent, no opportunity was afforded and the orders were passed ex-parte, in violation of principles of natural justice.

22. Standards have been revised by Board vide Notification dated 19.09.1992, a copy whereof has been filed as Annexure SA-9 to the Supplementary Affidavit sworn by Dr. M.C. Bardiya in November, 1994.

23. After revised standards and installation of Treatment Plant, petitioner-Factory has been found discharging Trade Effluent as per prescribed revised standards and there is no violation of provisions of Act, 1974. The proceedings initiated by Board under Sections 33 and 44 of Act, 1974 are malicious, there is no mens rea or intention on the part of petitioner to flout any provision thereof and, therefore, all the impugned orders are liable to be set aside.

24. Learned counsel for petitioner has addressed us at a great length taking great pain to show that Act, 1974 being a new legislation, after framing of Rules in 1981, petitioner-Company made earnest efforts to treat Trade Effluent in most effective manner so as to reduce pollutants and bring standards to the nearest possible as prescribed by Board, but since those standards were impossible to achieve, petitioner Company failed to do so. Further, installation of Treatment Plant took a longer time of seven years, firstly, due to delay in acquiring requisite area of land and secondly, for installation of plant since its technology was not commonly available and petitioner-company has to consult and engage various experts in the field and for all these reasons, the bona fide of petitioner to comply with the requirement of Act, 1974 is writ large and there is no reason to penalize petitioner for some lapses, if got committed due to the reasons beyond the control of petitioner.

25. However, having gone through the entire record and looking to the detailed submissions, in our view the scope of judicial review in this writ petition is very limited. The number of orders impugned in this writ petition are very large, but in effect same can be classified in two categories; first, orders passed by Board refusing to grant consent under Section 25/26; and, second, criminal proceedings initiated by Board for defiance on the part of petitioners in observing mandate of Act, 1974 by filing applications under Section 33 and 44 which are pending before the appropriate Court having jurisdiction in the matter.

26. Now so far as first category's orders are concerned whereby Board has refused consent, it is an admitted position that petitioner-Company continued to run its factory and discharging Trade Effluent which was not treated so as to bring down pollutants upto the standard prescribed by Board. Meaning thereby petitioner continued to discharge 'Trade Effluent' on the land/sewer/stream, as the case may be, without its treatment to bring down pollutants so as to comply with the standards prescribed by Board and that too without any consent of Board. Apparently, this action on the part of petitioners and its continued running of Factory and discharge of Trade Effluent which was polluted beyond the standards prescribed by Board, was bound to cause health hazards to the public at large. The applications filed by petitioner-1 seeking consent of

Board did not satisfy requirement of Statute inasmuch admittedly Trade Effluent was not treated or could not be treated at that time so as to bring down pollutants to the prescribed level. Board, therefore, committed no mistake either in law or otherwise in rejecting consent and in view of these admitted facts, on merits we find no justification at all to interfere therewith.

27. The substantial argument at this stage is that standards prescribed by Board were such that no person despite best efforts and installing available technology, could have achieved. Statute does not require a person to do something which is impossible and for such things petitioners cannot be penalized at all.

28. The proposition of law in its abstract form is well established. There are three maxims i.e."**Lex Non Cogit ad impossibilia", "impotentia Excusat legim"** and **"neon tenatur ad impossibilia**". Law does not compel a man to do that which he cannot possibly perform. Where law creates a duty and a party is unable to perform it without any default in him and has no remedy over there, the law will excuse him.

29. The aforesaid doctrines have been accepted, approved and applied by Courts in India also. As long back as in **Cochin State Power and Light Corporation Ltd. Vs. State of Kerala AIR 1965 SC 1788,** Court followed the aforesaid maxims and held;

"The performance of this impossible duty must be excused in accordance with the maxim, lex non cogit ad impossibilia (the law does not compel the doing of impossibilities) and Sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible." (para 8)

30. A Constitution Bench of seven Hon'ble Judges **in Re Presidential Pool 1974 (2) SCC 33**, held as under:

"The maxim of law impotentia excusat legam is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legam 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 of 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 Edition at pp. 162-163 and Craies on Statute Law 6th Ed. at p.268)." (para 15)

31. In **State of Rajasthan Vs. Shamsher Singh AIR 1985 SC 1082**, Court, while considering a case under National Security Act, applied the aforesaid doctrine and held as under:

"Mr. Jethmalani placed before us a passage from Broom's Legal Maxims (p. 162), 10th Edn., where the doctrine of impossibility of performance (lex non cogit ad impossibilia) has been discussed. It has been indicated therein that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor. Keeping the attendant circumstances of this case in view, we find it difficult to hold that the time taken by the State Government can amount to withholding of the representation which resulted in non-compliance of Section 10 of the Act so as to vitiate the detention." (Para 10)

32. In **Industrial Financial Corporation of India Ltd. Vs. Cannanore Spinning & Weaving Mills Ltd. AIR 2002 SC 1841**, it was held as follows:

"The Latin Maxim referred to in the English judgement "lex non cogit ad impossibilia" also expressed as "impotentia excusat iegem" in common English acceptation means, the law does not compel a man to do that which he cannot possibly perform. There ought always thus to be an invincible disability to perform the obligation and the same is akin to the Roman Maxim, "nemo tenetur ad impossibilia." (para 30)

33. In **Rajesh D. Darbar Vs. Narsing Rao Krishnaji Kulkarni and others (2003) 7 SCC 219**, it was held:

"The other maxim is, lex non cogit ad impossibilia i.e. the law does not compel a man to do that what he cannot possibly perform. The applicability of the above said maxim has been approved by this Court in Raj Kumar Dey Vs. Tarapada Dey 1987 (4) SCC 398, Gursharan Singh Vs. New Delhi Municipal Committee 1996 (2) SCC 459 and Mohd. Gazi Vs. State of M.P. 2000 (4) SCC 342" (Para 6)

34. This is followed again in **Ram Chandra Singh Vs. Sabitri Devi and others 2003 (8) SCC 319**.

35. A Constitution Bench of five Hon'ble Judges also considered the aforesaid maxim in **Special Reference no. 1 of 2002, AIR 2003 SC 1987** and held as under:

"The maxim of law impotentia excusat legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat Iegem 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 of 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 Edition at pp. 1962-63 and Craies on Statute Law 6th Ed. p. 268). These aspects were highlighted by this Court in Special Reference 1 of 1974, (1975) 1 SCR 504 . Situations may be created by interested persons to see that elections do not take place and the caretaker Government continue in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded." (para 154)

36. Recently in **Board of Control for Cricket in India Vs. Netaji Cricket Club AIR 2005 SC 592**, Court has again followed and approved the aforesaid maxim by referring to the earlier judgment in **Rajesh D. Darbar (supra)** and said:

"The other maxim is, lex non cogit ad impossibilia, i.e. the law does not compel a man to do that what he cannot possibly perform...." (Para 107)

37. In **HUDA and Anr. Vs. Dr. Babeswar Kanhar 2005 (1) SCC 191**, referring to certain English decisions, Court has observed as under:

"Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see Sambasiva Chari v. Ramaswami Reddi 1898 (8) Madras Law Journal 265). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the Court or office is open. The reason is that law does not compel the performance of an impossibility. (See Hossein Ally v. Donezelle ILR 5 Calcutta 906). Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying ***are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem gravabit (the act of court shall prejudice no man)****." (para 5)*

38. We, therefore, have no hesitation in observing that, if the material on record justify an inference that standards prescribed by Board were impossible to attain, obviously petitioner cannot be and should not be penalized for not attaining the same. But then it has to be pleaded and proved by substantial material on record that standards prescribed by Board are impossible to attain. The Board has exercised power which is akin to legislative power by prescribing standards of Trade Effluent which can be discharged after treatment so that it may not create any health hazards to public at large or to environment in general. Except pleading that standards were not possible to attain, we do not find any material on record to show that the said standards were impossible to attain. There is no technological analysis by

any expert body, placed on record to show that standards prescribed by Board were not achievable. Mere fact that petitioners and other Distilleries at the relevant point of time did not or could not attain those standards is one thing and to suggest that standards were not achievable is another thing. On mere pleading of petitioners and that too quite vague, the legislative exercise of Board in prescribing standards for discharge of Trade Effluent neither can be interfered nor can be said to be unachievable. When somebody pleads that it is being required to do something which is impossible, it has to show that a person similarly placed, having all the possible aid and assistance with him, cannot achieve something which it is required to do so.

39. Contention is that installation of Treatment Plant in a single phase so as to attain prescribed standards was not possible, but that cannot be equated with the submission that standards prescribed by Board were unachievable. We, therefore, reject the above submission and hold that it was for petitioner to take all steps to comply strictly the provisions of Act, 1974 which was a welfare legislation for protection of environment in general and for safety and health of general public.

40. Now coming to question, whether proceedings initiated by Board by filing applications under Sections 33 and 44 of Act, 1974 are ex facie illegal so as to justify exercise of our extraordinary jurisdiction under Article 226 for quashing the same, here also, we find no substance in the arguments advanced on behalf of petitioners.

41. Complaints filed by Board satisfy ingredients of Sections 33 and 44 and it is not the case of petitioners that Court concerned has no jurisdiction or that applications filed by Board are otherwise not maintainable under relevant Statute. Rest of the submissions that some of Directors are not in-charge or not responsible for functioning of Company are the arguments in defence which will be considered by Court concerned when petitioners shall appe ar and place their defence before it. At this stage, our scope of interference is very limited. It is akin to the cases wherein writ petitions are filed for quashing of first information report wherein it has been held repeatedly that only scope of judicial review is to peruse first information report and treating allegations contained therein to be true, to find out whether an offence under Sections mentioned in the report is made out or not. If the offence is made out, Court will not interfere by quashing the report. Whatever possible defence the accused person may have, that will be seen by Court concerned and not by a writ Court. When we examine the matter in the light of above principles, we find no ground to interfere with the proceedings pending before Magistrate concerned justifying quashing of any order or proceedings.

42. In the result and in the ultimate discussion, it is evident that writ petition has no merits.

43. Dismissed with cost which we quantify to Rs. 25,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 9548 Of 2003

Santosh Kumar & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
W.H. Khan, Gulrez Khan, J.H. Khan

Counsel for the Respondents:
C.S.C., A.A. Khan

Land Acquisition — Urgency clause — Dispensation of Section 5-A inquiry — Validity — Newly created district — Establishment of district headquarters — Public purpose — Judicial reviewLand Acquisition — Invocation of urgency powers under Section 17 of the Land Acquisition Act, 1894 must be justified by real urgency and cannot be exercised mechanically. (Paras 8, 19)

However, where land is required for establishing infrastructure of a newly created district, including offices, residences, and public institutions, the requirement may legitimately be treated as urgent. *(Paras 20–22)*
In such circumstances, dispensation of inquiry under Section 5-A is not per se illegal if supported by objective material and administrative satisfaction. (Paras 21–22)

Section 17 invocation — Requirement of urgency — Infrastructure development — Administrative satisfactionLand Acquisition — Section 5-A — Right of objection — Natural justice — Whether can be dispensed withLand Acquisition — Lapse — Section 24(2) of 2013 Act — Non-payment of compensation — Non-taking of possessionRemand by Supreme Court — Duty of High Court — Consideration on merit.

Result — petition dismissed

Case cited:-

Gojer Brothers Private Limited and another v. State of West Bengal and others, (2013) 16 SCC 660
Prabhawati and others v. State of Bihar and others, (2014) 13 SCC 721
Union of India and others v. Shiv Raj and others, (2014) 6 SCC 564
Pune Municipal Corporation and another v. Harakchand Misirimal Solanki and others, (2014) 3 SCC 183
Naresh Kumar v. State of Haryana and others, (2014) 6 SCC 589
Magnum Promoters Private Limited v. Union of India and others, (2015) 3 SCC 327
Rajiv Chowdhrie HUF v. Union of India and others, (2015) 3 SCC 541

Velaxan Kumar v. Union of India and others, (2015) 4 SCC 325
Ram Kishan and others v. State of Haryana and others, (2015) 4 SCC 347

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

1. These four writ petitions have raised common questions of fact and law relating to acquisition of land in Villages Tarauha, Garhiva and Banari of Pargana Karvi, District Chitrakoot, sought to be acquired by State Government by issuing notifications dated 18.06.2002 under Section 4(1) of Land Acquisition Act, 1894 *(hereinafter referred to as the "Act, 1894")* and dated 10.12.2002 under Section 6(1) of Act, 1894 for acquiring a total 234 acres of land (131.33 acres in Village Tarauha, 40.76 acres in Village Garhiva and 61.91 acres in Village Banari), hence have been heard together and are being decided by this common judgment.

2. In leading Writ Petition No. 9548 of 2003 there are 38 petitioners. Writ Petitions No. 17312 of 2003 has been filed by petitioner-Ram Bahori, 99 of 2006 has been filed by petitioner-Mulayam Singh and 43685 of 2015 has been filed by two petitioners, namely, Shaheed and Nizamuddin.

3. Learned counsel for the parties stated that for the purpose of pleadings, record of leading Writ Petition No. 9548 of 2003 should be referred to and that is how we are taking facts pleaded in aforesaid writ petition.

4. The case set up by petitioners is that in 1835 when State of U.P. was under the regime of Britishers (East India Company), Karvi was a Tahsil but it was given status of a sub-district. About 80 Bighas of land was secured for establishment of District Headquarters, whereupon Revenue and Civil Courts were established and 75 Bighas of land remained vacant for being used for other purposes of establishment of District Headquarters. A full fledged district named as "Chitrakoot" was constituted in 1997, bifurcating District Banda.

5. For establishing District Headquarters by constructing residential and non-residential buildings in newly created district, State Government proposed to acquire 234 acres of land and in furtherance thereof issued notification dated 18.06.2002 under Section 4(1) of Act, 1894 proposing to acquire aforesaid land comprising in three Villages Tarauha, Garhiva and Banari. State Government also invoked powers under Section 17(1) and (4) stating that land is required urgently hence to eliminate delay, likely to be caused due to inquiry under Section 5-A, the said inquiry is being dispensed with and provision of Section 5-A shall not apply. Thereafter declaration under Section 6(1) was made by notification dated 16.12.2002.

6. Local residents and tenure holders, even before aforesaid notifications, had opposed attempt on the part of respondents in acquiring land and in this respect petitioners have referred to letter dated 19.11.1999 sent by the then Member of Parliament to Chief Minister, letter dated 21.08.2000 sent by Gram Pradhan of Gram Panchayat Radauli and petitioners' representations dated 03.08.2002 and 05.08.2002.

7. Petitioners were issued notices under Section 9(3) on 25.01.2003, whereagainst also they filed objections on 30.01.2003.

8. Acquisition notifications have been challenged on the ground that dispensation of inquiry under Section 5-A is illegal in as much as:

(i) There is no urgency involved necessitating invoking of powers under Section 17 of Act, 1894.

(ii) No valid ground exist for dispensation of inquiry and opportunity of filing objection available to tenure holders under Section 5-A.

(iii) No relevant material was placed before State Government or authorities justifying exercise of power under Section 17.

(iv) Section 5-A brings in the principle of natural justice and substantial right upon land owners and this could not have been denied in view of law laid down in **Gojer Brothers Private Limited and another Vs. State of West Bengal and others, 2013(16) SCC 660; Prabhawati and others Vs. State of Bihar and others, 2014(13) SCC 721; and, Union of India and others Vs. Shiv Raj and others, 2014(6) SCC 564.**

(v) There is no objective application of mind by Collector in respect of objections raised by petitioners pursuant to Supreme Court's order dated 08.04.2011 passed in Special Leave to Appeal (Civil) No. 3740 of 2006 and report/ order shows that objections raised by petitioners have not been considered objectively.

9. Petitioners have also taken plea in the light of Section 24 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 *(hereinafter referred to as the "Act, 2013")* stating that Special Land Acquisition Officer *(hereinafter referred to as the "SLAO")* made award on 27.12.2005 under Section 11 of Act, 1894 but actual and physical possession of disputed land has not been taken. Neither amount of compensation has been paid to petitioners nor deposited before appropriate forum hence acquisition proceedings must be deemed to have lapsed under Section 24(2) of Act, 2013. In support of above submission petitioners have placed reliance on **Pune Municipal Corporation and another Vs. Harakchand Misirimal Solanki and others, 2014(3) SCC 183; Naresh Kumar Vs. State of Haryana and others, 2014(6) SCC 589; Magnum Promoters Private Limited Vs. Union of India and others, 2015(3) SCC 327; Rajiv Chowdhrie HUF Vs. Union of India and others, 2015(3) SCC 541; Velaxan Kumar Vs. Union of India and others, 2015(4) SCC 325; and, Ram Kishan and others Vs. State of Haryana and others, 2015(4) SCC 347.**

10. The petition has been contested by respondents by filing a counter affidavit sworn on 08.04.2003 by Sri Gyan Prakash Srivastava, Tahsildar Karvi, District Chitrakoot. It is said that District Chitrakoot was created by notification dated 13.05.1997 issued under Section 11 of U.P.

Land Revenue Act, 1901 (hereinafter referred to as the "Act, 1901") as a new Revenue District by including Tahsils Mau and Karvi, which earlier were part of District Banda. On 23.05.1997 District Magistrate was posted in newly created District and on 27.05.1997 Superintendent of Police was posted. Other District officials were posted like, Chief Development Officer on 06.06.1997, District Judge on 10.02.1998 and Chief Medical Officer on 24.08.2000.

11. For newly created district, since entire infrastructure of district offices as well as residential accommodations of all the officials to be posted thereat was required, and need was urgent, in order to construct residential and non-residential buildings for establishing District Headquarters, 234 acres of land (547 Bighas) was sought to be acquired and in furtherance thereof impugned notifications were issued. Since need was urgent and for public purposes, therefore, inquiry under Section 5-A was dispensed with. The contention of petitioners that in 1835 certain land was earmarked for establishing District Headquarters and 70-80 Bighas land are still available is without any basis as there is no such record available to fortify the above claim of petitioners. Acquisition proceedings have been initiated after indepth study of authorities of Government inasmuch as State Government vide order dated 25.02.2000 constituted a committee under the Chairmanship of Commissioner of Division to enquire into and submit report with regard to acquisition of land for constructing residential and non-residential buildings to establish District Headquarters at newly created District Chitrakoot. Committee deliberated on 22.04.2000 and decided to establish District Headquarters on the side of Devangana Road which would include Villages Tarauha, Garhiva and Banari, since this land is near to City Railway Station, Bus Stand and others places of general public importance which would be convenient to public at large who will have to visit District Headquarters for various purposes.

12. District Magistrate also certified that by virtue of acquisition notifications only nine family/ individuals are likely to become landless, out of which three are in General Category and remaining six are Scheduled Castes. District Magistrate also certified that these families likely to render landless would be provided equivalent land at some other place. Thereafter District Committee also made a survey on 24.12.2001 and submitted report to Bhoomi Upyog Parishad stating that no unarable land is available for the purpose of establishing District Headquarters. The proposed acquired land is situate within one kilometer from Town Karvi. In view thereof notification under Section 4 was issued on 18.06.2002 and declaration under Section 6 was issued on 16.12.2002. Since suitable accommodations for Government officers and residences was not available, and, newly created district required land for establishing offices like Collectorate, Civil Court, Vikas Bhawan, Police Officer, District Hospital, School, District Jail, Bank, Post Officer, Educational Institutions etc, and requirement was urgent, hence inquiry was dispensed with. Details of land proposed to be assigned to different departments has also been given in Annexure-6 to the counter affidavit, which read as under:

Sl. No.	Name of Department	Area in acres proposed to be given

1	Collectorate	27
2	Civil Court	50
3	Vikas Bhawan	5
4	Office of Superintendent of Police	3
5	District Hospital	15
6	Stadium	25
7	I.T.I.	10
8	Polytechnic	10
9	Park and Museum	10
10	District Jail	30
11	Bank/ Post Office	10
12	Residential	45
13	Government Inter College	10
	Total	**250**

13. Notification was also issued in daily newspaper as required under Section 4 of Act, 1894. District offices were mostly running in rented buildings which were inadequate, very small and incapable for proper functioning of district authorities and others in such buildings.

14. Writ Petition No. 9548 of 2003 initially came up before a Division Bench on 06.03.2003 when respondents were granted time to file counter affidavit and interim order was passed providing that petitioners shall not be dispossessed from their agricultural holdings until further orders of this Court.

15. Subsequently, Writ Petitions No. 9548 of 2003 and 17312 of 2003 came up before Division Bench on 08.12.2005 when the same were dismissed, passing following order:

Order passed in Writ Petition No. 9548 of 2003

"Heard Sri W.H. Khan learned counsel for the petitioners and Sri A.A. Khan learned counsel and the standing counsel appearing for the respondents.

It has been submitted by the learned counsel for the petitioners that no permission has been taken from the Parishad and therefore, acquisition of the land of the petitioners is bad under law.

Having considered the submission of the learned counsel for the petitioners, we are of the view that there is no such impediment that permission from Parishad may be taken for acquiring the land.

In view of this, the writ petition lacks merit and is dismissed summarily. No order is passed as to costs."

Order passed in Writ Petition No. 17312 of 2003

"Heard Sri W.H. Khan learned counsel for the petitioners and standing counsel appearing on behalf of respondents.

It has been submitted by the learned counsel for the petitioners that all the petitioners are belonging to scheduled caste and are landless agriculturist therefore, their land cannot be acquired.

Having considered the submission of the learned counsel for the petitioners, we are of the view that there is no such provision under the Land Acquisition Act 1894 to grant any relief to the landless scheduled caste person.

In view of this, the writ petition lacks merit and is accordingly dismissed. No order is passed as to costs."

16. Matter was taken up in appeal before Supreme Court. On 08.04.2011, Court considered matter and permitted petitioners to file objections under Section 5-A and competent authority was directed to decide same. The order dated 08.04.2011 passed by Supreme Court in Special Leave to Appeal (Civil) No. 3740 of 2006 with other connected appeals, reads as under:

"These petitions are directed against order dated 8.12.2005 passed by the Division Bench of the Allahabad High Court dismissing the writ petitions filed by the petitioners questioning the acquisition of their land by the State Government by invoking section 4 read with section 17(1) and (4) of the Land Acquisition Act, 1894 (for short "the Act").

After the arguments were heard for some time, Shri Dinesh Dwivedi, learned senior counsel appearing for the respondents made a request that further hearing of these cases be adjourned and the respondents may be allowed to hold inquiry under section 5A and submit a

detailed report which may then be scrutinized by this Court. According to Shri Dwivedi notices will be issued to the affected persons within three weeks' from today to enable them to file objections within four weeks and after hearing those who file objections, the report will be submitted to the Court within three months.

In view of the statement made by Shri Dwivedi we deem it proper to issue the following directions:

1. With three weeks' from today the Land Acquisition Officer shall issue notice to the affected persons, who may file their objections within four weeks from the date of receipt of notice.

2. The Land Acquisition Officer shall hear the objectors and submit report this Court within three months.

3. Copies of the recommendations of the concerned officer shall be made available to the petitioners, who may file further affidavit within next two weeks.

List the case on 8.8.2011."

(emphasis added)

17. Notices were issued by SLAO. Petitioners filed their objections and thereafter report was submitted. Thereafter all these appeals came up before Court on 19.09.2011 and it allowed appeals, set aside this Court's judgments dated 08.12.2005 and remanded matter to consider grounds taken by petitioners in challenging acquisition notifications in taking recourse to Section 17 and decide matter on merits. The final order passed by Court on 19.09.2011 reads as under:

"Leave granted.

These appeals are directed against orders dated 8.12.2005 passed by the Division Bench of the Allahabad High Court whereby the writ petitions filed by the appellants questioning the acquisition of their land were summarily dismissed.

We have heard Shri Kailash Vasdev, learned senior counsel appearing for the appellants and Shri S.R. Singh, learned senior counsel appearing for the respondents and carefully perused the record including affidavit dated 4.8.2011 of the Special Land Acquisition Officer (Joint Organization), Banda and additional documents filed by the appellants.

In our considered opinion, the impugned orders are liable to be set aside only on the ground that while dismissing the writ petitions, the ***High Court did not advert to the factual matrix of the case and grounds on which the appellants have challenged the acquisition of their land including the one that the urgency provision contained in section 17 of the Land Acquisition Act, 1894 could not have been invoked*** *for the acquisition of land for construction of*

residential and non-residential wings of District Headquarter. ***The High Court should have considered on merits the grounds of challenge and decided the same by assigning cogent reasons****. Its failure to do so has resulted in manifest injustice to the appellants.*

In the result, the appeals are allowed, the impugned orders are set aside and the matters are remitted to the High Court for fresh disposal of the writ petitions. The parties are given liberty to file additional affidavits and documents before the High Court within a period of 12 weeks.

All the pending interlocutory applications are disposed of as infructuous."
(emphasis added)

18. Petitioners have filed supplementary affidavit placing on record copies of their objections and report submitted by authorities. They have also amended their petitions in the light of provisions of Act, 2013. We shall refer to relevant pleadings etc. whenever the same would be required.

19. Basic submission as we have already noticed is that dispensation of inquiry by invoking powers under Section 17 of Act, 1894 is illegal and arbitrary and in any case acquisition proceedings in respect of petitioners' land have deemed lapsed under Section 24(2) of Act, 2013.

20. It is not in dispute that Karvi was a Tahsil of Revenue District Banda till it was separated and made part of a new District Chitrakoot by notification dated 13.05.1997 issued under Section 11 of Act, 1901. Newly created Revenue District 'Chitrakoot' comprised of two Tahsils, Mau and Karvi. District Headquarter was sought to be set up in Karvi.

21. Before creation of new District Chitrakoot, Karvi did not have any infrastructure so as to cope up with requirement of a new Revenue District. As a result of creation of new Revenue district a large number of district level offices and other incidental institutions had to be set up which included offices pertaining to different departments like Health, Education, Transportation, Postal Services, Irrigation, Public Works Department, Rural Development, Police, Revenue, Judiciary etc. Since after creation of Revenue district, in respect of various things certain formalities are also required to be performed which took some time. This is evident from the fact that first district level officer, i.e., District Magistrate was posted in newly created District Chitrakoot on 23.05.1997. Thereafter district level Police Officer, i.e., Superintendent of Police was posted on 27.05.1997. Rest district level officers were posted on various subsequent dates. District Judge could be posted on 10.02.1998, Chief Medical Officer on 24.08.2000 and the process continued. All these district level officers and their entire subordinate hierarchy required not only functional office space but also residential accommodation to keep their families at the place of their posting and for catering other needs and attending facilities like Hospital, School etc. First and foremost responsibility of State as well as Authorities was to build up official infrastructure to cater need of district level Revenue Officers, Police Officers, Judicial Officers, Medical Officers etc. and to provide requisite residential accommodation to them. State Government constituted a committee

to work out area of land required for various purposes so that it may proceed to acquire the same. The committee proposed 27 acres of land for Collectorate, 50 acres for Civil Court, 3 acres for office of Superintendent of Police, 15 acres for District Hospital, 5 acres for Vikas Bhawan, 30 acres for District Jail and so on. At first stage it resolved to possess atleast 250 acres of land, whereagainst identified land was only about 234 acres. Hence first notification under Section 4(1) proposing to acquire land measuring 234 acres land came to be issued on 18.06.2002.

22. Though it is contended by petitioners that there was already land earmarked more than a century back but they could not substantiate and identified any such land available to State. Requirement of establishing district level offices in a newly created Revenue District as well as residential accommodations for newly posted officers factually is not disputed and looking to backdrop that it was a newly created district, it also cannot be said that said requirement was not urgent. Government constituted initially a committee to find out requirement of various departments who submitted report ultimately on 24.12.2001 and thereafter notification was issued on 18.06.2002.

23. State Government apparently, therefore, in our view, did not erred in law in invoking urgency clause by exercising powers under Section 17(1) and (4) and dispensing with inquiry under Section 5-A of Act, 1894. Even otherwise, grievance of petitioners that opportunity of hearing which was available to land owners if inquiry under Section 5-A would have been made, has also been observed in this case in view of directions issued by Supreme Court on 08.04.2011 pursuant whereto objections were filed by various land owners and after referring to same a report has been submitted by concerned revenue officials. The objections submitted by land owners, some of which have been placed on record, would show that they have mainly pleaded for exemption of their land from acquisition. It has been highlighted in report that from 1835 to 1982 Karvi was enjoying status of a Tahsil only and there was no district level office available. Only block level officers were posted and offices for them were available. These facts formerly are not shown to be incorrect. We would further elaborate our views on the question, whether Government was justified in this particular case in dispensing with inquiry under Section 5-A by invoking powers under Section 17(1) of Act, 1894.

24. In this regard we may recapitulate the law relevant on this aspect by referring to some relevant authorities on the subject.

25. Section 5-A was inserted in Act, 1894 as long back as in 1923, by Act No. 38 of 1923. There are minor amendments made subsequently but substance of provision has remained the same.

26. Normal procedure of acquisition is that a proposal of acquisition is published in notification under Section 4 of Act, 1894. Land owners whose land is proposed to be acquired, are given an opportunity to make their objections. Collector is under an obligation to consider objections and also offer an opportunity of hearing to objectors and thereafter submit a report to Government containing his recommendations on the objections, for decision of Government. After

considering the report and other material, Government make declaration that land is proposed to be acquired for public purpose and this is done by publication of notification under Section 6. Therefore, there is possibility of some difference in details of land stated in the notification issued under Section 4 and finally declared land, as acquired for public purpose, detailed in notification under Section 6.

27. Collector is then authorised to take order for acquisition and under Section 8 is supposed to mark, measure and plan the acquired land. A notice thereafter is issued under Section 9 to Land Owners by Collector notifying his intention of taking possession of land and that the claim for compensation be submitted to him. Under Section 11, Collector makes enquiry for determining amount of compensation payable to land owners, whose land has been acquired, and make award. After payment of compensation, Collector takes possession of land.

28. There is an exception to normal procedure of taking possession which is contained in Section 17 of Act 1894. It says that in case of urgency, even though no award has been made, Government can direct Collector to take possession of any land, needed for public purpose, and on such possession being taken by Collector, land shall vest absolutely with the Government free from all encumbrances. Section 17(4) provides, where such urgency for the purpose of possession is to be acted upon, Government, shall declare that provision of Section 5-A shall not apply.

29. The circumstances, when Government would be justified to dispense with enquiry under Section 5-A while invoking urgency clause under Section 17, for the purpose of taking possession, has been considered in a catena of decisions in last several decades and it would be useful to refer some relevant authorities in this regard.

30. Right to file objection against proposal of acquisition of land published under Section 4 is a substantial right, consistent with principle of natural justice, since forcibly acquisition of land, without consent of land owners, is a serious matter.

31. In **Nandeshwar Prasad vs. U.P. Government AIR 1964 SC 1217**, Court said, *"the right to file objection under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side wind"*.

32. In **Munshi Singh and others vs. Union of India (1973) 2 SCC 337**, which is a decision of three judges bench, Court stressed upon and emphasized upon an inbuilt legislative recognition of principle of natural justice in Section 5-A and said:

"Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. ..... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their

objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A".

33. In **State of Punjab vs. Gurnail Singh and others 1980 (1) SCC 471** it was held that it is fundamental that compulsory taking of a man's property is a serious matter and smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness. Denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of Act, 1894. A slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes travesty of emergency power.

34. In **Shyam Nandan Prasad and others vs. State of Bihar and others (1993) 4 SCC 255** reiterating that section 5-A is mandatory, Court said *"the proceeding before the Collector is a blend of public and individual enquiry".*

35. In **Union of India and others vs. Mukesh Hans (2004) 8 SCC 14**, Court held that Section 17(4) is an exception to normal mode of acquisition. Mere existence of urgency or unforeseen emergency by itself is not sufficient to direct for dispensation of Section 5-A. Court reiterated that there must be real existing emergency for which an opinion must be formed by the Government, objectively. Court said:

"It requires an opinion to be formed by concerned government that along with existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A enquiry, which indicates that the legislature intended that the appropriate government to apply its mind before dispensing with Section 5-A enquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by itself be sufficient for dispensing with Section 5-A enquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A enquiry will be dispensed with, but then that is not language of the Section which, in our opinion, requires the appropriate Government to further consider the need for dispensing with Section 5-A enquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5-A inquiry does not mean that in every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with Section 5-A enquiry. ..... There is need for application of mind by appropriate Government that such an urgency for dispensing of Section 5-A enquiry is inherent ..... ."

36. In **Hindustan Petroleum Corporation Ltd. vs Darius Shapur Chenai & Ors (2005) 7 SCC 627** it was held that the provisions of Section 5-A of Act, 1894 must be read consistent with

Article 300-A of the Constitution and it is akin to fundamental right of procedure before depriving a persons of his land, and must be strictly complied with.

37. In **Essco Fabs Pvt. Ltd. & Anr vs State Of Haryana & Anr (2009) 2 SCC 377** it was held that enquiry should not be dispensed with lightly.

38. In **Anand Singh and another vs. State of U.P. and others (2010) 11 SCC 242** Court considered as to when State would be justified in invoking power under Section 17(4) for acquisition of land and dispensing with enquiry under Section 5-A so as to take possession immediately. It is said that power under Section 17 is not to be exercised in a routine manner. It would be justified only when circumstances warrant immediate possession. It should not be lightly invoked. It is an exceptional power enabling land acquiring body to dispense with enquiry under Section 5-A. Government must apply its mind before dispensing with enquiry under Section 5-A whether urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A. The mere mention of words in acquisition notification that Government is satisfied about urgency and dispensing with enquiry under Section 5-A may raise a presumption in favour of Government with per-requisite conditions for exercise of such power are satisfied but when challenged, Government has to produce relevant material before Court to show existence of such circumstances, which justify dispensation of inquiry and avail an exceptional power under Section 17. Court further said, *"upon challenge being made to the use of power under Section 17 the Government must produce appropriate material before the Court that the opinion for dispensing with enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it"*.

39. With regard to judicial review of exercise of power, Court in Anand Singh and another (Supra) further said in paras 45, 46, 47 and 48 as under :

"45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary.

46. As to in what circumstances the power of emergency can be invoked are specified in Section 17 (2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of land owners/persons interested may not be considered. In many cases on general assumption, likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously.

47. The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that decision in Pista Devi must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree.

48. As regards the issue whether pre- notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact-situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate government before the court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."

40. In **Radhe Shyam (Dead) through Lrs. and others vs. State of U.P. and others 2011(5) SCC 553** it was reiterated that property of a citizen cannot be acquired by State without complying with the mandate of Sections 4, 5-A and 6 of Act, 1894. A public purpose however, loudable would not entitle Government to invoke urgency provisions, since the same have the effect of depriving owner of his right to property and that too without being heard. Only in a case of real urgency, Government would be justified in invoking urgency provisions. Section 17 must have been invoked only when purpose of acquisition cannot brook the delay of even few weeks or months. The authority must be fully satisfied that time of few weeks or months likely to be taken in conducting enquiry under Section 5-A shall, in all probability, frustrate the public purpose for which land is proposed to be acquired. Satisfaction of Government on issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and can be challenged on the ground that authority did not apply its mind to relevant factors, and on record, there is no material justifying existence of alleged urgency. It also held that exercise of power under Section 17(1) necessarily does not result in exclusion of Section 5-A, inasmuch as, the person concerned can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-Section (4) of Section 17 shows that it merely enables Government to direct that Section 5-A would not apply to the cases covered under Sections (1) or (2) of Section 17. Therefore, mere fact that certain purposes may be treated as public purpose for purpose of acquisition but that by itself would not mean that their exists urgency to dispense with inquiry unless the circumstances actually and really are in existence to show that delay in taking possession would be adverse to public interest. It also held that Court can take judicial notice of the fact that forplanning, execution and implementation of scheme relating to development of residential, commercial and industrial or institutional areas, Government takes few years, therefore, in such cases private property should not be acquired by invoking urgency clause as denial of Rule of audi alteram partem embodied in Section 5-A is not at all warranted in such cases.

41. In **Darshan Lal Nagpal (Dead) By Lrs. vs. Govt. of NCT of Delhi and others (2012) 2 SCC 327** after having retrospection of some of authorities on the subject, Court in para 28 of the judgment stated as under :

"What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law - Article 300-A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing."

42. In **Union of India and others vs. Shiv Raj (supra),** Court in para 15 said that Section 5-A confers a valuable right on the owner of land and it is not an empty formality. It is a substantive right, which can be taken away only for good and valid reasons and within the limitations prescribed under Section 17(4) of Act, 1894.

43. The up shot of the authorities discussed above is that inquiry under Section 5-A should not be dispensed with on mere asking or in a routine course but it is only when there actually exist urgency, such inquiry should be dispensed with.

44. There are total 42 petitioners in these four petitions. Details of disputed land belong to petitioners in different writ petitions as also other details are given in the form of a chart as under:

Sl. No.	Writ No.	Name of Petitioner	Plot(s) No.	Area in Acres	Village
1	9548/03	Santosh Kumar, Govind Kumar, Bhupat Prasad (P-1, 2, 3)	706, 707, 710/3, 648, 650/1Ka	0.49, 0.36, ….., 0.77, …..	Tarauha
2	9548/03	Suraj Pal (P-4)	682, 238	1.11, 0.57	Tarauha, Banari
3	9548/03	Indrajeet (P-5)	710/3, 239	……, 1.11	Tarauha, Garhiva
4	9548/03	Bhagwan, Ram Khelawan(P-6, 7)	722, 759, 721M	6.33, 2.01, …..	Tarauha

5	9548/03	Kallu alias Naviullah (P8)	691	0.98	Tarauha
6	9548/03	Kunni Lal (P-9)	778, 612, 669M, 673 Ka	2.13, 0.86, ….., ……	Tarauha
7	9548/03	Abdul Kalim Bux (P-10)	559M	…..	
8	9548/03	Raju (P-11)	710/2	…..	
9	9548/03	Shivdhar alias Raja Bhaiya, Chandrapal (P-12, 13)	606, 607/2, 758, 768/1, 1007, 608, 609	1.04, 0.20, ….., ……., 0.36, 0.36	Tarauha
10	9548/03	Badri Prasad (P-14)	648, 668, 680, 713M, 781, 811/1, 812Kha, 814, 818	0.77, 0.67, 0.32, ……, 1.73, ….., ……, 1.76, 0.30	Tarauha
11	9548/03	Gopal Krishan (P-15)	602, 604, 603, 810/2, 1011/2, 718	1.29, 1.63, 0.80, 0.60, 0.65, 0.35	Tarauha
12	9548/03	Kodu alias Ram Das (P16)	245	0.87	Garhiva
13	9548/03	Yusuf, Abdul Haleem (P-17, 18)	600	2.01	Tarauha
14	9548/03	Ram Kishan (P-19)	1019, 1022, 1023, 666M, 667, 663M	1.26, 1.70, 0.12, ….., 1.03, …..	Tarauha
15	9548/03	Girija Sharan, Shyam Charan, Vidhya Charan, Maithly Sharan, Nanhey Lal (P-20 to 24)	698, 699, 681, 696/2, 688, 689, 689/1, 697, 665/1, 708, 711Ka, 712M, 720	0.78, 1.06, 0.64, 0.39, 0.95, ….., 0.62, 0.56, ……, 0.48, ……, ….., 0.58	Tarauha
16	9548/03	Karim Gux (P-25)	236, 205, 177	1.78, 1.10, 0.58	Garhiva
17	9548/03	Shaheed (P-26)	202	0.59	Garhiva

18	9548/03	Mohd. Hajja, Mohd. Nanhi (P-27, 28)	191	.....	
19	9548/03	Mohd. Hasma (P-29)	234	5.26	Garhiva
20	9548/03	Yusuf (P-30)	211	0.43	Garhiva
21	9548/03	Naviullah (P-31)	242, 239, 214Ka	1.04, 1.11, ...	Garhiva
22	9548/03	Abdul Rahman (P-32)	214	1.04	Garhiva
23	9548/03	Kaleem (P-33)	207	0.38	Garhiva
24	9548/03	Tufel Ahmad (P-34)	235	1.49	Garhiva
25	9548/03	Ram Prasad (P-35)	250	3.00	Garhiva
26	9548/03	Chiman Ali (P-36)	213	0.88	Garhiva
27	9548/03	Shekh Abdula, Shekh Jumman Khan (P-37, 38)	212	1.87	Garhiva
28	17312/03	Ram Bahori	207	0.38	Garhiva
39	99/06	Mulayam Singh	649Ka	0.27	Tarauha
30	43685/15	Shaheed (P-1)	240	1.04	Garhiva
31	43685/15	Nizamuddin (P-2)	243	3.08	Garhiva

45. Except one, land of all petitioners is either in Village Taroha or Garhiva. Most land which was proposed to be acquired has already been taken possession by State and developmental activities like construction of offices and residential buildings either have completed or in process. Some part of land of petitioners where interim orders are operating are with petitioners. It cannot be doubted, when development activities in a particular manner have to be carried out, land required will constitute a conjoint chunk and land here and there in a scattered manner cannot be allowed to be exempted otherwise the very scheme of developmental activities is bound to suffer. Looking to the facts of these cases we are satisfied that for establishment of district level infrastructure in newly created District 'Chitrakoot', land was necessary and there was a real urgent need justifying exercise of power under Section 17 to dispense with inquiry under Section 5-A of Act, 1894. It thus cannot be said that impugned notifications are bad in law on account of dispensation of inquiry under Section 5-A.

46. Now coming to question of applicability of Section 24(2) of Act, 2013 we find that in a casual fashion petitioners have only said that actual physical possession has not been taken though this fact is not admitted by respondents. It is said that after dismissal of Writ Petitions by the time matter was taken up in Supreme Court, respondents had already taken possession of entire land. We do not find anything placed on record to discredit aforesaid stand taken by respondents.

47. In the supplementary counter affidavit-II sworn on 12.02.2013 by B.D. Gupta, Tahsildar Sadar, District Chitrakoot it is said that on 24.11.2003 possession of 131.40 acres of land was taken and 80% compensation was paid to affected persons. Land belong to certain land owners who had filed Writ Petitions No. 9548 of 2003, i.e., leading one and 17312 of 2003, since there was interim orders passed, hence possession of their land was not taken. After dismissal of both the above writ petitions on 08.12.2005, remaining 90 acres of land was also taken in possession on 27.12.2005. An award was signed on 27.12.2005 in which compensation for entire acquired land was declared which included land, subject matter of Writ Petition No. 9548 of 2003 and others. These facts have been stated in paras 34 to 38 of supplementary counter affidavit-II as also in award, copy whereof has been filed as Annexure SCA-2. We find nothing on record placed by petitioners to contradict aforesaid facts. Hence, Section 24(2) of Act, 2013 also has no application in the case in hand.

48. No other point has been argued.

49. The writ petitions lack merit. Dismissed accordingly.

50. Interim order, if any, stands vacated.

51. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Habeas Corpus Writ Petition No.- 11921 Of 2015

Ramesh Chand Joshi & Anr. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
H.N. Shukla, R.R. Shukla

Counsel for the Respondents:

Govt.Advocate, A.N. Bhargava, Amit Singh Chauhan, Rajul Bhargava

Constitution of India – Art. 226 – Habeas corpus – Custody of minor child – Natural guardian (father) vs. maternal relatives –

Held, father being natural guardian has preferential right to custody of minor unless proved unfit. Mere allegations regarding conduct or financial incapacity not sufficient to deny custody. Welfare of child is paramount consideration (paras 6-9).

Custody of minor – Welfare principle –

Held, while deciding custody, court must consider overall welfare including financial capacity, upbringing and personal care.

Where father is financially sound and capable of providing proper care, custody cannot be denied merely because child was living with relatives for long (paras 10-13).

Habeas corpus – Maintainability in child custody –

Held, detention of minor by persons other than natural guardian, against his wishes, amounts to illegal detention.
Writ under Article 226 maintainable without resort to Guardians and Wards Act (paras 14-15).

Custody – Preference of father over relatives –

Held, Mama and Mausi cannot claim better right over natural guardian. Joint custody with relatives not preferable to custody of father. Future uncertainty of relatives also relevant consideration (paras 18-19).

In Result-Writ petition allowed – Respondents directed to hand over custody of minor to father within stipulated time.

Cases cited

Athar Hussain Vs. Syed Siraj Ahmed and others Civil Appeal No. 11 of 2010 arising out of SLP (c) No. 24148 of 2007 decided on 5.1.2010
Lekha Vs. P. Anil Kumar (2006) 13 SCC 555
Ankur Tripathi alias Tinnu vs. Sri Radhey Shyam Pandey and others AIR 1994 Allahabad 250
Gohar Begum Vs. Suggi alias Nazma Begum AIR 1960 SC 93

(Delivered by Hon'ble Abhai Kumar, J.)

1. This writ petition has been filed by Ramesh Chand Joshi for issuing a writ, order or direction in the nature of habeas corpus for producing the petitioner no. 2/corpus Kumari Tripur Sundari Joshi before this court who is said to be in illegal detention of respondent nos. 4 to 9.

2. The respondent nos. 4 to 9 appeared before this court and filed their counter affidavit.

3. Various counter affidavits and rejoinder affidavits have been filed from both sides.

4. Heard learned counsel for the parties and perused the records.

5. Brief facts of the case are as follows:

6. Petitioner No. 1 was married to Dr. Tulsi on 3.7.2006 who was sister of respondent nos. 4 to 9. This is admitted fact that she died out of cancer. It is also admitted fact that out of wedlock of petitioner no. 1 and Dr. Tulsi, petitioner no. 2 - corpus born out and it is also not disputed that at present she is in custody of respondent nos. 4 to 9.

7. There are certain facts regarding the conduct of petitioner as stated by respondent nos. 4 to 9 in their counter affidavit, that petitioner no. 1 wanted some money from the respondents. He did not care his wife during her illness and that corpus was living from the very beginning with the respondent nos. 4 to 9 and her Nani who has since expired but these facts are not very relevant for the disposal of the present writ petition.

8. There are also dispute regarding the benefits of service that are being accorded after her death which will be taken in the later part of this order. This is not disputed that pensionary benefits after the death of Dr. Tulsi, the wife of petitioner no.1, is being given to the petitioner no. 1.

9. As far petitioner no. 1 is concerned, he is a natural guardian of corpus whereas respondent nos. 4 to 9 are Mama and Mausi of the corpus. Therefore, in normal course, father is always entitled for the custody of minor in preference to Mama and Mausi and, in this regard it is submitted by the learned counsel for the respondents that petitioner no. 1 is irresponsible person and during lifetime of his wife, he did not care her and his wife was living with her parents due to differences with her husband.

10. Certain papers have been filed by the respondents that an FIR was lodged by the deceased Dr. Tulsi in which address of the respondents was given. It is also contended by the learned counsel that all the expenses of treatment of Dr. Tulsi had been undertaken by the respondents as well as her mother. It is also contended by the learned counsel that money was given to the petitioner no. 1 as this money was demanded by him and statement of bank account regarding that has also been annexed.

11. From the above narrated facts by the respondents no. 4 to 9, it cannot be reached conclusively that petitioner ever illtreated deceased Dr. Tulsi. It cannot also be said that she was not taken proper care by petitioner no. 1 as there is no concrete proof regarding that.

12. In all probability, Dr. Tulsi was living at the house of her mother as and when she fell ill and in the circumstances it can be accepted that Dr. Tulsi was taken care by the respondents as well as her mother and on the basis of that it can also be inferred that when Dr. Tulsi fallen ill she was with respondents, then corpus was also shifted there from the house of the petitioner no. 1 and on the basis of that it can be said that petitioner no. 1 submitted wrong facts regarding taking away of corpus from his home. Inspite of all these facts, the only fact that is to be seen in the present

case, whether petitioner no. 1 is entitled for custody of corpus as well as where the welfare of the corpus lies.

13. As already said above, from the facts it cannot be accepted that petitioner no. 1 maltreated Dr. Tulsi and this cannot also be said that he exhorted money by pressure from respondents and from mother of Dr. Tulsi and on that basis custody of minor cannot be denied.

14. Learned counsel for the respondents vehemently argued that petitioner no. 1 is a lawyer but he has no income and is living alone in his house. In the circumstances, he is not a fit person for the custody of the corpus. It is further submitted by the learned counsel that petitioner no. 1 is not having sufficient means for the welfare of minor and there is none to look-after the corpus at the house of petitioner no. 1.

15. Quelling that argument, learned counsel for the petitioner submitted that petitioner no. 1 is a lawyer of repute and having experience of several years. He is earning well enough and can very well take care of the needs of the corpus. It is also submitted by the learned counsel that the family pension of the deceased Dr. Tulsi is being given to the petitioner, besides several lacs rupees has also been received by the petitioner as gratuity and other benefits of Dr. Tulsi, and petitioner is financially sound and cannot be said that he is financially weak or not in a position to take care of corpus.

16. So far as the financial condition of petitioner no. 1 is concerned that cannot be doubted. He is a lawyer of several years of standing and is practising in the High Court of Allahabad, therefore, it cannot be said that he is not earning anything, rather it can be assumed that he is earning sufficiently. Moreover he is also getting pension after the death of his wife Dr. Tulsi and about Rs. 26 lacs has been received by him as gratuity and other benefits of Dr. Tulsi. In the circumstances, it cannot be said that petitioner no. 1 is not having sufficient means for maintaining the corpus.

17. Income of respondent nos. 4 to 9 is shown by learned counsel for the respondents and from that it can also be inferred that they are also capable of taking proper care of the minor.

18. Learned counsel for the respondents argued that custody of the minor is with them for the last six years and now that custody should not be disturbed.

19. The contention raised by the learned counsel is supported by the law propounded by Apex Court in ***Civil Appeal No. 11 of 2010 arising out of SLP (c) No. 24148 of 2007, Athar Hussain Vs. Syed Siraj Ahmed and others, decided on 5.1.2010***, but the facts of the case are not applicable in the present case. In that case Hon'ble Apex Court discussed the interim custody of the minor and case for custody was going on in the court of Family Judge and in that circumstances it was held by the Apex Court that custody in that cases where minor is living with the relations for a long time and having developed a fond relations then interim custody should not be disturbed, but in the present case facts are different.

20. Question regarding custody is not pending in any civil court, therefore, in the instant case, this court is to decide the custody of the minor and not interim custody.

21. Hon'ble Apex Court in so many cases in very clear terms has propounded that it is the welfare of child that is supreme and in several cases Hon'ble Apex Court has given the custody of the minor to the other persons in comparison to natural guardian.

22. Hon'ble Apex Court in the case of **Lekha Vs. P. Anil Kumar, (2006) 13 SCC 555**, gave the custody of minor to the mother instead of father though mother was married second time. It was found by the Hon'ble Apex Court that custody to mother is more appropriate.

23. Hon'ble Apex Court in so many words has held that custody of the minor is to be decided after taking into account other facts as well, such as the capacity of the father to look after the child's needs and to arrange for his upbringing, and it is also to be viewed that father decide other commitments in any position to give personal attention to the child's overall development.

24. The Allahabad High Court in the case of **Ankur Tripathi alias Tinnu vs. Sri Radhey Shyam Pandey and others, AIR 1994 Allahabad 250** has categorically held that parents being natural guardians of child are entitled to custody.

25. Learned Judge in the above referred case elaborately discussed various laws propounded in this regard and held that detention of a child against the wishes of natural guardians amounted to illegal detention and it was not necessary that father should have sought remedy under the Guardians and Wards Act. It was also held that petition under Article 226 of the Constitution of India is maintainable on the ground that right of the natural guardian is indefeasible.

26. Learned Judge discussed the law propounded in **Gohar Begum Vs. Suggi alias Nazma Begum, AIR 1960 SC 93**, in which Hon'ble Supreme Court observed as under:

"The respondent has no legal right whatsoever to the custody of the child. Her refusal to make over the child to the appellant therefore resulted in an illegal detention of the child within the meaning of Section 491"

27. After discussing various pronouncement of different High Courts, the court finally observed as follows:

"24. In the present case the admitted fact is that the parents have claimed the custody of the minor child and they are the natural guardians. The father of the minor is the natural guardian of the minor and he has a right to keep the child with him. The opposite party No. 3 is the Mausi of the child and is not a natural guardian of the child and she has no right to keep the child in her custody."

28. After considering the point regarding the resources of the petitioner for giving the corpus good education and provide a comfortable living according to the status, now it is to be seen whether in view of the commitments of the father, he is in a position to give personal attendance to the child's overall developments.

29. It is contended by the learned counsel for the respondents that petitioner lives alone and being a lawyer he is having his own commitments and in the circumstances he cannot be in a position to look after the welfare of the child so as to give her a conducive atmosphere for child's overall development.

30. Dispelling the fear of the respondents' counsel, it is submitted by the learned counsel for the petitioner that other relations like brothers and sisters are used to live in association and the whole family will take care of the corpus and there is no danger of being neglected by the corpus. Although, petitioner has given details of the brothers, those who are living with him and certain documents are being provided by the respondents that brothers who are said to be living with the petitioner are not actually living with the petitioner rather they are living elsewhere.

31. This is not disputed that several family members like brothers in his family are living in Allahabad and in the circumstances it cannot be said that caring of corpus cannot be undertaken properly by petitioner. Even if petitioner is living alone then certainly he will make arrangements regarding that and certainly will see that caring of corpus is not overlooked. All these points are in the nature of facts and on the basis of presumption no inference can be drawn by this court.

32. Seeing the overall view of the petitioner as well as family members in the nature of brothers and sisters, it can very well be inferred that interest of corpus is very much safe in the custody of the petitioner.

33. Two things are against the respondents, firstly, that they are unmarried and certainly in future they will have their own family and in all probability interest of the corpus will be neglected thereafter. Secondly, it is not made clear that as to in whose custody in normal way corpus will be given. Custody of the single person can be more attributed for betterment of the corpus rather custody of various persons jointly.

34. In the result, this court is of the view that Mama and Mausi, jointly cannot be a better option in place of father who is a natural guardian as well as having sufficient source for the well being of the corpus. Corpus is taking education in a well reputed school of Allahabad. It is directed to the petitioner that corpus will remain get education in the same school.

35. The respondents 4 to 9 are directed to handover custody of the petitioner no. 2/corpus Kumari Tripur Sundari Joshi to petitioner no. 1 Ramesh Chand Joshi, within fifteen days from today.

36. The writ petition is allowed. There will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 13846 Of 1988
&
Writ C No.- 20134 Of 2000

Brij Bihari Lal Tandon **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Atul Dayal, A.K. Srivastava, A.N. Singh, Ashok Srivastava, K.M. Dayal, Pramod Jain

Counsel for the Respondents:
S.C., Ashok Khare, D.D. Chaudhary, D.D.Chauhan, K.K. Singh, L.P. Naithani, P.K.Singh, Satendra Pratap Singh, V.Malviya, R.C. Singh

Nazul Land / Municipal Property—Lease—Renewal—Freehold Conversion—Entitlement— Land in dispute found to be property of Municipal Board and not Nazul land—Petitioner's claim based on Nazul Manual held misconceived—Lease deed itself described land as Municipal Board property and petitioner had admitted ownership of Municipal Board—Petitioner estopped from taking contrary plea—Nazul Manual not applicable—(Paras 21, 23, 27)
Lease—Expiry—Breach of Covenants—Effect— Lease granted for 30 years expired by efflux of time—Petitioner committed breach of lease conditions by unauthorized sub-letting without Collector's permission—Violation admitted—No subsisting right to continue in possession—(Paras 25, 26)
Lease—Renewal—No Vested Right— Mere recommendation for renewal or acceptance subject to conditions does not confer enforceable right—Renewal not automatic—Condition of premium validly imposed—Refusal to waive premium justified—(Paras 9, 3)
Public Premises—Eviction— After expiry of lease and breach of conditions, petitioner became unauthorized occupant—Municipal Board entitled to seek eviction—Collector's order directing removal of possession valid—(Paras 27, 28)
Freehold Conversion—Claim—Maintainability— No right to seek conversion of leasehold into freehold where underlying title and eligibility itself disputed and lease already expired—Proceedings rightly kept in abeyance in view of disputes—(Paras 14, 28)
Holding Over—Inapplicability— Doctrine under Section 116 of Transfer of Property Act not applicable after expiry of lease in absence of landlord's assent—No deemed renewal—(Para 28)
In Result— Writ petitions dismissed; petitioner held to have no right for renewal of lease or conversion into freehold; eviction action upheld. (Paras 29, 30)

Cases cited

Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd.

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

1. Both these writ petitions relates to same parties and properties and are connected, therefore, have been heard together and are being decided by this common judgment.

2. Petitioner-Brij Bihari Lal Tandon claims himself to be a lease holder of Nazul Plots no. 148/14 area 1.366 karis and 167/4 area 2.200 karis, total 1.566 karis, within Manunath Bhanjan Municipality, pursuant to a registered lease deed dated 10.10.1953. Lease deed was executed by Governor of United Provinces on one part and petitioner-Brij Bihari Lal Tandon on second part. On behalf of Governor lease deed was executed by Municipal Board, Mau and Collector of District Azamgarh as 'Lessor'. The term of lease was 30 years w.e.f. 01.10.1953.

3. Petitioner constructed two godowns on leased land which were sub-let to Regional Food Controller as directed by Collector, Azamgarh. Subsequently a Bungalow was also constructed over a portion of land and same was let out to Life Insurance Corporation under the directions of Collector. Term of lease was to expire in 1983 and in anticipation thereof petitioner applied for renewal of lease in 1979. Lease was not renewed till the term expired, though subsequently Collector recommended renewal of lease vide letter dated 16.07.1984. State Government accepted recommendation, required petitioner to pay premium of Rs. 1,97,200/- and annual rent of Rs. 295/-. Letter to this effect was issued to petitioner on 31 May/ 10 June, 1985 by Nazul Officer. Petitioner agreed to pay annual rent but objecting demand of premium of Rs. 1,97,200/-, submitted an application dated 05.08.1985 requesting for its waiver, in view of Rule 17(3) of Nazul Manual. Collector, Azamgarh, vide letter dated February, 1986 made recommendation in favour of petitioner for waiver of premium but same was not accepted and instead impugned order dated 08.07.1988 has been passed by Collector, Azamgarh, directing petitioner to remove his Malba from disputed land and handover vacant possession to Executive Officer, Nagar Palika, Maunath Bhanjan. It is this order dated 08.07.1988 (Annexure-8 to the writ petition) which has been challenged in Writ Petition No. 13846 of 1988 (hereinafter referred to as the "first petition") seeking a writ of certiorari for quashing the same. Petitioner has also sought a mandamus commanding respondents to renew lease in his favour for another term of 30 years in accordance with Rules 17(3), 22, 55 and 56 of Nazul Manual, without insisting for payment of any premium.

4. Original copy of lease deed has also been placed on record, alongwith a supplementary affidavit sworn on 18.03.1998 by Vishnu Kumar Tandon son of petitioner.

5. The first petition has been contested by Respondent-3 by filing a counter affidavit sworn by Faizur Rahman, Head Clerk, Municipal Board, Maunath Bhanjan. It is stated therein that petitioner has played fraud inasmuch as he was President of Municipal Board in 1950. He moved an application to District Magistrate, Azamgarh who was also occupying the office of Administrator, Municipal Board in 1953, requesting that disputed plots be given to him on lease. Collector/ Administrator sought report from Secretary, Municipal Board. Land belong to Municipal

Board and was governed by rules applicable to Municipal Board. Pursuant thereto Executive Officer submitted report dated 21.04.1951 recommending to execute lease deed for a period of 30 years.

6. Nazul Clerk also examined matter and submitted report that land in question is property of Municipal Board, Mau and not Nazul land, hence would be governed by Municipal Board and not rules applicable to Nazul land.

7. Petitioner when applied for renewal concealed this fact that land in dispute is not Nazul but belong to Municipal Board and sought renewal in terms of Nazul Manual, whereupon District Magistrate forwarded his request under the impression that disputed property is Nazul land, without examining old record.

8. The State Government, however, vide order dated 20.03.1985 observed that petitioner has committed breach of terms of lease. However, if he agrees to pay premium of Rs. 1,97,200/- and annual rent of Rs. 295/-, matter of renewal may be examined. Municipal Board wrote a letter dated 09.07.1987 to District Magistrate stating that disputed land is needed for Industrial Development by Respondent-3. Collector then communicated petitioner the said need of Municipal Board and directed him to vacate premises vide letter dated 08.07.1986. The lease having already expired, petitioner has no right of any kind to occupy disputed land and, therefore, has to vacate the same.

9. A counter affidavit has also been filed on behalf of Respondents-1 and 2 sworn by Raj Bahadur, Additional District Magistrate (Finance and Revenue), Mau stating that mere recommendation for renewal does not confer any right upon petitioner for renewal in the manner he likes. It is also said that it is not a case where Government gave an option to petitioner for renewal but an option was given for fresh lease subject to payment of premium. Further, in the meantime, since Municipal Board required land for its own purpose, therefore, petitioner has been directed to vacated disputed land.

10. Another counter affidavit has been filed by Respondent-4 stating that disputed land belong to Respondent-3 and in support thereof he has referred to Khatauni of 1391 Fasli. We find that in the said Khatauni disputed land is shown as 'Abadi' and recorded as "Government land" under the management of Municipal Board.

11. In reply to counter affidavit filed by Respondent-3 petitioner has also filed a rejoinder affidavit. In respect of averments contained in para 4 of the counter affidavit that petitioner has deliberately suppressed material facts and disputed land is not a "Nazul" but belong to Municipal Board, nothing has been said in para 4 of rejoinder affidavit except of referring to lease deed, provisions of Nazul Manual and subsequent recommendations made by Collector. It would be appropriate to reproduce para 4 of counter affidavit filed by respondent no. 4 and petitioner's reply contained in para 4 of rejoinder affidavit:

"4. That plot no. 148/14 and 167/4 situated within the Municipal Limit of Maunath Bhanjan has all along vested in the Municipal Board and is not a Nazul land. The petitioner has made deliberate suppression of material facts especially when he had been the President of Municipal Board. On 3.10.1950 the petitioner moved application to the District Magistrate, Azamgarh who was the Administrator of Municipal Board in 1950 praying that the aforesaid plots of land may be given to him on lease. A copy of the same is filed herewith as Annexure (1) to this counter affidavit. The Administrator directed the Secretary of Municipal Board to report in the matter. At the particular time the transfer of property vested in Municipal Board were govern by the rules. A copy of the same is filed herewith as Annexure (2) to this counter affidavit. The Executive Officer of the Board submitted report on 17.10.1950. On 21.4.1951 the Executive Officer submitted report. A copy of the report is filed herewith and is marked as Annexure (3) to this counter affidavit."

"4. The contents of para 4 of the counter affidavit are misconceived and denied. The lease deed was executed on 10.10.1953 and petitioner applied lease for 90 years. But the lease was granted for 30 years only inspite of clear provision under Rule 22 Rule 56 of Nazul Manual. Moreover the petitioner also applied for renewal of lease in the year of 1979, enquiry and opinion of D.G.C. was also obtained and thereafter the District Magistrate recommended the renewal lease on 16.7.84 vide Annexure 4 to the petition. However the application of petitioner for renewal of lease is still pending."

12. However, in respect of averments contained in para 5 and 6 of counter affidavit filed by Respondent-3 that Nazul Clerk submitted report that property belongs to Municipal Board, petitioner in para 5 of rejoinder affidavit has said that disputed land originally owned by Rani Dhandei Kuwar, Zamindar and acquired by Secretary of State for India under Land Acquisition Act, 1894 (hereinafter referred to as the "Act, 1894") vide award dated 09.09.1909 and Government of India became owner thereof. Subsequently these plots were given under management of Town Area and never vested in it. Town Area with passage of time became Municipal Board. Transfer of management does not create proprietory rights and control of Nazul land remain with Collector on behalf of State, hence Nazul Manual continue to apply.

13. The first petition came up for admission before this Court on 26.07.1988 when this Court passed following interim order:

"Till further orders of the Court the direction of the Government to the petitioner to renew the lease on condition of payment of premium of Rs. 1,97,200/- shall remain stayed. The petitioner shall be liable to pay only the annual rent as has been determined in the order dated 31.3.85, copy of which has been filed as Annexure 5 to the writ petition. The arrears shall be paid within six weeks from the date a copy of this order is filed before the District Magistrate/ Collector, Azamgarh."

14. During pendency of above writ petition, petitioner applied for conversion of free hold rights in respect of disputed property by submitting application dated 04.01.1999 and depositing

Rs. 2,40,000/- (1/4 of total value). It appears that Collector issued a demand notice dated 31.08.1999 requiring petitioner to deposit total balance amount of Rs. 11,19,046.80. Petitioner deposited same on 04.09.1999. Thereafter District Magistrate sought direction from Government vide letter dated 06.09.1999 and State Government vide letter dated 22.09.1999 required Collector to proceed for execution of sale deed. When no action was taken, petitioner moved representation dated 28.09.1999 to Chief Secretary, U.P. whereupon a direction was issued on 04.10.1999 to comply with earlier direction of State Government contained in letter dated 22.09.1999 and Commissioner was also directed to ensure compliance. Thereupon Commissioner issued letter on 07.10.1999 to Collector requesting him to execute sale deed. However, Collector again sought direction from State Government, vide letter dated 25.10.1999, whereupon Government vide order dated 05.12.1999 directed Collector to execute sale deed. Since matter remained pending, petitioner filed Writ Petition No. 8776 of 2000, which was disposed of on 22.02.2000 directing Collector to decide petitioner's claim. In the meantime, one Jagannath Singh moved objection dated 07.03.2000 stating that land belong to Nagar Palika and persons occupying same should not be evicted. Another objection dated 08.03.2000 was filed by Nagar Palika stating that civil suit is pending in respect of disputed land. District Magistrate rejected objection of Nagar Palika for deferring free hold proceedings vide order dated 23.08.1999 but thereafter passed order dated 20.04.2000 directing that matter should be kept in abeyance till civil suits are decided. It is this order dated 20.04.2000, which has been challenged by petitioner by means of Writ Petition No. 20134 of 2000 (hereinafter referred to as the "second petition").

15. It is not in disputed that two suits were pending in respect of disputed land being Original Suits No. 79 of 2000 and 164 of 1999.

16. Both the writ petitions were disposed of on 08.05.2009 by a Division Bench consisting of Hon'ble P.C. Verma and Hon'ble Rajesh Chandra, J.J. with following order:

"Heard learned counsel for the petitioners, and learned standing counsel.

Collector Mau is directed to take decision in compliance with the Government Order dated 17.1.2000 contained in (Annexure-10 to the writ petition) within a period of two months as the petitioner has already deposited the whole amount as mentioned in the Government Order for getting the land free hold.

Petitioner is disposed of with the aforesaid observation/ direction."

17. Felt aggrieved by aforesaid order, Respondent-3 filed appeal in Supreme Court being Civil Appeals no. 5684 and 5685 of 2012. The appeals have been decided vide judgment dated 27.07.2012 and setting aside order dated 08.05.2009, matter has been remanded to decide both these writ petitions on merits. The order passed by Apex Court on 27.07.2012, reads as under:

"Leave granted.

We have heard the learned counsel for the parties.

A perusal of the order passed by the High Court clearly shows that no reasons have been assigned by the High Court in support of its conclusion. ***The matter pertains to grant of freehold rights to the respondents which had to be considered on the basis of material produced before the Court.***

In view of above, the impugned orders passed by the High Court are set aside and the matters are remitted back to the High Court for deciding the writ petitions on merit. Since the parties have been litigating for a very long time, the High Court is requested to dispose of the writ petitions as early as possible, in any event, within a period of six months from the date of communication of this order.

The appeals are disposed of accordingly."

18. It is in these circumstances, both these matters have come up before this Court for hearing and disposal.

19. We are also informed that Original Suit No. 164 of 1999 filed by Respondent-3 has been dismissed by Civil Judge (Senior Division), Mau vide judgment and decree dated 14.03.2016.

20. Copy of original agreement (deed of lease) executed on 10.10.1953 is on record and on the top it is mentioned as "Lease Of The Municipal Board Land For The Purpose Of Building Residential Quarter And Godowns For The Government Department". It further says that deed is being executed between Governer of Uttar Pradesh called as "Lessor" and Brij Behari Lal Tandon called as "Lessee". It further says that Municipal Board, Mau of District Azamgarh has agreed on behalf of Lessor to demise plot of land described in deed subject to rights and restrictions and several covenants stated thereafter in agreement. The right to hold premises by lessee is clearly mentioned for a tenure of 30 years from 01.10.1953. Thereafter it contains about 13 stipulations dealing with terms and conditions. Right to cancel lease, reentry etc. are contained in following clause:

"Provided always and these presents are executed on this express condition that if and whenever the rent hereby reserved as payable by the lessee or any part thereof shall be in arrear and unpaid for the spare of three months, whether the same shall have been lawfully demanded or not, or if there shall be a breach of non-observance of any of the covenants by the Lessee hereinbefore contained then and in any such case the lessor notwithstanding the Waiver of any cause or right of re-entry may re-enter upon the said premises and expel the lessee and forfeit all rights to remove and recover any compensation for any building rented by him on the said premises.

And the Lessor hereby covenants with the Lessee, (Firstly) that he will during the period of his sub-tenancy pay and discharge all rates, taxes, charges and assessments of every

description which may then or which may at any time thereafter be assessed, charged or imposed upon the said premises or the buildings to be erected thereon or the landlord or tenant in respect thereof.

Provided also that the expressions 'the lessor' and 'the Lessee' hereinbefore used shall unless such an interpretation be inconsistent with the context include in the case of the former his successor and assigns and in the case of the latter his heirs, executors, administrators, representatives and assigns."

21. The document makes it very clear that though agreement was executed by Municipal Board, Mau and Collector both and it was on behalf of Governor of Uttar Pradesh, and petitioner, Brij Behari Lal Tandon but description of land was clearly mentioned as Municipal Board's land.

22. Besides above, copy of petitioner's own letter dated 03.10.1950 has also been placed on record as Annexure-1 to the counter affidavit filed on behalf of Respondent-3 sworn on 30.08.1988 by Faizur Rahman, Head Clerk, Municipal Board, Mau and petitioner himself has admitted therein that disputed land is owned by Mau Municipal Board. The letter reads as under:

"To,
The District Magistrate,
Azamgarh.

Sir,

Most respectfully I bet to submit that I need a suitable plot of land for cottage industries at the outskirts of the Town.

The ***Mau Municipal Board owns two plots of lands in Village Nizamuddinpur. The number of the plots of land 148/11/2 and 167/1/1 and their area is 2 acres 888 kari and 207 kari respectfully****. That land is lying useless and is quite suitable for our purposes.*

The Municipal Board Mau used to give this land on yearly contract every year, but it is lying vacant now.

I request you most earnestly, every kindly to give these two plots of lands to me on suitable compensation in the interest of development of the Cottage Industries.

Thanking you. *Yours faithfully,*

Ocrober, 3, 1950 *Brij Behari Lal Tandon"*

23. Report submitted by Nazul Clerk on 27.09.1951 on application of petitioner also refers to old acquisition files and says that land was acquired for Town Area, Mau, in 1909 for "Night

Soil" and it was transferred to it by State hence it was property of Municipal Board and not a Nazul land. Subsequent case pleaded by petitioner is also that land initially belong to Smt. Rani Dhandei Kuwar, the then Zamindar, wherefrom it was acquired by State for being used as "Night Soil" by the then local body Town Area, Mau, which subsequently has been upgrated to the status of Municipal Board, Mau. All these facts make it clear that the factum that land in dispute belong to Municipal Board Mau since its very inception when lease agreement was executed was never disputed by petitioner. That being so, petitioner is estopped from taking a different stand in order to claim a right of renewal under Nazul Manual or otherwise or right of conversion of freehold by stating that land is not owned by Municipal Board but is vested in State Government and is a Nazul land, governed by provisions of Nazul Manual and not the rules and regulations applicable to land owned and maintained by Municipal Board.

24. Then the question comes, whether there is any breach of the covenants of lease deed or not.

25. Stipulation No. 8 of agreement reads as under:

"And (Eighthly) that he will not at any time carry on or permit to be carried on upon the said premises and trade or business whatsoever or use the same for any other purpose then as godowns, residential quarter and outbuildings or the Government Departments without the consent in writing of the Collector first had and obtained."

26. Petitioner let out two godowns without the consent of Collector to U.P. Small Scale Industries, Lucknow. Similarly in violation of Clause 12 of agreement he let out residential building to a Sale Tax Officer though it was not directed or nominated by Collector. Both these facts were admitted by petitioner in his letter dated 05.08.1985 (Annexure-6 to the writ petition). He, therefore, committed breach of covenants and lost any right to continue. Even otherwise, petitioner's lease expired on expiry of 30 years from 01.10.1953.

27. Rule 17 and 55 of Nazul Manual, as referred to by learned counsel for the petitioner, have no application whatsoever as is evident from bare reading thereof. On the contrary, land in dispute is clearly a "Public Premises" owned and managed by Municipal Board, Mau. It was entitled to determine lease deed and request Collector for petitioner's eviction from disputed property. It is pursuant thereto Collector has passed impugned order.

28. In **Delhi Development Authority Vs. Anant Raj Agencies Pvt. Ltd., AIR 2016 SC 1806** Court has observed, where there is a breach of the covenants of lease deed, in law, there was no need to even formal determination of tenancy as after expiry of original period of lease it stands terminated by efflux of time. There is no automatic or deemed acceptance of renewal of tenancy and even principle of "Holding Over" under Section 116 of Transfer of Property Act, 1882 would have no application. The status of petitioner, the original lessee, after expiry of period of lease thus became that of an "unauthorized occupant". Therefore, petitioner has no legal or otherwise right to

seek a mandamus either to command respondents to renew lease of land in question in his favour or to convert his lease rights into freehold rights.

29. We, therefore, find no merit in both these writ petitions.

30. Dismissed.

31. Interim order, if any, stands vacated.

32. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 15550 Of 1985
&
Connected With Other Cases

Satya Prakash **...Petitioner**
Versus
State **...Respondent**

Counsel for the Petitioner:
Vipin Sexena

Counsel for the Respondent:
S.C.

Service Law—Recruitment—Statutory Rules—Commencement—Effect— Group 'D' Employees Service Rules, 1985 providing that Rules shall "come into force at once" held operative from date of notification i.e. 16.03.1985—Subsequent publication does not postpone enforceability—Rules applicable to all selections made thereafter. (Paras 12, 13, 14)

Service Law—Appointment—Illegality—Non-compliance with statutory Rules— Selections made without following prescribed procedure under applicable Rules held illegal and void—Appointments made after enforcement of Rules but in breach thereof cannot be sustained—Cancellation of such appointments justified. (Paras 14, 19)

Service Law—Irregularity vs. Illegality— Non-observance of mandatory recruitment procedure under statutory Rules not a mere irregularity but goes to root—Appointments made dehors Rules liable to be set aside—(Paras 3, 14)

Equitable Relief—Recovery of Salary— Where appointments were illegal but employees not guilty of fraud or misrepresentation and irregularity attributable to employer—Recovery of salary received during service would be inequitable—Particularly in case of lower cadre employees—Recovery barred on principles of equity and good conscience. (Paras 15, 18)

In Result— Cancellation of appointments upheld; however, recovery of salary and benefits received by petitioners disallowed. (Paras 19, 20)

Cases cited

Chiraunji Lal Yadav Vs. State of U.P. and others
Brij Bhushan Chaudhary and others Vs. State of U.P.
State of Punjab and others Vs. Rafiq Masih (White Washer)
Syed Abdul Qadir Vs. State of Bihar
Sahib Ram vs. State of Haryana1995 Supp. (1) SCC 18
Shyam Babu Verma vs. Union of India(1994) 2 SCC 521
Union of India vs. M. Bhaskar(1996) 4 SCC 416
V. Ganga Ram vs. Director(1997) 6 SCC 139
B.J. Akkara vs. Government of India(2006) 11 SCC 709
Purshottam Lal Das & Ors. vs. State of Bihar(2006) 11 SCC 492
Punjab National Bank Vs. Manjeet Singh(2006) 8 SCC 647
Bihar SEB Vs. Bijay Bahadur(2000) 10 SCC 99

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Vipin Kumar Saxena, learned counsel for the petitioners and Sri Yatindra, learned standing counsel for the respondents.

SUBMISSIONS:-

2. These writ petitions were heard together on 18.07.2016 and facts as well as submissions of learned counsels for the parties, were noted as under:

"Heard Sri Vipin Kumar Saxena, learned counsel for the petitioners and Sri Yatindra, learned standing counsel for the respondents.

Learned counsel for the parties jointly submit that the facts and controversy involved in all the above noted writ petitions, are similar in nature and, therefore, they may be heard together. Considering the aforesaid statement, these writ petitions are heard together with the consent of the learned counsel for the parties treating the Writ Petition No.15550 of 1985 as the leading writ petition.

In paragraph-6 of the leading writ petition, it is stated that pursuant to the Government Order dated 31.10.1984, the District Selection Committee was constituted and steps were taken to prepare the list for filling up the vacancy. In paragraph-7 of the said writ petition, it is stated that the petitioner of the said writ petition, was registered in the employment exchange and from where he received intimation to appear for interview on 27.03.1985 on which date, he appeared and a list of successful candidates was pasted on the Notice Board on 28.03.1985 in which the name of the petitioner finds mention. In paragraph-8 of the said writ petition, it is stated that by order dated 18.04.1985, the Regional Employment Officer, Agra intimated the petitioner

about his appointment in the office of the District Employment Officer, Etah as a peon in the pay-scale of Rs.305-5-330 EB-6-360- EB-6-390 on purely temporary basis. It is stated that the petitioner appeared and he was issued an ***appointment letter dated 18.04.1985****. In paragraph-9, it is stated that on 25.04.1985, the petitioner appeared before the Employment Officer, Etah and produced the relevant documents and he was appointed. In paragraph-14, it is stated that the District Magistrate, Etah issued directions by* ***letter dated 23.09.1985*** *for termination of services of the employees who were appointed prior to coming into force of the Rules dated 16.03.1985.*

Aggrieved with the termination order dated 23.09.1985, the petitioners have filed the present writ petitions.

Learned counsel for the petitioners submits that the appointments were made strictly in accordance with the provisions of the G.O. dated 31.10.1984. The Rules called "The Group 'D' Employees Services Rules 1985" dated 16.03.1985, were published on 31.08.1985. Thus, they come into force on 31.08.1985. Therefore, the appointments made prior to the coming into force of the aforesaid Rules, shall not be effected by the provisions of these Rules. He further submits that the Rules are prospective in nature and, therefore, they cannot be applied retrospectively. He also submits that no opportunity of hearing was afforded to the petitioners before terminating their services.

Learned standing counsel submits that Rule 1(2) of the Rules provides that the Rules shall come into force immediately. The Rules are dated 16.03.1985 and as such, they came into force immediately, i.e. w.e.f. 16.03.1985. Publication of the Rules in the Gazette on a subsequent date, cannot prevent its operation effective from 16.03.1985. He further submits that G.O. dated 31.10.1984 provides merely for constitution of District Level Committee, but the manner and mode of the selection etc. are to be governed by the Rules. The relevant Rules for the purpose are the aforesaid Rules of 1985 effective from 16.03.1985. Since the selections were made without following due procedure of law and the petitioners were allegedly appointed on 18.04.1985 while the Rules came into force on 16.03.1985 and as such, the cancellation of selection/ appointment of the petitioners, is wholly valid.

Learned counsel for the petitioners prays for adjournment to make his submissions on the question of coming into force of the Rules of 1985.

As prayed, put up on 20.07.2016 for further hearing."

3. Today, Sri Saxena submits that non-observance of the Rules in recruiting the petitioners in accordance with the government order, was merely an irregularity and for that reason, the selection and appointment of the petitioners cannot be said to be illegal or void. He further submits that since no fraud was practised by the petitioners to obtain the employment and as such merely because recruitment was not made in accordance with the Rules in force, neither post retirement benefits to those employees who have retired, can be denied nor salary received by the petitioners during continuance of interim order can be recovered. In support of his submissions, he relies upon

a decision in the case of **Chiraunji Lal Yadav Vs. State of U.P. and others, (2012) 3 UPLBEC 2072 (para-22).**

4. Sri Yatindra, learned standing counsel submits that the government order dated 31.10.1984 merely provides for constitution of committee, preparation of a list by that committee and to send it to the employment exchange. It does not provide for any recruitment or the procedure for recruitment. He further submits that the relevant Rules are Subordinate Officers, Ministerial Staff (Direct Recruitment) Rules 1985, dated 16.03.1985. As per Rule 1(2) of the Rules, the Rules shall be deemed to have come into force at once. He, therefore, submits that the Rules came into force w.e.f. 16.03.1985 which provide detailed procedure for recruitment including qualification and advertisement inviting applications, which has not been followed. The selection of the petitioner took place subsequent to the coming into force of the Rules and they were allegedly appointed on 18.04.1985 and as such the appointment of the petitioners being without following due procedure of law, is null and void. With regard to the enforceability, he submits that since the Rule 1(2) of the Rules provides that it shall come into force w.e.f. 16.03.1985. In support of his submissions, he relies upon a Full Bench judgment of **Brij Bhushan Chaudhary and others Vs. State of U.P., 2002 (2) ALJ 1907 (FB) (Para-60 & 61).**

Questions for Determination:-

5. Considering the submissions of learned counsel for the parties and with their consent, the following questions are framed for determination to resolve the controversy involved in these writ petitions:

(i) Whether the relevant Service Rules for recruitment became operative from 16.03.1985 inasmuch as Rule 1(2) of the Rules provides that "the Rules shall come in force at once" ?

(ii) Whether appointments of petitioners on 18.04.1985, were illegal due to non-observance of the Rules and, therefore the same were cancelled lawfully?

(iii) Whether State Government is entitled to recover salary and other benefits from the petitioners which were received by them during the pendency of the writ petition?

6. Since the facts and controversy involved in these writ petitions, are similar and therefore with the consent of the learned counsel for the parties, Writ-A No.15550 of 1985 is treated as a leading writ petition and the facts thereof are being noted.

FACTS OF THE CASE:-

7. Briefly stated, facts of the present case are that according to the petitioner, pursuant to a circular dated 30.10.1984; a District Selection Committee was constituted in District Etah to fill up vacancies of class-IV employees. The petitioner was registered with the employment exchange. He

received intimation from the employment exchange requiring him to appear for interview on 27.03.1985. On 28.03.1985, a list of successful candidates, was pasted on the notice board. It is alleged in paragraph-8 of the writ petition that by order dated 18.04.1985 issued by the Regional Employment Officer, Agra, the petitioner was appointed in the office of the District Employment Officer. It is alleged in paragraphs- 9 & 10 of the writ petition that on 25.04.1985, the petitioner appeared before the Employment Officer, Etah, along with relevant documents and he was appointed as a peon in the said department and since then, he is working as a peon. In paragraph-11, it is stated that to the utter surprise of the petitioner, a notice was pasted on the notice board intimating that the selection list has been cancelled by the District Magistrate and the proceedings for selection will now be started from 01.07.1985. It is alleged in paragraph-14 that on 23.09.1985, the District Magistrate issued directions to all the departments including the department of the petitioner that under the directions of Government, the service of the candidates may be terminated forthwith since all the selections made, were illegal as they were not in conformity with the Service Rules.

8. The respondents took the stand that directions were issued by the State Government for constitution of District Selection Committee mentioning that the Rules shall be sent separately. The Rules were framed by the State Government which came into force w.e.f. 16.03.1985. The Committee was mistakenly constituted before the Rules were enacted. It is stated in paragraph-4 of the counter affidavit that the constitution of committee and selection made in contravention of the Rules, were illegal and irregular, and the same were pointed by the then District Employment Officer, Etah to the District Magistrate, Etah and on this basis, the District Magistrate cancelled the list prepared by the District Selection Committee. In paragraph-5 of the counter affidavit, it is stated that the District Selection Committee and the Rules both ceased to operate in view of the decision of the State Government communicated by Radiogram dated 24.06.1986, that appointments shall now be made by the Departmental Selection Committee. The contents of paragraph-6 of the counter affidavit has been admitted by the petitioners in paragraphs-5 of the rejoinder affidavit but it is stated that the circular dated 01.07.1986 shall not apply to the petitioner which made it clear that vacancies existing upto 30.06.1986 shall be made from the list prepared by the District Selection Committee.

DISCUSSIONS AND FINDINGS:-

9. The Group 'D' Employees Service Rules, 1985 (hereinafter referred to as 'the Group 'D' Rules') and the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 (hereinafter referred to as 'the Ministerial Staff Rules'), both provide for sources of recruitment, qualifications, physical fitness, character, marital status, procedure for recruitment, procedure for selection and procedure for promotions and appointment. Both the Rules also deal with seniority and pay scale. Rule-2 of the **Ministerial Staff Rules** provides for application of the Rules. As per this provision, these Rules shall govern recruitment to all the ministerial posts of the lowest grade other than the post of stenographer, in all subordinate offices under the control of the Government excluding the Uttar Pradesh Secretariat , the Offices of the State Legislature, Lok Ayukt, Public Service Commission, High Court, the Sub-ordinate courts under the control and superintendence of High

Court, the Advocate General, Uttar Pradesh, and of the establishments under the control of the Advocate General. Rule 4(g) of the Ministerial Staff Rules defined the words "Ministerial Staff" to mean the clerical staff of the sub-ordinate offices, which is required to be appointed by direct recruitment.

10. Rule 2 of the **Group 'D' Rules** provides for application of the Rules. It provides that the Rules shall apply to all Group 'D' posts referred to in Rule 6 in all the sub-ordinate offices as defined in clause (h) of Rule 4. Rule 6 provides for source of recruitment to various categories of Group 'D' posts as under:

"6. Sources of recruitment.- The sources of recruitment to the various categories of Group 'D' posts shall be as follows:

(a)	Peon, Messenger, Chaukidar, Mali, Farrash, Sweeper, Waterman/ Bhisti, Tindal, Thelaman, Record Lifter and every other non-technical post.	By direct recruitment,
(b)	Peon-Jamadar	By promotion from amongst peons.
(c)	Daftri/ Bookbinder/ Cyclostyle Operator,	By promotion from amongst qualified peons, Messenger and Farrashs
(d)	Farrash Jamadar	By promotion from amongst permanent Farrashs
(e)	Sweeper Jamadar	By promotion from amongst permanent Sweepers
(f)	Head Mali	By promotion from amongst permanent Malis

Provided that where no eligible suitable candidate is available for promotion to a particular post which is required to be filled by promotion, the post may be filled by direct recruitment."

11. Clause-h of Rule 4 defines the words "Subordinate Offices" as under:

"(h) "Subordinate Officers" shall refer to all the offices under the control of the Government, excluding the Secretariat, Offices of State Legislature, Lok Ayukt, Public Service Commission, High Court, Subordinate Courts under the control and the superintendence of the High Court Advocate General and the establishments under the control of the Advocate General-"

12. Thus the **Group 'D' Rules were applicable for recruitment to the various categories of Group 'D' posts as mentioned in Rule-6.** The Ministerial Staff Rules shall apply to the clerical staff of the subordinate offices as provided in Rule 4(g) read with Rule 2 of the Ministerial Staff Rules. Rule 1(2) of the Group 'D' Rules reads as under:

"They shall Come into force at once."

13. Since the Group 'D' Rules provide for coming into force at once and as such the Rules became operative from the date of notification, i.e. 16.03.1985.

Questions No. (i) Whether the relevant Service Rules for recruitment became operative from 16.03.1985 inasmuch as Rule 1(2) of the Rules provides that "the Rules shall come in force at once"?

AND

Questions No. (ii) Whether appointments of petitioners on 18.04.1985, were illegal due to non-observance of the Rules and, therefore the same were cancelled lawfully?

14. The Group 'D' Rules enacted by the State Government vide Notification No.20/3/82-I-Personnel-2-85 dated 16.03.1985 came into force at once as per Rule 1(2). It provides complete procedure for recruitment. The Rules were in force on 27.03.1985 when the petitioners allegedly received a letter from the Employment Exchange for interview, on 28.03.1985 when a list of successful candidates was allegedly pasted on the notice board and also on 18.04.1985 when they were allegedly appointed. Thus procedure for recruitment as provided in the Rules including the procedure for selection and preparation of list under Rules 19 and 21, were not followed. Consequently, the appointment of the petitioners were not valid since they were appointed without following due procedure of law. Under the circumstances, I do not find any good reason to interfere with the impugned orders.

Question No. (iii) Whether State Government is entitled to recover salary and other benefits from the petitioners which were received by them during the pendency of the writ petition?

15. It is not the case of the respondents that illegalities in the appointments of the petitioners was on account of any fraud, collusion or fault of the petitioners. There was no misrepresentation on the part of the petitioners to obtain appointments. Appointments made in breach of Rules, were the result of mistake of the respondents which was not even within the

knowledge of the petitioners. The respondent No.1 has not taken any action against the officers who mistakenly made the appointments without following the Rules. The respondents filed counter affidavit along with stay vacation application dated 27.10.1986 but the order sheet shows that they never pursued their stay vacation application. Thus, on the peculiar facts of the present cases, I do not find it equitable to permit the respondents to recover salary and other benefits received by the petitioners during the period they worked/ remained in employment.

16. In the case of **State of Punjab and others etc. Vs. Rafiq Masih (White Washer) ETC. (2015) 4 SCC 334**, Hon'ble Supreme Court considered the principles of equity and good conscience in recovery of payments mistakenly made by employer from employees belonging to class-III and class-IV service (Gorup 'C' and Group 'D' Service) and held as under:

"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. ***As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.***

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "fundamental rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39,

39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group C and Group D service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(emphasis supplied by me)

17. In the case of **Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475** (Para-58), Hon'ble Supreme Court held that the relief against recovery is granted by courts not because of any rights in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardships that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. Similar views have also been expressed by Hon'ble Suprement Court in **Sahib Ram vs. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma vs. Union of India, (1994) 2 SCC 521, Union of India vs. M. Bhaskar, (1996) 4 SCC 416, V. Ganga Ram vs. Director, (1997) 6 SCC 139, B.J. Akkara vs. Government of India (2006) 11 SCC 709, Purshottam Lal Das & Ors., vs. State of Bihar, (2006) 11 SCC 492; Punjab National Bank Vs. Manjeet Singh, (2006) 8 SCC 647, and Bihar SEB Vs. Bijay Bahadur (2000) 10 SCC 99.**

18. Considering the facts of the case of the petitioners, the findings recorded in Para-15 above and the law laid down by Hon'ble Supreme Court in the afore-noted judgments, I find that it would be iniquitous, more unfair and unwarranted to permit the respondents to recover the payments made to the petitioners for the period they worked/ remained in employment.

19. In view of the aforesaid, the impugned order cancelling appointment of the petitioners, is upheld. However on facts, it is directed that salary and other benefits received by the petitioners from the respondents shall not be recovered from them.

20. All the Writ Petitions are disposed of and interim orders are vacated. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 16115 Of 2002

Upbhokta Sanrakshan Evam Awas Vikas Samiti ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
C.B. Yadav, Dhruv Agarwal, Kshitij Shailendra, Manu Khare, Monu Agarwal, Nikhil Agarwal, Shwetashwa Agarwal

Counsel for the Respondents:
C.S.C., M. D. Singh Shekhar, R.D. Tiwari, Rajendra Kumar Mishra, Shivam Yadav

Land Acquisition Act, 1894—Ss. 4, 5-A, 6 & 17(1), (4)—Urgency clause—Dispensation of enquiry under S. 5-A—Validity— Right to file objections under S. 5-A is a substantial and valuable right embodying principles of natural justice—Dispensation permissible only in cases of real and genuine urgency—Mere recital of "public purpose" or "planned industrial development" not sufficient—State must place material to justify application of mind and existence of urgency—Failure to disclose any such material renders invocation of S. 17(4) arbitrary and illegal—Impugned notifications dispensing with enquiry held unsustainable. (Paras 16, 21, 24, 29)
Land Acquisition—Urgency power—Scope and limits— Power under S. 17 is exceptional and not to be exercised routinely—Delay in development schemes ordinarily negates claim of urgency—Government must demonstrate that even minimal delay for S. 5-A enquiry would frustrate public purpose—Absence of such circumstances vitiates acquisition—(Paras 24–26, 29)
Natural Justice—Right of hearing—Compulsory acquisition— Deprivation of property without hearing is permissible only in exceptional cases of real urgency—S. 5-A enquiry is integral safeguard and cannot be dispensed with mechanically—Arbitrary exclusion violates statutory and constitutional protections—(Paras 16, 19, 28)
Land Acquisition—Partial challenge—Maintainability— Challenge to acquisition fails in respect of land already acquired under earlier notifications not impugned—Court confines scrutiny to impugned notifications only—(Paras 9, 30)
In Result— Writ petition partly allowed—Acquisition proceedings upheld for plots already acquired earlier—Impugned notifications quashed to the extent they dispense with S. 5-A enquiry in respect of remaining plots—Authorities permitted to proceed afresh from stage of S. 5-A enquiry. (Para 30)

Cases cited:

Nandeshwar Prasad vs. U.P. GovernmentAIR 1964 SC 1217
Munshi Singh and others vs. Union of India(1973) 2 SCC 337
State of Punjab vs. Gurnail Singh and others1980 (1) SCC 471
Shyam Nandan Prasad and others vs. State of Bihar and others(1993) 4 SCC 255
Union of India and others vs. Mukesh Hans(2004) 8 SCC 14
Hindustan Petroleum Corporation Ltd. vs Darius Shapur Chenai & Ors(2005) 7 SCC 627
Essco Fabs Pvt. Ltd. & Anr vs State Of Haryana & Anr(2009) 2 SCC 377
Anand Singh and another vs. State of U.P. and others(2010) 11 SCC 242
Radhe Shyam (Dead) through Lrs. and others vs. State of U.P. and others2011(5) SCC 553
Darshan Lal Nagpal (Dead) By Lrs. vs. Govt. of NCT of Delhi and others(2012) 2 SCC 327
Union of India and others vs. Shiv Raj and others2014 (6) SCC 564

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

1. Heard Sri Shwetashwa Agarwal, learned Counsel for petitioner, Sri Ravi Kant, learned Senior Advocate, assisted by Sri Shivam Yadav, Advocate, for New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA"); and learned Standing Counsel for State-respondents.

2. Petitioner, Upbhokta Sanrakshan Evam Awas Vikas Samiti, Hajipur, District Gautambudh Nagar (hereinafter referred to as "Society") is a Society registered under the

provisions of Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860"). It purchased 49 bigha land bearing Khatas No. 103, 275, 276, 280, 281, 446, 447, 448, 449, 450, 451, 452 and 463 vide various sale-deeds of the same date, i.e., 22.10.1981, from different farmers. Society requested NOIDA, a body constituted under U.P. Industrial Area Development Act, 1976 (hereinafter referred to as "Act, 1976"), to grant no-objection so that land purchased by petitioner may be allotted to its members. NOIDA did not act on the said request and on the contrary, on a request made by NOIDA, State Government issued Notification dated 28.11.2001 under Section 4(1) of Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894") proposing to acquire 205-625 acres of land in Village Hajipur, Tehsil and Pergana Dadari, District Gautambudh Nagar, which included petitioners' land also. State Government also exercised its power under Section 17 (1) and (4) of Act, 1894 stating that there is an urgency, therefore, enquiry under Section 5A shall stand dispensed with. Thereafter, declaration under Section 6 was issued vide Notification dated 26.02.2002. Both these Notifications have been challenged on the ground that dispensation of enquiry under Section 5A is illegal, there existed no urgency and there is no material to justify the same. It is further said that land was purchased by petitioner for the purpose of allotting the same to its members for constructing residential buildings, and, that being so, there was no justification for respondents to acquire the said land for the same purpose.

3. A Bench constituting of Hon'ble P.C. Verma and Hon'ble Rajesh Chandra, J.J. disposed of this Writ Petition of vide judgment dated 10.12.2009 referring to decision in Ghaziabad Sheromani Sahkari Avas Samiti Ltd. and another etc. Vs. State of U.P. and others 1990 (1) SCC 583 and directing respondents to allot 90 square meters of land to each member of petitioner-Society in any Housing Scheme, convenient to them, after verifying correct number of genuine members in accordance with bye-laws and regulations. This order was passed on a statement made by learned counsel for petitioner that he is waiving all the reliefs sought in the writ petition except that members of Society (210 in all) be allotted land in any other scheme of NOIDA. This judgment was taken in appeal by NOIDA, i.e. Civil Appeals No. 10119-10120 of 2011. Supreme Court vide judgment dated 25.11.2011 has set aside the aforesaid judgment observing as under:

"We have heard learned counsel for the parties and examined the record. In our view, ***the direction given by the High Court for allotment of 90 sq. mets. plots to all the members of respondent No. 1 is legally unsustainable****. Admittedly, the State Government had acquired the land for Planned Industrial Development****. The development plan prepared by NOIDA does not envisage allotment of plots for residential purposes. Therefore, the High Court was not at all justified in ordaining allotment of plots to the members of respondent No. 1****.*

Learned counsel for respondent No. 1 submits that if this Court is inclined to set aside the impugned orders, liberty may be given to his client to press its challenge to the acquisition proceedings on merits. Learned counsel for the appellant says that he does not have any objection if leave is granted to respondent No. 1 to resurrect its challenge to the acquisition proceedings.

In the result, the appeals are allowed. The impugned orders are set aside and the matter is remitted to the High Court for fresh disposal of the writ petition on merits.

Since majority of the members of respondent No. 1 are quite old, we request the High Court to make an endeavour to dispose of the writ petition as early as possible but latest within six months from the date of receipt of copy of this order. As soon as the copy of this order is received, the Registrar (Judicial), the High Court of Allahabad shall place the matter before Hon'ble the Chief Justice for appropriate direction."

(emphasis added)

4. After change of roster on 28.03.2016, in view of Hon'ble Chief Justice's administrative order dated 16.12.2013, this matter has come up before us on 04.04.2016. We have heard learned counsels for parties and we proceed to decide this matter finally.

5. The principal argument assailing acquisition Notifications is in regard to dispensation of enquiry under Section 5A by taking recourse to Section 17(1) and (4) of Act, 1894 and the submission is that neither there existed any actual urgency nor there is any material to justify exercise of power under Section 17(4). State Government has exercised its power of dispensation of enquiry in a mechanical manner without applying its mind. Enquiry under Section 5A provides a substantial right of hearing to land owners which is consistent with the principles of natural justice and such a right can be deprived only when there is actual urgency and not in a slipshod manner. The land in question was purchased by petitioner for residential accommodations to be constructed by members of Society and for the same purpose, NOIDA has proposed to acquire the land. Hence, there is no justification to deprive petitioner from development of land for the benefit of its members. NOIDA itself is not undertaking any development activity, and, in fact, allotting land to Builders and Colonizers. In effect the acquisition in question is for the benefit of private individuals, hence, even otherwise, it is bad being a colourable exercise of power by respondents.

6. Respondents have contested the matter on various grounds. In the counter affidavit filed on behalf of NOIDA, it is said that petitioner has clubbed, illegally, several plots, inasmuch some plots were already acquired by NOIDA as long back as in 1992 and 1994 and numbers of such plots have also been mentioned in the writ petition. The impugned acquisition Notifications have no concern to the said plot numbers, namely, Plots No. 103, 275, 276, 280 and 281. The acquisition Notifications impugned in the writ petition, i.e., 28.11.2001 and 26.02.2002 involve petitioners' Plots No. 446, 452 and 463. Possession of all these plots has already been taken by respondents vide transfer memo dated 23.03.2002.

7. In the counter affidavits and supplementary counter affidavits filed by respondents, on the question of urgency they have not said anything, whatsoever, except that NOIDA is an authority constituted under Act, 1976 and entitled to take 'Planned Industrial Development' and to acquire required area of land for that purpose under the provisions of Act, 1894. Issuance of acquisition Notifications under Section 4 and 6 on 28.11.2001 and 26.02.2002 are admitted but why dispensation of enquiry under Section 5A was found necessary and what was the urgency, in

this regard nothing has been said, except that since acquisition was necessary in public interest for planned industrial development, therefore enquiry has been dispensed with.

8. The reply is extremely vague, and, in fact, does not constitute any reply, whatsoever. It is in this backdrop, we have to examine challenge to impugned Notifications.

9. Before proceeding in this regard we may make it clear that impugned Notifications nowhere mention or refer to Plots no. 103, 275, 276, 280 and 281. On the contrary, from Annexures CA-1, CA-2 and CA-3 to the counter affidavit filed by NOIDA, we find that these plots were acquired by a Notification issued under Section 4(1), dated 06.01.1992, published in U.P. Gazette dated 15.02.1992 and declaration under Section 6 was published vide Notification dated 22.09.1992 (published in U.P. Gazette dated 28.11.1992). Possession of said land was taken by State and transferred to NOIDA on 18.03.1994. The Notifications dated 06.01.1992 and 22.09.1992 are not under challenge. Therefore, this writ petition is bound to fail so far as it challenges acquisition proceedings in respect to Plots No. 103, 275, 276, 280 and 281.

10. Now we are confining our scrutiny to the correctness of impugned Notifications dated 28.11.2001 and 26.02.2002 to the extent of Plots No. 446, 452 and 463. The question is, "whether dispensation of enquiry under Section 5A by exercising power under Section 17(1) and (4) is justified or not".

11. Section 5-A was inserted in Act, 1894 as long back as in 1923, by Act No. 38 of 1923. There are minor amendments made subsequently but substance of provision has remained the same.

12. Normal procedure of acquisition is that a proposal of acquisition is published in notification under Section 4 of Act, 1894. Land owners whose land is proposed to be acquired, are given an opportunity to make their objections. Collector is under an obligation to consider objections and also offer an opportunity of hearing to objectors and thereafter submit a report to Government containing his recommendations on the objections, for decision of Government. After considering the report and other material, Government make declaration that land is proposed to be acquired for public purpose and this is done by publication of notification under Section 6. Therefore, there is possibility of some difference in details of land stated in the notification issued under Section 4 and finally declared land, as acquired for public purpose, detailed in notification under Section 6.

13. Collector is then authorised to take order for acquisition and under Section 8 is supposed to mark, measure and plan the acquired land. A notice thereafter is issued under Section 9 to Land Owners by Collector notifying his intention of taking possession of land and that the claim for compensation be submitted to him. Under Section 11, Collector makes enquiry for determining amount of compensation payable to land owners, whose land has been acquired, and make award. After payment of compensation, Collector takes possession of land.

14. There is an exception to normal procedure of taking possession which is contained in Section 17 of Act 1894. It says that in case of urgency, even though no award has been made, Government can direct Collector to take possession of any land, needed for public purpose, and on such possession being taken by Collector, land shall vest absolutely with the Government free from all encumbrances. Section 17(4) provides, where such urgency for the purpose of possession is to be acted upon, Government, shall declare that provision of Section 5-A shall not apply.

15. The circumstances, when Government would be justified to dispense with enquiry under Section 5-A while invoking urgency clause under Section 17, for the purpose of taking possession, has been considered in a catena of decisions in last several decades and it would be useful to refer some relevant authorities in this regard.

16. Right to file objection against proposal of acquisition of land published under Section 4 is a substantial right, consistent with principle of natural justice, since forcible acquisition of land, without consent of land owners, is a serious matter.

17. In **Nandeshwar Prasad vs. U.P. Government AIR 1964 SC 1217**, Court said *"the right to file objection under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side wind"*.

18. In **Munshi Singh and others vs. Union of India (1973) 2 SCC 337**, which is a decision of three judges bench, Court stressed upon and emphasized upon an inbuilt legislative recognition of principle of natural justice in Section 5-A and said *"Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. ..... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A"*.

19. In **State of Punjab vs. Gurnail Singh and others 1980 (1) SCC 471** it was held that it is fundamental that compulsory taking of a man's property is a serious matter and smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness. Denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of Act, 1894. A slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes travesty of emergency power.

20. In **Shyam Nandan Prasad and others vs. State of Bihar and others (1993) 4 SCC 255** reiterating that section 5-A is mandatory, Court said *"the proceeding before the Collector is a blend of public and individual enquiry"*.

21. In **Union of India and others vs. Mukesh Hans (2004) 8 SCC 14**, Court held that Section 17(4) is an exception to normal mode of acquisition. Mere existence of urgency or unforeseen emergency by itself is not sufficient to direct for dispensation of Section 5-A. Court reiterated that there must be real existing emergency for which an opinion must be formed by the Government, objectively. Court said *"It requires an opinion to be formed by concerned government that along with existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A enquiry, which indicates that the legislature intended that the appropriate government to apply its mind before dispensing with Section 5-A enquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by itself be sufficient for dispensing with Section 5-A enquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A enquiry will be dispensed with, but then that is not language of the Section which, in our opinion, requires the appropriate Government to further consider the need for dispensing with Section 5-A enquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5-A inquiry does not mean that in every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with Section 5-A enquiry. ..... There is need for application of mind by appropriate Government that such an urgency for dispensing of Section 5-A enquiry is inherent ..... ."*

22. In **Hindustan Petroleum Corporation Ltd. vs Darius Shapur Chenai & Ors (2005) 7 SCC 627** it was held that the provisions of Section 5-A of Act, 1894 must be read consistent with Article 300-A of the Constitution and it is akin to fundamental right of procedure before depriving a persons of his land, and must be strictly complied with.

23. In **Essco Fabs Pvt. Ltd. & Anr vs State Of Haryana & Anr (2009) 2 SCC 377** it was held that enquiry should not be dispensed with lightly.

24. In **Anand Singh and another vs. State of U.P. and others (2010) 11 SCC 242** Court considered as to when State would be justified in invoking power under Section 17(4) for acquisition of land and dispensing with enquiry under Section 5-A so as to take possession immediately. It is said that power under Section 17 is not to be exercised in a routine manner. It would be justified only when circumstances warrant immediate possession. It should not be lightly invoked. It is an exceptional power enabling land acquiring body to dispense with enquiry under Section 5-A. Government must apply its mind before dispensing with enquiry under Section 5-A whether urgency is of such a nature that justifies elimination of summary enquiry under Section 5-

A. The mere mention of words in acquisition notification that Government is satisfied about urgency and dispensing with enquiry under Section 5-A may raise a presumption in favour of Government that pre-requisite conditions for exercise of such power are satisfied but when challenged, Government has to produce relevant material before Court to show existence of such circumstances, which justify dispensation of inquiry and avail an exceptional power under Section 17. Court further said *"upon challenge being made to the use of power under Section 17 the Government must produce appropriate material before the Court that the opinion for dispensing with enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it"*.

25. With regard to judicial review of exercise of power, Court in **Anand Singh and another (Supra)** further said in paras 45, 46, 47 and 48 as under :

"45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary."

"46. As to in what circumstances the power of emergency can be invoked are specified in Section 17 (2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of land owners/persons interested may not be considered. In many cases on general assumption, likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously."

47. The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that decision in Pista Devi must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree."

"48. As regards the issue whether pre- notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact-situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate government

before the court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."

26. In **Radhe Shyam (Dead) through Lrs. and others vs. State of U.P. and others 2011(5) SCC 553** it was reiterated that property of a citizen cannot be acquired by State without complying with the mandate of Sections 4, 5-A and 6 of Act, 1894. A public purpose however, loudable would not entitle Government to invoke urgency provisions, since the same have the effect of depriving owner of his right to property and that too without being heard. Only in a case of real urgency, Government would be justified in invoking urgency provisions. Section 17 must have been invoked only when purpose of acquisition cannot brook the delay of even few weeks or months. The authority must be fully satisfied that time of few weeks or months likely to be taken in conducting enquiry under Section 5-A shall, in all probability, frustrate the public purpose for which land is proposed to be acquired. Satisfaction of Government on issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and can be challenged on the ground that authority did not apply its mind to relevant factors, and on record, there is no material justifying existence of alleged urgency. It also held that exercise of power under Section 17(1) necessarily does not result in exclusion of Section 5-A, inasmuch as, the person concerned can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-Section (4) of Section 17 shows that it merely enables Government to direct that Section 5-A would not apply to the cases covered under Sections (1) or (2) of Section 17. Therefore, mere fact that certain purposes may be treated as public purpose for purpose of acquisition but that by itself would not mean that there exists urgency to dispense with inquiry unless the circumstances actually and really are in existence to show that delay in taking possession would be adverse to public interest. It also held that Court can take judicial notice of the fact that for planning, execution and implementation of scheme relating to development of residential, commercial and industrial or institutional areas, Government takes few years, therefore, in such cases private property should not be acquired by invoking urgency clause as denial of Rule of audi alteram partem embodied in Section 5-A is not at all warranted in such cases.

27. In **Darshan Lal Nagpal (Dead) By Lrs. vs. Govt. of NCT of Delhi and others (2012) 2 SCC 327** after having retrospection of some of authorities on the subject, Court in para 28 of the judgment stated as under :

"What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law - Article 300-A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing."

28. In **Union of India and others vs. Shiv Raj and others 2014 (6) SCC 564**, Court in para 15 said that Section 5-A confers a valuable right on the owner of land and it is not an empty formality. It is a substantive right, which can be taken away only for good and valid reasons and within the limitations prescribed under Section 17(4) of Act, 1894.

29. Now examining the factum of existence of urgency in the case in hand, we find that respondents have not cared to place anything before us to justify that there existed real urgency for acquisition and possession of acquired land, justifying dispensation of enquiry under Section 5A. In fact, except repeating that acquisition has been made in public interest and for 'Planned Industrial Development', no factual foundation has been placed on record either by means of affidavits or by placing original relevant record for our perusal. Respondents, in fact, have not made any attempt to justify dispensation of enquiry by showing that there actually existed such circumstances and real urgency which necessitated exercise of power under Section 17 to dispense with enquiry under Section 5A. In view thereof, we have no manner of doubt that dispensation of enquiry under Section 5A in the present case is nothing but arbitrary, illegal and a colourable exercise of power. Impugned Notifications dated 28.11.2001 and 26.02.2002 so far as they dispense with enquiry under Section 5A of Act, 1894, cannot be sustained.

30. The writ petition is partly allowed. In respect of the claim of petitioners Plots no. 103, 275, 276, 280 and 281, writ petition fails and is dismissed. However, impugned Notifications, to the extent the same relate to Plots no. 446, 452 and 463, in so far as Section 17 has been invoked and enquiry under Section 5-A has been dispensed with, are hereby quashed. If respondents still require land in dispute, they may proceed from stage of making enquiry under Section 5-A of Act, 1894 after giving public notice to landowners, inviting objections and thereafter take appropriate action as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 17029 Of 2008
&
Connected With Other Cases

Aakash Education Society Chithera ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Uma Nath Pandey, Pradeep Kumar

Counsel for the Respondents:
C.S.C., Anurag Khanna, Ashish Mohan Srivastava, Pankaj Dubey, Ramendra Pratap Singh, S.K. Mishra, Satish Chaturvedi, Siddhartha Verma.

Subsequent purchaser—Locus standi—Held, purchasers acquiring land after publication of notification under Section 4(1) have no right to challenge acquisition proceedings and can only claim compensation—Such transactions do not bind the State—Hence, writ petitions to that extent not maintainable—Urgency clause—Dispensation of inquiry under Section 5-A is an exception and cannot be invoked mechanically—Right to object under Section 5-A is a valuable and substantive right embodying principles of natural justice—Existence of real urgency must be demonstrated on objective material—Mechanical invocation of Section 17(4) without genuine urgency vitiates acquisition—Court reiterated settled principles governing urgency and protection of landowners' rights.

Result — petition dismissed.

Case cited

U.P. Jal Nigam Vs. Kalra Properties Pvt. Ltd. (1996) 3 SCC 124
Sneh Prabha Vs. State of U.P. (1996) 7 SCC 426
Ajay Krishan Shinghal etc. Vs. Union of India and others (1996) 10 SCC 721
State of U.P. Vs. Smt. Pista Devi and others AIR 1986 SC 2025
Gian Chand Vs. Gopala and others (1995) 2 SCC 528
Mahavir and another Vs. Rural Institute, Amravati and another (1995) 5 SCC 335
Laxmi Engineering Works Vs. P.S.G. Industrial Institute (1995) 3 SCC 583
Star Wire (India) Ltd. Vs. State of Haryana and others (1996) 11 SCC 698
Meera Sahni Vs. Lieutenant Governor of Delhi and others (2008) 9 SCC 177
Bangalore Development Authority Vs. Vijaya Leasing Ltd. (2013) 14 SCC 737
Pandit Leela Ram Vs. Union of India AIR 1975 SC 2112
V. Chandrasekaran and another Vs. Administrative Officer and others (2012) 12 SCC 133
Nandeshwar Prasad Vs. U.P. Government AIR 1964 SC 1217
Munshi Singh and others Vs. Union of India (1973) 2 SCC 337
State of Punjab Vs. Gurnail Singh and others (1980) 1 SCC 471
Shyam Nandan Prasad and others Vs. State of Bihar and others (1993) 4 SCC 255
Union of India and others Vs. Mukesh Hans (2004) 8 SCC 14

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

1. These writ petitions have been filed by Aakash Education Society, Chithera and other petitioners assailing notifications dated 19.01.2007 published under Section 4(1) of Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894'); and dated 11.07.2007 published under Section 6 of Act, 1894, proposing to acquire 87.249 hectare (215.592 acres) of land in village Chithera, Pargana Dadari, District Gautambudh Nagar comprising a large number of plots owned by petitioners. Land is proposed to be acquired at the instance of and for the benefit of U.P. State Industrial Development Corporation, Kanpur (hereinafter referred to as 'UPSIDC'). State Government has also invoked power under Section 17(1) and (4) and eliminated inquiry under Section 5A of Act, 1894.

2. Counsel for parties stated that issues raised in all these writ petitions are common, therefore, for the purpose of referring pleadings, parties have agreed to refer leading Writ Petitions no. 17029 of 2008 (Aakash Education Society Chithera vs. State of U.P. and others). Hence, we are proceeding to discuss the matter after referring pleadings in Writ Petition no.17029 of 2008. However, in order to show details of land acquired in other connected writ petitions we may give brief details in the form of chart as under and thereafter, shall proceed to discuss entire matter with reference to leading Writ Petition no. 17029 of 2008.

Sl. No.	Writ petition No.	Petitioner/ Claimant	Plot no.	Area (in hectare	Sale deed / gift deed	Date of mutation
1	2	3	4	5	6	7
1	21078/08	Rohtash Kumar	1005	0.2910		12.10.2006
2	23948/08	Mahendra Pal Singh	1051 M 1051 M	0.107 0.228	1990	03.11.2007 03.11.2007
3	24150/08	1. Mahendra Singh 2. Ravindra Singh 3. Smt. Ram Rati 4. Krishna Singh 5. Bharat Singh	1052M	1.084	Ancestral	26.12.2006 on the basis of succession of late Balvir
4	24152/08	1. Ram Pal Singh 2. Charan Singh	1049	0.4430	Ancestral	
5	27115/08	1. Rampal Singh 2.Charan Singh	1051M	1.0250	05.07.1986	04.09.2006
6	49767/08	All India Rehabilitation Education Society	1007/2	1.628 (5-14-8) b	28.12.2002 09.08.2002 26.12.2002 31.12.2002	03.06.2003
7	54286/08	1. Ram Veer Singh 2. Sri Ram Sharma 3. Ram Das	1050	0.1390		27.07.2007
8	54287/08	Kishnu	1051M	0.6070	03.07.1973	
9	20991/09	1.Gajendra Singh 2.Virendra Singh 3. Ram Prasad	1051M	0.1112	19/06/75	07.08.1976

3. Brief facts giving rise to leading petition are that petitioner M/s Akash Education Society is a Society registered under Societies Registration Act, 1860 (hereinafter referred to as 'Act, 1860'). Its title has now changed as "R.V. Higher Education and Technical Institution", Chithera, Dadari, Gautambudh Nagar. Petitioner Society owns land comprising of Plots no.1040, 1041, 1042, 1044, 1045, 1046, 1047, 1048, 1049 and 1051. It is running an educational institution having raised construction over land bearings plots no. 1046, 1047 and 1048. Land has been mutated in the name of petitioner. It has started one year course of B.Ed after approval granted by National Council for Teacher Education vide letter dated 28th August, 2004 to which State Government also issued "no objection certificate" on 10th February, 2005. Aforesaid course is affiliated to Chaudhari Charan Singh University, Meerut, affiliation to which has been granted vide Vice Chancellor's order dated 19.06.2006. Petitioner has also been granted approval by All India Council for Technical Education for running B. Pharmacy Course since academic year 2006-2007.

4. Government issued notification, aforesaid, proposing to acquire land for public purpose namely "Planned Industrial Development" through UPSIDC at Gautambudh Nagar, though Society's land has already been utilised for industrial development by running professional, technical and educational institutions.

5. Acquisition proceedings have been challenged on the ground that dispensation of inquiry under Section 5A is wholly arbitrary inasmuch as there is no urgency whatsoever, hence Section 5A has been illegally dispensed with. Denial of opportunity to file objections by land owners is illegal and there is no material to demonstrate that there existed such an urgency so as to justify dispensation of inquiry under Section 5A of Act, 1894.

6. UPSIDC is a company owned by State of U.P., hence provisions of Part VII of Act, 1894 are attracted but no inquiry under Land Acquisition (Companies) Rules, 1963 (hereinafter referred to as 'Rules, 1963') has been carried out before issuing impugned notifications. Villages in which proposed acquired land is situated, are part of New Okhala Industrial Development Authority (hereinafter referred to as 'NOIDA'), a body constituted under U.P. Industrial Development Act, 1976 (hereinafter referred to as ' Act, 1976') and no development of land etc. is permissible without permission of such authority but no approval or permission of NOIDA has been obtained.

7. Petitioner-Society has filed a supplementary affidavit sworn on 11th February, 2014 stating that earlier some documents were not available, hence the same could not be appended along with writ petition. Now it has got, therefore, filing supplementary affidavit. Land in question was acquired for the benefit of a private company i.e. "M/s Shiv Nadar Foundation". Proposal for acquisition for benefit of respondent-4 was initiated by UPSIDC vide letter dated 10.06.2006. Additional District Magistrate (Land Acquisition) [hereinafter referred to as 'ADM(LA)'] vide letter dated 15.06.2006 required UPSIDC to deposit 10% tentative compensation and 10% acquisition expenses. UPSIDC sent a letter dated 19.06.2006 asking details of demand. ADM(LA) vide letter dated 26.08.2006 raised objection that proposal was not made in prescribed format. No report of Land Selection Committee was appended. Purpose of acquisition was not mentioned and there are

other defects. UPSIDC vide letter dated 30.08.2006 replied that acquisition is proposed for benefit of S.S.N. Educational and Charitable Trust who has selected the land. Again a letter dated 31.08.2006 was sent by ADM(LA) raising objections. Thereafter, Collector sent proposal vide letter dated 10.11.2006 to State Government for issuance of notification under Sections 4(1) read with 17(4) of Act, 1894. State Government deputed UPSIDC to take step for publication of notification in two daily newspapers pursuant whereto, UPSIDC deputed Administrative Officer and HCL company for taking steps for such publication vide letter dated 08.02.2007.

8. UPSIDC vide letter dated 16.04.2007 requested its Head Office to forward rehabilitation amount against proposal of acquisition of land to Revenue Authorities. Rehabilitation amount was remitted by UPSIDC to ADM(LA) vide letter dated 05.04.2007.

9. With respect to purchase of land in dispute, details have been given by petitioner society in paragraph 18 to 26 of supplementary affidavit which are as under:

"18. *That, the land of Khasra No.1040 area 0.1265 hectare has been purchased by the petitioner vide* ***sale deed dated 05.06.2006****. for ready reference, a true copy of the sale deed dated 05.06.2006 regarding Khasra No.1040 is being annexed herewith and marked as Annexure No.SA-11 to this affidavit.*

19. That, the land of Khasra No.1044 area 0.550 hectare has been gifted by the original tenure holder vide ***registered gift deed dated 22.12.2003*** *and the name of petitioner has been recorded in the revenue record vide order of Niab Tehsildar dated 27.10.2005. For ready reference, a photostate copy of the Khatauni of Khasra No.1044 is being annexed herewith and marked as Annexure No.SA-12 to this Affidavit.*

20. That, the land of Khasra No.1049 has been purchased by two separate ***sale deed dated 04.09.2006 and 03.02.2007*** *and the name of petitioner has been recorded in the revenue record vide order of Niab Tehsildar dated 07.03.2008 and 22.03.2010. For ready reference, a photostat copy of the Khatauni of Khasra No.1049 is being annexed herewith and marked as Annexure No.SA-13 to this affidavit.*

The aforesaid land of Khasra No.1040, 1044 and 1049 has been purchased prior to publication of notification under Section 4(1) read with 17(4) of the Land Acquisition Act.

21. That, the part of the land of Khasra No.1040 area 0.1265 hectare was purchased vide ***sale deed dated 18.07.2007*** *and name of petitioner has been mutated in revenue record vide order of Naib Tehsildar dated 24.08.2007. For ready reference, a photostat copy of the Khatauni of Khasra No.1040 is being annexed herewith and marked as Annexure No.SA-14 to this affidavit.*

22. That, the land of Khasra No.1041 area 0.2887 hectare has been purchased by the petitioner vide ***sale deed dated 14.09.2007*** *and the name of petitioner has been recorded in the*

revenue record vide order of Niab Tehsildar dated 01.10.2007. for ready reference, a photostat copy of the Khatauni of Khasra No.1041 is being annexed herewith and marked as Annexure No.SA-15 to this affidavit.

23. That, the land of Khasra No.1042 area 0.0380 hectare has been purchased by the petitioner vide ***sale deed dated 14.09.2007*** *and the name of petitioner has been recorded in the revenue record vide order of Niab Tehsildar dated 01.10.2007. For ready reference, a photostat copy of the Khatauni of Khasra No.1042 is being annexed herewith and marked as Annexure No.SA-16 to this affidavit.*

24. That, the remaining part of the Khasra No.1044 has been purchased by petitioner vide ***sale deed dated 01.09.2007*** *and the name of petitioner has been recorded in the revenue record vide order of Niab Tehsildar dated 18.10.2007. For ready reference, a photostat copy of the Khatauni of Khasra No.1044 is being annexed herewith and marked as Annexure No.SA-17 to this affidavit.*

25. That, the land of Khasra No. 1045 has been purchased by two ***separate sale deed dated 14.11.2007 and 15.12.2007*** *and the name of petitioner has been recorded in the revenue record vide order of Niab Tehsildar dated 26.12.2007 and 19.03.2008. For ready reference, a photostat copy of the Khatauni of Khasra No.1045 are being annexed herewith and marked as Annexure No.SA-18 collectively to this affidavit.*

26. That, the land of Khasra No.1051 has been purchased by two separate ***sale deed dated 22.09.2007 and 10.09.2007*** *and the name of petitioner has already been recorded in the revenue record vide order of Naiab Tehsildar dated 01.11.2007 and 04.11.2007. For ready reference, a photostat copy of the Khatauni of Khasra No.1051 are being annexed herewith and marked as Annexure No.SA-19 collectively to this affidavit.*

10. The main building of Pharmacy and Management Institution is situated at Plots no.1046, 1047 and 1048. Building of B.Ed. and Physical Education is situated over Plot No.1049. Play ground is situated over Plots no. 1040, 1041, 1042, 1044, 1045 and 1051. It is also pleaded that in view of Section 24(2) of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as 'Act, 2013'), acquisition proceedings have lapsed.

11. Counter affidavit on behalf of UPSIDC (respondent 2) has been filed stating that Collector satisfied himself with urgency of acquisition of land and issued certificate in this regard and forwarded to Board of Revenue along with letter dated 29th September, 2006. Notices under Section 9 of Act, 1894 were issued to land owners and thereafter possession of acquired land was taken on 13.12.2007. Most land owners have received compensation under U.P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997 (hereinafter referred to as 'Rules, 1997') on the basis of compromise. At the time of publication of acquisition notifications, name of petitioner was not found recorded in revenue record. Only on

Khasra No. 1040, Dhanpal and others had two borings and one Rahta Tree. On Khasra No.1045, Sri Ram Prasad and others have borings. On Khasra No. 1051, Sri Kishnu, Khacheru, Mukut, Vijai Pal and others have boundary wall measuring 5 x 2 x 1 metre high, 30 x 200 x 9 feet high, 60 x100 x 9 feet, 60 x 14 x 9 feet high for construction of shop, boundary wall measuring 4.60 x 100 x 9 feet high was existing and there was 5 feet soil digging in 1.719 hectare as per possession certificate dated 13.12.2007. No institution existed on disputed land till date of possession. Hence question of running such institution at that time does not arise. At the time of possession, plots in dispute were vacant and still are lying vacant. Notifications were published in two daily newspapers "Vartman Satta" and "Dainik Yatharth" on 11.05.2007 and 10.05.2007 respectively. Greater New Okhla Industrial Development Authority (hereinafter referred to as 'GNOIDA') has also issued certificate on 30.05.2006 stating that acquired land is outside notified area of GNOIDA.

12. UPSIDC is government owned Corporation and not a private company. Part VII of Act, 1894 is not attracted in the present case. Writ petition has been filed with lot of delay and laches without explaining the same and for this reason also petition deserves to fail.

13. Rejoinder Affidavit, sworn by Sri Vijendra Singh Bhati on 06.09.2009, has been filed by petitioner society stating that though relevant facts have not been disclosed by respondents but it has come to know that prior to acquisition notifications in question, UPSIDC issued a letter dated 19.06.2006 to a private company namely "M/s Shiv Nadar Foundation Charitable Trust" requiring it to deposit Rs. 6,14,98,829/- towards 10% of compensation amount of total proposed acquired land for establishing "S.S.N. Educational and Charitable Trust" for which UPSIDC proposed to acquire 87.193 hectare of land in village Chithera. The said amount was paid by aforesaid company namely "M/s Shiv Nadar Foundation Charitable Trust" (respondent 4) vide cheque dated 6th July, 2006 in the name of UPSIDC. UPSIDC also entered into an agreement on 8th September, 2008 with respondent-4 allocating entire land acquired by acquisition notifications in question. The agreement shows that an application was submitted by respondent-4 on 12.06.2006 requesting to acquire/allot land which was accepted by UPSIDC and pursuant thereto 293.292 acres of land (215.592 acres private land and 77.70 acres of Gram Sabha land) was allotted to respondent-4, who had deposited a total sum of Rs. 1,04,28,52,440.00 towards provisional premium of land with overhead charges. Balance, if any, would be intimated by UPSIDC later on. Petitioner has not received compensation of land in question and if compensation has been received by some other tenure holders that would not debar petitioner from challenging validity of impugned notifications. Land was actually proposed to acquire for a private individual in the garb of public purpose by dispensing with urgency clause which shows that total illegal mode has been adopted by respondents in acquisition of disputed land.

14. Respondents 1 and 3 have filed a supplementary counter affidavit sworn by Sri Shishir, ADM(LA), Gautam Budh Nagar on 19th May, 2014. It is stated therein that UPSIDC vide letter dated 10th May, 2006 sent a proposal for acquisition of 216.1952 acres land in village Chithera for establishment of "S.S.N Educational and Charitable Trust" through UPSIDC.

15. With regard to acquired land of petitioner society, respondents 1 and 3 have given details of dates on which land has been purchased by petitioner society are as under:

Sl. No.	Khasra no.	Area (in hectare)	Date of sale deed	Date of Mutation
1	1049	0.1873	04.09.2006 03.02.2007	07.03.2008 22.03.2010
2	1040	0.1265	18.07.2007	24.08.2007
3	1041	0.2887	14.09.2007	01.10.2007
4	1042	0.0380	14.09.2007	01.10.2007
5	1044	1.3517	01.09.2007	18.10.2007
6	1045	0.1897 0.0843	14.12.2007 15.12.2007	26.12.2007 19.03.2008
7	1051	0.2108 0.1265	22.07.2007 10.09.2007	01.11.2007 04.11.2007

16. It is said that most sale deeds having been executed after provisional notification, petitioner society being a subsequent purchaser, has no right to challenge acquisition proceedings in respect to said land. Out of total 87.249 hectare of land most tenure holders have received compensation under Rules, 1997 and in respect of remaining land, ADM(LA) has made award on 23.11.2011. It is reiterated that acquisition has been made for the purpose of establishment of "S.S.N Educational and Charitable Trust" through UPSIDC. Respondent- 4 (M/s Shiv Nadar Foundation) is not a private company but a charitable trust which imparts education. Education is a public purpose and in consonance with Industrial and Service Sector Investment Policy, 2004 framed by State of U.P. in 2004. Acquisition proposal was not initiated by Collector but it was done by UPSIDC through its letter dated 10.05.2006. Allegations of colourable exercise of power are denied.

17. A supplementary rejoinder affidavit sworn on 6th July, 2014 has also been filed, wherein besides others it is also said that tenure holders who are alleged to have received compensation under agreement have mostly challenged acquisition in various writ petitions.

18. On behalf of respondent- 4, a counter affidavit has been filed separately, stating that petitioner has concealed the fact that compensation for land comprising Khasra No. 1051, 1106, 1209, has been accepted by petitioner. It has also given a chart in paragraph 4 stating that land comprising Khasra Nos. 1040, 1041, 1051, 1042, 1044, 1045, 1049 has been purchased after

publication of provisional notification under Section 4 (1) of Act, 1894. Further acquired land has been transferred by Collector to UPSIDC on 13.07.2008. The land on which petitioner's institution is running, is excluded from acquisition. Challenge, in fact, pertains to adjacent land which was acquired by petitioner mostly, after acquisition proceedings were initiated and provisional notification under Section 4(1) was published. The allotment of land by UPSIDC to respondent- 4 on 8th September, 2008 is not disputed. Respondent-4 is a registered public charitable trust established with the object of imparting high standard education to public at large. The State Legislature enacted Shiv Nadar University Uttar Pradesh Act, 2011(hereinafter referred to as 'U.P. Act, 2011') (U.P. Act No.12 of 2011) notified in gazette on 6th April, 2011. Shiv Nadar University is an independent institution for providing multi-faceted higher education, learning and research in State of Uttar Pradesh. University has also been allowed to commence function for academic session 2011 vide State Government's letter dated 18th April, 2011. University has been established on lease land. University Grant Commission has also notified Shiv Nadar Foundation as an accredited University and All India Council of Technical Education has granted approval to University. Entire geography and topography and use of land has irreversibly changed and third party interest has been created. Acquisition proceedings were initiated by State of U.P. for benefit of UPSIDC for "Planned Development" which includes establishment of University also. Rate of compensation payable to farmers was fixed by consensus and determined at Rs.850/- per sq. meter instead of prevailing rate of Rs.250/- per sq. meter. Respondent-4 has already undertaken several developmental activities like construction of road, drainage, street lights etc. There already existed now a functional University with huge construction and infrastructure etc.

19. In rejoinder affidavit filed in reply to counter affidavit of respondent-4, petitioner has stated that present writ petition has nothing to do with land under Khasra nos. 1096, 1106 and 1209. On other aspect, it has reiterated what it has said in writ petition.

20. There is another Supplementary Counter Affidavit sworn by Sri V.K. Singh, Manager Law, UPSIDC in reply to supplementary affidavit, wherein facts stated are similar to supplementary counter affidavit filed on behalf of respondent-3 and same is the position to supplementary rejoinder affidavit, therefore we are not repeating the same.

21. Sri K.R. Sirohi, learned Senior Advocate appearing on behalf of petitioner society contended that land in question has been acquired for the benefit of a private body but neither any inquiry as contemplated under Rule 4 of Rules, 1963 has been conducted nor procedure under Part VII has been followed. He further submitted that dispensation of inquiry under Section 5A is founded on no material and in fact it is just in a mechanical manner without any justification, and therefore exercise of power under Section 17(4) to dispense with inquiry under Section 5A is patently illegal.

22. Learned Standing Counsel appearing on behalf of State and Sri Navin Sinha, learned Senior Counsel appearing for respondent- 4 contended that land has been acquired for public purpose of establishing an educational institution which was to be developed through UPSIDC. Collector having satisfied with urgency of matter made its recommendation, therefore, dispensation

of inquiry under Section 5A is just, valid and in accordance with law. He further submitted that petitioner basically is a subsequent purchaser in respect of major part of disputed land and hence has no right to challenge acquisition proceedings. Further in most of the matters compensation without any objection, in fact, under the agreement, has been accepted by tenure holders. There are subsequent developments on land in question hence no interference would be justified by this Court in writ jurisdiction under Article 226 of Constitution of India.

23. Authorities relied by parties are common and we shall discuss the same while discussing the relevant issues.

24. The first question is about land comprising plots which have been acquired by petitioner society after notification under Section 4(1) was published. The notification dated 19.01.2007 was also published in newspapers on 10th May, 2007 and 11th May, 2007. Following land said to have been acquired by petitioner vide sale deeds executed after notification dated 19.01.2007.

Sl. No.	Plot No.	Area (in acre)	Date of sale deed/ gift deed
1	1040	0.3125	18.07.2007
2	1041	0.7135	14.09.2007
3	1042	0.0939	14.09.2007
4	1044	1.3517	01.09.2007
5	1045	0.4688	14.12.2007
6	1045	0.2083	15.12.2007
7	1049	0.1873	03.02.2007
8	1051	0.3126	22.07.2007
9	1051	0.5209	10.09.2007

25. The question in relation to above mentioned land, need be considered by this Court is, "whether petitioner, who is subsequent purchaser can challenge acquisition proceedings after a declaration is made under Section 4(1) of Act, 1894".

26. This question came to be considered before Supreme Court in **U.P. Jal Nigam Vs. Kalra Properties Pvt. Ltd. 1996 (3) SCC 124** where it observed in para 3 of judgment, as under:

"3. ... It is well-settled law that after the notification under Section 4(1) is published in the gazette ***any encumbrance created by the owner does not bind the Government and the purchaser does not acquire any title to the property****."*

27. **In Sneh Prabha Vs. State of U.P. 1996 (7) SCC 426**, Court said:

"5. .... It is settled law that any person who purchases land after publication of the notification under Section 4(1), does so at his/her own peril. The object of publication of the notification under Section 4(1) is notice to everyone that the land is needed or is likely to be needed for public purpose and the acquisition proceedings point out an impediment to anyone to encumber the land acquired thereunder. It authorises the designated officer to enter upon the land to do preliminaries etc. Therefore, any alienation of land after the publication of the notification under Section 4(1) does not bind the Government or the beneficiary under the acquisition. On taking possession of the land, all rights, titles and interests in land stand vested in the State, under Section 16 of the Act, free from all encumbrances and thereby absolute title in the land is acquired thereunder."

28. In **Ajay Krishan Shinghal etc. Vs. Union of India and others 1996 (10) SCC 721**, Court in para 13 of judgment referring to its earlier decisions in **State of U.P. Vs. Smt. Pista Devi and others AIR 1986 SC 2025; Gian Chand Vs. Gopala and others 1995 (2) SCC 528; Mahavir and Anr. Vs. Rural Institute, Amravati and another 1995 (5) SCC 335 and Laxmi Engineering Works Vs. P.S.G. Industrial Institute 1995 (3) SCC 583**, and held that it is a settled proposition that after Notification under Section 6 is published, property under acquisition cannot be transferred and any such transaction is void. The subsequent purchaser at the best can only claim compensation of acquired land claiming interest in land which his predecessor-in-title had.

29. In **Star Wire (India) Ltd. Vs. State of Haryana and others 1996 (11) SCC 698**, Court reiterated the aforesaid exposition of law.

30. The aforesaid authorities were followed **in Meera Sahni Vs. Lieutenant Governor of Delhi and others 2008 (9) SCC 177** and in para 21 of judgment, Court said as under:

"21. In view of the aforesaid decisions it is by now well settled law that under the Land Acquisition Act the subsequent purchaser cannot challenge the acquisition proceedings and that he would be only entitled to get the compensation."

31. The above decision in **Meera Sahni vs. Lieutenant Governor of Delhi (supra)** was followed in **Bangalore Development Authority vs. Vijaya Leasing Ltd. 2013 (14) SCC 737**.

32. In **Pandit Leela Ram vs. Union of India AIR 1975 SC 2112**, Court said that "any one who deals with the land subsequent to a Section 4 notification being issued, does so, at his own peril".

33. In **V. Chandrasekaran and another vs. Administrative Officer and others, (2012) 12 SCC 133**, Court after referring to the aforesaid authorities summarised its conclusion, as under;

"In view of the above, the law on the issue can be summarised to the effect that ***a person who purchases land subsequent to the issuance of a section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever****, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title."*

(emphasis added)

34. When confronted with aforesaid exposition of law, learned counsel for petitioner could neither dispute the same, nor could place any authoritative precedent binding on this Court so as to pursue us to take an otherwise view in the matter. Hence, in respect of above mentioned land, it is not necessary to examine whether Notification under Section 6(1) of Act, 1894 is valid or not since petitioner lacks locus standi to challenge acquisition proceedings. In view of exposition of law discussed above and considering the fact that petitioner is subsequent purchaser of land mentioned in paragraph no.24 has no locus standi to challenge acquisition proceedings in respect thereof and to this extent, in our view, this writ petition deserves to fail.

35. Now we come to the question of dispensation of inquiry under Section 5A by invoking power under Section 17(4). This issue will be relevant only in respect to Plots no. 1040 area 0.1265 acre, 1044 area .0550 acre and 1049 area 0.4430 acre which came to be possessed by petitioner vide sale/ gift deeds dated 05.06.2006, 22.12.2003 and 04.09.2006, respectively. Submission is that there is no material on record to show existence of circumstances justifying urgency so as to dispense with inquiry under Section 5A.

36. Section 5-A was inserted in Act, 1894 as long back as in 1923, by Act No. 38 of 1923. There are minor amendments made subsequently but substance of provision has remained the same.

37. Normal procedure of acquisition is that a proposal of acquisition is published in notification under Section 4 of Act, 1894. Land owners whose land is proposed to be acquired, are given an opportunity to make their objections. Collector is under an obligation to consider objections and also offer an opportunity of hearing to objectors and thereafter submit a report to Government containing his recommendations on the objections, for decision of Government. After considering the report and other material, Government makes declaration that land is proposed to be acquired for public purpose and this is done by publication of notification under Section 6. Therefore, there is possibility of some difference in details of land stated in the notification issued under Section 4 and finally declared land, as acquired for public purpose, detailed in notification under Section 6.

38. Collector is then authorised to take order for acquisition and under Section 8 is supposed to mark, measure and plan the acquired land. A notice thereafter is issued under Section 9

to Land Owners by Collector notifying his intention of taking possession of land and that the claim for compensation be submitted to him. Under Section 11, Collector makes enquiry for determining amount of compensation payable to land owners, whose land has been acquired, and makes award. After payment of compensation, Collector takes possession of land.

39. There is an exception to normal procedure of taking possession which is contained in Section 17 of Act 1894. It says that in case of urgency, even though no award has been made, Government can direct Collector to take possession of any land, needed for public purpose, and on such possession being taken by Collector, land shall vest absolutely with the Government free from all encumbrances. Section 17(4) provides, where such urgency for the purpose of possession is to be acted upon, Government, shall declare that provision of Section 5-A shall not apply.

40. Dispensation of inquiry under Section 5A has not been held valid as a matter of routine but it has been held time and again that power should be exercised whenever it is necessary and urgency actually exist.

41. The circumstances, when Government would be justified to dispense with enquiry under Section 5-A while invoking urgency clause under Section 17, for the purpose of taking possession, have been considered in a catena of decisions in last several decades and it would be useful to refer some relevant authorities in this regard.

42. Right to file objection against proposal of acquisition of land published under Section 4 is a substantial right, consistent with principles of natural justice, since forcible acquisition of land, without consent of land owners, is a serious matter.

43. In **Nandeshwar Prasad vs. U.P. Government AIR 1964 SC 1217**, Court said *"the right to file objection under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side wind"*.

44. In **Munshi Singh and others vs. Union of India (1973) 2 SCC 337**, which is a decision of three judges bench, Court stressed upon and emphasized upon an inbuilt legislative recognition of principles of natural justice in Section 5-A and said *"Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. ..... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A"*.

45. In **State of Punjab vs. Gurnail Singh and others 1980 (1) SCC 471**, it was held that it is fundamental that compulsory taking of a man's property is a serious matter and smaller the

man, more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness. Denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Articles 14, burke an enquiry under Section 17 of Act, 1894. A slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes travesty of emergency power.

46. In **Shyam Nandan Prasad and others vs. State of Bihar and others (1993) 4 SCC 255** reiterating that section 5-A is mandatory, Court said "the proceeding before the Collector is a blend of public and individual enquiry".

47. In **Union of India and others vs. Mukesh Hans (2004) 8 SCC 14**, Court held that Section 17(4) is an exception to normal mode of acquisition. Mere existence of urgency or unforeseen emergency by itself is not sufficient to direct for dispensation of Section 5-A. Court reiterated that there must be real existing emergency for which an opinion must be formed by the Government, objectively. Court said *"It requires an opinion to be formed by concerned government that along with existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A enquiry, which indicates that the legislature intended that the appropriate government to apply its mind before dispensing with Section 5-A enquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by itself be sufficient for dispensing with Section 5-A enquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A enquiry will be dispensed with, but then that is not language of the Section which, in our opinion, requires the appropriate Government to further consider the need for dispensing with Section 5-A enquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5-A inquiry does not mean that in every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with Section 5-A enquiry. ..... There is need for application of mind by appropriate Government that such an urgency for dispensing of Section 5-A enquiry is inherent ..... ."*

48. **In Hindustan Petroleum Corporation Ltd. vs Darius Shapur Chenai & Ors (2005) 7 SCC 627**, it was held that the provisions of Section 5-A of Act, 1894 must be read consistent with Article 300-A of the Constitution and it is akin to fundamental right of procedure before depriving a person of his land, and must be strictly complied with.

49. In **Essco Fabs Pvt. Ltd. & Anr vs State Of Haryana & Anr (2009) 2 SCC 377**, it was held that enquiry should not be dispensed with lightly.

50. In **Anand Singh and another vs. State of U.P. and others (2010) 11 SCC 242**, Court considered as to when State would be justified in invoking power under Section 17(4) for acquisition of land and dispensing with enquiry under Section 5-A so as to take possession immediately. It is said that power under Section 17 is not to be exercised in a routine manner. It would be justified only when circumstances warrant immediate possession. It should not be lightly invoked. It is an exceptional power enabling land acquiring body to dispense with enquiry under Section 5-A. Government must apply its mind before dispensing with enquiry under Section 5-A whether urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A. The mere mention of words in acquisition notification that Government is satisfied about urgency and dispensing with enquiry under Section 5-A may raise a presumption in favour of Government that pre-requisite conditions for exercise of such power are satisfied but when challenged, Government has to produce relevant material before Court to show existence of such circumstances, which justify dispensation of inquiry and avail an exceptional power under Section 17. Court further said *"upon challenge being made to the use of power under Section 17 the Government must produce appropriate material before the Court that the opinion for dispensing with enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it".*

51. With regard to judicial review of exercise of power, Court in ***Anand Singh and another (Supra)*** further said in paras 45, 46, 47 and 48 as under:

"45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary."

"46. As to in what circumstances the power of emergency can be invoked are specified in Section 17 (2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking ***, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of land owners/persons interested may not be considered****. In many cases on general assumption, likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously."*

"47. The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that decision in Pista Devi must be confined to the fact situation in those days when it was rendered and

the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree."

"48. As regards the issue whether pre- notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact-situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate government before the court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."

(emphasis added)

52. In **Radhey Shyam (Dead) through Lrs. and others vs. State of U.P. and others 2011(5) SCC 553**, it was reiterated that property of a citizen cannot be acquired by State without complying with the mandate of Sections 4, 5-A and 6 of Act, 1894. A public purpose however, loudable would not entitle Government to invoke urgency provisions, since the same have the effect of depriving owner of his right to property and that too without being heard. Only in a case of real urgency, Government would be justified in invoking urgency provisions. Section 17 must have been invoked only when purpose of acquisition cannot brook the delay of even few weeks or months. The authority must be fully satisfied that time of few weeks or months likely to be taken in conducting enquiry under Section 5-A shall, in all probability, frustrate the public purpose for which land is proposed to be acquired. Satisfaction of Government on issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and can be challenged on the ground that authority did not apply its mind to relevant factors, and on record, there is no material justifying existence of alleged urgency. It also held that exercise of power under Section 17(1) necessarily does not result in exclusion of Section 5-A, inasmuch as, the person concerned can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-Section (4) of Section 17 shows that it merely enables Government to direct that Section 5-A would not apply to the cases covered under Sections (1) or (2) of Section 17. Therefore, mere fact that certain purposes may be treated as public purpose for purpose of acquisition but that by itself would not mean that there exists urgency to dispense with inquiry unless the circumstances actually and really are in existence to show that delay in taking possession would be adverse to public interest. It also held that Court can take judicial notice of the fact that in planning, execution and implementation of scheme relating to development of residential, commercial and industrial or institutional areas, Government takes few years, therefore, in such cases private property should not be acquired by invoking urgency clause as denial of Rule of audi alteram partem embodied in Section 5-A is not at all warranted in such cases.

53. **In Darshan Lal Nagpal (Dead) By Lrs. vs. Govt. of NCT of Delhi and others (2012) 2 SCC 327** after having retrospection of some of authorities on the subject, Court in para 28 of the judgment, stated as under :

"What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law - Article 300-A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, ***compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing."***

(emphasis added)

54. In **Laxman Lal (Dead) through Lrs. and another vs. State of Rajasthan and others, 2013 (3) SCC 764**, Court said that "the special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving cases of real urgency. The Government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A".

55. In **Union of India and others vs. Shiv Raj and others 2014 (6) SCC 564**, Court in para 15 said that Section 5-A confers a valuable right on the owner of land and it is not an empty formality. It is a substantive right, which can be taken away only for good and valid reasons and within the limitations prescribed under Section 17(4) of Act, 1894.

56. In the present case, the facts, as borne out from records, are that UPSIDC sent a letter dated 10.06.2006 to Collector requesting for acquisition of land for benefit of establishment of University by respondent-4. A formal application was submitted to UPSIDC on 12.06.2006. ADM(LA) sent a letter dated 15.06.2006, requiring UPSIDC to deposit 10% tentative compensation. On 19.06.2006 UPSIDC required respondent-4 to deposit 10% of tentative/estimate amount of compensation i.e. Rs.6,14,98,829/-. Said amount was deposited by respondent-4 on 6th July, 2006. ADM(LA) sent another letter dated 26.08.2006, stating that proposal was not made in prescribed format. UPSIDC sent a letter dated 30.08.2006 stating that land is proposed to be acquired for the benefit of respondent-4, who itself has selected land. ADM(LA) sent a letter dated 31.08.2006 again raising certain objections. Collector sent letter dated 10.11.2006 to State Government, proposing issue of notification under Section 4(1) read with Section 17(4) of Act, 1894. State Government issued notification dated 19.01.2007 but it was published in newspapers on 10/11 May, 2007. Declaration under Section 6 was issued on 11.07.2007. Hence the entire exercise took almost more than one year and even publication in newspapers took almost four months time, still respondents have treated question of possession of land of such urgency so as to dispense with inquiry under Section 5A. Looking to the entire facts and circumstances in the light of discussion made above, we are of the view that in the present case respondents have erred in law in invoking provisions of Section 17(4) to dispense with inquiry under Section 5A erroneously and illegally. We are satisfied that there existed no such urgency so as to justify exercise of power under Section 17(4) for dispensation of inquiry under Section 5A of Act, 1894 and impugned

notifications, therefore, in so far as inquiry under Section 5A has been dispensed with, are vitiated in law.

57. Respondents have taken an objection that petitioners have filed writ petitions with delay of more than one year which disentitles them any relief and writ petitions are liable to be dismissed on this reason alone.

58. It is true that delay in challenging acquisition proceedings is relevant aspect but in the present case, notification under Section 4 was published in newspapers in May, 2007. Notification under Section 6 was published in July, 2007 and leading writ petition has been filed in March, 2008. This delay per se is not so undue and unreasonable so as to non-suit petitioners only on the ground of laches and delay in filing writ petitions.

59. Next submission is "whether here is case where acquisition is sought to be made for a private body in the garb of public purpose, sought to be acquired by UPSIDC and whether compliance of Part VII was necessary in this case".

60. Respondents have contended that respondent-4 is a charitable trust, and therefore, is not a company as defined under Section 3(e) of 'Act, 1894', hence provisions of Part VII of Act, 1894 read with Rules, 1963 have no application in respect of acquisition of land in dispute. Record shows that respondent-4 initially was a society registered under Act, 1860 and subsequently on 8th August, 2008, it was registered as a "Trust" under name and title "Shiv Nadar Foundation" with Sub-Registrar Office, Delhi under Indian Trust Act, 1882 (hereinafter referred to as 'Act, 1882'). This fact is also mentioned in Section 2(o) of 'U.P. Act, 2011'. At the time of acquisition, therefore, it was not a 'Trust' and nothing has been brought on record to show otherwise. Respondent-4 thus satisfies definition of 'company' under Section 2(e) of Act, 1894 when acquisition proceedings were initiated and acquisition notifications in question were issued, therefore, it was incumbent upon respondents to observe the procedure under Part VII of Act, 1894 read with Rules 1963. It is true that acquisition proceedings for the benefit of respondent-4 were initiated at the instance of UPSIDC under the pretext of "public purpose" but the facts discussed above leave no manner of doubt that it was a colourable exercise of power and, in fact, acquisition was for a private company. Hence, it was incumbent upon respondents 1, 2 and 3 to follow the procedure prescribed under Rules, 1963 read with Part VII of Act, 1894.

61. This aspect has been dealt with by a Division Bench of this Court, in which one of us (Sudhir Agarwal, J.) was a member, in **Pooran and others vs. State of U.P. and others, 2009(10) ADJ 679 (DB)**, Court in para 54, 57-59 of the judgement, held as under:

"54. ..... It is admitted case of the respondents that no inquiry under the Land Acquisition (Companies) Rules, 1963 has been taken in the impugned acquisition proceedings nor part VII of the Act has been complied. Rule 4 of the Land Acquisition (Companies) Rules, 1963, provides a mandatory inquiry with regard to several subjects including as to whether any

alternative suitable site can be found, if the acquisition is for the good agricultural land. Rule 4 (1) of the Land Acquisition (Companies) Rules, 1963 is quoted as below:

" Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings.

4. (1) Whenever a company makes an application to the appropriate Government for acquisition of any land, that Government shall direct the Collector to submit a report to it on the following matters, namely :--

(i) that the company has made its best endeavour to find out lands in the locality suitable for the purpose of the acquisition;

(ii) that the company has made all reasonable efforts to get such lands by negotiation with the person interested therein on payment of reasonable price and such efforts have failed;

(iii) that the land proposed to be acquired is suitable for the purpose;

(iv) that the area of land proposed to be acquired is not excessive;

(v) that the company is in a position to utilise the land expeditiously; and

(vi) where the land proposed to be acquired is good agricultural land, that no alternative suitable site can be found so as to avoid acquisition of that land."

57. From the pleadings of the parties and examination of the original records, following facts emerged with regard to impugned acquisition proceedings;

(1) an application dated 19.1.2004 was submitted by Reliance Delhi Power Private Ltd. to the Collector Ghaziabad as well as to the Chief Secretary of the State of U.P. The Collector proceeded to inquire the proposal submitted by the respondent no. 2. The proposal was submitted by the respondent No. 2 with deposit of 10% of the acquisition costs and 10% of the estimated compensation (amount of Rs. 16 Crores). Acquisition proceedings were not initiated pursuant to any decision of the State Government or its any of the Departments.

(2) the land measuring 2500 acres was identified and selected by Reliance Delhi Power Pvt. Ltd. and in the application submitted to the Collector, Ghaziabad, the name of seven villages were mentioned by company. The site was neither selected by the State Government or its any of the Departments or by Collector, Ghaziabad for acquisition.

(3) the Collector Ghaziabad after conducting the necessary inquiry sent the proposal for acquisition to the Director Land Acquisition Directorate Board of Revenue U.P.

Lucknow. In the letter dated 24.1.2004 it was stated that the proposal for land acquisition has been received from Reliance Delhi Power Pvt. Ltd. for acquisition of land with regard to 735.45 acres of land of village Kakarma Pargana Dasna, Tahsil Hapur. It was further stated that Reliance Delhi Power Pvt Ltd deposited the required 10% acquisition cost and 10% of estimated compensation in the specified head. The separate letters dated 24.1.2004 were forwarded by the Collector Ghaziabad with regard to seven villages along with plot numbers and area sought to be acquired. A proposed notification under section 4(1) also invoking the urgency provisions of Sub-section (1) of Section 17 and Sub-section (4) of section 17 was submitted. After receipt of the letter by the Collector, Ghaziabad, Director Land Acquisition examined the proposal and forwarded it by letter dated 28.1.2004 to the Principal Secretary, Energy, State of U.P. Lucknow. Separate letters dated 28.1.2004 were issued for different villages in question. In the letter dated 28.1.2004 it was specifically mentioned that Reliance Delhi Power Private Limited is a private Company hence taking into consideration Land Acquisition (Companies) Rules, 1963 and Part VII and Part III Sections 38 to 55 of the Land Acquisition Act and after getting the agreement executed, notification under section 4(1)/17 be issued. Collector thus completed the entire proceedings and forwarded the proposal of the company for land acquisition for a company after following parts VII and VIII.

(4) the proposal received from the Director Land Acquisition vide letter dated 28.1.2004 was examined by the Department of Energy Government of U.P. and it was decided to obtain recommendation of Bhumi Upyog Parishad. Bhumi Upyog Parishad submitted a note through Principal Secretary, Niyojan on 31.1.2004 that the Reliance Delhi Power Pvt. Ltd. being a private company, keeping into consideration part VII of the Land Acquisition Act as amended according to the provisions of Sections 38 to 44-B proceedings be undertaken after taking approval from the Department of Revenue and Law. The recommendations were duly approved by the Chief Minister on 31.1.2004. The Secretary, Revenue submitted a note that before issuance of section 4(1)/17 notification agreement be executed as required by paragraph 14 of the Land Acquisition Manual and the entire cost of acquisition shall be necessary to be got deposited. Subsequently although it was earlier recommended that notification under section 4(1)/17 be issued after execution of the agreement as required under section 41 but it was decided to issue notification under section 4(1) by invoking Section 17 and agreement be executed thereafter. After publication of the notification under section 4(1)/17 the draft of the agreement as contemplated under section 41 of the Act was approved by Hon'ble the Chief Minister on 19.2.2004 and thereafter it was executed. Under section 41, the entire cost of the acquisition was to be born by the company and the State was not to bear any cost of acquisition.

(5) the land acquisition proceedings were not initiated under any project/scheme submitted by Energy Department or any other Department of the State nor the acquisition in question was to result into any project of the State rather the agreement stipulated transfer of the land in favour of the respondent No. 2.

(6) the decision to bear 60% costs of the acquisition was taken after amendments in power policy was approved on 8.6.2004 and accordingly, the State support agreement was executed on 16.6.2004.

*58. From the aforesaid**, it is fully established that the proceedings for acquisition were taken on an application of respondent no. 2 on 19.1.2004 as acquisition for a company**. When the notification was issued under section 4, **the acquisition of the land was for the company and the acquisition being not acquisition initiated by the State under any of its own projects or scheme, could not be treated as acquisition for public purpose**.*

59. The above discussion answers the issue No. 2 that the acquisition was for a company." (emphasis added)

62. For the reasons stated in **Pooran and others vs. State of U.P. and others (supra)**, we find that here also acquisition was for a private company but mandatory procedure under Part VII read with Rules, 1963 has not been followed, therefore, acquisition notifications are patently illegal.

63. The discussion made above leads to the conclusion that petitioner society in Writ Petition no. 17029 of 2008 has to fail in its challenge to acquisition notifications in respect of land purchased by it after notification under Section 4(1) was issued. Rest of the petitions deserves to succeed.

64. In the result, Writ Petition no.17029 of 2008 is partly allowed. Impugned acquisition notifications in respect to Plots no. 1040 area 0.1265 acre, 1044 area .0550 acre and 1049 area 0.4430 acre, relating to petitioner society, are hereby quashed.

65. Remaining connected 9 writ petitions are allowed and impugned acquisition notifications in respect of disputed acquired land of these petitioners are hereby quashed.

66. Petitioners shall also be entitled to cost which we quantify to Rs.5,000/- against respondents 1 to 3, in each set of petitions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 26169 Of 2001

M.P. Daga (since deceased) & Ors. ...Petitioners

Versus

Pradeshiya Industrial Investment Corporation & Ors. ...Respondents

Counsel for the Petitioners:
V.K. Singh, Amit Daga, G.K. Singh, H.N. Singh, Sumit Daga

Counsel for the Respondents:
C.S.C., A. Khanna, Ashish Mishra, Vivek Saran

Limitation Act, 1963 — Ss. 3, 5 — Applicability — Recovery proceedings under U.P. Public Money (Recovery of Dues) Act, 1972 — Held, Limitation Act applies to Courts and not to executive authorities — Recovery by Collector as arrears of land revenue is executive action — Hence, bar of limitation under S. 3 not attracted at stage of recovery certificate or its execution
Limitation — Nature — Procedural law — Effect — Limitation bars remedy and not the right (except where expressly extinguished) — Cannot be extended to proceedings outside Courts unless statute provides
Financial Corporation — Recovery of dues — Special statute — U.P. Act, 1972 — Provides exclusive and speedy remedy — Civil suit barred — Recovery through certificate valid — Collector acts as executive authority
Limitation — Applicability of Articles — Loan secured by guarantee creating charge over immovable property — Applicable provision — Art. 62 (12 years), not Arts. 19 or 21 (3 yearsLimitation — Computation — Recovery proceedings initiated within 12 years — Not time-barred

Result — Writ petition dismissed with costs.

Case cited:

State of Kerala vs. V.R. Kalliyanikutty(1999) 3 SCC 657
Hukumdev Narain Yadav vs. Lalit Narain Mishra(1974) 2 SCC 133
Bharat Barrel & Drum Mfg. Co. vs. ESI Corporation(1971) 2 SCC 860
Kerala State Electricity Board vs. T.P. Kunhaliumma(1976) 4 SCC 634
Bombay Dyeing & Manufacturing Co. Ltd. vs. State of BombayAIR 1958 SC 328
Tilokchand Motichand vs. H.B. Munshi(1969) 1 SCC 110
Syndicate Bank vs. Prabha D. Naik(2001) 4 SCC 713

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

1. In this writ petition, an interesting question of application of limitation to recovery proceedings has been raised, which is of wider public implication.

2. Brief facts, giving rise to present case, are that M/s Rainbow Steel Limited (hereinafter referred to as "Company") is a Company incorporated and registered under provisions of Companies Act, 1956 (hereinafter after referred to as "Act, 1956") and petitioners are Directors of aforesaid Company. On 06.08.1990, Company sought financial assistance from Pradeshiya Industrial and Investment Corporation of U.P. Limited (respondent 1) (hereinafter referred to as "PICUP") under Equipment Refinance Scheme initiated by Industrial Development Bank of India (hereinafter referred to as "IDBI") for installation of 15 tons continuous casting machine for the plant used in manufacturing of Ingots/Billots. PICUP sanctioned a loan of Rs. 80.60 lacs on 22.08.1990 under aforesaid Scheme. The bond of guarantee was executed on 29.11.1990 between PICUP and petitioners wherein guarantors agreed for repayment of loan in case of default by Borrower, i.e., Company.

3. The agreement stipulates that on demand, guarantors shall pay to PICUP, whole of such principal sum and/or interest and/ or other moneys which may be due to PICUP and will indemnify all loss of principal sum/interest or other moneys secured by mortgage and all costs, charges and expenses whatsoever which PICUP may incur by reason of any default on the part of Company.

4. First instalment was released to Company on 31.01.1991. Therefore, repayment schedule as per Deed of Hypothecation commenced on 28.02.1992. Last instalment was payable on 31.08.1995. Company committed default in repayment of loan amount and interest, whereupon PICUP issued notices dated 23.03.1992, 25.05.1992 and 14.10.1992 under Section 29 of State Financial Corporation Act, 1951 (hereinafter referred to as "Act, 1951"). Thereafter, in Company Petition No. 8 of 1994 filed by another person, this Court passed order on 09.03.1995 for winding up. Sale by Official Liquidator, except lot no. 1, was confirmed by Court's order dated 22.11.1995.

5. A demand notice for the first time was issued to petitioner-1 on 21.03.2001 demanding a sum of Rs. 4,56,19,798.29 in terms of Bond of Guarantee, which was replied by them raising an objection that demand is barred by limitation. PICUP, however, issued recovery certificates whereupon impugned recovery citations dated 02.07.2001 have been issued by Tehsildar and that are under challenge.

6. A counter affidavit has been filed by PICUP giving details of outstanding dues in para 9 as under:

		(Rupees in Lacks)
i)	Loan Sanctioned	80.60
ii)	Loan Disbursed	77.30
iii)	Loan Overdue and not paid	77.30
iv)	Interest at the rate of 15 per cent per annum on overdue principal loan (inclusive of penal interest) Period 01.11.2001 to 31.01.2002	3,40,967.12
v)	Overdue interest (as on 01.11.2001)	4,32,45,621.00
vi)	Interest on overdue interest	19,07,546.57

Interest on Overdue Principal (iv)+ Overdue
Interest (v) + Interest on overdue interest (vi) 4,54,94,134.80

Total Overdue = Rs. 77,30,000.00+ Rs. 4,54,94,134.80
= **Rs. 5,32,24,134.80 only**

7. It is, however, stated that Company approached Board of Industrial Finance and Reconstruction (hereinafter referred to as "BIFR") by filing an application for rehabilitation under Section 15 of Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "Act, 1985"). PICUP also received notice dated 27.05.1994 to appear before BIFR and participate in the proceedings. Reference was ultimately rejected by BIFR on 28.02.1995 as untenable observing that Company is not in a position of rehabilitation. BIFR also decided to forward the matter to High Court for winding up of Company. Thereafter, Company preferred an appeal before Appellate Authority, i.e., Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as "AAIFR"). The appeal was dismissed on 10.10.1996. It is also said that recovery proceedings are not time barred, Statute of limitation has no application to the proceedings under U.P. Public Money (Recovery of Dues) Act, 1972 (hereinafter referred to as "UP Act, 1972") and even otherwise proceedings earlier could not be initiated against Company since matter was pending before BIFR and AAIFR under Act, 1985 and also before this Court in Winding Up Petition.

8. Sri H.N. Singh, learned Senior Advocate, has advanced only single submission that under Article 19 of Schedule to Limitation Act, 1963 (hereinafter referred to as "Act, 1963"), period of limitation is three years from the date amount is due. In the present case limitation would commence on 31.08.1995, which was the date of payment of last instalment by Company. Since even demand notice has been issued for the first time only on 21.03.2001, i.e., almost five and half years from the last date of payment of last instalment, recovery proceedings are barred by limitation and in this regard he placed reliance on **State of Kerala and others Vs. V.R. Kalliyanikutty and another 1999 (3) SCC 657, Maharashtra State Financial Corporation Vs. Ashok Kumar Agarwal and others JT 2006 (4) SC 197** and a Division Bench judgment of this Court in **Narendra Kumar and another Vs. Collector, Bulandshahar and others 2004 (2) UPLBEC 2037.**

9. Learned counsel appearing for PICUP, however, contended that recovery proceedings under UP Act, 1972 are neither quasi judicial nor judicial proceedings. He submitted that Section 3 of Act, 1963 bars a Court from entertaining a suit or other proceedings, if it is barred by limitation. In the present case, when Collector proceeds to recover dues as arrears of land revenue on the basis of recovery certificate received by it from a Financial or Banking Institution, he acts as a Revenue Authority discharging executive function of realization of dues, and, therefore, is not supposed to comply bar under Section 3 of Act, 1963, hence question of application of limitation under Act, 1963 does not arise.

10. We have heard Sri H.N. Singh, learned Senior Advocate, assisted by Sri Sumit Daga, Advocate, for petitioners and Sri Ashish Mishra, Advocate, appearing for respondent-Pradeshiya Industrial Investment Corporation.

11. The issue of limitation raised by learned Senior Advocate has to be examined in the light of the following questions: (i) whether Act, 1963 is applicable to recovery proceedings of certain dues as arrears of land revenue through Revenue Authorities; (ii) whether there is a

limitation prescribed for such recovery proceedings; (iii) whether bar under Section 3 of Act, 1963 shall be applicable to the Financial institutions or authorities like PICUP or Collector in proceeding to recover dues under UP Act, 1972; (iv) what is the period of limitation, if any, in the present case, and, (v) when limitation will continue?

12. All these questions we propose to consider together.

13. There are some basic principles with regard to limitation. It is a plea in defence and where limitation apply and has exhausted, the remedy shall stand barred but right will not stand barred. For this purpose, it would be appropriate to have historical evolution of principles and provisions pertaining to limitation. Nature of the statute on limitation has been considered in **C. Beepathuma and others Vs., Valasari Shankaranarayana Kadambolithaya and others, AIR 1965 SC 241** and it says:

"There is no doubt that the Law of Limitation is a ***procedural law and the provisions existing on the date of the suit apply to it****."*

14. Before the British, during the period when Muslims ruled the Country, it appears that personal laws governed all matters. Muslim law does not recognize limitation; while in Hindu personal laws, on certain aspects, in different schools, some provisions for limitation were prescribed which are not common to all Hindus. Hindu Law recognizes both prescription and limitation while Muslim jurisprudence recognises neither of them. In some of Smritis a period of 20 years was prescribed for acquisition of title by prescription. It appears that since agriculture was the main occupation of people, Smritis concentrated more on land and on the rights therein.

15. Thus, in ancient scriptures applicable to natives of this land before entry of Muslims and Christians, principles of prescription of limitation were recognized vis-a-vis property, i.e., land and rights thereon. In Christianity, attempt to enforce payment of a debt which, time and misfortune has rendered the debtor unable to discharge, was forbidden.

16. Before 1857 there were Regulations framed by East India Company governing Courts in three Presidencies of Fort William, Madras and Bombay. Courts set up by British Government as also three Supreme Courts adopted English law of limitation. The three Presidencies were governed by Regulations, namely, Bengal; Regulation III of 1793, Regulation II of 1805, Regulation VIII of 1831, Madras; Regulation II of 1802, Bombay; Regulation I of 1800 and Regulation V of 1827. Later on, they came to be governed by Act 1 of 1845, Act 12 of 1848 and Act 11 of 1859. Interestingly, Regulations did not apply to certain Non-Regulation Provinces, like Punjab and Oudh. It is in these circumstances, after Crown took over Indian Territory from East India Company in 1857, it enacted Act 14 of 1859.

17. Cause of action with respect to the statutes of Limitation as applicable in England in one of the earliest cases came to be considered in 1849 as to when it would run. Privy Council in **The East India Company Vs. Oditchurn Paul 1849 (Cases in the Privy Council on Appeal**

from the East Indies) 43 held that the Statute runs from the time of breach, for that constitutes the cause of action. With reference to East India Company, it observed that statute of limitation was extended to India by Indian Act No.XIV of 1840. The appeal against Supreme Court of Judicature at Fort William in Bengal (Calcutta) was allowed by Privy Council. It also observed therein if the matter would have been tried by Hindu law, the limitation of suits, under Hindu law, would have been twelve years.

18. The first codified statute was Act No. XIV of 1859, enacted to amend and consolidate laws relating to limitation of suits. This Act received the assent of Governor General on 5th May, 1859. It was repealed by Act No. IX of 1871, Act XV of 1877 and thereafter by Act IX of 1908 (hereinafter referred to as "Act, 1908"). Presently, even Act, 1908 has been repealed and Courts in India are now governed by Act, 1963.

19. Section I of Act XIV of 1859 says that no suit shall be maintained in any Court of Judicature within any part of British territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation, hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding. The territory upon which the said Act was made operative, was provided in Section XXIV as under:

"XXIV. This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits Settlements; but shall not take effect in any Non-Regulation Province or place until the same shall be extended thereto by public notification by the Governor-General in Council or by the Local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council or by the Local Government to which such Province or place is subordinate, all suits which, within such Province or place, shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding."

20. Though Act no. XIV of 1859 was drafted in a language much more precise than the loose phraseology of earlier Regulations, but Privy Council in **The Delhi and London Bank Vs. Orchard, I.L.R. 3 (1876) Calcutta 47 (PC)** observed it as an "inartistically drawn statute".

21. Act IX of 1871 extended the scope and made provisions relating to limitation to suits, appeals and certain applications to Courts. It received the assent of Governor General on 24th March, 1871.

22. Some of the feature of Act IX of 1871 are:

(a) Section-3 defines term 'minor means a person who has not completed his age of eighteen years;

(b) Section-7 deals with legal disability, Section 9 provides continuous running of time, Sections 23 and 24 deals with continued cause of action or renewal of cause of action and 29 for the first time provides for extinction of rights of a person in respect to any land or hereditary office and read as under:

"7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed. When this disability continues upto his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disabilities or the death of the person affected thereby, the period within which the suit must be brought"

" 9. When once time has begun to run, no subsequent disability or inability to sue stops it : Provided that where letters of administration to the stage of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues."

"23. In the case of a suit ***for the breach of a contract****, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.*

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due."

"24. In the case of a ***continuing nuisance*** *a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nuisance continues."*

"29. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, ***his right to such land or office shall be extinguished****."*

23. Drafting of this statute received better observations from Privy Council in **Maharana Futtehsangji Vs. Dessai Kullianraiji, (1873) LR 1 IA 34** and it commented as a "more carefully drawn statute".

24. The Act gave for the first time some recognition to the doctrine of prescription by the Legislative Council of India, viz. the doctrine of extinctive prescription as to land and hereditary offices, and of positive prescription as to easements. It lived short and was replaced by Act 15 of 1877 which extended principle of extinctive prescription to movable property and the principle of positive or acquisitive prescription to profits a prendre.

25. Law of Prescription prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is acquired or extinguished. A prescription by which a right is acquired, is called an "acquisitive prescription". A prescription by which a right is extinguished is called "extinctive prescription". The distinction between the two is not of much practical importance or substance. The extinction of right of one party is often the mode of acquiring it by another. The right extinguished is virtually transferred to the person who claims it by prescription. Prescription implies that the thing prescribed for is the property of another and that it is enjoyed adversely to that other. In this respect it must be distinguished from acquisition by mere occupation as in the case of res nullius. The acquisition in such cases does not depend upon occupation for any particular length of time.

26. Then came Act XV of 1877, which received assent of Governor General on 19th July, 1877 and came into force on 1st October, 1877.

27. Section 2 of Act XV of 1877 makes it very clear that the right to sue if already barred shall not revive by said enactment. It reads as follows:

"2. All reference to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act, or under any enactment, thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, section 25."

28. Section 4 makes it obligatory for Court to dismiss a suit if presented after expiry of period of limitation. Section 7 deals with the legal disability which is virtually pari materia with the earlier provision of 1871 Act though slightly worded differently and says:

"7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned. A minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made."

29. There were several amendments in the above statute and ultimately it was repealed and replaced by Act 9 of 1908.

30. Act, 1908 came into force on 1st January, 1909. It continued with the provision imposing obligation upon Court to dismiss a suit, if, while it is instituted, is already barred by limitation vide Section 23.

31. The doctrine of limitation is founded on considerations of public policy and expediency. It does not give a right where there exist none, but to impose a bar after a certain period to the remedy for enforcing an existing right. The object is to compel litigants to be diligent for seeking remedies in Courts of law if there is any infringement of their right and to prevent and prohibit stale claims. It fixes a life span for remedy for redressal of the legal injury, if suffered, but not to continue such remedy for an immemorial length of time. Rules of limitation do not destroy rights of the parties and do not create substantive rights if none existed already. However, there is one exception i.e. Section 28 of Act, 1908, which provides that at the determination of period prescribed for instituting suit for possession of any property, his right to such property shall stand extinguished and the person in possession, after expiry of such period, will stand conferred title. The law of limitation is enshrined in the maxim "*interest reipublicae ut sit finis litium*" (it is for the general welfare that a period be part to litigation).

32. The statute of limitation, thus, is based upon two broad principles. First, there is a presumption that a right not exercised for a long time is non existent. Where a person has not been in possession of a particular property for a long time, the presumption is that he is not the owner thereof. The owners are usually possessors and possessors are usually owners. Possession thus being normally evidence of ownership. Longer the possession has continued, the greater is its evidentiary value. The law therefore has deemed it expedient to confer upon such evidence of possession for a particular time, a conclusive force.

33. In **Motichand Vs. Munshi, AIR 1970 SC 898**, Court noticed the maxim vigilantibus non dormientibus jura subventiunt (the law assists the vigilant not those who sleep over their rights). Though there is a general principle ubi jus ibi remedium i.e. where there is a legal right there is also a remedy, but there are certain exceptions to this general rule.

34. Mere expiry of limitation could have extinguished remedy but the principle embodied in Section 28 extinguishes the right also and thereby makes the said general principle inapplicable. Once the right of getting possession extinguished it cannot be revived by entering into possession again **[See Salamat Raj Vs. Nur Mohamed Khan (1934) ILR 9 Lucknow 475; Ram Murti Vs. Puran Singh AIR 1963 Punjab 393; Nanhekhan Vs. Sanpat AIR 1954 Hyd 45 (FB) and Bailochan Karan Vs. Bansat Kumari Naik 1999 (2) SCC 310].**

35. Act, 1908 has been substituted by Act, 1963.

36. Act, 1963 in its "Introduction" part itself says that it is an Act to consolidate and amend law of limitation of suits and other proceedings and for the purposes connected therewith.

37. Bar of limitation under Section 3 is on a Court and it says that subject to provisions of Sections 4 to 24, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed even if no limitation has been set up as a defence.

38. PICUP, therefore, in common law could not have filed suit after limitation provided for recovery of outstanding dues from Company or guarantors has expired. However, here we are concerned with procedure of recovery under UP Act, 1972.

39. It has been held time and again that Section 3 of Act, 1963 applies to Courts and not to other bodies, such as quasi judicial Tribunal or even Executive authorities.

40. In **A.S.K. Krishnappa Chettiar Vs. S.V.V. Somiah AIR 1964 SC 227**, in para 13 of judgment, the Court said:

"The Limitation Act is a consolidating and amending statute relating to the limitation of suits, appeals and certain types of applications to courts and must, therefore, be regarded as an exhaustive Code. ***It is a piece of adjective or procedural law and not of substantive law. Rules of procedure, whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication.*** *They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication.* ***It would, therefore, not be correct to apply any of the provisions of the Limitation Act to matters which do not strictly fall within the purview of those provisions****. Thus, for instance, period of limitation for various kinds of suits, appeals and applications are prescribed in the First Schedule.* ***A proceeding which does not fall under any of the articles in that schedule could not be said to be barred by time on the analogy of a matter***

which is governed by a particular article. *For the same reasons the provisions of Sections to 28 of Limitation Act cannot be applied to situations which fall outside their purview.*

These provisions do not adumbrate any general principles of substantive law nor do they confer any substantive rights on litigants and, therefore, cannot be permitted to have greater application than what is explicit or implicit in them."

(emphasis added)

41. In **Town Municipal council, Athani Vs. Presiding Officer, Labour Court, Hubli and others AIR 1969 SC 1335**, in para 12 of judgment, Court has observed, *"... we do not think that this addition necessarily implies that the Limitation Act is intended to govern proceedings before any authority, whether executive or quasi-judicial, when, earlier, the old Act was intended to govern proceedings before civil courts only."*

42. Court held that application under Section 33C(2) of Industrial Disputes Act, 1947 before Labour Court would not attract limitation under Act, 1963.

43. Similarly, a three-Judge Bench in **Nityanand M. Joshi and another Vs. Life Insurance Corporation of India and other AIR 1970 SC 209** held that scheme of Act, 1963 is that it only deals with applications to Court and Labour Court is not a Court within Act, 1963, hence limitation, if any prescribed therein, shall not be applicable to any proceedings before Labour Court.

44. In **L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. And another (2004) 11 SCC 456**, a three-Judge Bench reiterating the law on the subject with regard to Act, 1963 has said:

"The provisions of the said Act are not applicable to the proceedings before bodies other than courts, such as quasi-judicial tribunal or even an executive authority. *The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act, 1963 per se may not be applied to the proceedings before it." (emphasis added*)

45. Here we may also refer to a Single Judge judgment of this Court **in Hari Raj Singh Vs. Sanchalak Panchayat Raj U.P. and others AIR 1968 All 246** wherein plea of limitation in respect of claim of arrears of salary of a Government Servant was raised in defence by State Government. Repealing it, this Court said that Act, 1963 is a complete Code in itself and outside it, there is no law of limitation except specific provisions in specific Statutes. Section 3 makes it clear that Act, 1963 applies only to Suits or Appeals or Applications filed in Courts. It has no application to any proceedings outside the law Court. Act, 1963 is a procedural law. It bars a suit for enforcement of a right but does not extinguish the right itself except where a case is governed by Section 28 of Act, 1963. Relying on Apex Court's decision in **Bombay Dyeing and**

Manufacturing Co. Vs. State of Bombay AIR 1958 SC 328, Court said that Statute of limitation bars remedy and does not extinguish debt. Lapse of time does not extinguish right of a person. Having said so, in para 15, Court said:

"15. Since limitation bars a suit for the enforcement of a right but does not destroy the right itself a defendant in a suit can set up a right in defence though he could not have enforced that right by a suit. There is no limitation against a defence. This again indicates how limited is the scope of the law of limitation even in suits."

46. It also considered meaning of the words "time barred" and in para 16 of judgment said that the concept "time-barred" cannot be extended to proceedings outside law Courts. The words "time barred' only means that a suit for enforcement of a right is no longer available and if a Government servant files a civil suit for recovery of his salary after expiry of prescribed period of limitation, it shall be dismissed by Court as time-barred. But the right is not extinguished and all other lawful means of enforcing the claim are not affected by limitation.

47. **In Mohd. Ashfaq Vs. State Transport Appellate Tribunal UP and others (1976) 4 SCC 330**, Court considered a similar provision which required filing of renewal application within fifteen days which could be extended but not beyond 15 days. Court held that Section 5 of Act, 1963 is not applicable since matter was covered by Section 58 (2) and (3) of Motor Vehicles Act 1939. It further held, if application for renewal is beyond time by more than fifteen days, authority shall not be entitled to entertain it or in other words, it shall have no power to condone delay. There being express provision for making application for renewal, condonable only if it is not more than 15 days, the provision expressly excludes not only power of condonation of delay under section 5 but being special enactment, the said period, even otherwise, cannot be extended. Court held that the provision may look harsh, but in the scheme of Statute, legislature has provided the same and it should not be disturbed by Court.

48. In **Sushila Devi Vs. Ramanandan Prasad and others AIR 1976 SC 177, Court said that provisions of Act, 1963** apply only to proceedings in "Courts" and not to appeals or applications before bodies other than Courts such as quasi-judicial Tribunals or Executive Authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on Courts under the Code of Civil Procedure.

49. In **Nityananda M. Joshi Vs. Life Insurance Corporation of India AIR 1970 SC 209**, Court held that in view of Section 4 and 5 of Act, 1963 it would be clear that under the scheme it only deals with applications to Courts. The "Labour Court" is not a "court" within the meaning of Act, 1963 and, therefore, an application under Section 33C(2) of Industrial Disputes Act, 1947 cannot be held barred under Article 137 of Act, 1963 on the plea that claim was for a period beyond three years.

50. In **L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and another AIR 2005 SC 1209**, it was held that provisions of Act, 1963 have no application so far as directions

required to be issued by Courts under Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. It held:

"Limitation Act, 1963 is applicable only in relation to certain applications and not all applications despite the fact that the words "other proceedings" were added in the long title of the Act in 1963. ***The provisions of the said Act are not applicable to the proceedings before bodies other than courts, such as quasi-judicial tribunal or even an executive authority****. The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act, 1963 per se may not be applied to the proceedings before it. Even in relation to certain civil proceedings, the Limitation Act may not have any application."*

(emphasis added)

51. In **Damodaran Pillai Vs. South Indian Bank Ltd. (2005) 7 SCC 300**, Court while considering, whether provisions of Section 5 of Act, 1963 would be applicable to the proceedings under Order 21 of Code of Civil Procedure, observed:

"It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power."

52. A Division Bench of this Court (in which I was also a member) in **M/S Vimal Organics Ltd. Vs. State of U.P. and others 2008 (2) AWC 1164**, considering a similar issue in respect of appeals under Section 13 of Water (Prevention and Control of Pollution) Cess Act, 1977 (hereinafter referred to as "Act, 1977") read with Rule 9 of the Water (Prevention and Control of Pollution) Cess Rules, 1978 (hereinafter referred to as "Rules, 1978"), in para 18 and 19 of judgment, said:

"18. The period of limitation, as contended by learned counsel for the petitioner, cannot be said to be a part of procedure only, as an universal proposition. Rather it would depend upon relevant provisions of the statute and the consequences flowing thereof, i.e., as a result of expiry of the period of limitation. In many cases, it may result in accrual of substantive rights to the other side and in those cases, provisions pertaining to limitation cannot be said to be directory but have to be held mandatory. For example, under Section 6 of Land Acquisition Act, 1894, a declaration has to be made within one year from the date of notification under Section 4. The period of one year limitation gets extended by the period for which some interim order of any nature has been passed by a Court of Law. If such a declaration is not made under Section 6 within the aforesaid period, the proceedings will lapse. This view was taken by the Apex Court in ***State of Haryana v. Sukhdev AIR 1994 SC 1255 and General Manager, Department of Telecommunications, Thiruvananthapuram v. Jacob AIR 2003 SC 1308.***

19. A Division Bench of this Court in ***Mahavir Sahkari Avas Samiti Ltd. Vs. State of U.P. and others, 2007 (2) AWC 1162****, considering the aforesaid provisions in para 54, sub para (iii) held that "the Court does not have the power to extend the period of limitation provided under the Statute." Similarly, in various taxing statutes where the period of limitation expires, thereafter the authorities cannot proceed to pass orders against the assessee treating it to be procedural only. In those cases expiry of period of limitation provided in the statute result in vested right to the assessee like not to be assessed or face any assessment proceedings etc. before the authority concerned under the relevant Act. The illustrations may be multiplied but we do not wish to do so and feel satisfied by observing that it is not always correct to say that whenever the limitation is prescribed, it is in the nature of procedural law and, therefore, has to be read leniently and must be treated to be directory instead of mandatory. In respect to special enactments which contain substantive provisions as well as procedure to give effect to carrying out the purpose of such Act, if period of limitation is provided the same has been held to be mandatory and once such period has expired, the Court is not competent to extend limitation and thereby nullify the otherwise provision(s) under the statute."*

53. Similarly, in a reference made to a Division Bench as to whether Section 5 of Act, 1963 would be attracted in contempt proceedings to condone delay if limitation under Section 20 of Contempt of Courts Act, 1971 has expired, this Court in **Islamuddin Vs. Sri Umesh Chandrara Tiwari and another 2009 (4) AWC 3680** held that it would not be applicable.

54. When questioned, learned Senior Counsel could not show that recovery certificate issued to Collector by PICUP is like filing a suit in a Court or an Appeal or any proceedings thereafter. Collector, while proceeding to recover dues communicated to him as arrears of land revenue through a recovery certificate, does not act as a Court.

55. While deciding revenue matters under Provisions of U. P. Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901"), U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act, No. 1 of 1951) (hereinafter referred to as "Act, 1950") and other provisions, Collector may function as a Revenue Court but for all purposes and for all times, in all matters, Collector does not act as a Revenue Court. He also exercises quasi judicial and executive powers under several statutes including U.P. Act, 1972. When a certificate of recovery is issued by a Corporation, as defined under Section 2(a) of U.P. Act, 1972, the Collector proceeds to recover dues as arrears of land revenue through himself and his subordinate authorities and there he functions as an executive Revenue Authority.

Section 3(2) of U.P. Act, 1972 states:

"(2) The ***Collector on receiving the certificate shall proceed to recover the amount*** *stated therein as an arrear of land revenue."*

(emphasis added)

56. Further, Section 3(3) of UP Act, 1972 bars a suit in Civil Court against any person referred to in Sub-section (1) of Section 3. UP Act, 1972 specifically bars a civil suit in respect to dues of a Financial or Banking Institution, which can be recovered as arrears of land revenue under the provisions of UP Act, 1972. Thus, such Financial or Banking Institutions cannot file suit for recovery of outstanding dues and remedy available to them is to issue recovery certificate whereupon Collector shall proceed to recover the amount stated therein as arrears of land revenue. This also shows that Legislature has intended not to provide dual remedy to Banking or Financial Institutions, which may recover dues under the provisions of UP Act, 1972. They need not follow a lengthy procedure of filing a civil suit in a Civil Court and instead they can resort to avail speedy remedy of recovery under the provisions of UP Act, 1972. If a defaulter, from whom recovery is made by Collector, has any grievance that such recovery has wrongly been given effect to and he has been deprived of his property in respect of certain dues, which were not liable to be recovered from him, UP Act, 1972 provides a remedy to such defaulter by stating that he shall pay such amount and thereafter file a suit for refund of the said amount. Limitation for defaulter obviously will commence only when he shall pay the amount or amount is recovered from him and not earlier thereto. We are, therefore, clearly of the view that provisions of Act, 1963 have no application to stage of issuance of recovery certificate by a Corporation, as defined under Section 2(a) of UP Act, 1972 and once such recovery certificate is issued, Collector is under an obligation to proceed to recover amount stated therein as arrears of land revenue vide Section 3(2) of UP Act, 1972. If at the stage of issuance of recovery certificate, provisions of Act, 1963 are not attracted to a Corporation, as defined under Section 2(a) of UP Act, 1972, consequential recovery proceedings initiated by Collector also would not attract provisions of Act, 1963.

57. Now we come to the decision in **State of Kerala and others Vs. V.R. Kalliyanikutty and another (supra)** relied on by learned Senior Counsel. The matter had arisen when recovery was resorted to under Kerala Revenue Recovery Act, 1968 (hereinafter referred to as "Kerala Act, 1968"). Kerala Act, 1968, as originally enacted, applied to arrears of "public revenue due on land". The words "public revenue due on land" were defined in Section 2(j) as land revenue charged on the land and includes all other taxes, fees and cesses on land, whether charged on land or not, and all cesses or other dues payable to the Government on account of water used for purposes of irrigation. Recovery of loan amount advanced by a Bank or Financial Institution was, as such, not included under Kerala Act, 1968. There was an enabling provision under Section 71 which reads as under:

"Power of Government to declare the Act applicable to any institution: The Government may, by notification in the Gazette, declare, if they are satisfied that it is

necessary to do so in public interest, that the provisions of this Act shall be applicable to the recovery of amounts due from any person or class of persons to any specified institution or any class or classes of institutions, and thereupon all the provisions of this Act shall be applicable to such recovery."

58. Kerala Government in exercise of power under Section 71 issued Notifications No. 797 and 851 of 1979, extending provisions of Kerala Act, 1968 for recovery of amount, due from any person to any Bank, on account of loan advanced for agriculture or agricultural purposes and recovery of amount of loan advanced by Kerala Financial Corporation. These provisions, thus, were made applicable to loan advanced for agricultural purposes by Bank or Kerala Financial Corporation for the first time in 1979. It appears that certain dues which could have been recovered by Bank by filing suit before 1979, already became barred by limitation. After extension of Kerala Act, 1968 to the Bank and Kerala Financial Corporation, they issued recovery certificate for recovery of already time barred debts. The issue came to be considered "whether a time barred debt can be said to be "amount due" under Section 71 of Kerala Act, 1968". There was no dispute about the fact that dues were already barred by limitation and now sought to be recovered after extension of provisions of Kerala Act, 1968 to Bank and Kerala Financial Corporation. It is in this backdrop, Court formulated question to be considered and it is evident from Para 8 of judgment which reads as under:

"8. Looking to the object of Section we have to examine ***whether time-barred claims of the State Financial Corporation and the banks can be recovered under it****."*

(emphasis added)

59. Court has also referred to arguments advanced by Financial Institution that the words "amount due" in Section 71 is encompassing time-barred claims also. It was negatived by Court. It held that the dues having already become barred by limitation, cannot be said to be 'amount due' when provisions of Kerala Act, 1968 were extended to Financial Institutions. Such dues cannot be recovered by taking recourse to the said Act after extension of Kerala Act, 1968 to Financial Institutions. Court said that Kerala Act, 1968 does not create any new right. It merely provides a process of speedy recovery of moneys due. If instead of filing a suit, Financial Institution can recover the claim under Kerala Act, 1968 they can do so, but where dues are already barred by limitation, by taking recourse to extension of Kerala Act, 1968 to Financial Institutions, they cannot proceed to recover time barred dues under the provisions of Kerala Act, 1968. Court has decided the matter in the light of specific provisions of Kerala Act, 1968 and, to our mind, aforesaid judgment, as such, is not applicable where matter is governed by U.P. Act, 1972. Moreover UP Act, 1972 bars a civil suit vide Section 3(3) against any person referred to in Sub-section (1) and Section 4(1)(b) states that Section 3 shall not bar a suit etc. against any person other than the person referred to in Section 3. Here also petitioners are admittedly governed and covered by Section 3(1) of U.P. Act, 1972.

60. Similarly, **in Maharashtra State Financial Corporation Vs. Ashok Kumar Agarwal (supra)** execution of a decree was up for consideration. Maharashtra State Financial Corporation (hereinafter referred to as "MSFC") moved an application under Sections 31 and 32 of Act, 1951 in the Court of District Judge, praying for order of sale of hypothecated goods of borrower Company. On 11.06.1990, attached property of borrower Company was put on sale since there was a shortfall of realization of dues. MSFC sent notices to sureties on 27.12.1991 and filed application under Section 31(1)(aa) on 02.01.1992. Sureties took objection that said application was barred by limitation provided under Article 137 of Act, 1963. District Judge upheld objection and rejected application filed by MSFC as barred by limitation. The order was confirmed by High Court by dismissing appeal of MSFC and it was also confirmed by Supreme Court. Court observed that Article 136 is applicable for execution of decree or order of any Civil Court. The application under Sections 31 and 32 is not by way of execution of a decree or order of any civil court and, therefore, Article 136 was not applicable. It is in these circumstances, Court held that Article 137 was applicable and hence the application was barred by limitation. The issue raised in this judgment was entirely different, and, in our view, it lends no support to petitioners on the issue raised in the present writ petition.

61. Then we come to Division Bench judgment **in Narendra Kumar and another Vs. Collector, Bulandshahar and others (supra**). Here loan was sanctioned by U.P. Financial Corporation (hereinafter referred to as "UPFC") and disbursed in instalments between 07.04.1975 to 17.071976. Instalments were not paid. UPFC recalled entire loan on 14.09.1978. Recovery certificate was issued on 02.01.1979 under U.P. Act, 1972. Deputy Collector on 20.08.1981 auctioned the unit of borrower as also mortgaged land belong to a guarantor. Sale certificate was issued by Collector on 20.08.1981. Tehsildar, thereafter, certified that borrower has nothing left with him wherefrom further recovery is possible and thereafter recovery certificate was returned by Collector to UPFC. It kept silence for about 18 years and thereafter sent a notice on 29.06.2000 to Narendra Kumar and another that they had taken loan of Rs. 1,38,700/- and have not paid the same which has swollen till 20.3.2000 to Rs. 48,03,281.94. Notice also detailed earlier recovery proceedings and invited Narendra Kumar and another to come for one time settlement. Collector issued order of recovery on 30.08.2000 whereon citation was issued by Tehsildar on 12.09.2000. These orders of Collector and Tehsildar were challenged. It had also come before Court that after Collector returned recovery certificate in 1979, Board of Directors of UPFC considered the matter and in its meeting dated 31.03.1986 resolved to waive off/write off remaining un-recovered loan amount. Court then proceeded to consider the argument of limitation with respect to recovery initiated on 30.08.2000. Relying on the decision in **State of Kerala and others Vs. V.R. Kalliyanikutty and another (supra),** Division Bench held that limitation will apply to such recovery proceedings and said as under:

"12. The law of limitation makes available a right of defence with the debtor to claim that after the expiry of period of limitation the remedy to recover the amount by the creditor from him had become time barred. The Act has been enforced for speedy

recovery of dues of the State Government, U.P. Financial Corporation etc. as mentioned in the Act. It has not been enacted with a purpose to enlarge the limitation ***nor the rights of the creditor had been enlarged to recover claims of sum due that had become time barred****. It is a settled law, that no one can extend the period of limitation by taking advantage of his own wrong."*

62. It has further said as under:

"Even assuming that the revenue authorities failed to discharge their duty in accordance with law, it could not stop the limitation. The cause of action for recovery of the loan arose when the petitioner committed default. The respondents initiated recovery within time. But ***once the recovery certificate was returned after sale of petitioners' assets, the recovery proceedings came to an end. If something remained or any property was not sold, the proceedings could have started but in accordance with law. The time taken to recover the amount was arrested when recovery proceedings were started****. It started running again when recovery certificate was returned. Since no proceedings were initiated for nearly eighteen years, the proceedings for recovery became barred by time."*

(emphasis added)

63. The distinction between Kerala Act, 1968 and U.P. Act, 1972 has not been examined in the aforesaid Division Bench judgment. Court also had no occasion to examine that Section 3 of Act, 1963 does not apply to executive authorities and Financial Institutions etc. It is applicable only to Courts. There was no period of limitation prescribed within which a Financial or Banking Institution should have issued recovery certificate, failing which, same would have become barred by limitation. It has also not examined as to when, Act, 1963 will apply, i.e., at the stage when recovery certificate is issued or at the stage when Collector proceeds to recover the amount mentioned in recovery certificate as arrears of land revenue. In fact, we find that though Court applied Act, 1963, but in fact it has laid stress upon the fact that recovery proceedings earlier initiated already attained finality and Financial Institution also waived unrecovered amount and thereafter fresh proceedings could not have been initiated after more than 18 years, but in general it has also discussed application of limitation under Act, 1963 without any specific reference to provisions thereof. Some of observations, therefore, in our view, are not correct.

64. In normal course, we could have referred the matter to a Larger Bench, but we find that even if we apply Act, 1963 to the proceedings in question, it has still to be seen, what is period of limitation which will apply in the case in hand and when it will commence and whether such period had expired or not.

65. Learned Senior Counsel referred to Article 19 and 21 stating that it is three years, while learned counsel appearing for respondent-PICUP referred to Article 62 which provides limitation of 12 years.

66. Articles 19, 21 and 62 read as under:

Article	**Description of suit**	**Period of limitation**	**Time from which period begins to run**
19	For money payable for money lent	Three years	When the loan is made.
21	For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made.
62	To enforce payment of money **secured by a mortgage or otherwise charged upon immovable property**	Twelve years	When the money sued for becomes due.

.

(emphasis added)

67. It is not in dispute that here is a case of amount of loan in respect whereto Company executed a Deed of Hypothecation in respect of its movable assets, as is evident from Annexure-7 to the writ petition which is a copy of deed of hypothecation dated 24.11.1990. However, petitioners executed Bond of Guarantee dated 29.11.1990 (Annexure 8 to the writ petition), creating equitable mortgage of their assets which included immovable property also. This is evident from Clause-3 of the said Bond. When recovery proceedings have been initiated against guarantors, i.e., petitioners, it cannot be doubted that Bank has proceeded to enforce payment of money secured by a charge upon immovable property of guarantors and that being so, it apparently attracts Article 62 of Schedule of Act, 1963 and not Article 19 or 21, as relied by learned counsel for petitioners. We reiterate that it is Article 62 which will apply and limitation would be 12 years.

68. Taking limitation as 12 years, learned Senior Counsel could not dispute that recovery proceedings are well within such period of limitation since his submission proceeds with assumption that limitation period is only three years. In these facts and circumstances, we are of the view that recovery in question is not barred by limitation.

69. We, therefore, find no reason to interfere with the same.

70. The writ petition lacks merits. Dismissed with cost, which we quantify to Rs. 10,000/-.

71. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ A No.- 31874 Of 1990

Shiv Pratap & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
S.Kumar, A.K. Gupta, Amit Saxena, Pradeep Chandra, Pradeep Kumar, Satya Prakash, Shailendra, Amit Saxena.

Counsel for the Respondents:
P.K. Jain, B.N. Singh, H.R. Mishra, M.C. Chaturvedi, O.P. Singh, Pushpendra Singh, S.C., S. V. Goswami.

Service Law — Promotion — Ad hoc promotion — Criteria of "merit" — Scope of judicial review— Petitioners (Co-operative Inspectors, Group-I) challenged ad hoc promotion of respondents to the post of Assistant Registrar (Co-operatives) on grounds of illegality in preparation of eligibility list, inclusion of unqualified persons and violation of Rules, 1970—Held, promotion governed by U.P. Co-operative Service Rules, 1979 where eligibility requires only 5 years' service in Group-I—No requirement of confirmation or passing departmental examination for eligibility—Substantive appointment distinct from confirmation—Petitioners' contention reading additional eligibility conditions into Rules rejected—Ad hoc promotions made in accordance with Government Orders dated 30-11-1971 and 29-03-1986, hence strict compliance of Rules, 1970 not mandatory—Selection based on merit after consideration of all eligible candidates—No illegality found (Paras 15, 17, 24).

Service Law — Merit vs Seniority — Promotion by selection — Comparative assessment—Where criteria is "merit", seniority has no determinative role—All eligible candidates fall within zone of consideration and are to be comparatively assessed—Seniority may at best be a minor factor in evaluating experience but cannot override merit—Promotion by merit is not a matter of right—Seniority relevant only after selection for arranging inter se position—Challenge on ground of seniority untenable (Paras 18–19).

Service Law — Judicial review of selection — Limited scope—Court does not sit in appeal over assessment of merit by Selection Committee—Interference permissible only in cases of mala fide, violation of statutory rules, fraud or patent illegality—In absence of such infirmities, comparative evaluation of merit cannot be re-examined—Petitioners having been considered but not selected, no ground for interference made out (Para 16).

Service Law — Ad hoc promotion — Applicability of procedural rules—Where promotions are purely ad hoc due to pending seniority disputes, Government Orders governing ad hoc promotions apply—Requirement is adherence to eligibility criteria and selection on merit—Non-compliance with procedural aspects of Rules, 1970 not fatal in such cases (Para 17).

In Result -Petition dismissed with costs of Rs. 5000/-.

Cases cited

State of Orissa vs. Durga Charan Das 1966 (2) SCR 907
Union of India vs. Mohan Lal Kapoor 1974 SCR (1) 797
B.V. Sivaiah and others vs. K. Addanki Babu and others AIR 1998 SC 2565

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

1. Heard Sri Amit Saxena, learned counsel for petitioners. None appeared on behalf of respondents, though matter has been called in revised. Hence, we proceed in the matter to decide the same ex parte after hearing learned counsel for petitioners.

2. Dispute relates to promotion to the post of Assistant Registrar (Cooperatives).

3. Recruitment, appointment and condition of service to the post of Assistant Registrar (Cooperatives) is governed by U.P. Cooperatives Service Rules, 1979 (hereinafter referred to as 'Rules, 1979'). As per Rule 4, post of Assistant Registrar is a Group-B post. Rule 5 provides for sources of recruitment and Clause 5 deals with Assistant Registrar and reads as under :

*"**5. Sources of recruitment**.- Recruitment to the various categories of posts in the service shall be made from the following sources :-*

*(5) Assistant Registrar.- (I) By promotion**, on the basis of merit**, from amongst the members of the Subordinate Co-operative Service, Group I, who have put in minimum of 5 years' service as such on the first day of the year of recruitment.*

(ii) By direct recruitment through the Commission :

Provided that the recruitment to the posts of Assistant Registrar shall be so arranged that, as far as possible, 50 per cent of the posts are held by promotee and 50 per cent by direct recruits."

(emphasis added)

4. Rule 19 deals with manner of promotion to post of Assistant Registrar and reads as under :

*"**19. Recruitment by promotion to the post of Assistant Registrar**.- Recruitment by promotion to the post of the Assistant Registrar shall be made **on the basis of merit** in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time."*

(emphasis added)

5. Rule 30 provides for regulation of other matters, not provided specifically under Rules, 1979. It reads as under :-

*"**30. Regulation of other matters**.- In regard to the matters not specifically covered by these rules or by special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State."*

6. Petitioners and respondents 5 to 37 were appointed as Co-operative Inspectors, Group-I. As per averments made in para 1 and 3 of writ petition, petitioners and respondents 5 to 7 were appointed by direct recruitment in 1980.

7. Recruitment, Appointment and Condition of Service of Co-operative Inspectors, Group-I is governed by Subordinate Co-operative Service Rules, 1979 (hereinafter referred to as 'Subordinate Rules, 1979'). Inspector, Group-I is defined in Rule 3 (i) and reads as under :-

*"**Inspector, Group I**" means Co-operative Inspectors, Group 1 and includes officers holding the posts of District Co-operative Officer, Additional District Co-operative Officer, Senior Additional District Co-operative Officer, Senior Farming Inspector, Executive Officer (Processing, Senior returns Inspector and such other subordinate executive posts as may be declared by the State Government as such from time to time;"*

8. As per Rule 5 of Subordinate Rules, 1979 sources of recruitment to post of Inspectors, Group-I is 50% by direct recruitment through U.P. Public Service Commission (hereinafter referred to as 'Commission') and 50% by promotion through Commission from amongst Inspectors, Group-II, who have put in at least five years' service. There was some dispute with regard to seniority of Inspectors, Group-I engaging some litigation between persons working in said cadre. For recruitment year 1988-89, it is said that 35 vacancies of Assistant Registrar (Co-operatives) were available, which were to be filled in by promotion from Cooperative Inspectors, Group-I. The criteria for promotion, as already said, is merit. The procedure for selection has to be followed as per provisions contained in U.P. Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 (hereinafter referred to as 'Rules, 1970').

9. Rule 8 provides for preparation of an eligibility list and if there are more than 12 vacancies, the eligibility list is required to contain three times the number of vacancies subject to a minimum of 50.

10. Rules 11 and 12 talk of Selection Committee and selection and reads as under :

*"11**. Selection Committee**.- A Selection Committee consisting of the following shall be constituted by the appointing authority :*

(i) the Chairman or member representing the Commission who will be the Chairman of the Committee;

(ii) the appointing authority; and

(iii) a senior officer of that or any other department nominated by the Government, provided that where the appointing authority is the Governor the head of that department shall ordinarily be nominated under this clause.

12. Fixing of dates for selection.- (1) The appointing authority shall in consultation with the Commission fix a date for selection:

Provided that the process of selection may spread over the dates more than one.

(2) In case the Commission or the appointing authority considers it necessary that all or any of the candidates included in the eligibility list or lists should be interviewed by the Selection Committee, the appointing authority shall call such candidates or candidate as the case may be, for the purpose on the aforesaid date or dates.

(3) The Selection Committee shall in case case consider the character rolls of the candidates and may consider any other factor relevant in its opinion."

11. The select list prepared by Selection Committee needs be approved by Commission vide Rule 14 of Rules, 1970 and, therefore, vide Rule 15 Appointing Authority shall rearrange the names of selected candidates in order of seniority and thereafter proceed for making appointment.

12. The Selection Committee considered candidates placed in eligibility list and made its recommendations. Thereafter respondents 5 to 37 were promoted on ad hoc basis vide order dated 13.2.1989. Petitioners were not selected. It is this order of promotion of respondents-5 to 37, which is under challenge.

13. Sri Amit Saxena, learned counsel for petitioners has challenged aforesaid promotion contending that :

No.1 - the eligibility list was prepared by Registrar Co-operative (respondent 3) and not Appointing Authority, therefore, the very eligibility list was illegal and not in consonance with Rule 8 of Rules, 1970;

No.2 - the eligibility list included persons, who had not passed departmental examination and having not been confirmed, placement of such persons in eligibility list is illegal. Such ineligible persons have also been selected and promoted, hence their promotion is also bad;

No.3 - the persons, who did not complete two years probation period satisfactorily, were liable to be terminated but instead thereof, they were allowed to continue and have now been selected, which is illegal. It is however, said that petitioners-1 to 5 and 7 also come in this category of unqualified persons. Only petitioner-6 and two others qualified departmental examination and fulfill all conditions under Rule 21 of Subordinate Rules, 1979 within two years of probation period, hence they were eligible and not others; and

No.4 - the names of unqualified persons could not have been placed above in seniority, to persons, who were qualified, and this also renders eligibility list, illegal.

14. Respondent State had not filed any counter affidavit but during pendency of matter, it appears that there were several incidental proceedings including Contempt Petition No. 2308 of 1993 and pursuant to order passed therein, petitioners and others were given an opportunity of making representation to State Government, who was required to decide the same, after giving opportunity of hearing to all concerned parties and pursuant thereto, a detailed order has been passed on 23rd September 1998 (Annexure 30 to amended writ petition). Therein it has been stated that since seniority of Inspectors, Group-I was in dispute, Government decided to fill in the post of Assistant Registrar by ad hoc promotion. The procedure for ad hoc promotion was governed by a Government Order dated 30th November 1971, as modified by subsequent order dated 29th March 1986 and therein it was provided that field of eligibility and criteria for selection shall be the same as provided in relevant Rules, which talk of 'merit'. Names of all petitioners were included in eligibility list and Selection Committee considered them also on 'merit'. Promotions have been made on the basis of recommendations made by Selection Committee.

15. The first submission is that unless one has passed various examinations as provided in Rule 21 of Subordinate Rules, 1979 neither could have been placed in seniority list of Inspectors, Group-I nor could have been considered for promotion to post of Assistant Registrar under Rules, 1979. In our view, it has no substance and the very foundation of this argument is thoroughly misconceived. A person, who is selected for Inspector, Group-I is appointed under Rule 19(1) of Subordinate Rules, 1979 on the occurrence of substantive vacancy and such an appointment is a substantive appointment. A substantive appointment is not to be equated with confirmation under Rule 21, which is a subsequent stage. Once a person is appointed under Rule 19 on the occurrence of substantive vacancy, which is a substantive appointment, he stands placed on probation for a period of two years. Under Rule 22, seniority is to be determined on the basis of date of order of substantive appointment and not on the basis of confirmation. Petitioners as well as respondents-5 to 37 were all working as Inspectors, Group-I. Their continuance in service is not in dispute. For the purpose of promotion under Rules, 1979, only requirement under Rule 5(5) is that incumbent working as Inspector, Group-I must have rendered five years of service on first day of year of recruitment. There is no requirement that member of Subordinate Cooperative Service Group, to be eligible for promotion as Assistant Registrar, must be a permanently appointed or confirmed member of Group-I service. It also does not provide that such incumbent must have passed all the tests as contemplated under Rule 21 of Subordinate Rules, 1979 and attempt on the part of petitioners' counsel to argue otherwise is nothing but an attempt to read something in Rule, 1979,

which is not otherwise provided therein. Moreover though process of selection has been followed under Rules but the fact remains that promotion in question is only ad hoc and has been made in accordance with procedure prescribed in Government Orders dated 30th November 1971 and 29th March 1986.

16. Petitioners have been considered for promotion and not selected. The criteria of promotion is merit. When all the petitioners and respondents-5 to 37 are similarly placed, working as Inspectors, Group-I have performed their service for minimum length prescribed so as to become eligible for consideration for ad hoc promotion to the post of Assistant Registrar (Cooperatives), if petitioners have not been found meritorious enough vis a vis respondents-5 to 37 and have not been selected, this Court shall not look into the process of selection as if it is sitting in appeal over the assessment of merit made by Selection Committee. Scope of judicial review in such matter is extremely limited and only if it is shown that either selection is vitiated on account of mala fide or the procedure followed is contrary to the Rules or that the decision otherwise ex facie illegal i.e. there is some misrepresentation, fraud or misreading of documents, else Court shall not interfere with the objective consideration of merit by a Selection Committee. It is not expected from a Court to find out whether petitioners or respondents are more meritorious so as to make re-assessment of merit of the candidates for the reason that it is the job of Selection Committee under Rules and only, if there is a patent illegality, Court shall interfere and not otherwise. In the present case, petitioners have not been selected though considered on the same criteria of merit on which respondents-5 to 37 have been considered, and in absence of any material to show that selection is vitiated in law, we do not find any justification to interfere.

17. It is further submitted that as per Rules, 1970, eligibility list ought to have been prepared by appointing authority and Selection Committee must consist of a member of Commission. Since promotion in question was ad hoc and in accordance with Government Orders dated 30th November 1971 and 29th March 1986 and not a substantive promotion on the post of Assistant Registrar, therefore, Rules, 1970 strictly were not applicable. As per Government Orders 30th November 1971 and 29th March 1986, which were applicable for ad hoc promotion, only two things were to be seen. First, eligibility criteria provided in the Rules, and, second, criteria of selection. Both these things have been taken into consideration and thereafter promotions have been made. Therefore, challenge to the impugned ad hoc promotion on the basis of Rules, 1970 is wholly misconceived and has no basis.

18. Counsel for petitioners submitted that petitioners are senior to respondents and hence have a right to be promoted first on the basis of their seniority, particularly when no adverse material is available on record. The submissions ignores the fact that criteria for promotion is 'merit' and not 'seniority'. The requisite criteria for promotion when is only merit, by no stretch of imagination it can be tampered with seniority. Seniority in the form of experience i.e. length of service may be one of the relevant factors amongst several others. In other words, when criteria is merit, persons who have more experience, may secure some marks on account of experience but that aspect cannot be equated with seniority, since seniority, as such, has no role to play, when

criteria is 'merit'. Seniority comes into picture only when incumbents are selected, then their names are re-arranged in order of seniority.

19. When criteria is merit all the persons within field of eligibility and zone of consideration have to be considered. The consideration of 'merit' means comparative merit of all candidates under consideration. Those who have highest merit, are selected without having any consideration to their seniority. The junior most person in the zone of consideration and field of eligibility compete with senior most when criteria is 'merit'. When criteria is merit obviously promotion is by way of selection and it is not a matter of right. It cannot be claimed merely on the basis of seniority as held in **State of Orissa vs. Durga Charan Das 1966 (2) SCR 907**.

20. In the matter of appointment by promotion from State Civil Service to Indian Administrative Service, where criteria was "merit and suitability", Court in **Union of India vs. Mohan Lal Kapoor 1974 SCR (1) 797** held that in such circumstances merit and suitability would be the governing consideration and not seniority. Seniority will play a secondary role and only when merit and suitability are roughly equal, seniority would be a determining factor and not otherwise.

21. Even in a case where "merit-cum-seniority" was criteria, in **B.V. Sivaiah and others vs. K. Addanki Babu and others AIR 1998 SC 2565**, Court held that greater emphasis would be on merit and ability while seniority would play a less significant role. Seniority would be given weight only when merit and ability are approximately equal.

22. In the present case, since Rules provide criteria for selection are merit, we do not find that petitioners can raise any objection with regard to selection of persons on criteria of merit, merely, on the basis that petitioners are senior. Moreover, promotion is wholly on ad hoc basis for the reasons that seniority of Inspectors was in dispute.

23. We find no apparent infirmity in the impugned promotion of respondents-5 to 37 which has been made in accordance with Government Orders dated 30th November 1971 and 29th March 1986.

24. The further contention of petitioners that unqualified, ineligible persons have been selected by referring Rules of Subordinate Rules, 1979 is thoroughly misconceived, as the same has no application in the case in hand, inasmuch as, under Rule 5(5) of Rules, 1979 no such eligibility is prescribed. The only eligibility for promotion is that an incumbent must have worked as a member of Group-I Cooperative Service for a period of five years on the first day of year of recruitment.

25. In the result, we find no merit in this petition.

26. Dismissed with cost of Rs.5000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ C No.- 31884 Of 1993

Smt. Hirawati Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
A.C. Tripathi, H.R. Mishra, K.M. Mishra

Counsel for the Respondents:
V.B. Singh, A.K. Dwivedi, S.C.

Land Acquisition Act, 1894—Sections 4, 5-A, 6, 17(1) & (4)—Dispensation of inquiry—Validity— Right to object under Section 5-A is a **substantive and valuable right** embodying principles of natural justice and cannot be taken away casually—dispensation permissible only in cases of **real and genuine urgency**—mere recitation of urgency is insufficient. (Paras 18, 20–24, 29, 31)

Requirement of application of mind—State must demonstrate existence of material justifying urgency and necessity to dispense with Section 5-A inquiry—absence of relevant material and mechanical invocation of urgency vitiates acquisition. (Paras 24, 27, 32)
Effect on urgency—Long delay between proposal, notification, declaration and possession negates claim of urgency—where authorities had sufficient time, denial of inquiry under Section 5-A is unjustified. (Paras 32–33)
Article 300-A—Right to property—Though no longer fundamental, right to property is a **constitutional right**, and deprivation must strictly follow procedure established by law—non-compliance renders acquisition illegal.

Result — Petition partly allowed.

Case cited

Radhy Shyam (Dead) through Lrs. and others vs. State of U.P. and others(2011) 5 SCC 553
Gajraj and others vs. State of U.P. and others2011 (11) ADJ 1 (FB)
Nandeshwar Prasad vs. U.P. GovernmentAIR 1964 SC 1217
Munshi Singh and others vs. Union of India(1973) 2 SCC 337
State of Punjab vs. Gurnail Singh and others(1980) 1 SCC 471
Shyam Nandan Prasad and others vs. State of Bihar and others(1993) 4 SCC 255
Union of India and others vs. Mukesh Hans(2004) 8 SCC 14
Hindustan Petroleum Corporation Ltd. vs. Darius Shapur Chenai & Ors.(2005) 7 SCC 627

Essco Fabs Pvt. Ltd. & Anr. vs. State of Haryana & Anr.(2009) 2 SCC 377
Anand Singh and another vs. State of U.P. and others(2010) 11 SCC 242
Darshan Lal Nagpal (Dead) by Lrs. vs. Govt. of NCT of Delhi and others(2012) 2 SCC 327
Union of India and others vs. Shiv Raj and others(2014) 6 SCC 564

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

1. Heard Sri H.R. Mishra, Senior Advocate, assisted by Sri Amit Kumar Pandey, learned counsel for petitioners, learned Standing Counsel for respondent-1 and Sri Ajeet Kumar Singh, learned counsel appearing for Varanasi Development Authority.

2. This writ petition under Article 226 of Constitution of India has been filed challenging notification dated 10th July 1992 issued under Section 4(1) of Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894') proposing to acquire a total 147.734 acres of land for planned development at the instance of Varanasi Development Authority (hereinafter referred to as 'V.D.A.') for constructing residential colony at Village Lalpur, Pargana Shivpur, Tehsil & District Varanasi.

3. The State Government also invoked provisions under Section 17(1) and (4) of Act, 1894 and stated that land is required urgently, hence to eliminate delay likely to be caused by an inquiry under Section 5-A, Governor directs that Section 5-A shall not apply.

4. Petitioners have further challenged subsequent declaration made vide notification dated 8th July 1993 published in the Gazette extraordinary of same date under Section 6(1) of Act, 1894, wherein total land sought to be acquired mentioned is 145.5665 acres.

5. Initially, 24 petitioners joined in writ petition and petitioners-25 to 38 have been impleaded subsequently but in the writ petition detailed facts of only petitioners-1 to 24 have been mentioned in paras 3 and 4 stating that they purchased disputed land vide sale deeds executed between 1985 to 1992. The land was owned by M/s Shiv Shankar Sahkari Awas Samiti. In small plots land was purchased by petitioners 1 to 24 from said Samiti. Petitioners, belong to middle income group, have invested their life time earning in purchasing plots for raising construction of residential houses. Some petitioners raised constructions also, whereupon V.D.A. issued notices under Section 27 alleging that constructions are unauthorised and those notices were challenged in appeal before Commissioner, which were pending when impugned notifications were issued.

6. Learned counsel for petitioners has challenged aforesaid acquisition notifications, in so far as inquiry under Section 5-A has been dispensed with, contending that there was no actual urgency. No material existed to show that requirement was urgent. One year time was taken by State in issuing declaration under Section 6 after publication of notification under Section 4. Even otherwise there is no application of mind on the part of State on this aspect that there was no urgency whatsoever, hence inquiry under Section 5-A could not have been dispensed with in exercise of powers under Section 17(1) and (4). Making Section 5-A inapplicable to the acquisition proceedings in question is patently illegal, arbitrary and bad in law. Reliance has been placed on

law laid down in **Radhy Shyam (Dead) through Lrs. and others vs. State of U.P. and others (2011) 5 SCC 553 and a Full Bench judgment of this Court in Gajraj and others vs. State of U.P. and others 2011 (11) ADJ 1**.

7. On behalf of respondents-2 and 3, a counter affidavit has been filed sworn by Swami Nath Pathak, Special Land Acquisition Officer, Varanasi. It is said that V.D.A. resolved to construct residential colony namely, Lalpur Housing Scheme Phase-I and on a proposal made by it, Collector recommended acquisition of land at village Lalpur. District Magistrate as well as State Government after preliminary inquiry were satisfied with requirement of V.D.A. Notification dated 10th July 1992 was published in daily newspapers 'Janwarta' and 'Bharatdoot' on 9.11.1992. It was also given vide publicity locally by beat of drum. Thereafter a corrigendum was published on 28.1.1993, which was also published in newspapers. Declaration under Section 6 was published on 8.7.1993 in daily newspapers 'Sanmarg' and 'Baharatdoot' on 5.9.1993 and 10.9.1993. V.D.A. had deposited about 73 lacs. towards 80% of estimated cost of compensation.

8. V.D.A. has also filed a separate counter affidavit, wherein also similar facts have been stated.

9. With regard to actual existence of urgency both affidavits were quite silent, hence respondents-2 and 3 filed a supplementary counter affidavit sworn by Sri Rajendra Prasad, Special Land Acquisition Officer, Varanasi. It was stated therein that V.D.A. filed an application dated 6.6.1990 before District Magistrate, Varanasi requesting for acquisition of land of 147.984 acres at Village Lalpur for construction of a residential colony. It is also mentioned that there was an urgency in the matter since housing accommodation at Varanasi was highly deficient and for removing the same immediate possession and construction of colony is necessary. Collector got the matter examined and thereafter in the light of report received, forwarded proposal to Director, Land Acquisition vide letter dated 16th June 1992. State Government then issued notification dated 10th July 1992 under Section 4(1) read with Section 17(1) and (4) and said notification was published in U.P. Gazette extraordinary of same date i.e. 10th July 1992. State Government on the basis of material available before it was satisfied that land was urgently and immediately needed and, therefore, dispensed with inquiry under Section 5-A. Subsequently declaration under Section 6 was published on 8th July 1993. The possession of land was taken vide possession memo dated 18.8.1994 and 28.7.1995. Special Land Acquisition Officer, Varanasi also made award on 8.10.1997. Only 139.072 acres of land was taken in possession as is evident from award dated 8.10.1997, copy whereof has been filed as Annexure S.C.A.-6.

10. Another supplementary counter affidavit has been filed by V.D.A. wherein also similar facts have been stated. However, date of possession of land has been mentioned as 19.8.1994 and 31.7.1995. It is said that petitioners have purchased plots from Arazi no. 373/1, 373/2, 377, 387/1, 394/2 and 394/2 and all these plots have been acquired and possession taken. V.D.A. carved out 1112 plots of different sizes and same have been allotted to prospective candidates. Further 25 acres of land has been allotted to Central Public Works Department; 10 acres has been allotted to Telecommunication Department and 5 acres for Coaching Centres. The aforesaid bodies have

commenced construction over allotted land. Plots have also been allotted to Community Health Centre, Library Hall, Shopping Complex and Nursing Home. 108 flats for Economical Weaker Sections (in short 'E.W.S.') and 140 flats for Lower Income Group (in short 'L.I.G.') have been constructed and allotted. In Multi Storied Building, 76 flats of 2 bedrooms and 64 flats of 3 bedrooms have been constructed, which is called Landmark Tower Phase-I. Further 14 flats of 2 bedrooms and 28 flats of three bedrooms have been constructed in Landmark Tower Phase-II. In 3rd Phase i.e. Land Mark Tower Phase-III 36 flats of three bedrooms have been constructed. Huge land has been developed by link-down road and procuring other amenities in the said residential area.

11. In view of the aforesaid developments, it is contended that a small piece of land belong to petitioners cannot be excepted and therefore this Court may decline to interfere in the acquisition proceedings and dismiss the writ petition.

12. Acquisition of land has to be consistent with the procedure prescribed in law inasmuch as though right to property is no more a fundamental right but it is a constitutional right enshrined under Article 300-A of the Constitution. It provides that no person shall be deprived of his property except in accordance with the procedure prescribed in law, therefore, without following procedure prescribed in law no person can be deprived of his property and any attempt otherwise would be illegal and unconstitutional.

13. In the present case, it was open to State to acquire land by dispensing with inquiry under Section 5-A of Act, 1894 but when, how and in what manner State would be justified in dispensing with inquiry under Section 5-A of Act, 1894 is no more res integra having been settled in a catena of decision in last two decades.

14. Section 5-A was inserted in Act, 1894 as long back as in 1923, by Act No. 38 of 1923. There are minor amendments made subsequently but substance of provision has remained the same.

15. Normal procedure of acquisition is that a proposal of acquisition is published in notification under Section 4(1) of Act, 1894. Land owners whose land is proposed to be acquired, are given an opportunity to make their objections. Collector is under an obligation to consider objections and also offer an opportunity of hearing to objectors and thereafter submit report to Government containing his recommendations on the objections, for decision of Government. After considering the report and other material, Government makes declaration that land is proposed to be acquired for public purpose and this is done by publication of notification under Section 6. Therefore, there is possibility of some difference in details of land stated in the notification issued under Section 4 and finally declared land, as acquired for public purpose, detailed in notification under Section 6.

16. Collector is then authorised to take order for acquisition and under Section 8 is supposed to mark, measure and plan the acquired land. A notice thereafter is issued under Section 9

to Land Owners by Collector notifying his intention of taking possession of land and that the claim for compensation be submitted to him. Under Section 11, Collector makes enquiry for determining amount of compensation payable to land owners, whose land has been acquired, and make award. After payment of compensation, Collector takes possession of land.

17. There is an exception to normal procedure of taking possession which is contained in Section 17 of Act 1894. It says that in case of urgency, even though no award has been made, Government can direct Collector to take possession of any land, needed for public purpose, and on such possession being taken by Collector, land shall vest absolutely with the Government free from all encumbrances. Section 17(4) provides, where such urgency for the purpose of possession is to be acted upon, Government, shall declare that provision of Section 5-A shall not apply.

18. However, right to file objection under Section 5-A against proposal of acquisition of land published under Section 4 is a substantial right, consistent with principle of natural justice, since forcible acquisition of land, without consent of land owners, is a serious matter. This is the view taken consistently, by Courts.

19. The circumstances, when Government would be justified to dispense with enquiry under Section 5-A while invoking urgency clause under Section 17, for the purpose of taking possession, have been considered in a catena of decisions in last several decades and it would be useful to refer some relevant authorities in this regard.

20. In **Nandeshwar Prasad vs. U.P. Government AIR 1964 SC 1217**, Court said :

"the right to file objection under Section 5-A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that that right can be taken away as if by a side wind".

21. In **Munshi Singh and others vs. Union of India (1973) 2 SCC 337**, which is a decision of three judges bench, Court stressed upon and emphasized upon an inbuilt legislative recognition of principal of natural justice in Section 5-A and said :

*"Sub-section **(2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard**. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. ..... **The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections.** It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A".*

(emphasis added)

22. In **State of Punjab vs. Gurnail Singh and others 1980 (1) SCC 471**, it was held that it is fundamental that compulsory taking of a man's property is a serious matter and smaller the

man, more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness. Denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Articles 14, burke an enquiry under Section 17 of Act, 1894. A slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes travesty of emergency power.

23. **In Shyam Nandan Prasad and others vs. State of Bihar and others (1993) 4 SCC 255** reiterating that section 5-A is mandatory, Court said :

"the proceeding before the Collector is a blend of public and individual enquiry".

24. In Union of India and others vs. Mukesh Hans (2004) 8 SCC 14, Court held that Section 17(4) is an exception to normal mode of acquisition. Mere existence of urgency or unforeseen emergency by itself is not sufficient to direct for dispensation of Section 5-A. Court reiterated that there must be real existing emergency for which an opinion must be formed by the Government, objectively. Court said as under :

"It requires an opinion to be formed by concerned government that along with existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A enquiry, which indicates that the legislature intended that the appropriate government to apply its mind before dispensing with Section 5-A enquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by itself be sufficient for dispensing with Section 5-A enquiry. If that was not the intention of the legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A enquiry will be dispensed with, but then that is not language of the Section which, in our opinion, requires the appropriate Government to further consider the need for dispensing with Section 5-A enquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5-A inquiry does not mean that in every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself would not contain the need for dispensing with Section 5-A enquiry. ..... There is need for application of mind by appropriate Government that such an urgency for dispensing of Section 5-A enquiry is inherent ..... ."

25. In **Hindustan Petroleum Corporation Ltd. vs Darius Shapur Chenai & Ors (2005) 7 SCC 627** it was held that the provisions of Section 5-A of Act, 1894 must be read consistent with Article 300-A of the Constitution and it is akin to fundamental right of procedure before depriving a persons of his land, and must be strictly complied with.

26. In **Essco Fabs Pvt. Ltd. & Anr vs State Of Haryana & Anr (2009) 2 SCC 377** it was held that enquiry should not be dispensed with lightly.

27. In **Anand Singh and another vs. State of U.P. and others (2010) 11 SCC 242** Court considered as to when State would be justified in invoking power under Section 17(4) for acquisition of land and dispensing with enquiry under Section 5-A so as to take possession immediately. It is said that power under Section 17 is not to be exercised in a routine manner. It would be justified only when circumstances warrant immediate possession. It should not be lightly invoked. It is an exceptional power enabling land acquiring body to dispense with enquiry under Section 5-A. Government must apply its mind before dispensing with enquiry under Section 5-A whether urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A. The mere mention of words in acquisition notification that Government is satisfied about urgency and dispensing with enquiry under Section 5-A may raise a presumption in favour of Government that pre-requisite conditions for exercise of such power are satisfied but when challenged, Government has to produce relevant material before Court to show existence of such circumstances, which justify dispensation of inquiry and avail an exceptional power under Section 17. Court said :

*"**upon challenge** being made to the use of power under Section 17 **the Government must produce appropriate material** before the Court **that the opinion for dispensing with enquiry** under Section 5-A **has been formed by the Government after due application of mind** on the material placed before it".*

(emphasis added)

28. With regard to judicial review of exercise of power, Court in ***Anand Singh and another (Supra)*** further said in paras 45, 46, 47 and 48 as under :

*"45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but **in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary."***

*"46. As to in what circumstances the power of emergency can be invoked are specified in Section 17 (2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking**, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of land owners/persons interested may not be considered**. In many cases on general assumption, likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously."*

47. The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and cases of real urgency. The government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that decision in Pista Devi must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree."

"48. As regards the issue whether pre- notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact-situation prevailing in those cases. In our opinion ***such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate government before the court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."***

(emphasis added)

29. In **Radhe Shyam (Dead) through Lrs. and others vs. State of U.P. and others 2011(5) SCC 553** it was reiterated that property of a citizen cannot be acquired by State without complying with the mandate of Sections 4, 5-A and 6 of Act, 1894. A public purpose however, loudable would not entitle Government to invoke urgency provisions, since the same have the effect of depriving owner of his right to property and that too without being heard. Only in a case of real urgency, Government would be justified in invoking urgency provisions. Section 17 must have been invoked only when purpose of acquisition cannot brook the delay of even few weeks or months. The authority must be fully satisfied that time of few weeks or months likely to be taken in conducting enquiry under Section 5-A shall, in all probability, frustrate the public purpose for which land is proposed to be acquired. Satisfaction of Government on issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and can be challenged on the ground that authority did not apply its mind to relevant factors, and on record, there is no material justifying existence of alleged urgency. It also held that exercise of power under Section 17(1) necessarily does not result in exclusion of Section 5-A, inasmuch as, the person concerned can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-Section (4) of Section 17 shows that it merely enables Government to direct that Section 5-A would not apply to the cases covered under Sections (1) or (2) of Section 17. Therefore, mere fact that certain purposes may be treated as public purpose for purpose of acquisition but that by itself would not mean that there exists urgency to dispense with inquiry unless the circumstances actually and really are in existence to show that delay in taking possession would be adverse to public interest. It also held that Court can take judicial notice of the fact that for planning, execution and implementation of scheme relating to development of residential, commercial and industrial or institutional areas, Government takes few years, therefore, in such cases private property should not be acquired by invoking urgency clause as denial of Rule of audi alteram partem embodied in Section 5-A is not at all warranted in such cases.

30. In **Darshan Lal Nagpal (Dead) By Lrs. vs. Govt. of NCT of Delhi and others (2012) 2 SCC 327** after having retrospection of some of authorities on the subject, Court in para 28 of the judgment, stated as under :

"What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law - Article 300-A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, ***compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing."***

(emphasis added)

31. In **Union of India and others vs. Shiv Raj and others 2014 (6) SCC 564**, Court in para 15 said that Section 5-A confers a valuable right on the owner of land and it is not an empty formality. It is a substantive right, which can be taken away only for good and valid reasons and within the limitations prescribed under Section 17(4) of Act, 1894.

32. When we examined the material available with State Government to justify dispensation of inquiry under Section 5-A, we found that in counter affidavit and supplementary counter affidavit virtually nothing has been placed to demonstrate that any such urgency was existing, justifying dispensation of inquiry. Respondents have also placed before us original record of acquisition and we have perused the same. Unfortunately, the alleged original record also contains only copies of application dated 6.6.1990, Collector's letter dated 16.6.1992, award dated 8.10.1997, copies of notifications dated 8th July 1993, 28th January 1993 and 10th July 1992 and the documents showing taking of possession of acquired land. From the order-sheet of V.D.A. record, we find that a proposal for constructing residential colony at Village Lalpur was conceived sometime in 1988. Since land at Village Lalpur was agricultural land hence, matter was examined to seek exemption of acquisition of such land for residential purposes. The proposal was ultimately approved by Chief Minister on 30.3.1990 but in the entire order-sheet there is nothing to justify as to why inquiry under Section 5-A ought not to have been held or that the acquisition of land was urgent and immediate. Moreover proposal was made by V.D.A. on 6th June 1990 whereupon Collector took almost two years in making recommendation to Government vide letter dated 16.6.1992. Thereafter, notification under Section 4 was published on 10th July 1992. It was published in newspapers after about four months i.e. on 9.11.1992. It appears that on a mere mention in the application dated 6.6.1990 that possession is urgently needed, without any further inquiry and application of mind on the relevant facts, in a mechanical manner, respondent State Government acted upon to invoke powers under Section 17(1) and (4) and dispensed inquiry under Section 5-A.

33. Further declaration under Section 6 was made after another one year i.e. on 8th July 1993. As already said, possession has been taken admittedly on 18.8.1994 and 28.7.1995. This all shows that as a matter of fact there was no such urgency where respondents could not have waited for a few weeks or months so as to hold an inquiry and give opportunity of hearing to all tenure holders or land owners whose land was proposed to be acquired. Exercise of power under Section 17 (1) and (4) by dispensing with inquiry under Section 5-A of Act, 1894 therefore, is clearly illegal, founded on no material whatsoever, arbitrary and vitiates the proceedings of acquisition.

34. In view of above discussions, writ petition is partly allowed to the extent that impugned notifications, to the extent of land belong to petitioners, in so far as it has dispensed with inquiry under Section 5-A of Act, 1894, are hereby set aside. However, respondents shall be at liberty to take further action from the stage of giving opportunity to land owners by submitting their objections under Section 5-A and after considering the same respondents may proceed in accordance with law.

35. Petitioners shall be entitled to costs against respondents-1 to 3, which we quantify to Rs.25,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Writ A No.- 47801 Of 2007

Dr. Nilesh Kumar Upadhyay **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
G.K. Singh, V.K. Singh

Counsel for the Respondents:
C.S.C., A.K. Singh, C.V.S. Raguvanshi, Dharmendra Kumar, Smt. Archana Singh.

Service Law — Appointment — Adjustment of selected candidate — Scope of Section 13(4) & 13(5), U.P. Higher Education Services Commission Act, 1980 — Validity of appointment against non-advertised vacancy — Petitioner appointed on honorarium basis against short-term vacancy and continued under interim protection — Respondent selected pursuant to a different advertisement and later sought to be adjusted against vacancy held by petitioner — Whether such adjustment permissible — Held, Section 13(5) applies only to cases where a substantively appointed teacher is rendered surplus due to abolition of post — Respondent not being such appointee, provision inapplicable (Paras 22, 23) — Section 13(4) applies only where vacancy arises during validity of select list and is not notified to Commission — In

present case, vacancy already advertised, hence condition not satisfied (Paras 21, 25) — Appointment dehors statutory provisions illegal and unsustainable (Paras 26, 27).

Service Law — Selection and appointment — Right of selected candidate — Mere selection does not confer a right to appointment against any vacancy — Appointment must strictly conform to the advertisement and statutory framework — Candidate selected for one advertisement cannot be adjusted against another vacancy — Adjustment dehors selection impermissible (Paras 19, 27).

In Result - Writ petition allowed; impugned orders dated 27.8.2007 and 20.9.2007 set aside; petitioner entitled to relief; costs of Rs.25,000 awarded (Para 28).

Cases cited

Kamlesh Kumar Sharma vs. Yogesh Kumar Gupta and others (1998) 3 SCC 45

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

1. Heard Sri G.K. Singh, learned counsel for petitioner, Ms. Pragya Pandey, Advocate holding brief of Smt. Archana Singh, learned counsel for respondent no.2 and learned Standing Counsel for respondent no.1.

2. Petitioner has challenged appointment of respondent no.5 Ram Kumar Singh on the post of Lecturer (Agriculture Economics) in B.R.D. P.G. College, Deoria.

3. Brief facts giving rise to present petition are as under :

4. B.R.D., P.G. Collage, Deoria (hereinafter referred to as 'College') is a Post Graduate College affiliated to Deen Dayal Upadhyay University, Gorakhpur (hereinafter referred to as 'University'). College receives grant-in-aid from State Government and is governed by provisions of U.P. State Universities Act, 1973 (hereinafter referred to as 'Act, 1973') and the first statute of University framed under Act, 1973. For the purpose of recruitment of teachers in College it is also governed by U.P. Higher Education Services Commission Act, 1980 (hereinafter referred to as 'Act, 1980'). Further College is being managed by an Authorised Controller (respondent no.4).

5. The post of Lecturer (Agriculture Botany) fell vacant on temporary basis since Dr. Amar Nath Singh, an incumbent, appointed on the said post in College, proceeded on long leave from 1.7.2002 to 9.5.2003. Since selection by U.P. Higher Education Services Commission (hereinafter referred to as 'Commission') was to take time, State Government issued an order dated 7th April 1998 permitting engagement of teachers on a fixed amount of honorarium in Non-Government Colleges. Under aforesaid Government Order, selection is to be made by Committee of Management on the criteria of merit after advertisement of vacancy and such a selection would be for concerned academic session, which may continue thereafter in subsequent session but would not entitle incumbent to claim regular appointment made on the post.

6. In view of Government Order dated 7.4.1998, College advertised the vacancy of Agriculture Botany. Petitioner was ultimately selected and appointed with approval of Director, Higher Education vide appointment letter dated 1.10.2002. A copy of appointment letter is Annexure-5 to writ petition. The aforesaid appointment initially was for a period upto 30th June 2003 or till regularly selected candidate is available. Pursuant to aforesaid letter of appointment, petitioner submitted his joining on 1.10.2002 itself. After end of session i.e. 30th June 2003, College treated service of petitioner having seized, whereupon he filed Writ Petition No. 24606 of 20003 for a direction to permit petitioner to continue on the post till regularly selected candidate by Commission joins the post. On 4th June 2003, this Court passed following interim order:

"Learned standing counsel has accepted notice on behalf of the respondents no.1 and 2.

Issue notice to respondent no.3.

Each one of the respondents is granted six weeks time for filing counter affidavit. Two weeks thereafter is granted for filing rejoinder affidavit.

List this case on 11.8.2003.

Till the next date of listing petitioners shall be permitted to discharge their duty as he is doing in the past till regularly selected candidate is recommended by the Commission."

7. The Government Order dated 7th April 1998 came up for consideration before a Division Bench in Malvika Shekhar vs. Director of Higher Education in Writ Petition No. 44332 of 2003 and it was set aside vide judgment dated 29.9.2003 holding that appointment under Government Order dated 7th April 1998 is illegal. Against aforesaid judgment dated 29.9.2003 in Malvika Shekhar (Supra) an appeal was preferred i.e. Special Leave to Appeal (Civil)...../2003 (CC 11221/2003) and Supreme Court vide order dated 9.12.2003 stayed judgment of this Court. Petitioner is thus, continuously working since 1.10.2002.

8. Commission advertised post of Lecturer (Agriculture Botany) for College. The said advertisement was issued on 26.4.2002, published in Daily Hindi Newspaper 'Amar Ujala'. The newspaper contained three advertisements nos. 30, 31 and 32. Advertisement no. 30 was for filling up backlog/carry forward vacancy for reserved category pursuant to advertisement no.24; Advertisement no. 31 for filling up of backlog/carry forward vacancy advertised in advertisement no. 26 and Advertisement no. 32 was for both general and reserved category. Respondent-5 applied pursuant to advertisement no.31. He was selected and placed in select list prepared by Commission and sent to Director, Higher Education for his placement. Director, Higher Education, vide recommendation dated 23.6.2005 forwarded name of respondent- 5 for appointment in College. It was mentioned in the said letter that the placement of respondent- 5 was made on a newly created post. When respondent- 5 approached College and requested for issuance of appointment letter to him, College wrote a letter dated 19th/20th July 2005 to Director, Higher Education stating that for

newly created post of Lecturer (Agriculture Botany) vide order dated 19.5.1998, Director, Higher Education sent recommendation/placement order dated 29.10.1999 in favour of one Rajendra Singh Lohia, a candidate selected by Commission, and pursuant thereto, he was appointed and is presently working and no such post is vacant in that College. It is also stated that respondent- 5 was working as Lecturer on honorarium basis in 'Ranjeet Singh Memorial P.C. College Dhampur, Bijnor' against a substantive vacancy when selected and recommended for appointment in College.

9. When College having clarified position with respect to the alleged newly created post of Lecturer (Agriculture Botany) and showed inability to issue appointment letter to respondent- 5, it compelled him to approach this Court in Writ Petition No. 743 of 2006 impleading State of U.P.; Commission; Director, Higher Education; Management of College and Dr. Rajendra Singh Lohia, seeking following reliefs :

"(a) a writ, order or direction of suitable nature commanding the respondents to give appointment to the petitioner as Lecturer (Agriculture Botany) for which the petitioner is selected by the Commission.

(b) a writ, order or direction in suitable nature commanding the respondents to recommend the name of the petitioner for the post of Lecturer (Agriculture Botany) to Ranjeet Singh Memorial, P.G. College Dhampur, Bijnore where a substantive post of Lecturer (Agriculture Botany) on honorarium basis or any other recognized institution where a substantive post of Lecturer (Agriculture Botany) is vacant.

(c) a writ, order or direction in suitable nature commanding the respondent authorities to decide the representations of the petitioner dated 31.5.2005, 14.11.2005 and 23.11.2005 (Annexure No. 7, 10-A & B to this writ petition)."

10. The writ petition was disposed of vide judgment dated 12.3.2007 permitting respondent- 5 to make a representation and Director, Higher Education was required to decide the same by a speaking order.

11. State Government instead of getting compliance of judgment dated 12.3.2007, issued an order dated 27.8.2007 requiring Director, Higher Education to place respondent no.5 in College and pursuant thereto vide letter dated 6.9.2007, Director, Higher Education informed College that for easy adjustment of respondent- 5, he should be appointed against vacancy advertised vide advertisement no.41 i.e. the post whereupon petitioner is working. In such circumstances, petitioner made a detailed representation dated 17.9.2007 informing that respondent no.5, having not been selected against vacancy advertised vide advertisement no. 41, hence cannot be adjusted thereagainst so as to dislodge petitioner. It was also stated that Dr. Amar Nath Singh, having continued on leave, ultimately resigned on 17.2.2007, rendering the vacancy permanent.

12. It is also stated that petitioner has applied to the post, he is holding as Lecturer on honorarium basis, pursuant to advertisement no. 41 and in case, respondent no. 5 is allowed to be

appointed against the said post, the entire selection pursuant to advertisement no.41 in respect of said post, will stand frustrated and this is not permissible to Director, Higher Education in any circumstances.

13. Further reliance is placed on Section 31-E inserted vide U.P. Act No. 42, 2006 of Act, 1980 providing for regularisation of teachers working on honorarium basis and have completed three years and it is contended that petitioner is also entitled for regularization in view of aforesaid provision, pursuant whereto, Director, Higher Education has already asked from concerned colleges names of such teachers, who fulfill requirement under Section 31-E for regularisation, College vide letter dated 6.2.2007 has sent information mentioning petitioner's name at Sl. No.2.

14. The writ petition has been contested by respondents. Counter affidavit on behalf of respondents- 1 and 3 has been filed sworn by Dr. P.K. Sharma, Assistant Director, in which it is not disputed that respondent- 5 Ram Kumar Singh was selected pursuant to advertisement no.31. He was allotted vacancy against newly created post but could not join since another selected candidate had already joined the said post/vacancy. Thereafter pursuant to order passed by this Court in Writ Petition No. 743 of 2006, an order was passed to accommodate respondent- 5 under Section 31(5) to any other college, State Government agreed with proposal of Director, Higher Education and thereafter placement of respondent- 5 has been made in the College against vacancy in which petitioner is working. It is said that the adjustment, which has been made by respondent- 3 is permissible under Section 13(5) of Act, 1980 to do justice and equity to selected candidate.

15. On behalf of Committee of Management of College, a separate counter affidavit has been filed, sworn by Sri K.N. Singh, Principal and there also stand taken by respondent- 5 has been reiterated and followed. It is also stated that pursuant to order dated 12.9.2007 respondent-5 has been given appointment letter and he has joined College and is working.

16. Petitioner has filed rejoinder affidavits disputing stand taken by respondents and reiterated what it has stated in writ petition and has also placed reliance on the judgment in **Kamlesh Kumar Sharma vs. Yogesh Kumar Gupta and others (1998) 3 SCC 45.**

17. The order adjusting respondent-5 is sought to be justified by respondents- 1 and 3 with reference to Section 13(5) of Act, 1980, which reads as under:

*"**13. Recommendation of Commission**. - (1) The Commission shall, as soon as possible, after the notification of vacancies to it under Sub-section (3) of Section 12 hold interview (with or without written examination) of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far practicable, twenty-five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.*

(2) The list sent by the Commission shall be valid till the receipt of a new list from the commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to Sub-section (4) of Section 12, intimate to the management to name of a candidate from the list referred to in Sub-section (1) for being appointed in the vacancy intimated under Sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in Sub-section (2) and such vacancy has not been notified to the Commission under Sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such its for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, ***where to abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy****, whether notified under Sub-section (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.*

(6) The Director shall send a copy of the intimation made under Sub-section (3) or Sub-section (4) or Sub-section (5) to the candidate concerned."

(emphasis added)

18. Sub-sections 1, 2 and 5 talk of selection made pursuant to concerned advertisement, merit list prepared by Commission and forwarded to Director, Higher Education and consequent recommendation made by Director to Management of College for appointing selected candidates on the vacancy intimated to Commission under Sub-section 2 of Section 12.

19. In this regard, case set up by respondents is clear that in advertisement no. 31, a vacancy of Lecturer (Agriculture Botany) created vide Government Order 7th April 1998 was advertised and there-against respondent-5 was recommended for appointment by Management of College. It appears that Director, Higher Education failed to consider or keep in mind that in the meantime, it had already filled in the said vacancy by recommending another candidate Rajendra Singh Lohia and he was already appointed, hence there is no such vacancy on the date of recommendation made by Commission or the date on which the placement and recommendation made by Director, Higher Education. In fact even this arrangement by Director was illegal but unfortunately appointment of Rajendra Singh Lohia is not subjected to this petition, hence we cannot help respondent-5.

20. There are two provisions, which permit Director to make appointment of a candidate in respect of a vacancy, which has not been advertised by recommending name of a candidate selected from another advertisement. They are Sub-sections 4 and 5 of Section 13.

21. Sub-section 4 comes into picture to a vacancy, which has occurred due to death, resignation or otherwise during validity period of a select list sent by Commission under Sub-section 2 of Section 13 and in respect of such vacancy, Director may intimate to Management, the name of a candidate from such list for appointment but it is subject to condition that firstly, a vacancy must have occurred during validity period of list and further that vacancy has not been notified to Commission under Section 12(3) of Act, 1980.

22. Sub-section 5 talks of a situation wherein due to abolition of post of a teacher in College, a person substantively appointed is terminated. State Government can protect such a person by issuing a suitable order for his appointment in a suitable vacancy whether notified under Sub-section 3 of Section 12 or not, in any other College, whereupon Director shall intimate Management accordingly.

23. We fail to understand as to how Sub-section 5 will be applicable in the case in hand, inasmuch as, respondent no.5 is not a person, who is substantively appointed and would stand terminated due to abolition of any post of teacher in College and to provide him suitable appointment an order can be passed under Section 13(5) of Act, 1980. Despite giving widest construction to the language of Section 13 (5), we do not find that respondent-5 can be fitted in the exigency contemplated by Section 13(5) of Act, 1980 and we have no hesitation in holding that aforesaid provision has no application to the case in hand.

24. Now we come to the question, "whether Sub-section 4 can be applied in the case in hand".

25. We find that Commission forwarded select list vide its letter dated 2.5.2005. The first placement was made by Director vide order dated 23.6.2005. Short-term vacancy on the post of Lecturer (Agriculture Botany) occupied by petitioner occurred on 1.10.2002 when permanent incumbent Dr. Amar Nath Singh proceeded on leave on 1.10.2002 and it got converted into a substantive vacancy on 17.2.2007 when Dr. Amar Nath Singh resigned. The aforesaid substantive vacancy has been advertised vide advertisement no. 41 in daily newspaper Dainik Jagran dated 10.2.2007. Thus, when Court passed order on 12.3.2007 in Writ Petition No. 743 of 2006 filed by respondent-5 directing authorities to decide his representation as also on 27.8.2007 and State Government issued order directing Director, Higher Education to adjust respondent-5 in the College and on 20.9.2007 when Director, Higher Education issued impugned order, the vacancy in question was already notified to Commission and advertised for recruitment. Therefore, one of the conditions under Sub-section 4 that such vacancy has not been notified to Commission under Sub-section 3 of Section 12 is not satisfied and that being so, Director did not get any authority to intimate management to appoint respondent-5 from select list sent by Commission on 2.5.2005.

26. Thus, section 13 is not at all applicable in the case in hand. No other provision has been relied by the respondents in order to justify impugned order of appointment of respondent-5.

27. In view of above discussion, we are clearly of the view that appointment of respondent-5 on the post in question by referring to Section 13(4) and (5) of Act, 1980 is beyond the scope of said provisions and is illegal. Respondent-5 having not been selected against the vacancy in question and there is no provision under the Act, which may justify his appointment against the vacancy in question despite having not been selected against the same, the impugned order issued by Director, Higher Education for appointment of respondent-5 on the post in question cannot be sustained.

28. In the result, the writ petition is allowed. Impugned orders dated 27.8.2007 (Annexure 15 to the writ petition) and 20.9.2007 (Annexure 8 to the writ petition) are hereby set aside. Petitioner shall be entitled to cost, which we quantify to Rs.25,000/- against respondents - 1 and 3.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Criminal Appeal No.- 75 Of 2014

Kallu Kushwaha **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellant:
Shri Sanjeev Khare, Shri Ram Sharan Giri

Counsel for the Respondent:
G.A.

Held –

Background: The appellant, Kallu Kushwaha, challenged his conviction by the Mahoba Sessions Court for kidnapping (Section 363), abduction (Section 366), and gang rape (Section 376(2)g). While two co-accused were acquitted by the trial court, the appellant was sentenced to various terms, including ten years for rape.

The Prosecution Story: It was alleged that the appellant abducted a 13-year-old girl on a motorcycle in 2011 and took her to a different district where she was repeatedly raped. However, medical evidence later estimated her age to be between 16 and 18 years.

Hon'ble High Court Findings on Rape and Abduction: The High Court observed that the medical report showed no external or internal injuries, which is inconsistent with a claim of forced sexual intercourse by multiple people. The Court concluded the prosecutrix was a consenting party who accompanied the appellant of her own free will, thereby setting aside the convictions under Sections 366 and 376 IPC.

Decision on Kidnapping: Despite the consent of the girl, the Court upheld the conviction under Section 363 IPC (Kidnapping). Since she was legally a minor (under 18) and was taken out of the "keeping" of her lawful guardian without the guardian's consent, the offence was technically complete.

Final Order: The appeal was partly allowed. The convictions for rape and abduction were quashed. The kidnapping conviction was maintained, but the sentence was reduced from five years to two years of rigorous imprisonment, considering the consensual nature of the relationship.

List of Citations

Subhedar Khan s/o Sher Khan Vs. State of Maharashtra, reported in 2005(1) ALL MR(Crl) 874 (Bombay High Court).
U.P. State Vs. Chotey Lal, reported in 2011 (1) JIC 666 (Supreme Court of India).

(Delivered by Hon'ble Abhai Kumar, J.)

1. This appeal has been directed against the judgement and order of conviction of the appellant dated 16.11.2013, passed by the Additional Sessions Judge, Court No.2, Mahoba, in Session Trial No. 25 of 2011 (State Vs. Kallu Kushwaha and other), under Sections 363, 366, 376, 368, in Case Crime No. 192 of 2011, related to Police Station Kabrai, District Mahoba, whereby the accused-appellant was convicted under Section 363 for five years rigorous imprisonment and fine of Rs. 10,000/- and in default of payment of fine, three months additional rigorous imprisonment, under Section 366 for seven years rigorous imprisonment and fine of Rs. 15,000/- and in default of payment of fine, six months additional rigorous imprisonment, under Section 376(2)G for ten years rigorous imprisonment and fine of Rs. 25,000/- and in default of payment of fine, six months additional rigorous imprisonment was awarded, whereas co-accused Sanjay Kushwaha and Devi Dayal Kushwaha were acquitted from all the charges. Aggrieved by the same present appeal has been filed by the appellant Kallu Kushwaha.

2. The facts in brief are as follows:-

3. The first information report was lodged by the father of the prosecutrix namely Ramkishore on 23.01.2011 at about 12.45 P.M. stating that his daughter aged about 13 years was abducted on 22.01.2011 at about 5.00 P.M. by KalluÂ alongwith one unknown person, when she was going to the field for easing out. She was taken to the Village Chakauthi, Police Station Kurara, District Hamirpur on the motorcycle at the residence of co-accused Devi Dayal Kushwaha. After getting information, the complainant immediately went to the house of co-accused Devi Dayal Kushwaha, from where his daughter was recovered, whereas both the accused were absconded. After that the complainant went to the Police Station Kabrai, District Mahoba and lodged the first information report under Sections 363 and 366 IPC. The statement of prosecutrix was got recorded under Section 164 Cr.P.C. by the Investigating Officer, wherein allegation of rape on both the persons was levelled. Prosecutrix was also examined medically and after finding the fact of rape Section 376 IPC was also added against the accused persons. After the investigation,

charge-sheet was filed against all the above referred three accused persons. Against the co-accused Devi Dayal Kushwaha, only charge under Section 368 I.P.C. was framed, whereas charges under Sections 363, 366 and 376(2)g were framed against accused-appellant Kallu Kushwaha and co-accused Sanjay Kushwaha. In order to established its case the prosecution examined its witnesses as P.W.-1 to P.W.-11 as oral evidence. The Ext. Ka-1 to Ka-16 have been marked upon prosecution papers as documentary evidence. The statements under Section 313 Cr.P.C. were taken of accused-persons, whereby false implication has been claimed. It is also claimed by the accused persons that prosecutrix was major at the time of incident and she gave statement against her will due to pressure exerted upon her by her father, the complainant. After considering the oral and the documentary evidences, the trial court has convicted the accused-appellant Kallu Kushwaha as noted above, whereas rest of the co-accused persons namely Sanjay Kushwaha and Devi Dayal Kushwaha were acquitted from all the charges levelled against them.

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

5. Learned counsel for the accused-appellant submitted that the conclusion drawn by the trial court is perverse. According to him the inconsistencies and contradictions in the evidence of the witness are being ignored and whole story is imaginary. There is no evidence except for the evidence of prosecutrix against the accused-appellant. Elaborating his submissions the learned counsel for the accused-appellant has submitted that as per medical report the age of the victim was more than 16 years and less then 18 years of old and from the facts it can be ascertained that she was consenting party. It is also submitted that a fake school certificate in the name of Km. Ram Shri, daughter of Ram Kishore was procured by the prosecution, although nowhere it was the story of the prosecution that Km. Ram Shri is the same person who was alleged to have been abducted. It is also alleged by the learned counsel for the accused-appellant that the charge under Section 376(2)g is not made out against the accused-appellant. He further submits that co-accused Sanjay Kushwaha against whom identical allegations were made, has been acquitted by the trial court and on the same analogy accused-appellant Kallu Kushwaha should have been acquitted.

6. Learned trial court considered the evidence of witnesses regarding facts and found that P.W.-3 Mangelal's evidence is of no value, who in his statement recorded during the course of examination-in-chief, stated that he did see the accused-appellant Kallu Kushwaha and Sanjay Kushwaha taking away the victim forcefully and fled away from the spot on motorcycle. Although in the cross-examination this witness failed to stand his earlier statement, and on that basis he was rightly disbelieved by the trial court. From the facts it can be inferred that nobody saw the abduction of the proxecutrix. It is also admitted facts that recovery of the prosecutrix was not made from the accused-appellant Kallu Kushwaha and co-accused Sanjay Kushwaha. The complainant is not the eye witness of the incident and he did not see the accused-appellant Kallu Kushwaha and co-accused Sanjay Kushwaha abducting or kidnapping the prosecutrix. He found his daughter at the house of another co-accused Devi Dayal Kushwaha, and all the story as narrated by his daughter, he got the first information report lodged.

7. The learned trial court discussed the matter in detailed regarding the innocence of the co-accused Devi Dayal Kushwaha and Sanjay Kushwaha in the matter, and considering the facts that the statement of complainant namely Ram Kishore, the P.W.-1 are not trustworthy, there are so many improvements in his statement and trial court disbelieved his evidence. I also found that this witness is not a trustworthy witness as he has narrated and improved several facts during the course of investigation as well as during his statement given in the trial court. As per him the first information report was not read over to him and various facts are being not incorporated in that, but he did not make any complaint to any officer in this regards, then he stated that the accused persons were having intention to kill the prosecutrix, but at his behest, the police contacted Chunnu Yadav and directed him that victim girl should be returned safely. It is worthwhile to mentioned here that the accused-appellant Kallu Kushwaha is said to be the driver of Chunnu Yadav, and this facts has not been disputed. Then the Chunnu Yadav directed the accused-appellant Kallu Kushwaha not to kill the victim, but all these facts are improvement made by this witness during the course of statement given before the trial court. The prosecution is totally silent upon the points as to how the complainant got the information regarding kidnapping of victim by the accused-appellant Kallu Kushwaha and how he came to know that Kallu Kushwaha has taken the prosecutrix to the house of co-accused Devi Dayal and why the complainant and other persons rushed to the house of co-accused Devi Dayal in the district Hamirpur which is far away from the place of incident. Similarly there is no allegation of rape in the first information report. From the statement of P.W.-1 it can very well be inferred that he inquired about the incident from his daughter the victim and after that the first information report was lodged. In the cross-examination it is stated by this witness that nobody told him regarding the complicity of the accused-appellant Kallu Kushwaha, rather on his own, he suspected the complicity of the accused-appellant Kallu Kushwaha in the incident. He further stated that it was Raghuvir Yadav, who told him about the whereabout of the proxecutrix, then they went to Chakauthi. So whole story narrated by this witness is full of doubts and not trustworthy, and on the same evidence of this witness, co-accused Sanjay Kushwaha, whose role was also identical to that of the accused-appellant Kallau Kushwaha, was acquitted by the trial court.

8. Learned trial court after considering the evidence at length, disbelieved most of the story of the prosecution and acquitted the co-accused Sanjay Kushwaha and Devi Dayal Kushwaha, but in the end of the judgement it is concluded by the trial court that rape upon the victim was committed and the accused-appellant Kallu Kushwaha was found guilty for the same.

9. It is vehemently argued by the learned counsel for the accused-appellant that co-accused Sanjay Kushwaha was acquitted on the same evidence, but in the end of the judgement the accused-appellant Kallu Kushwaha was convicted without any basis and evidence regarding that. From the facts and observations made by the trial court, it can be inferred that trial court convicted the accused-appellant on two grounds, firstly he was named in the first information report and secondly committal of rape is proved. The charges under Section 363 IPC was also found true by the trial court and arrived at the finding, on the ground that prosecutrix was taken away from the lawful custody of her guardian.

10. The argument of the learned counsel for the accused-appellant regarding acquittal of co-accused Sanjay Kushwaha, I don't find that argument does hold any water. The name of the accused-appellant Kallu Kushwaha finds place in the first information report, whereas name of co-accused Sanjay Kushwaha was not even stated by the prosecutrix in her statement recorded under Section 164 Cr.P.C. before the Magistrate. Name of co-accused Sanjay Kushwaha was not even revealed by the co-accused Devi Dayal, in whose house the victim was said to have been kept after kidnapping. So there is material differences in the evidence against the accused-appellant Kallu Kushwaha and co-accused Sanjay Kushwaha.

11. Before considering the charges under Section 363 IPC, matter under Section 366 and 376 IPC is being taken prior to that. During the argument learned counsel for the accused-appellant accepted and argued that victim was a consenting party and on her own free will she accompanied with the accused-appellant Kallu Kushwaha. It is also submitted by the learned counsel for the accused-appellant that complainant did admit the facts that Chunnu Yadav was willing to get the victim married with accused-appellant Kallu Kushwaha. Kallu Kushwaha was also known to the complainant prior to the incident. There is shop of Kallu Kushwaha in front to the house of the complainant and Kallu Kushwaha used to visit the house of prosecutrix. Although, all the facts are not being admitted clearly by the complainant, but most of the facts are admitted by the complainant during his cross-examination. So it can be said that prosecutrix was known to the accused-appellant Kallu Kushwaha and she might have travelled with the Kallu Kushwaha out of her own free will.

12. It submitted by the learned AGA for the State that even if it is presumed that the prosecutrix went out of her own free will, but in her statement given before the court as well as in the statement recorded under Section 164 Cr.P.C. before the Magistrate, she had clearly made allegation of rape and in the circumstances presumption under Section 114-A of Evidence Act, 1872 will be done and on that basis the charges of rape are being proved against the appellant Kallu Kushwaha.

13. The presumption under Section 114-A can be drawn where sexual intercourse by the accused is proved and if it is stated by prosecutrix before the court that she did not consent, the court shall presume that she did not consent. For ready reference Section 114-A is reproduced herein below:-

"***114-A. Presumption as to absence of consent in certain prosecution for rape:-*** *In a prosecution for rape under clause (a), clause (b), clause(c), clause(d), clause €, clause(f), clause(g), clause (h), clause (i), clause(j), clause(k), clause (l), clause(m), or clause(n), of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."*

14. The age of the victim was narrated as 13 years in the first information report. A school certificate was also produced in the name of the Km. Ram Shri and during the investigation it is stated by the complainant that other name of the prosecutrix is Ram Shri, but this facts is not being incorporated during the statement in the court. Moreover, the trial court also not relied this certificate regarding the age of prosecutrix, but on the basis of medical report, it was found that the age of the victim was more than 16 years and less than 18 years at the time of incident.

15. The incident is of the year 2011 and at that time the consent of a girl, who is aged about more than 16 years was a valid consent, and if it is proved that victim was a consenting party then no allegation regarding rape can be accepted.

16. In this case medical report corroborated the sexual intercourse as per Ext. Ka-4 i.e. report of vaginal smear in which 2 to 4 dead spermatozoa per high power field were found. On the basis of which the trial court came to the conclusion that sexual intercourse is being taken and I also don't find any reason to defer from that finding. Now the question arises as to whether the prosecutrix is a consenting party for sexual intercourse or is being done against her will and whether a presumption under Section 114-A of the Evidence Act, 1872 can be done. Nobody saw the incident of abduction. Complainant suspected abduction by Kallu Kushwaha as per his own admission and that means he was having some knowledge regarding relation of prosecutrix with the accused Kallu Kushwaha, and a girl of more than 16 years old cannot be abducted forcefully by a single person in a given circumstances, then the story was hatched that two persons did the job of kidnapping. The complicity of second person namely Sanjay Kushwaha was not found correct by the trial court. The statement of P.W.-2 the prosecutrix also not helpful to the prosecution to prove its case regarding no consent. Prosecutrix was recovered by the complainant from the house of co-accused Devi Dayal, although at some places it has come that co-accused Devi Dayal handed over the prosecutrixe to the complainant at the outskirts of the village, so as to this facts might not come in the knowledge of villagers, but that makes no difference. No allegation of rape is being made in the first information report, although the prosecutrix must have told the whole story regarding her elopement and certainly she did not tell anything about rape in the incident to the complainant. After the medical examination of the prosecutrix it was found that sexual intercourse took place, then a theory of rape is being cooked.

17. The medical report Ext. Ka-4 is dated 24.01.2011 whereas the statement of prosecutrix under Section 164 Cr.P.C. was taken on 27.01.2011 and in that statement she made allegation of rape on accused-appellant Kallu Kushwaha as well as one another person. It is worthwhile to mention here that as per the prosecutrix she was raped twice by both the accused persons. Firstly immediately after kidnapping in the same village of the prosecutrix in the field of Kallu Kushwaha and then she was again raped by both the accused in the house of co-accused Devi Dayal. From the medical report, it is clear that no injury was found on the part of prosecutrix. As per Ext. Ka-6 no external injury was found on any part of body, and in the examination of private part hymen was found torned. No bleeding was found and no discharge was present on vulua or inside vagina. No injury was found on vulua or inside vagina.

18. If a lady of 16 years is being raped by two persons twice, firstly in the field and again in the house of co-accused Devi Dayal, then there should have been injuries on the part of victim. There should have been injuries regarding resistance against rape and then injuries should have been on the private party also. More so, in the circumstances when rape is being committed in an agricultural field then there are more chances of receiving injuries on the body, firstly the resistance caused by the victim and the injuries caused by the rough surface of the field.

19. From the above facts, it can be inferred that absence of any injuries on the part of victim was because that she was a consenting party and out of her own free will she made physical contact with the accused-appellant Kallu Kushwaha. Presumption of Section 114-A of the Indian Evidence Act, 1872 is a rebuttable presumption and by mere statement of the victim that she did not give consent, it cannot be conclusively accepted, rather if consent is rebutted then benefit of Section 114-A of the Indian Evidence Act, 1872 cannot be given to the prosecution and in that case offence of rape cannot be accepted.

20. Bombay High Court in the case of '**Subhedar Khan s/o Sher Khan Vs. State of Maharashtra, reported in 2005(1) ALL MR(Crl) 874'** has elaborately discussed this matter and observed that 'No injuries were found on her private parts, then the victim can be said to be a consenting party and presumption under Section 114-A of the Evidence Act can be said to have been rebutted'. Hon'ble Mr. Justice A. S. Bagga,J. has observed as follows:-

"13. If there is sexual intercourse with consent of the girl who is more than 16 years of age, it cannot amount to rape. Once it is shown that the age of the girl is more than 16 years and once it is held (as has been so held in this case in the foregoing paragraphs that there was consent, the age, status in society and the relationship of the accused with the girl is irrelevant and insignificant. Therefore, even if it is shown that the appellant was an aged person, he was teacher or that he was respected as a guardian of students, could not make any difference. The appellant cannot be convicted for the offence of rape. Therefore, the conviction of the appellant for the offence punishable under Section 376 of the Indian Penal Code and sentence awarded to him on that count, will have to be quashed and set-aside".

21. From the above facts, I come to the conclusion that prosecutrix was a consenting party and trial court conclusion again this was erroneous and not based upon the proper elucidation of the evidence on record.

22. Consent of the prosecutrix can also be inferred from the altered stand taken by her. In the first information report rape was not alleged. In the statement of the prosecurtix under Section 164 Cr.P.C. rape was alleged but at what place it is not made clear, later on this is stated that rape was committed firstly in the field of accused-appellant Kallu Kushwaha, then in the house of co-accused Devi Dayal by the accused-appellant Kallu Kushwaha as well as co-accused Sanjay. Then another story was cooked that phone of the police official was received for safe return of the prosecutrix. The complaint, father of the prosecutrix also changed his stand at several places already discussed. The prosecutrix was taken to another district i.e. for away from the place of

incident, where she was recovered. During the period of travelling she did not raise alarm at any point of time and it cannot be believed that a young girl is being taken away without her consent to a place i.e. about 40 kilometre away form the place of incident and not raising any alarm, more so when was not having consented. From this facts it can be accepted that prosecutrix did go with the accused-appellant Kallu Kushwaha out of her free will or consent.

23. So the charges under Section 376 IPC against the accused-appellant were not proved beyond all reasonable doubt and the learned trial court misdirected itself and reached to a wrong conclusion without properly discussing the evidence. No where it is discussed by the trial court whether victim was consenting party or not. As charges under Section 376 IPC not proved, consequently charges under Section 366 IPC can very well be said to have not proved.

24. As held above the prosecutrix was a consenting party, so it can very well be said that she was not abducted with the intention to compel her to merry any person against her will, or she was likely to be forced or seduced to illicit intercourse, and consequently I find that appellant is also entitled to be acquitted of the charges under Section 366 IPC.

25. Accused is also convicted under Section 363 IPC. Kidnapping from lawful guardianship is defined in Section 361 of IPC, which runs as follows:-

"361. Kidnapping from lawful guardianship.- *Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."*

26. If a female, under the age of 18 years is removed from the lawful guardianship without the consent of her guardian, then it is said to be kidnapping of such minor. This Section requires the consent of the guardian, and the consent of the minor is of no consequence. So it is to be seen whether the victim was minor (eighteen years of age) at the time of incident or not. It is observed by the trial court that as per medical report the age of the victim was above 16 years and below 18 years and in the circumstances it was found by the trial court that addition of two years cannot be given and it will be presumed that the victim was above 16 years but below 18 years of age. The trial court fortified its observation on the law as held by Hon'ble Apex Court in **2011 (1) JIC 666 U.P. State Vs. Chotey Lal,** wherein it was held by the Hon'ble Apex Court that two years of extra benefit cannot be given in the cases where medical report says the age keeping the two years difference. Counsel for the accused-appellant also could not dispute this facts, hence the conclusion drawn by the trial court is not liable to be interfered with. On that basis it can very well be said that prosecutrix was below 18 years of age at the time of incident. Although prosecutrix might have consented the elopement with the appellant but it was accused-appellant persuasion, which compelled the proxecutrix to go with the appellant. Even if the proxecutrix accompanied the appellant with her own free will and without persuasion, even then the continuous association of the appellant with the prosecutrix, then taking her to the house of his Mausiya, which is far away

from the place of proxecutrix's father, can't be justified. Although it may be his moral duty to return her to her parents custody, when is not doing so, is no infringement of the Act, or the Act does not says that he shall restore her, but he shall not take her away. It is however, very well clear that if the girl acting under his persuasion or out of her own free will and leaves her father's house, yet he aware himself for that leaving, that would be taken her out of her father's possession, because the persuasion would be motive cause for her leaving. Initially persuasion may not be there, but after the victim accompanied that appellant, then taking her on the motorcycle or by any other means, which were far away place, can very well be assumed the inducement by the appellant and keeping her away from her father custody continuously, such person is guilty of the offences. There was no consent of the guardian of the prosecutrix, i.e. complainant, the father of the prosecutrix, and in the circumstances it can very well be assumed that prosecutrix was taken away from the lawful guardianship of her father and in the instant facts if learned trial court held the appellant guilty for the offence under Section 363 IPC, that cannot said to be perverse or without the material on record. Offence punishable under Section 363 IPC is therefore proved against the appellant.

27. Since, in the case it has been held in the foregoing paragraphs that the girl/victim voluntarily went with the appellant and she is having sexual intercourse out of her consent, so offences punishable under Section 366 and 376 I.P.C. are not made out.

28. The conviction of the appellant for the offences punishable under Section 363 IPC is upheld and affirmed. The order of conviction and sentence of the appellant for the other offences is set-aside.

29. Though the appellant was convicted under Section 363 IPC for five years rigorous imprisonment and fine of Rs. 10,000/- and in default three months further rigorous imprisonment was given, this punishment was awarded on the ground that prosecutrix was kidnapped against her will and she was also raped and that is why a severe punishment was awarded. Counsel for the appellant in the circumstances argued that a lenient view should be taken, where prosecutrix is consenting party.

30. The request made by the counsel for the appellant is considered worthy, and seeing the facts and circumstances of the case and the manner of incident and the consent of prosecutrix, a lesser punishment can be given and sentence is accordingly modified. Accused-appellant is directed to serve out rigorous imprisonment of two years and to pay a fine of Rs. 10,000/- and in default, he shall further undergo rigorous imprisonment for a term of three months for the offence punishable under Section 363 IPC. In the event of realization of fine, the same shall be paid to the complainant, the father of the prosecutrix. He will, of course, be entitled to set off for the period, if any, he has undergone in jail earlier.

31. The accused-appellant shall surrender his bail to serve out the aforesaid sentence.

32. In the result, appeal is ***allowed partly.***

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Income Tax Appeal No.- 136 Of 2006

Commissioner of Income Tax, Allahabad ...Appellant
Versus
Allahabad High School Society ...Respondent

Counsels for the Appellant:
Shri R.K. Upadhyaya, Shri Shubham Agarwal

Counsel for the Respondent:
Shri Ashish Bansal, Shri S.K. Garg

Held –

Appeal Background
This is a Revenue appeal under Section 260A of the Income Tax Act, 1961, challenging a 2005 Tribunal order that condoned a long delay in registration for the Allahabad High School (AHS) Society and granted it retrospective tax benefits from 1973.

Legal Framework of Section 12A
The judgment traces the evolution of Section 12A (registration for trusts/institutions). Initially, applications were due by July 1973. Later amendments granted Commissioners the discretion to condone delays if "sufficient reasons" were recorded in writing.

Facts of the Case
The AHS Society runs two prominent schools: Boys High School (BHS) and Girls High School (GHS). BHS obtained registration under Section 12A in 1991 (effective from 1973), while GHS obtained it in 1999 (effective from 1999).

The Society's Application
In 2004, the parent Society applied for registration, asking to cancel the individual registrations of the schools and register the Society instead. It sought to have this registration backdated to 1973, claiming it had previously misunderstood the registration requirements.

Commissioner's Initial Ruling
The Commissioner of Income Tax (CIT) granted registration to the Society starting from April 1, 2004, but refused to condone the delay for a retrospective effect (to 1973), noting that the Society was assisted by qualified professionals and failed to provide a satisfactory explanation.

Tribunal's Reversal
The Tribunal overturned the CIT's decision, condoning the delay and directing that the Society be treated as registered from April 1, 1973. It cited the educational nature of the institutions and general principles of the Limitation Act.

High Court's Analysis of Delay
The High Court noted that for condonation of delay under the Act, the "genuineness of activities" is not the criteria; rather, the applicant must provide a satisfactory explanation for the delay. The Society's claim of "unawareness" was deemed insufficient.

Overlapping Registrations
The Court observed that backdating the Society's registration to 1973 would create legal complications and overlapping periods, especially since the two schools already held individual registrations for different timeframes.

Final Conclusion
The High Court ruled that the Tribunal erred in law by condoning the delay without a valid explanation. The Court set aside the Tribunal's order and restored the CIT's order, granting registration only from 2004.

List of Citations

The Income Tax Act, 1961 (Sections 11, 12, 12A, 12AA, and 260A)
Societies Registration Act, 1860
Finance Act, 1972
Direct Tax Laws (Amendment) Act, 1987
Direct Tax Laws (Amendment) Act, 1989
Finance (No. 2) Act, 1991
Finance Act, 1994
Finance (No. 2) Act, 1996
Finance Act, 1999
Finance Act, 2001
Finance Act, 2002
Finance (No. 2) Act, 2004
Finance Act, 2007
Finance Act, 2010
Limitation Act, 1963

(Delivered by Hon'ble Sudhir Agarwal, J
&
Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Shubham Agarwal, Advocate, for appellant and Sri Ashish Bansal, Advocate, for respondent.

2. This is Revenue's appeal under Section 260A of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") arising from judgment and order dated 22.09.2005 passed by Income

Tax Appellate Tribunal, Allahabad (hereinafter referred to as "Tribunal") in Income Tax Appeal No. 180(Alld)/2006.

3. This appeal was admitted on following two substantial questions of law:

(i) Whether Income Tax Appellate Tribunal was right in law and on facts of the case in condoning delay in filing application for registration under Section 12A of Act, 1961?

(ii) Whether Income Tax Appellate Tribunal was right in law and on facts of the case in directing to treat the Assessee- Society as registered under Section 12A(2) of Act, 1961 with effect from 01.04.1973?

4. The facts in brief necessary for understanding the dispute and answer the aforesaid questions are as under.

5. Allahabad High School Society (hereinafter referred to as "AHS Society") claims to have been founded in the year 1861 and set up two Schools, namely, "Girls High School and College" and "Boys High School and College". It was registered under Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860") in February' 1988.

6. Section 12A was inserted in Act, 1961 vide Section 6 of Finance Act, 1972 (hereinafter referred to as "Act, 1972") and came into force with effect from 01.04.1973. Initial Section 12A as inserted with effect from 01.04.1973 read as under:

"12A. Conditions as to registration of trusts, etc. - The provisions of section 11 and section 12 shall not apply in relation to the income of any trust or institution unless the following conditions are fulfilled, namely :-

(a) the person in receipt of the income ***has made an application for registration*** *of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner* ***before the 1st day of July, 1973, or before the expiry of a period of one year from the date of the creation of the trust*** *or the establishment of the institution****, whichever is later*** *:*

Provided that the ***Commissioner may****, in his* ***discretion, admit*** *an application for the registration of any trust or institution* ***after the expiry of the period aforesaid****;*

(b) where the total income of the trust or institution as computed under this Act without giving effect to the provisions of section 11 and section 12 exceeds twenty-five thousand rupees in any previous year, the accounts of the trust or institution for that year have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the person in receipt of the income furnishes along with the return of income for the relevant assessment year the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed."

(emphasis added)

7. Before the word "Commissioner" occurring in Section 12A(a) and proviso thereto, words "Chief Commissioner or" were inserted by Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1988.

8. Section 12A was omitted by Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1989 and was reintroduced by Direct Tax Laws (Amendment) Act, 1989 with effect from the same date i.e. 01.04.1989.

9. Proviso to Section 12A was substituted by Section 7 of Finance (No. 2) Act, 1991 with effect from 01.10.1991 and initial provision stood substituted by the following:

Earlier proviso	Changed proviso
Provided that the Chief Commissioner or Commissioner may, in his discretion, admit an application for the registration of any trust or institution after the expiry of the period aforesaid;	*Provided that where an application for registration of the trust or institution is made after the expiry of the period aforesaid, the provisions of Sections 11 and 12 shall apply in relation to the income of such trust or institution.* *(i)* ***from the date of the creation of the trust or the establishment of the institution if the Chief Commissioner or Commissioner is, for reasons to be recorded in writing, satisfied that the person in receipt of the income was prevented from making the application before the expiry of the period aforesaid for sufficient reasons****;* *(ii) from the first day of the financial year in which the application is made, if the Chief Commissioner or Commissioner is not so satisfied;* *(emphasis added)*

10. Further, the words "twenty-five thousand" occurring in Sub-clause (b) of Section 12A was substituted as "fifty thousand" vide Section 8 of Finance Act, 1994 with effect from 01.04.1995.

11. The words "Chief Commissioner or" inserted before the word "Commissioner" occurring in Section 12A(a) and proviso thereto by Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1988 were omitted by Finance Act, 1999 with effect from 01.06.1999.

12. The words "whichever is later" occurring in Section 12A(a) were substituted with "whichever is later and such trust or institution is registered under Section 12AA" by Finance (No. 2) Act, 1996 with effect from 01.04.1997.

13. In Section 12A, Clause (c) was inserted by Finance Act, 2001 with effect from 01.04.2002, which read as under:

"(c) where the total income of the trust or institution as computed under this Act without giving effect to the provisions of sections 11 and 12 exceeds one crore rupees in any previous year, the trust or institution-

(i) publishes its accounts in a local newspaper, before the due date for furnishing the return of income under sub-section (4A) of section 139; and

(ii) furnishes a copy of such newspaper along with such return."

14. Aforesaid Clause (c) was omitted by Finance Act, 2002 with effect from 01.04.2002.

15. An application was filed on behalf of "Boys High School" in 1991 seeking registration under Section 12A of Act, 1961. Commissioner, Income Tax (hereinafter referred to as 'CIT') granted registration to Boys High School under Section 12A vide order dated 24.07.1991 with effect from 01.01.1973 and delay in filing application was condoned.

16. Vide Finance (No. 2) Act, 1996 and with effect from 01.04.1997, Section 12AA under heading "Procedure for Registration" was inserted and it reads as under:

" Procedure for registration.

12AA. (1) The Chief Commissioner or Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) of section 12A, shall -

(a) call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he -

(i) shall pass an order in writing registering the trust or institution;

(ii) shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution,

and a copy of such order shall be sent to the applicant :

***Provided** that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.*

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) of section 12A."

17. Words "Chief Commissioner or" occurring in Section 12AA (1) were omitted by Finance Act, 1999 with effect from 01.06.1999.

18. Further, Sub-Section 1(A) was inserted in Section 12AA by Finance Act, 1999 with effect from 01.06.1999 and the same reads as under:

"(1A) All applications, pending before the Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Commissioner and the Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.".

19. Further, in Sub-section 2 of Section 12AA the words "or clause (aa) of sub-section (1)" were inserted by Finance Act, 2007 with effect from 01.06.2007.

20. Sub-Section (3) in Section 12AA was inserted by Finance (No. 2) Act, 2004 with effect from 01.10.2004 and the same reads as under:

"(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently the Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution:

***Provided** that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard."*

21. Vide Finance Act, 2010 with effect from 01.06.2010, the words "or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)]" were inserted.

22. A separate application was filed for Registration of Girls High School and College in the year 1999 but no explanation was furnished for delay, hence vide order dated 19.09.2000 registration under Section 12AA was granted to Girls High School and College with effect from 01.04.1999, i.e., from first day of Financial Year in which application is made. Thereafter, an application on behalf of High School Society itself was filed on 28.09.2004 stating that Society is parent body of both educational institutions and both are being run by it, hence, under a mistake it got registration for individual educational institution, though it ought to be in the name of Society, which would govern both the institutions. Consent on behalf of both the educational institutions was also filed for cancellation of their registration and grant registration to Society itself. An application seeking condonation of delay was filed on behalf of Society on 07.03.2005. CIT granted registration to Society with effect from 01.04.2004, vide order dated 21.03.2005.

23. Counsel for appellant contended that there was no justification to condone delay in respect to Society for the reason that two educational institutions run by Society were already enjoying registration one with effect from 01.01.1973 and another with effect from 01.04.1999 and there was no power vested in Commissioner to cancel such registration once granted. It is submitted that power came to be vested in Commissioner subsequently and that too on satisfaction of two conditions by Sub-section 3 to Section 12AA which was inserted vide Finance (No. 2) Act, 2004 with effect from 01.10.2004. Moreover the aforesaid Section was applicable only when Commissioner is satisfied that activities of institution are not genuine or are not being carried out in accordance with object of Trust or Institution which is not the case in hand. Even with consent, it was open to Commissioner to cancel registration of two educational institutions by order dated 21.03.2005, but there was no justification on the part of Tribunal to refuse registration to Society with retrospective effect, i.e., from 01.04.1973.

24. We find no merit in the submission. This argument ignores and overlook the fact that such a registration would cause overlapping of period during which two institutions were enjoying registration with effect from different periods and that will create complication in the matter.

25. It is submitted that power to condone delay is vested in Commissioner which has to be exercised by recording reasons but Tribunal itself has condoned delay getting itself influenced with the fact that it is a matter of educational institution. We find that for condonation of delay, purpose or objective with which Trust or Institution has been constituted is not relevant but for the purpose of condonation of delay one has to satisfy about genuineness of the reasons causing delay in filing application for registration which was not explained by respondent-Society at all.

26. Initial application filed by Society did not make any request for condonation of delay and no justification was given. In the subsequent application filed seeking condonation delay, the only reason given is that Society was not aware that instead of getting separate individual

educational institutions registered, Society itself should have got registration. This explanation has not been found satisfactory by CIT since Society admittedly had assistance of well qualified Chartered Accountants etc. and it is not the case that registration granted to two educational institutions separately was illegal or impermissible.

27. Tribunal has discussed several law, applicable for considering the question of condonation of delay under Limitation Act, 1963 but looking to the language of statute in the case in hand, we do not find that respondents have given any such explanation, what to say of satisfactory, and Tribunal has read much more therein which has not been stated at all. The registration of individual institutions have been cancelled with the consent prospectively and simultaneously, Society as a whole, has been granted registration. Therefore, in our view, Tribunal in condoning delay and granting registration to Society with effect from 01.04.1973 has erred in law and the aforesaid judgment and order cannot be sustained.

28. Both the questions formulated above are answered in favour of appellant and against respondents. The order dated 22.09.2005 passed by Tribunal in these circumstances is hereby set aside and order of CIT is restored.

29. Appeal is allowed with costs.

CRIMINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Transfer Application (Criminal) No.- 179 Of 2016

Jaspreet Singh Grewal **...Applicant**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
Shri Sikandar B. Kochar

Counsel for the Opposite Parties:
G.A., Anoop Trivedi

Held –
Nature of Application
The applicant filed a transfer application under Section 407 Cr.P.C. seeking to move S.T. No. 123 of 2013 (offences under Sections 452, 307 I.P.C.) from the Court of Additional District & Sessions Judge, Court No. 1, Bareilly, to the Special Judge (Gangster Act), Court No. 5, Bareilly.
Applicant's Contention

The applicant argued that since the I.P.C. case was included in the gang chart for a subsequent prosecution under the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Sections 7 and 8 of said Act mandate that both cases be tried together by the Special Court to avoid conflicting findings and double jeopardy.

Opposition by State and O.P. No. 2

The prosecution and the complainant opposed the plea, stating the I.P.C. trial was at a "ripe stage" (prosecution evidence concluded, fixed for Section 313 Cr.P.C. statements). They argued the application was a delay tactic to bypass four previous High Court directions for an expeditious, day-to-day trial.

Court's Interpretation of the Gangsters Act

The Court analyzed Sections 7(3), 8, and 12 of the Gangsters Act. It ruled that the use of the word "may" in Section 8(1) indicates discretionary power. There is no absolute mandate that a substantive I.P.C. offence must always be transferred to the Special Court if a Gangster Act case is pending.

Comparison of Trial Progress

The Court noted a significant disparity in progress: the I.P.C. case was nearly finished, whereas the Gangster Act case was in the early stages of evidence (only three witnesses examined). Transferring the case now would cause "undue delay" and violate the spirit of speedy justice.

Final Decision

The Court found no personal allegations against the presiding judge and held that legal rights cannot be used to "throttle" the mandate of an expeditious trial. Relying on the principle that speedy trial is the quintessence of the Code, the Court dismissed the transfer application.

List of Citations

Subhash Vs. State of U.P., Criminal Misc. Writ Petition No. 835 of 1998 (decided on 24.3.1998).
Mohd. Mashkoor Vs. State of U.P., 2010(2) JIC 2014.
Mahmood and another Vs. State of U.P., 2011(2) JIC 239.
Mohd. Rashid Vs. State of U.P., Special Leave to Appeal (Crl) No. 24066 of 2013 (decided by the Supreme Court on 25.11.2013).

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard Mr. Sikandar B. Kochar, learned counsel for the applicant, learned AGA for the State and Mr. Anoop Trivedi, learned counsel for O.P. No. 2.

2. This transfer application has been moved under section 407 Cr.P.C. with prayer to transfer the entire proceedings of S. T. No. 123 of 2013, State Vs. Nirmal Singh Grewal and others, pertaining to Case Crime No. 2568 of 2012, under sections 452, 307 I.P.C., P.S. Kotwali, District Bareilly, from the court of Additional District & Sessions Judge, Court No. 1, Bareilly, to the court of Special Judge (Gangster Act)/ Additional District & Sessions Judge, Court No. 5, Bareilly.

3. The applicant had earlier moved a transfer application before the Sessions Judge, Bareilly, on 27.1.2016, which was rejected on merits vide order dated 29.4.2016, certified copy whereof has been filed as Annexure no. 5 to the affidavit filed in support of the instant transfer application.

4. It has been submitted by learned counsel for the applicant that the applicant together with his elder brother Karanpreet Singh Grewal and his father Nirmal Singh is facing trial for the

offence under sections 452, 307 I.P.C. However, the police, in order to harass him and his family booked the applicant, his elder brother and father on the basis of the aforesaid trial and two other criminal cases pertaining to the years 1997 and 2008, under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, (hereinafter referred to as the Gangsters Act) vide first information report dated 25.12.2012. A gang chart was prepared and after investigation the police submitted charge sheet under sections 2/3 of the Gangsters Act. Subsequently cognizance was taken by the Special Judge (Gangsters Act), Bareilly, on 21.9.2013 and at present three prosecution witnesses have already been examined in the aforesaid trial under the Gangsters Act.

5. The submission of learned counsel for the applicant is that as per sections 7(3) and 8 of the Gangsters Act, S.T. No. 123 of 2013 pending in the court of Additional Sessions Judge, Court No. 1, Bareilly, should also be tried by the Special Judge Gangsters Act, Bareilly, where the applicant, his elder brother and father are facing trial under the Gangsters Act because it is one of the cases mentioned in the gang chart on the basis of which Gangsters Act has been imposed on the applicant, his elder brother and father.

6. Learned counsel for the applicant has placed reliance on the judgment dated 24.3.1998 delivered by this court in the case of **Subhash Vs. State of U.P. in Criminal Misc. Writ Petition No. 835 of 1998** in which this court has held that if by a single act or omission the offender commits an offence under the general law and also under the Gangsters Act, both the offences should be tried together before the Special Court to avoid double jeopardy to the accused. The contention of learned counsel for the applicant is that the learned Sessions Judge, Bareilly, without keeping in view the law laid down by this court in the aforesaid case of Subhash (supra), has rejected his transfer application relying on the following two judgments of this court, which are completely inapplicable to the present case.

1. Mohd. Mashkoor Vs. State of U.P. 2010(2) JIC2014.

2. Mahmood and another Vs. State of U.P., 2011(2)JIC 239.

7. Learned counsel for the applicant has next contended that the ground taken by the applicant for transfer of the trial of S.T. No. 123 of 2013 to the court of Special Judge (Gangsters Act), Bareilly, emanates from sections 7 and 8 of the Gangsters Act. However, the learned Sessions Judge, Bareilly, overlooked these provisions and has rejected the transfer application without considering that both the cases i.e. the case under the Gangsters Act and the case under section 452 and 307 I.P.C. relate to the same incident, hence being tried by separate courts, can also lead to conflicting judicial findings on the same facts.

8. It has further been argued by learned counsel for the applicant that one of the major reasons assigned for rejection of the transfer application by the learned Sessions Judge, Bareilly, is that the proceedings of S. T. No. 123 of 2013 has been expedited by the High Court and in case it is transferred, it will cause delay in disposal. The submission of learned counsel for the applicant is that the learned Sessions Judge, Bareilly, has failed to appreciate that the trial was directed to be

concluded expeditiously in accordance with the law, which means that the legal rights of the parties cannot be throttled under the garb of expeditious trial.

9. Learned counsel for O.P. No. 2 and learned AGA have vehemently opposed the transfer application by arguing that the court below has rightly rejected the transfer application moved clearly the applicant by observing that the applicant is trying to prolong the proceedings despite several orders of Hon'ble High court to conclude the trial within a stipulated period and now the instant application has also been moved with the ulterior motive of delaying the disposal of the trial.

10. Learned counsel for O.P. No. 2 has submitted that the law laid down by this court in the case of Subhash (supra) has no application to the present case because in the case of Subhash (supra) the criminal proceedings were at the initial stage of investigation. Moreover, in the case of Subhash the High Court had either quashed the first information reports or had stayed the issuance of coercive process against the applicants on finding that due to political rivalry and to settle personal scores, the applicants were falsely implicated. The learned counsel for O.P. No. 2 has further submitted that on the contrary, in the present case, the trial under the substantive offences under sections 452 and 307 I.P.C. is already at the ripe stage as the prosecution evidence has been concluded and the date has been fixed for recording statements of accused persons under section 313 Cr.P.C. Moreover, there are several directions of this court for expeditious disposal of the sessions trial concerned vide orders dated 21.1.2013, 25.7.2013, 9.4.2014 and 23.7.2015 passed on Criminal Misc. Bail Application No. 364 of 2013, Criminal Misc. Bail Application No. 17956 of 2013, Criminal Misc. Application U/s 482 Cr.P.C. No. 3811 of 2014 and Criminal Misc. Application U/s 482 Cr.P.C. No. 20143 of 2015, respectively.

11. The further submission of learned counsel for O.P. No. 2 is that the applicant and his family members are trying to delay the disposal of the trial by moving several applications on flimsy grounds causing unnecessary delay in the trial in order to defy the directions issued by this court and that the applicant is adamant to undermine this court's orders of expeditious disposal of the trial and is misusing the process of law, hence this application be dismissed with costs.

12. Considered the rival submissions of learned counsel for both the parties. Before proceeding further, it appears appropriate to have a glance on the relevant legal provisions which are as under:-

13**. Section 7(3) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986**, reads here as under:-

7.Jurisdiction of special court.- *(3) Where it appears to any court in the course of any inquiry or trial in respect of any offence that the case is one which should be 'red by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court and thereupon such case shall be tried and disposed of by the Special Court in accordance with the provisions of this Act:*

Provided that it shall be lawful for the Special Court to act on the evidence, if any, recorded by the Court in the case in the presence of the accused before the transfer of the case under this section:

Provided further that if the Special Court is of opinion that further examination of any of the witnesses whose evidence is already recorded in the case is necessary in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination and re-examination, it any, as it may permit, the witness shall be discharged.

14. **Section 8 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986,** reads here as under:-

8. Power of special courts with respect to other offences.- *(1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial.*

(2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

15. **Section 12 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986**, reads here as under:-

12. Trial by special court to have precedence*:- The trial under this Act of any offence by Special Court shall have precedence over the trial of any other case against the accused in any other court (not being a Special Court) and shall be concluded in preference to the trial of such other case and accordingly the trial of such other case shall remain in abeyance.*

16. A careful perusal of the aforesaid legal provisions clearly shows that none of the aforesaid provisions mandates that in any eventuality substantive offence would have to be tried by the Special Court in case a case under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, is pending there. Use of the word “may” in section 8(1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, clearly indicates that the power is discretionary and it has to be exercised keeping in view the particular facts and circumstances of the case.

17. It is not disputed that the concerned Sessions Trial, the proceedings of which are sought to be transferred, is at the ripe stage of recording of statements of the accused under section 313 Cr.P.C. whereas the Special case under the Gangsters Act is pending at the stage of

evidence and only three prosecution witnesses have been examined so far. It is also not disputed that this court has not only once but four times has directed the trial court to conclude the trial expeditiously by fixing it on day to day basis. Considering these facts and circumstances of the case the learned Sessions Judge, Bareilly, has rightly rejected the transfer application moved by the applicant by relying on the law laid down by this court in the case of **Mohd. Mashkoor Vs. State of U.P. (supra)** in which this court, under almost the same circumstances has held as under:-

"As said above here the trial has not started in the court of Special Judge, Gangster Act. On the contrary in the present case the trial under the substantive offence under Section 306, 406, 506 I.P.C. is already at a ripe stage and under the orders of this Court dated 02.02.2009 it was supposed to have conclude by May, 2009. The order of this Court for conclusion of the trial within the stipulated period, was passed even before the filing of the charge sheet under the Gangsters Act in July, 2009 and therefore, also the question of keeping the aforesaid trial under the substantive offence in abeyance does not arise. This order for expeditious trial has never been challenged. The aforesaid provisions cannot be construed to mean that in any situation the Special Court will have precedence and particularly when trial of substantive offence has been expedited by High Court even before filing of the charge-sheet under the provisions of Gangster Act."

18. The applicant has not made any personal allegation against the Additional Sessions Judge, where the concerned sessions trial is pending. There is no other ground for transfer of the sessions trial except that the proceedings under Gangsters Act has also been initiated against the applicant, his elder brother and father on the basis of S.T. No. 123 of 2013 along with two other earlier cases. Under this situation, there does not appear any chance of expeditious disposal of the case under the Gangsters Act and if S. T. No. 123 of 2013 is transferred to the Special Court for disposal along with special case it will certainly cause undue delay in the disposal of the sessions trial despite four orders of this court directing for its expeditious disposal, more so in view of the law laid down by Hon'ble Apex Court in **Special Leave to Appeal (Crl) No. 24066 of 2013, Mohd. Rashid Vs. State of U.P**., decided on 25.11.2013 in which the Hon'ble Apex Court has held that "*the trial court should strictly comply with the direction issued by High Court and take effective steps to ensure that the trial be conducted on day to day basis and the presence of the witnesses be secured by adopting, if necessary, coercive means. The Administrative Judge of the District concerned should monitor the progress of trial proceeding in order to ensure that the trial court does not defy the orders issued by High Court with impunity."*

19. Speedy trial is the quintessence of the code, which cannot be withheld years together on flimsy grounds. Considering the peculiar facts of this case the case of Subhash (supra) has no application to this case.

20. Keeping in view of the facts and circumstances of the case and the relevant legal provisions, there does not appear any merit in the transfer application, which is liable to be dismissed and is hereby dismissed accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 1521 Of 2016

Surendra Sharma ...Revisionist
Versus
State Of U.P. & Anr. ...Opposite parties

Counsel for the Revisionist:
Shri Amit Daga

Counsel for the Opposite Parties:
G.A.

Held –

Para 1: The revisionist challenges the order dated 01.03.2016 passed by the ACJM, Meerut, which rejected his discharge application in a case involving Sections 420, 467, 468, and 471 of the I.P.C.

Para 2: The Court heard arguments from the counsel for the revisionists and the learned A.G.A. (Additional Government Advocate).

Para 3: The prosecution alleges the revisionist forged a letter from the Registrar of the Supreme Court directing the arrest of certain accused persons. Verification with the Supreme Court confirmed the letter was fake and fabricated.

Para 4: The revisionist argued for discharge on the grounds of a discrepancy between the F.I.R. (stating the FAX was sent to the C.J.M.) and the letter (addressed to the District Judge), claiming no offence was made out.

Para 5: The A.G.A. opposed the revision, pointing out that the lower court found sufficient prima facie evidence against the revisionist to proceed with the trial.

Para 6: The Court observed that at the stage of framing charges, the prosecution is not required to prove the case beyond reasonable doubt; a "reasonable doubt" or prima facie suspicion is sufficient to proceed.

Para 7: The Court outlined the settled legal position where a judge may discharge an accused: insufficient evidence, no legal ground to proceed, prosecution barred by limitation, or precluded by a prior High Court judgment.

Para 8: Citing Kanti Bhadra Shah, the Court noted that while a discharge order must contain detailed reasons, an order framing a charge is not necessarily quashed for lacking them.

Para 9: Citing Sudarshan Khakkar and Rukmani Narvekar, the Court emphasized that at this stage, the court must focus only on the prosecution's documents (Section 173 Cr.P.C.) and not the accused's probable defense.

Para 10: Citing Sanghi Brothers, the Court reiterated that even a "strong suspicion" regarding the commission of an offence is enough to frame a charge.
Para 11-12: The Court concluded that the revision lacks merit given the detailed evidence discussed by the lower court and the established legal principles. The revision was dismissed at the admission stage.

List of Citations

Kanti Bhadra Shah vs. State of Bengal, AIR 2000 SC 522
State of J & K vs. Sudarshan Khakkar, AIR 1995 SC 1954
Rukmani Narvekar vs. Vijaya Satardekar, AIR 2009 SC 1013
Sanghi Brothers (Indore) Pvt. Ltd. V. Sanjay Choudhary and others, 2009 (1) SCC (Cri) 87

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. This revision has been filed against the judgment and order dated 01.03.2016, passed by learned Additional Chief Judicial Magistrate 4th, Meerut, in Criminal Case No. 244 of 2015, State of U.P. Vs. Surendra Kumar Sharma, arising out of Case Crime No. 597 of 2012, under Sections 420, 467, 468, 471 I.P.C., Police Station Nauchandi, District Meerut, whereby the discharge application of the revisionist has been rejected.

2. Heard learned counsel for the revisionists and learned A.G.A.

3. The allegation against the accused revisionist is that he forged a letter in the name of Registrar, Hon'ble Supreme Court, directing the District & Sessions Judge, Ghaziabad, to arrest the accused persons involved in a Criminal Case U/s 498A, 304B of I.P.C. and ¾ D. P. Act and sent it to District Judge, Ghaziabad, by FAX. To verify the truthfulness of the letter, when correspondence was made from the Registrar of Supreme Court, it was revealed that the letter was fake and fabricated.The copy of the letter is available on record.

4. The revisionist has assailed it on the ground that this letter is addressed to District and Sessions Judge, whereas in the FIR it has been alleged that FAX was sent to C.J.M., Ghaziabad. It has been further contended that from the perusal of the entire evidence on record it appears that no offence is made out against the revisionist under Sections 420, 467, 468, 471 I.P.C., therefore, the impugned order dated 01.03.2016, which has been passed without appreciating the evidence on record, be set aside.

5. Learned A.G.A. has vehemently opposed the aforesaid submissions by drawing the attention of this Court to the observations of court below in order dated 01.03.2016, wherein it has

been clearly mentioned that sufficient prima facie evidence is available against the revisionist. The submission of learned AGA is that the court below has rightly rejected the discharge application, moved by the revisionist, keeping in view the facts and circumstances of the case.

6. The impugned order shows that the court below has elaborately discussed in it the prima facie evidence available on record. At the stage of framing a charge only a reasonable doubt in the mind of the court concerned is sufficient and the courts are not required to see whether the evidence available on record is sufficient to prove the case of prosecution beyond reasonable doubt. Only prima facie evidence as available on record is to be considered by the court concerned at the initial stage of framing charges. So far as the instant case is concerned, there appears sufficient prima-facie evidence to frame charges against the revisionist and only the basis of the fact that the letter addressed to District & Sessions Judge, Ghaziabad, was faxed to C.J.M., Ghaziabad, it cannot be said that there was no prima-facie evidence againt the revisionist.

7. As per settled legal position the Sessions Judge has the power to discharge the accused in the following circumstances;

A-where the evidence produced is not sufficient,

B- where there is no legal ground for proceeding against the accused,

C-where the proseuction is clearly barred by limitation, or

D-where he is precluded from proceeding because of a prior judgment of High Court.

8. In ***Kanti Bhadra Shah vs. State of Bengal AIR 2000 SC 522***, Hon'ble Supreme Court has held that the discharge order must contain reasons but an order of framing charge cannot be quashed merely because it does not contain reasons.

9. In ***State of J & K vs. Sudarshan Khakkar AIR 1995 SC 1954*** and in ***Rukmani Narvekar vs. Vijaya Satardekar, AIR 2009 SC 1013***, it has been held that no weight is to be attached to the probable defence of the accused and at the time of framing of the charge, the Court has to confine its attention to documents referred to under Section 173 Cr.P.C. only.

10. In ***Sanghi Brothers (Indore) Pvt. Ltd. V. Sanjay Choudhary and others; 2009 (1) SCC (Cri) 87***, it has been held by the Hon'ble Apex Court that 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.

11. In wake of the aforesaid legal position and considering the facts and circumstances of the present case and the prima facie evidence available on record, which has been discussed in

detail by the court below, the revision appears to have no force and it is liable to be dismissed at the admission stage.

12. The revision is accordingly dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No.- 1574 Of 2016

Ganga Prasad & Ors. **...Revisionists**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Revisionists:
Shri Bipin Pal Singh

Counsel for the Opposite Parties:
G.A.

Held –

Para 1: The revisionists seek to set aside a summoning order dated 09.05.2013 (pertaining to a 2015 case) issued by the Additional Session Judge, Pilibhit. They were summoned via Section 319 Cr.P.C. for offences including kidnapping (363, 366), rape (376), criminal intimidation (504, 506), and Sections 11/12 of the POCSO Act.

Para 2: The Court heard the counsel for the revisionists and the learned A.G.A. and reviewed the case record.

Para 3: The revisionists argued they were falsely implicated by the complainant to harass the main accused's father and brothers. They pointed out that the police originally did not charge-sheet them and that the victim's trial statement contained no allegations of rape or sexual harassment against them.

Para 4: It was further argued that the medical evidence (P.W. 4) placed the victim's age between 17 to 19 years, and there was no evidence satisfying the specific criteria for sexual harassment under the POCSO Act.

Para 5: The A.G.A. opposed the revision but admitted there was no specific material linking the revisionists to the charges of rape or POCSO violations.

Para 6-7: The Court noted that the victim made no allegations of rape against the revisionists in either her Section 164 Cr.P.C. statement or her trial testimony.

Para 8: The Court reproduced Section 11 of the POCSO Act, which defines sexual harassment through specific acts with "sexual intent," and Section 12, which provides the punishment.

Para 9-10: The Court found "no iota of evidence" that the revisionists committed any act attracting POCSO culpability. Given the medical age report and the lack of rape allegations, the Court decided to dispose of the revision at the admission stage.

Para 11-12: The Court held that the revisionists' roles were entirely distinguishable from the main accused (Uma Shankar). Consequently, it set aside the summoning order specifically for Section 376 I.P.C. and Sections 11/12 of the POCSO Act.

Para 13-14: However, the Court refused to quash the summoning for the remaining sections (363, 366, 504, 506 I.P.C.), noting that at the summoning stage, only prima facie evidence is required, which was present for these charges.

Para 15-16: The Court directed the revisionists to apply for bail within 30 days. It ordered the lower court to consider the bail application in light of the Amrawati and Lal Kamlendra Pratap Singh precedents and stayed coercive action for that 30-day period.

Para 17: The revision was partly allowed and finally disposed of with these observations.

List of Citations

Amrawati and another Vs. State of U.P., 2004 (57) ALR 290 (Full Bench)
Lal Kamlendra Pratap Singh Vs. State of U.P., 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Challenging its legality and correctness, the revisionists have prayed to set aside the order dated 9.5.2013 passed by the Additional Session Judge, Court No. 1, Pilibhit in S.T. No. 02 of 2015 (State Vs. Umashankar) arising out of Case Crime No. 490 of 2015 under Sections 363, 366, 376, 504 and 506 I.P.C. and 11/12 POCSO Act, P.S. Jahanabad, district Pilibhit on the application under Section 319 Cr.P.C. whereby the revisionists have been summoned to face trial under the aforesaid sections.

2. Heard learned counsel for the revisionists and the learned A.G.A. Perused the record.

3. Learned counsel for the revisionists has submitted that the revisionists are innocent and they have wrongly been summoned by learned trial court on the application under Section 319 Cr.P.C.; the police after completion of investigation had not submitted charge-sheet against them however, the court below, after allowing the application under Section 319 Cr.P.C. has summoned the revisionists without considering the fact that there is no evidence on record to implicate them in the aforesaid offence. Learned counsel has drawn the attention of this Court to the statement of the victim recorded during trial before the court in which she has not uttered even a single word against the revisionists about the commission of rape on her or about any such fact on the basis of which Sections 11 and 12 of POCSO Act could have been made out against them. Learned counsel has

further submitted that with malafide intention to unnecessarily harass the revisionists, who all are real brothers and father of main accused Uma Shankar, the complainant/opposite party no. 2 has involved them in the aforesaid offence. The contention of learned counsel is that the learned trial court while treating all the accused alike, has wrongly summoned all of them without considering the fact that their roles are entirely different from the main accused Uma Shankar. It is further contended that the radiological age of the prosecutrix has been found to be between 17 to 19 years as has been stated by P.W. 4 Dr. Smt. Santosh Rana. There is no iota of evidence against the revisionist that they committed any of the acts coming within the purview of Sections 11 and 12 of POCSO Act. Hence the summoning of the revisionists under aforesaid sections appears to be without any basis and against the law.

4. Learned A.G.A. has opposed the revision but he failed to point out any relevant material showing the involvement of the revisionists in the offences under Section 376 of I.P.C. and Sections 11 and 12 of POCSO Act.

5. Considered the submissions

6. The victim, neither in her statement recorded before the Magistrate under Section 164 Cr.P.C. nor in her statement recorded during trial, has made any allegation of committing rape against the revisionists.

7. So far as **Sections 11 and 12 of POCSO Act** are concerned, both of these provisions are reproduced here as under :

*"**Section 11.** A person is said to commit sexual harassment upon a child when such person with sexual intent –*

(i) Utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) Makes a child exhibit his body or any part of his body so as it is seen by such perwson or any other person; or

(iii) Shows any object to a child in any form or medial for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) Threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi)Entices a child for pornographic purposes or gives gratification therefor.

Section 12- *Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine."*

8. There is no iota of evidence on record that any of the revisionists has done any such act so as to attract the culpability under the aforesaid sections. Moreover, as per the statement of lady doctor, the radiological age of the prosecutrix was between 17 to 19 years. There is no allegation of rape against any of the revisionists.

9. Considering the peculiar facts and circumstances of this case there does not appear any sense in keeping this revision pending any further and it deserves to be finally disposed of at the admission stage itself.

10. Keeping in view the facts and circumstances as discussed above and the fact that the case of present revisionist is entirely distinguishable from the case of Uma Shankar, who is the main accused, the summoning of the revisionists so far as it relates to the offence under Section 376 I.P.C. and 11/12 of POCSO Act deserves to be set aside.

11. Accordingly the revision is partly allowed and impugned summoning order so far as it relates to the offence **under Section 376 I.P.C. and 11/12 of POCSO Act is set aside**.

12. So far as the remaining sections of I.P.C. under which the revisionists have been summoned are concerned, on the basis of prima facie material, it cannot be said that no offence is made out against them. It is well settled that at the stage of summoning, only prima facie evidence is to be looked into.

13. Hence, the prayer for setting aside the summoning order under remaining sections i.e. Sections 363, 366, 504 and 506 I.P.C. is refused.

14. However, it is directed that if the revisionists appear before the courts below and apply for bail within 30 days from today under the aforesaid remaining sections, the court below shall make all endeavour to decide their bail applications keeping in view the observations made by this Court in the Full Bench decision of **Amrawati and another Vs. State of U.P. 2004 (57) ALR 290** and affirmed by Hon'ble Supreme Court in the case of **Lal Kamlendra Pratap Singh Vs. State of U.P. 2009 (3) ADJ 322 (SC).** For the aforesaid period of 30 days no coercive action shall be taken against the revisionists.

15. With the aforesaid observations this revision is finally disposed off.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAXMI, J.

Criminal Appeal No.- 4013 Of 2013

Panna **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Shri K.D. Tiwari

Counsel for the Respondent:
G.A.

Held –

Background of Appeal
This appeal challenges the judgment dated August 13, 2013, by the Additional Sessions Judge, Rampur, which convicted the appellant (Panna) under Sections 452, 376, and 506 of the I.P.C. The appellant was sentenced to various terms, including 7 years Rigorous Imprisonment for rape.

Prosecution Case
The prosecution alleged that on August 25, 2011, while the prosecutrix's parents were away, the appellant entered their home and forcibly raped the 15-year-old victim. Witnesses Ram Phool and Rajpal allegedly arrived upon hearing her screams, after which the accused fled.

Defense and Trial Court Findings
The appellant denied all charges, claiming false implication due to a wage dispute. The trial court convicted the appellant primarily on the testimony of the prosecutrix, adhering to the principle that a woman would not risk her prestige by making false allegations of rape.

Evidence of the Parents and Witnesses
The High Court noted that the parents (P.W. 2 and P.W. 4) were not eye-witnesses. Of the two alleged witnesses, only Ram Phool (P.W. 5) was examined. The court scrutinized whether the prosecutrix's testimony met the "sterling witness" standard required for conviction on sole testimony.

Material Contradictions in Testimony
Several discrepancies were identified: the prosecutrix claimed the incident happened on a cot in the courtyard, while P.W. 5 claimed it happened inside a room with a locked door. Furthermore, the prosecutrix and her mother claimed clothes were handed to the police, but the Investigating Officer (I.O.) denied receiving any.

Medical Discrepancies

Although witness Ram Phool claimed the victim was bleeding from injuries, the medical report by P.W. 1 found no injuries on her body and no spermatozoa in the vaginal smear. The doctor could not provide an opinion confirming rape.

Delay and F.I.R. Irregularities
There was an unexplained 4-day delay in lodging the F.I.R. Additionally, the informant (P.W. 2) admitted that the F.I.R. was written under the dictation of police officers, rendering the foundation of the criminal case unreliable.

Court's Conclusion
The High Court found the prosecution story riddled with improvements and embellishments. It ruled that while a victim's testimony is vital, it must be trustworthy. Given the contradictions and the possibility of a "caught-together" scenario, the court held that the charges were not proved beyond reasonable doubt.

Final Order

The appeal was allowed, the conviction and sentence were set aside, and the court ordered the immediate release of the appellant from jail.

List of Citations

Rai Sandeep Vs. State (NCT of Delhi); (2012) 8 SCC 21
Hem Raj Vs. State of Haryana; (2014) 2 SCC 395
Sadashiv Ramrao Hadbe vs. State of Maharashtra; (2006) 10 SCC 92
Raju vs. State of Madhya Pradesh; (2008) 15 SCC 133
Radhu Vs. State of M.P.; (2007) 12 SCC 57

(Delivered by Hon'ble Mrs. Vijay Laxmi, J.)

1. Challenge in this appeal is to the judgment and order dated 13.8.2013 passed by learned Additional Sessions Judge, Court No. 2, Rampur in Session Trial No. 14 of 2012 (State Vs. Panna) arising out of Case Crime No. 1228 of 2011, under Sections 452, 376 and 506 I.P.C., P.S. Patwai, district Rampur whereby the appellant has been convicted and sentenced for 3 years R.I. and fine of Rs. 1000/- under Section 452 I.P.C., 7 years R.I. and fine of Rs. 5000/- under Section 376 I.P.C. and one year R.I. under Section 506 I.P.C.

2. Heard Sri K.D. Tiwari, learned counsel for the appellant and learned A.G.A. representing the State. Perused the impugned judgment and lower court's record.

3. The prosecution case, in brief, as unfolded during trial, is that on 29.8.2011 at 10.45 A.M. a report was lodged at P.S. Patwai, district Rampur by the complainant Sukhpal, father of the prosecutrix, with the allegations that on 25.8.2011 at about 2.00 P.M., when the complainant and his wife had gone to Bagar (Rajasthan) for some religious purpose and his 15 years old daughter (prosecutrix) was lying down in the courtyard of his own house, the accused-appellant entered into his courtyard from where he took her inside the room and forcibly committed rape on her. When his daughter raised alarm, the witnesses Ram Phool and Rajpal reached on the spot and saved his

daughter. Thereafter the accused ran away from the spot threatening the witnesses to kill them. When the informant and his wife returned from Bagar, his daughter told him about the incident and on the basis of the information given by his daughter, the informant lodged the F.I.R.

4. The case was registered and investigated and after completion of the investigation the police submitted charge-sheet against the appellant. The case was committed to the sessions court where charges under Sections 452, 376 and 506 I.P.C. were framed against the appellant and the trial proceeded.

5. In order to prove its case the prosecution examined 7 witnesses in all. P.W. 1 is Dr. Chitra Jauhari, who has medically examined the prosecutrix, P.W. 2 is the informant Sukhpal, father of the prosecutrix, P.W. 3 is the prosecutrix herself, P.W. 4 is Premwati, mother of the prosecutrix, P.W. 5 is Ram Phool, who is said to have reached on the spot after hearing the alarm raised by the prosecutrix, P.W. 6 is S.I. Om Prakash Sharma and P.W. 7 is radiologist Dr. R.K. Sharma.

6. After completion of the prosecution evidence the statement of the appellant under Section 313 Cr.P.C. was recorded in which he denied all the allegations and stated that due to an earlier dispute with regard to payment of wages, a false case has been lodged by the informant against him.

7. No defence witness was produced by the appellant.

8. The learned trial court, after a detailed appreciation of the evidence available on record, found the appellant guilty and convicted and sentenced him by the impugned judgment.

9. The legality and correctness of the aforesaid judgment has been challenged by learned counsel for the appellant in the instant appeal mainly on the ground that the learned trial court has illegally convicted the appellant without considering the fact that the prosecution case was totally unreliable and untrustworthy. There was no evidence to prove the charges beyond reasonable doubt against the appellant. However, the trial court relying on the sole testimony of the prosecutrix, convicted and sentenced the appellant.

10. Per contra learned A.G.A. has contended that in case of rape, sole testimony of the prosecutrix is sufficient to convict the accused and no further corroboration is required for this purpose.

11. Considered the submissions advanced by learned counsel for both the parties.

12. A careful scrutiny of the evidence available on record shows that the informant and his wife were admittedly not present at the scene of occurrence as both of them had gone to Bagar and had returned to their home in the evening on 27.8.2011. The occurrence is of 25.8.2011. Thus, the statements of P.Ws. 2 and 4, who are the parents of the prosecutrix, are based on the information

given to them by their daughter and also by the witnesses Ram Phool and Rajpal, about whom it is said that on hearing the alarm raised by the prosecutrix, they reached at the spot and saw the applicant running out from the spot. Out of the abovesaid two witnesses named in the F.I.R. the witness Rajpal has not been produced by the prosecution and only Ram Phool has been examined as P.W. 5. Thus, the prosecution case mainly rests on the testimony of the prosecutrix and the alleged eye witnesses Ram Phool-P.W. 5.

13. There is no doubt that in cases of rape, the solitary statement of the victim is sufficient to hold the accused guilty but the quality of such statement should be such, so as to inspire confidence. It should be absolutely trustworthy, unblemished and must be of sterling quality.

14. The Hon'ble Supreme Court in case of **Rai Sandeep Vs. State (NCT of Delhi); (2012) 8 SCC 21** has explained the meaning of "sterling witness" as under:-

"In our considered opinion, the ''sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness."

"Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ''sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

15. In **Hem Raj Vs. State of Haryana; (2014) 2 SCC 395** the Hon'ble Supreme Court has held as follows:-

"In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible, if it inspires total confidence, it can be relied upon even sans corroboration."

"Such weight is given to the proxecutrix's evidence because her evidence is on a par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinise it carefully, because in a given case on that lone evidence a man can be sentenced to life

imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it."

16. In **Sadashiv Ramrao Hadbe vs. State of Maharashtra; (2006) 10 SCC 92,** the Hon'ble Supreme Court has observed as under:-

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

17. Now testing the evidence available on record in the instant appeal on the touch stone of law as laid down by the Apex Court in the above cited judgments, it appears that the prosecutrix who has been examined as P.W. 3, has supported the prosecution case in her statement and has proved her statement recorded under Section 164 Cr.P.C. as Ext. Ka. 5. She has stated that at the time of occurrence she was present in her courtyard and was lying down on a cot. At that time the appellant came there and committed rape with her on the said cot. She tried to get free herself and raised alarm on which her uncle Ram Phool and Rajpal reached there. The accused ran away threatening them to kill. When her parents returned from 'Bagar' she told them about the incident and went to police station with her father to lodge the report. The police took her for medical examination to District Hospital and her statement under Section 164 Cr.P.C. was also recorded. During her cross examination she has stated that she knew the appellant since prior to the occurrence and her family and appellant's family had visiting terms with each other. She has stated that she has one elder unmarried brother who is one year elder than her. She has also stated that the Daroga Ji had taken her clothes which she was wearing at the time of occurrence.

18. However, the aforesaid statement of prosecutrix appears to be in total contradiction with the statement of her father and mother as the father has categorically stated that the prosecutrix is eldest amongst their eight children. The mother of the prosecutrix-P.W. 4 has stated that her daughter never informed her that the accused had threatened to kill any one. Though, the mother has stated that she had given the clothes of the prosecutrix to Daroga Ji. However, the statement of prosecutrix and her mother does not find support with the statement of I.O. who has stated as follows:

" मैंने वादी से पीड़ता के कपड़े मांगे थे तो उसने बताया था क कपड़े धो दिए है। उसने कपड़े नहीं दिए और न ही मुझे दिखाये ।"

19. The mother of the prosecutrix has stated that when they returned, their daughter had shown her cloth to them. That clothes were torn whereas the I.O. has stated that the prosecutrix had neither shown any injury to him during her statement recorded under Section 161 Cr.P.C. nor she had given her cloth to him.

20. The only eye witness Ram Phool examined as P.W. 5 has stated that when he reached the spot after hearing the shrieks of the prosecutrix, he saw the appellant with the prosecutrix in a compromising position inside the room. When he challenged him, he ran away from the spot threatening him to kill. When he asked from the prosecutrix about the occurrence she informed that she was lying down on a cot on the Chaupal from where the accused took her inside the room and committed rape on her.

21. Thus there appears material contradictions between the statement of the prosecutrix and the eye witness with regard to place of occurrence. As per the prosecutrix version she was lying on a cot kept in the Chaupal/courtyard when the appellant came and committed rape on the said cot itself, whereas according to the witnesses the rape was committed inside the room. Thus, the placed of occurrence also appears to be doubtful.

22. There is delay in lodging the F.I.R. The occurrence is said to have taken place on 25.8.2011 at 2.00- P.M. (noon) but the F.I.R. has been lodged after expiry of 4 days on 29.8.2011. According to the informant he had returned from Bagar on 27.8.2011 but he has not assigned any reason as to why the F.I.R. was lodged on 29.8.2011 despite the fact that P.W. 5 has stated that he had informed the father of the prosecutrix about the occurrence immediately. There is no explanation for such delay in lodging the first information report.

23. The only eye witness Ram Phool has stated that the prosecutrix had sustained several injuries during the occurrence and blood was oozing out from all these injuries and her clothes also got stained with blood but the medical examination report of the prosecutrix shows that the doctor has not found any injury on her body.

24. The aforesaid statement of Ram Phool is in total contradiction of the statement of I.O. who has stated as follows:

"गवाह रामफूल ने पी ड़ता के चोटों वाली बात नहीं बताई थी।"

25. The prosecution story also becomes doubtful in view of the following statement of the sole eye witness-P.W. 5:-

"जब नीरज ने शोर मचाया था शोर की आवाज पर मैं व गांव के बहुत सारे लोग पहुंचे तो कमरे का दरवाज़ा बंद था। गांववालों ने दरवाजा तुड़वाया था। "

26. The prosecution story becomes wholly doubtful, also in wake of the following statement of the first informant – P.W. 2 Sukhpal who has stated that the F.I.R. was written under the dictation of S.O. Saheb:-

"थाने सुबह 10-11 बजे पहुंचा था। तहरीर मैने थाने में बैठकर लखी थी। दीवान जी ने बोली थी फर कहा S.O. साहब ने बोली थी मै लखता गया। मैने कुछ अपनी मर्जी से लखा था मै बता नहीं सकता क्या मैने अपनी मर्जी से लखा था क्या दरोगा ने।"

27. Thus the aforesaid statement of the first informant makes the F.I.R., which is the foundation stone of a criminal case, wholly unreliable.

28. Some more instances making the prosecution story unworthy of credence are that P.W. 2 – first informant has stated that his daughter never told him about her raising alarm. He has also stated that the witnesses Rajpal and Ram Phool had not told anything about it. P.W. 2 has stated that the prosecutrix had also not informed him that after how much time the witnesses Rajpal and Ram Phool had reached the spot. P.W. 2 has admitted that he did not see any injury on the body of his daughter.

29. Moreover, the following statement given by P.W. 2 suggests that the prosecutrix was caught alongwith the appellant:

" घटनास्थल मैने देखा है। लड़की व घरवालों ने बताया था जब लड़की पकड़ी गई थी।

30. The doctor (P.W. 1) who has examined the prosecutrix has stated that during medical examination she did not find any injury on the body of the victim. Her breast were found well developed and her hymen was found old torn. No spermatozoa, either dead or alive, was found in her vaginal smear so no opinion could be given about rape by the doctor.

31. The learned trial court has convicted the appellant mainly on two grounds :

1. No woman would come to court to depose at the cost of her prestige

2. As the prosecutrix is minor, even assuming that she was a consenting party, her consent was immaterial.

32. The question whether the prosecutrix was consenting party or not could have been relevant if her statement was found to be reliable and trustworthy. It has been seen earlier that the statement of the prosecutrix and also other witnesses produced by the prosecution suffers from several contradictions, omissions, embellishment and improvement making the prosecution story totally unreliable. Hence it does not make any difference whether she was consenting party or not or whether she was a minor i.e. 17 years of age at

the time of occurrence. The first ground that no woman would come to court to depose at the cost of her prestige also looses its importance in wake of doubtful prosecution story.

33. Considering the facts and of this case and the apparent contradictions, embellishments and improvements in the statements of the witnesses it cannot be said that the prosecution has successfully proved its case against the appellant beyond reasonable doubt. The trial court has relied on the statement of the prosecutrix only in view of the legal position that no self respecting woman would come forward in a court at the cost of her honour, ignoring the anomalies and discrepancies in the prosecution case.

34. In case **Raju vs. State of Madhya Pradesh; (2008) 15 SCC 133**, the Supreme Court has held as under:-

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

35. In **Radhu Vs. State of M.P.; (2007) 12 SCC 57** the Hon'ble Apex Court has observed that :

"The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

36. In wake of the aforesaid judgments of the Hon'ble Apex Court it cannot be said that the prosecution has led the evidence of sterling quality in this case.

37. For the aforesaid reasons the impugned judgment is liable to be set aside the the appeal deserves to be allowed.

38. Accordingly, this appeal is **allowed** and the impugned judgment dated 13.8.2013 passed by the trial court is hereby set aside. The appellant is in jail. The appellant shall be released forthwith if not wanted in any other case.

39. Let a copy of this judgment be sent to the courts below forthwith for immediate compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Misc. Writ Petition No.- 4775 Of 2003

Dr. (Mrs.) Shayesta Khan & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shri V.M. Zaidi

Counsel for the Respondents:
G.A., Shri J.N. Sharma

Held –

Para 1: Petitioners Dr. Shayesta Khan and Abid Raza Badar challenge the orders of the Judicial Magistrate and the Revisional Court, which summoned them under Section 63 of the Indian Copyright Act, 1957, and rejected their objections.

Para 2: The Rampur Raza Library Board (RRLB) filed a complaint alleging that it holds exclusive rights to manuscripts and rare collections under the Rampur Raza Library Act, 1975, and its 1987 Rules.

Para 3: RRLB alleged that Petitioner-1 published a book ("Ferhist-E-Farsi") based on the library's Persian manuscripts without permission, constituting a copyright violation.

Para 4: Following statements recorded under Sections 200 and 202 Cr.P.C., the Magistrate found sufficient grounds to summon the petitioners for trial under Section 63 of the Act and Section 120B IPC.

Para 5: The petitioners' subsequent application to recall the summoning order was rejected by the Magistrate and later upheld by the Revisional Court.

Para 6: The petitioners' counsel argued they had no role in the publication, there was no evidence of their involvement, and the publication was funded independently by another library.

Para 7: The Court notes that these defenses are for the Trial Court to examine; the High Court's current role is limited to checking if there was enough material to justify the initial summoning.

Para 8: The Court finds that the complaint and witness statements established a prima facie case. At the summoning stage, the Magistrate is only required to see if an offence is made out, not to evaluate the ultimate success of the trial.

Para 9-10: Citing Adalat Prasad, the Court clarifies that a Magistrate cannot recall a summoning order as there is no power of "review" in the Cr.P.C. The accused must present their defense during the trial, not at the preliminary stage of issuing process.

Para 11-12: The Court refuses to discuss the merits further to avoid prejudicing the trial. It emphasizes that writ jurisdiction cannot be used as a "mini-trial" to examine evidence that hasn't been vetted by the lower court.
Para 13-16: The Court outlines the limited scope of Articles 226 and 227. It is a power of superintendence to keep lower courts within their bounds, not an appellate power to correct every perceived error or hardship.

Para 17-21: Various precedents are cited to establish that findings of fact cannot be overturned unless they are "perverse" or "patently erroneous." The High Court cannot substitute its own opinion for that of the lower court.

Para 22-24: It is emphasized that even if a second view is possible, the Writ Court should not interfere as long as the lower court's decision is based on some relevant material.

Para 25-27: The Court reiterates that supervisory jurisdiction is used "sparingly" to prevent the miscarriage of justice or flagrant violations of law, ensuring the "wheel of justice" is not unnecessarily halted.

Para 28-30: Reconfirmation that the High Court should not act as an appellate body under Articles 226/227 and should only intervene in extreme cases of irrationality or jurisdictional error.

Para 31-32: Finding no error in the lower courts' orders, the High Court dismisses the petition and vacates any interim stays.

List of Citations:

Adalat Prasad Vs. Rooplal Jindal and others, 2004(7) SCC 338
D. N. Banerji Vs. P. R. Mukherjee, 1953 SC 58
Waryam Singh and another Vs. Amarnath and another, AIR 1954 SC 215
Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, AIR 1951 Cal. 193
Mohd. Yunus v. Mohd. Mustaqim and Ors., AIR 1984 SC 38
Nibaran Chandra Bag Vs. Mahendra Nath Ghughu, AIR 1963 SC 1895
Rukmanand Bairoliya Vs. the State of Bihar & ors., AIR 1971 SC 746
Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha & ors., AIR 1980 SC 1896
Laxmikant R. Bhojwani Vs. Pratapsing Mohansingh Singh Pardeshi, (1995) 6 SCC 576
Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel & ors., (1997) 7 SCC 300
M/s. Pepsi Food Ltd. & Anr. Vs. Sub-Judicial Magistrate & ors., (1998) 5 SCC 749
Virendra Kashinath Ravat & ors. Vs. Vinayak N. Joshi & ors., (1999) 1 SCC 47
Rena Drego Vs. Lalchand Soni & ors., (1998) 3 SCC 341
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Omeph Mathai & ors. Vs. M. Abdul Khader, (2002) 1 SCC 319
Surya Dev Rai Vs. Ram Chander Rai and others, (2003) 6 SCC 675
Jasbir Singh Vs. State of Punjab, (2006) 8 SCC 294
Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil, (2010) 8 SCC 329
Kokkanda B. Poondacha and others Vs. K.D. Ganapathi and another, AIR 2011 SC 1353
Bandaru Satyanarayana Vs. Imandi Anasuya, (2011) 12 SCC 650
Abdul Razak (D) through Lrs. & others Vs. Mangesh Rajaram Wagle and others, (2010) 2 SCC 432
T.G.N. Kumar Vs. State of Kerala and others, (2011) 2 SCC 772
Commandant, 22nd Battalion, CRPF and others Vs. Surinder Kumar, (2011) 10 SCC 244
Union of India Vs. R.K. Sharma, (2001) 9 SCC 592

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

1. This writ petition under Article 226 of the Constitution of India has been filed by two petitioners, namely, Dr. (Mrs.) Shayesta Khan and Abid Raza Badar, assailing orders dated 26.10.1999 and 21.09.2002 passed by Judicial Magistrate, Rampur in Case No. 422 of 2002 for summoning petitioners under Section 63 of Indian Copy Right Act, 1957 *(hereinafter referred to as the "Act, 1957"),* after rejecting their objections. Petitioners have also challenged order dated 22.05.2003 passed by Sri Lokendra Kumar Rathi, Additional Sessions Judge (Fast Track Court No. 2), Rampur *(hereinafter referred to as the "Revisional Court")* dismissing Criminal Revision No. 230 of 2002 and confirming Magistrate's order dated 26.10.1999 summoning petitioners under Section 63 of Act, 1957 and order dated 21.09.2002, whereby petitioners' objection and application for recall of summoning order was rejected.

2. Facts giving rise to present petition are that a complaint was filed by Rampur Raza Library Board *(hereinafter referred to as the "RRLB")* against petitioners as well as two others, namely, M/s Makhtaba Jamia Limited through its Proprietor/ Partner / Authorized Person and Khuda Bux Oriental Public Library, Patna (Bihar) through its Director for proceeding against them under Section 63 of Act, 1957. Complaint case set up was that RRLB is a Body Corporate under Rampur Raza Library Act, 1975 (Central Act No. 22 of 1975) (hereinafter referred to as the "Act, 1975"). It is an old and prestigious institution founded in the year 1974 by then Ruler of Rampur Estate. Library possessed very precious and rare collections of manuscripts, documents, paintings, specimens of calligraphy, printed books in various languages such as Urdu, Hindi, Arbic, Persian, Sanskrit, Turkish and Tamil etc. RRLB possessed all rights to publish and print any work available in Library or to develop the same by virtue of Rampur Raza Library Anurakshan Rules, 1987 (hereinafter referred to as the "Rules, 1987").

3. Accused-1, i.e., petitioner-1, published a book named, "Ferhist-E-Farsi" from Persian Manuscripts available in Library alleging that same was communicated by Accused-2 in the name of publisher-accused-4. In respect of aforesaid Manuscripts, Rampur Raza Library is the first owner and without seeking its permission, publication of work from said Manuscripts amounts to violation of Act, 1957.

4. Judicial Magistrate recorded statement of Sri W.H. Siddiqui as representative of RRLB under Section 200 Cr.P.C. and also statement of Abu Sad Ilahi under Section 202 Cr.P.C. and thereafter summoned Accused-1 and 3, (petitioners before this Court) vide order dated 26.10.1999 for being tried under Section 63 of Act, 1957 read with Section 120B IPC and complaint was rejected against Accused-2 and 4.

5. Petitioners then filed objections against summoning order dated 26.10.1999 and requested for its recall, which has been rejected by Judicial Magistrate vide order dated 21.09.2002 and revision preferred thereagainst has been dismissed by Revisional Court vide order dated 22.05.2003.

6. Sri V.M. Zaidi, learned Senior Advocate appearing for petitioners, contended that petitioners have no role in publication of aforesaid Manuscripts/work. There is no evidence to show any knowledge of petitioners in regard of aforesaid publication. There is no resolution passed by Board so as to authorize RRLB to file complaint and further that publication was done by Khuda Bux Oriental Public Library, Patna (Bihar) out of its own funds and there is no implication of petitioners in the matter at all.

7. Most of the arguments raised by learned counsel for petitioners are basically advanced which are yet to be examined by Trial Court since petitioners are yet to appear and place their defence before Court below. At this stage it cannot be lost sight that petitioners have come to this Court challenging only summoning order passed by Judicial Magistrate and, therefore, scope of judicial review is limited to the extent whether there was material before Judicial Magistrate to summon petitioners under Section 63 of Act, 1957 read with Section 120B IPC.

8. A bare perusal of complaint which has been supported by statements made on behalf of complainant under Section 200 Cr.P.C. and witness under Section 202 Cr.P.C., it cannot be doubted that a prima facie case of violation of Section 63 of Act, 1957 and Section 120B IPC has been made out. Whether there is any evidence to prove charge against petitioners is a matter to be examined in trial when both parties shall be free to lead evidence in entirety but at the stage of summoning Magistrate is supposed to apply its mind only to material placed before it and to find out whether there is prima facie case made out by complainant, with objective consideration so as to proceed for trial against accused persons in respect of offences which has been made out in complaint supported by statements made under Sections 200 and 202 Cr.P.C. So far as these materials are concerned, I have no manner of doubt that a prima facie case has been made out by complainant and Magistrate has rightly issued summoning order which has been confirmed by Revisional Court.

9. In **Adalat Prasad Vs. Rooplal Jindal and others, 2004(7) SCC 338** it has been observed that condition precedent for issuing process under Section 204 Cr.P.C. is satisfaction of Magistrate either by examination of complainant and witnesses or by inquiry contemplated under Section 202 Cr.P.C. that there is sufficient ground for proceeding with complaint. Till this stage there is nothing which requires Magistrate to hear summoned accused. This is only a preliminary stage and stage of hearing of accused would arise subsequently as provided under Code of Criminal Procedure. Inquiry to be made by Magistrate at this stage is confined to the material available before him as contemplated under Sections 200 and 202 Cr.P.C. and not to the possible defence which may be placed by summoned accused after appearing before Magistrate. Court also held that Magistrate has no power to recall its order of summoning since accused cannot invoke Section 203 Cr.P.C. but remedy lies by invoking Section 482 Cr.P.C. Paras 15 and 16 of the judgment read as under:

"15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code.

16. Therefore, in our opinion the observation of this Court in the case of Mathew (supra) that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at inter-locutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew's case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

10. The law laid down in above authority is clear that Magistrate has to form its opinion on the basis of material placed before it and the possible defence of accused is not to be seen since that is a stage which would come subsequent to the issue of process under Section 204 Cr.P.C.

11. Since entire trial is yet to proceed, any further discussion on the matter is bound to prejudice interest of parties, therefore, I am refraining myself from discussing matter further but at this stage I am satisfied that there is no error apparent on the face of record in impugned orders so as to warrant interference in writ jurisdiction under Article 226 of the Constitution of India.

12. I may put a word of caution that in writ jurisdiction Court will not permit accused persons to place material which has not been subject matter of scrutiny by Court below so as to turn writ jurisdiction as a trial to examine for the first time entire defence of accused to find out whether there would be a successful trial or not. A stage which is yet to come before Court below cannot be allowed to be made in writ jurisdiction by placing certain material which is yet to be examined by Trial Court. Petitioners will have full opportunity of placing their defence before Court below and

something which has not come before Court below till date should not be examined by this Court to consider correctness of summoning order passed by Court below on the basis of material placed before it for the first time by accused.

13. Even otherwise, scope of judicial review under Articles 226/227 of the Constitution is not like Appellate Court. The scope of judicial review in such matters where the orders of courts below are assailed before this Court is very limited. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes.

14. In **D. N. Banerji Vs. P. R. Mukherjee 1953 SC 58** the Court said:

"Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere."

15. A Constitution Bench of Apex Court examined the scope of Article 227 of the Constitution in **Waryam Singh and another Vs. Amarnath and another AIR 1954 SC 215** and made following observations at p. 571 :

"This power of superintendence conferred by article 227 is, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee AIR 1951 Cal. 193, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors".

16. In **Mohd. Yunus v. Mohd. Mustaqim and Ors. AIR 1984 SC 38** the Apex Court held that this Court has very limited scope under Article 227 of the Constitution and even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. Has resulted in grave injustice.

17. For interference under Article 227, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and de hors the factual and legal position on record. (See: **Nibaran Chandra Bag Vs. Mahendra Nath Ghughu, AIR 1963 SC 1895; Rukmanand Bairoliya Vs. The State of Bihar & ors., AIR 1971 SC 746; Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha & ors., AIR 1980 SC 1896; Laxmikant R.**

Bhojwani Vs. Pratapsing Mohansingh Singh Pardeshi, (1995) 6 SCC 576; Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel & ors., (1997) 7 SCC 300; M/s. Pepsi Food Ltd. & Anr. Vs. Sub-Judicial Magistrate & ors., (1998) 5 SCC 749; and Virendra Kashinath Ravat & ors. Vs. Vinayak N. Joshi & ors. (1999) 1 SCC 47).

18. It is well settled that power under Article 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (See: **Rena Drego Vs. Lalchand Soni & ors., (1998) 3 SCC 341; Chandra Bhushan Vs. Beni Prasad & ors., (1999) 1 SCC 70; Savitrabai Bhausaheb Kevate & ors. Vs. Raichand Dhanraj Lunja, (1999) 2 SCC 171; and Savita Chemical (P) Ltd. Vs. Dyes & Chemical Workers' Union & Anr.,(1999) 2 SCC 143).**

19. Power under Article 227 of the Constitution is not in the nature of power of appellate authority enabling re-appreciation of evidence. It should not alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence. (See: **Union of India & ors. Vs. Himmat Singh Chahar, (1999) 4 SCC 521).**

20. In **Ajaib Singh Vs. Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82,** the Hon'ble Apex Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

21. In **Mohan Amba Prasad Agnihotri Vs. Bhaskar Balwant Aheer, AIR 2000 SC 931,** the Hon'ble Supreme Court held that jurisdiction of High Court under Article 227 of the Constitution is not appealable but supervisory. Therefore, it cannot interfere with the findings of fact recorded by Courts below unless there is no evidence to support findings or the findings are totally perverse.

22. In **Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245**, the Court observed that it is impermissible for the Writ Court to reappreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

23. In **Union of India Vs. Rajendra Prabhu, (2001) 4 SCC 472**, the Hon'ble Apex Court held that the High Court, in exercise of its extraordinary powers under Article 227 of the

Constitution, cannot re-appreciate the evidence nor it can substitute its subjective opinion in place of the findings of Authorities below.

24. Similar view has been reiterated in **State of Maharashtra Vs. Milind & ors., (2001) 1 SCC 4; Extrella Rubber Vs. Dass Estate (P) Ltd., (2001) 8 SCC 97; and Omeph Mathai & ors. Vs. M. Abdul Khader, (2002) 1 SCC 319.**

25. In **Surya Dev Rai Vs. Ram Chander Rai and others (2003) 6 SCC 675**, it was held that in exercise of supervisory power under Article 227, High Court can correct errors of jurisdiction committed by subordinate Courts. It also held that when subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or jurisdiction though available is being exercised in a manner not permitted by law and failure of justice or grave injustice has occasioned, the Court may step in to exercise its supervisory jurisdiction. However, it also said that be it a writ of certiorari or exercise of supervisory jurisdiction, none is available to correct mere errors of fact or law unless error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law; or, a grave injustice or gross failure of justice has occasioned thereby.

26. In **Jasbir Singh Vs. State of Punjab (2006) 8 SCC 294**, the Court said:

"...while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions."

27. In **Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil (2010) 8 SCC 329**, the Court said that power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court. The above authority has been cited and followed in **Kokkanda B. Poondacha and others Vs. K.D. Ganapathi and another AIR 2011 SC 1353 and Bandaru Satyanarayana Vs. Imandi Anasuya (2011) 12 SCC 650.**

28. In **Abdul Razak (D) through Lrs. & others Vs. Mangesh Rajaram Wagle and others (2010) 2 SCC 432**, Apex Court reminded that while exercising jurisdiction under Article 226 or 227, High Courts should not act as if they are exercising an appellate jurisdiction.

29. In **T.G.N. Kumar Vs. State of Kerala and others (2011) 2 SCC 772**, the Court said that power of superintendence conferred on the High Court under Article 227 of the Constitution of

India is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority.

30. In **Commandant, 22nd Battalion, CRPF and others Vs. Surinder Kumar (2011) 10 SCC 244**, Apex Court referring to its earlier decision in **Union of India Vs. R.K. Sharma (2001) 9 SCC 592** observed that only in an extreme case, where on the face of it there is perversity or irrationality, there can be judicial review under Articles 226 or 227.

31. In view thereof, I find no justification warranting interference with the orders impugned in this writ petition.

32. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE SHASHI KANT, J.

Habeas Corpus Writ Petition No.- 4878 of 2016

Raju @ Abid **...Petitioner**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Petitioner:
Shri Tapan Kumar Mishra

Counsel for the Respondents:
G.A., A.S.G.I., Shri N.D. Rai

Held –

Nature of the Petition
The petitioner, Raju @ Abid, filed a writ of Habeas Corpus seeking to quash his detention order dated August 28, 2015, issued under Section 3(2) of the National Security Act (NSA), and the subsequent approval order by the State Government.

Background and Allegations
The detention was based on the recovery of counterfeit currency notes totaling ₹2,94,000 from the petitioner and his accomplices. He was also allegedly involved in a similar case from 2012 involving ₹2,50,000 in counterfeit notes. The authorities argued his activities disturbed public order and harmed the national economy.

Primary Legal Contention
The petitioner's counsel challenged the detention solely on the grounds of inordinate and unexplained delay. Specifically, it was argued that the District Magistrate (Respondent No. 3) failed to promptly forward the petitioner's representation to the State Government, violating Article 22(5) of the Constitution.

Examination of the Timeline
The petitioner submitted his representation on September 12, 2015. While the State Government acted quickly once they received it, records showed the District Magistrate did not forward the documents to the State until February 15, 2016—a delay of over five months.

Failure of Explanation
The Court found that the District Magistrate provided no plausible explanation for "sitting over" the representation for five months. While the authorities had sent comments to the Central Government in September 2015, they inexplicably failed to notify the State Government simultaneously.

Judicial Principles Applied
The Court reiterated that the right to representation against detention is a fundamental right under Article 21 and 22(5). While no "hard and fast" time limit exists, any delay must be explained. "Lethargic indifference" or "needless procrastination" by authorities is not permissible.

Final Decision
The Court ruled that the unexplained five-month delay constituted a breach of constitutional imperatives, rendering the detention illegal. The writ petition was allowed, the detention orders were quashed, and the Court ordered the immediate release of the petitioner.

List of Citations:

Jayanarayan Sukul v. State of West Bengal, AIR 1970 SC 675
Frances Coralie Mullin v. W.C. Khambra, AIR 1980 SC 849
K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India, 1991 AIR (SC) 574

(Delivered by Hon'ble Bala Krishna Narayana, J.
&
Hon'ble Shashi Kant, J.)

1. This writ petition has been filed by the petitioner with a prayer to issue a writ, order or direction in the nature of Habeas Corpus quashing the detention order dated 28.8.2015 passed by the respondent no. 3 and the order dated 7.9.2015 passed by the respondent no. 2 approving the detention order (collectively filed as annexure-2 to the writ petition). A further prayer has been made for issuing a writ, order or direction in the nature of Habeas Corpus directing the respondent no. 5 to release the petitioner forthwith.

2. The relevant facts giving rise to this writ petition as narrated in the grounds of detention are that on the basis of the F.I.R. lodged by the SHO Echotech-3, district-Gautam Budh Nagar at Police Station-Echotech-3, district-Gautam Budh Nagar, Case Crime no. 240 of 2015, under Sections 489B and 489C I.P.C. was registered against the petitioner and his two other accomplices on the allegation that counterfeit currency notes of Rs. 2,94,000/- (Rs. Two lacs ninety four

thousand) were recovered from the petitioner and his two other accomplices on 16.7.2015 when they were intercepted, searched and arrested by the SHO police station-Echotech-3, district-Gautam Budh Nagar and his two companions on the Haldwani Road, Gautam Budh Nagar, while they were going on a motorcycle and a scooty along with counterfeit currency notes. Apart from the aforesaid incident, the counterfeit currency notes of Rs. 2, 50,000/- (Rs. Two lacs fifty thousand) were recovered from one Neeraj and his other accomplices on 13.10.2012 and on the basis of the aforesaid recovery, Case Crime no. 592 of 2012, under Sections 489B and 489C I.P.C. was registered against the petitioner and his other accomplices at police station-Echotech-3, district-Gautam Budh Nagar, in which after completion of investigation charge sheet was submitted against the petitioner and the other co-accused. The aforesaid activities of the petitioner had not only disturbed the public order but had also adversely effected the circulation and supply of Indian currency which is essential for the community. While the petitioner was in District Jail, Gautam Budh Nagar on account of his being accused in Case Crime no. 240 of 2015 was served with the impugned order of detention passed by the respondent no. 3 in the exercise of his power under Section 3(2) of the National Security Act (hereinafter referred to as the "NSA") along with the grounds of detention on 28.8.2015. The petitioner made a representation against the impugned detention order before the respondent no. 1 through respondent no. 5 on 12.9.2015 (annexure-6). The petitioner's representation was rejected by the respondent no. 1 on 27.10.2015. The order dated 23.10.2015 was communicated to the petitioner on 27.10.2015. The representation dated 12.9.2015 moved by the petitioner before the State Government was rejected by the State Government on 22.2.2016. Information whereof was communicated to the petitioner through district authority by the State Government on 23.2.2016. The U.P. Advisory Board, Lucknow approved the detention order on 30.9.2015. The State Government took a decision to confirm the detention order and to keep the petitioner under detention for a period of twelve months from the date of his actual detention, i.e. 28.8.2015.

3. The only ground on which the petitioner's counsel has assailed the detention of the petitioner under the N.S.A. is that there was an inordinate and unexplained delay on the part of the respondent no. 3 in forwarding the representation made by the petitioner on 12.9.2015 (annexure-6) to the State Government against the impugned detention order dated 28.8.2015 to the State Government and also on the part of the State Government in deciding the same which has totally vitiated the impugned detention order as the same infringed the fundamental right guaranteed to the petitioner under Section 22(5) of the Constitution of India.

4. Per contra, Sri J.K. Upadhyay appearing on behalf of the State and Sri N.D. Rai, learned counsel for the respondent no. 1 made their submissions in support of the impugned detention order. Sri J.K. Upadhyay vehemently submitted that the delay, if any, in the disposal of the petitioner's representation has been satisfactorily explained in the counter affidavit filed by the respondent no. 2 in this case and the impugned order is not liable to be set aside merely on the ground of some delay on the part of the State Government in deciding the petitioner's representation.

5. We have heard the learned counsel for the parties and perused the impugned order of detention as well as the grounds of detention and the pleadings of the parties. The only question which requires consideration in this writ petition is that whether there was any undue and unexplained delay on the part of the respondent no. 3 in forwarding the petitioner's representation to the respondent no. 2 and on the part of respondent no. 2 in deciding the petitioner's representation dated 12.9.2015 made by him before the respondent no. 2 against the impugned order of detention, through the respondent no. 3.

6. There is no dispute about the fact that while the petitioner was in District Jail, Gautam Budh Nagar on account of his being accused in Case Crime no. 240 of 2015 he was served with the impugned detention order dated 28.8.2015 along with the grounds of detention. Against the detention order dated 28.8.2015 the petitioner made a representation on 12.9.2015 before the State Government which was rejected by the State Government on 22.9.2015. Thus apparently there has been a delay of about five months and ten days on the part of the State Government in deciding the petitioner's representation. According we proceed to examine whether the delay has been sufficiently accounted for or not.

7. We have very carefully gone through the counter affidavit filed in this case on behalf of the respondent nos. 2 and 3.

8. A perusal of the paragraph nos. 5, 6 and 7 of the counter affidavit of the respondent no. 2 show that the petitioner's representation (annexure-6) was received in the concerned section of the State Government on 16.2.2016 along with the comments of the detaining authority along with his letter dated 15.2.2016. Copy of the petitioner's representation was sent by the State Government along with the parawise comments to the Central Government, New Delhi along with letter dated 17.2.2016. Thereafter the concerned section (Gopan Anubhag-7) of the State Government examined the petitioner's representation on 18.2.2016. The Under Secretary Home Government of Uttar Pradesh, Lucknow and the Special Secretary examined the petitioner's representation on 19.2.2016. Since 20.2.2016 and 21.2.2016 were holidays on account of Saturday and Sunday, the Secretary Government of Uttar Pradesh examined the petitioner's representation on 22.2.2016, where after the necessary record was submitted to the higher authorities for passing final order in this matter and after due consideration the petitioner's representation was rejected by the State Government on 22.2.2016, information whereof was communicated to the petitioner through District Authorities on 23.2.2016. Thus, as far as the State Government is concerned there does not appear to be any undue or deliberate delay on its part in deciding the petitioner's representation but there does appear to be an inordinate delay on the part of the District Magistrate, NOIDA in forwarding the petitioner's representation to the State Government. In order to examine whether the District Magistrate, NOIDA has been able to come up with any plausible explanation for the delay of more than five months on his part in forwarding the petitioner's representation to the State Government, we consider it appropriate to refer to the counter affidavit filed by the District Magistrate, Gautam Budh Nagar, respondent no. 3 in this case.

9. In paragraph 15 of his counter affidavit the respondent no. 3 has admitted that the representation of the petitioner dated 12.9.2015 was received in his office on 12.9.2013 itself. In paragraph 27 of his counter affidavit the respondent no. 3 has stated that that the petitioner's representation dated 12.9.2015 was marked by him to the Addl. District Magistrate (Executive), Gautam Budh Nagar who marked the aforesaid representation of the petitioner to the assistant to the District Magistrate on 14.9.2015 and the Addl. District Magistrate (Administration)/Office Incharge, Gautam Budh Nagar requested the Senior Superintendent of Police, Gautam Budh Nagar to submit his report on the representation of the petitioner. The aforesaid letter was issued by the A.D.M. (Administration)/Office Incharge, Gautam Budh Nagar on 19.9.2015. In paragraph 29 of his counter affidavit the respondent no. 3 has stated on oath that he had forwarded the copy of the representation along with parawise comments/police report to the Govt. Of U.P. Lucknow on 15.2.2016.

10. There is absolutely no explanation in the counter affidavit of respondent no. 3 for his failure to forward the petitioner's representation dated 12.9.2015 to the State Government immediately after receiving the parawise comments from the Senior Superintendent of Police, Gautam Budh Nagar. It appears that respondent no. 3 has deliberately suppressed the date on which the parawise comments of Senior Superintendent of Police to the petitioner's representation were received by him. The respondent no. 3 has failed to come up with any explanation as to why he did not dispatch/forward the petitioner's representation to the State Government on 29.9.2015 which is the date on which the petitioner's representation along with the parawise comments of the respondent no. 3 and the police report was forwarded by him to the Government of India.

11. In the case of ***Jayanarayan Sukul-case, AIR 1970 SC 675***, Hon'ble A.N. Ray, J., as His Lordship then was, speaking for the Constitution Bench has laid down following four principles which should govern the consideration of representation of detenus.

"First the appropriate authority is bound to give an opportunity to the detenue to make a representation and to consider the representation of the detenue as early as possible. Secondly, the consideration of the representation of the detenu by the appropriate authority is entirely independent of any action by the Advisory Board including the consideration of the representation of the detenue by the Advisory Board. Thirdly, there should not be any delay in the matter of consideration. It is true that no hard and fast rule can be laid down as to the measure of time taken by the appropriate authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens. A citizen's right raised a correlative duty of the State. Fourthly, the appropriate Government is to exercise its opinion and judgment on the representation before sending the case along with the detenue's representation to the Advisory Board. If the appropriate Government will release the detenue the Government will not not send the matter to the Advisory Board. If, however, the Government will not release the detenue the Government will send the case along with the detenue's representation to the Advisory Board. If thereafter the Advisory Board will express an opinion in favour of release of the detenu the Government will release the detenue. If the Advisory Board will express any

opinion against the release of the detenu the Government may still exercise the power to release the detenue."

12. In Frances **Coralie Mullin v. W.C. Khambra, AIR 1980 SC 849**, Chinnappa Reddy, J., while dealing with the time imperative for consideration of the representation has emphasised

"We, however, hasten to add that the time imperative can never be absolute or obsessive. The Court's observations are not to be so understood. There has to be lee-way, depending on the necessities (we refrain from using the word 'circumstances) of the case. One may well imagine a case where a detenu does not make representation before the Board makes its report making it impossible for the detaining authority either to consider it or to forward it to the Board in time or a case where a detenu makes a representation to the detaining authority so shortly before the Advisory Board takes up the reference that the detaining authority cannot consider the representation before then but may merely forward it to the Board without himself considering it. Several such situations may arise compelling departure from the time-imperative. But no allowance can be made for lethargic indifference.

No allowance can be made for needless procrastination. But allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved. The burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority.

In Frances Coralie Mullin's case AIR 1980 SC 849, the detenu's representation was received by the detaining authority on December 26, 1979. Without any loss of time copy of the representation was sent to the customs authorities for their remarks which was obviously necessary because the information leading to the order of detention was collected by the customs authorities. The fact were undoubtedly complex since allegation against the detenu revealed an involvement with an international gang of dope smugglers. The comments of the customs authorities were received on January 4, 1980. The Advisory Board was meeting on January 4, 1980 and so there could be no question of the detaining authority considering the representation of detenu before the board met, unless it was done in a great and undue haste. After obtaining the comments of the customs authorities, it was found necessary to take legal advice as the representation posed many legal and constitutional question, so, after consultation with the Secretary (Law and Judicial) Delhi Administration, the representation was finally rejected by the Administrator on January 15, 1980. It was held that if there appeared to be any delay it was not due to any want of care but because the representation required a thorough examination in consultation with investigation agencies and advisers on law."

13. Agreeing with the observations in Frances Coralie Mullin's case, AIR 1980 SC 849, the Apex Court in paragraph 16 of its judgement rendered in **K.M. Abdulla Kunhi And B.L. Abdul Khader versus Union of India** reported in 1991-AIR (SC)-574 observed as hereunder :-

"(16.) We agree with the observations in frances Coralie Mullin case. The time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. The representation may be received before the case is referred to the Advisory Board, but there may not be time to dispose of the representation before referring the case to the Advisory Board. In that situation the representation must also be forwarded to the Advisory Board along with the case of the detenu. The representation may be received after the case of the detenu isreferred to the Board. Even in this situation the representation should be forwarded to the Advisory Board provided the Board has not concluded the proceedings. In both the situations there is no question of consideration of the representation before the receipt of report of the Advisory Board. Nor it could be said that the government has delayed consideration of the representation, unnecessarily awaiting the report of the Board. It is proper for the Government in such situations to await the report of the Board. If the Board finds no material for detention on the merits andreports accordingly, the Government is bound to revoke the order of detention. Secondly, even if the Board expresses the view that there is sufficient cause for detention, the Government after considering the representation could revoke the detention. The Board has to submit its report within eleven weeks from the date of detention. The Advisory Board may hear the detenu at his request. The Constitution of the Board shows that it consists of eminent persons who are Judges or person qualified to be Judges of The High Court. It is therefore, proper that the Government considers the representation in the aforesaid two situations only after the receipt of the report of the Board. If the representation is received by the Government after the Advisory Board has made its report, there could then of course be no question of sending the representation to the Advisory Board. It will have to be dealt with and disposed of by the Government as early as possible."

14. Thus after going through the numerous authorities on the subject, referred to herein above what follows is that the appropriate authority is bound to give opportunity to the detenue to make a representation and to consider the representation of the detenue as early as possible, but however, if it appears that the delay was not due to any want of care but because the representation required a thorough examination in consultation with investigation agencies and advisers on law, such a situation may compel departure from the time-imperative. But no allowance can be made for lethargic indifference or for needless procrastination. An allowance must surely be made for necessary consultation where legal intricacies and factual ramifications are involved and a burden of explaining the necessity for the slightest departure from the time-imperative is on the detaining authority.

15. However, the facts and circumstances of the present case unequivocally indicate that there was an inordinate and unaccounted delay of about five months on the part of the detaining authority (District Magistrate), respondent no. 3 in forwarding the petitioner's representation dated 12.9.2015 to the State Government. The respondent no. 3 has failed to discharge the burden of the necessity for departuring from the time to imperative. He has

failed to furnish any reasons for sitting over the petitioner's representation for about five months before forwarding it to the State Government.

16. The Apex Court in paragraph 12 of the case of K.M. Abdulla Kunhi (supra) observed as here under:-

"The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Artilce 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenue submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with."

17. Thus, in view of the settled law on the issue and in the background of the facts of the instant case, we do not hesitate in holding that the present case is a glaring example of supine indifference, slackness and callous attitude on the part of the detaining authority, respondent no. 3 in forwarding the petitioner's representation to the State Government after a lapse of five months measurably failed to account for. The inordinate and unexplained delay in this case on the part of the respondent no. 3 in forwarding the petitioner's representation to the State Government, in our opinion, amounts to breach of the constitutional imperative, rendering the continued detention of the petitioner impermissible and illegal.

18. Since there is no explanation on the part of the respondent no. 3 for not having forwarded the petitioner's representation promptly and there being an inordinate and unexplained delay of more than five months on his part in forwarding the petitioner's representation to the State Government, the impugned order can not be sustained.

19. For the aforesaid reasons, writ petition succeeds and is allowed. The impugned detention order dated 28.8.2015 and the order of approval dated 7.9.2015 are hereby quashed.

20. Let the petitioner, **Raju @ Abid** be released from jail forthwith, if he is not wanted in any other case.

21. There shall be however, no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE BHARAT BHUSHAN, J.

Jail Appeal No.- 5049 Of 2012

Pappu **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellant:
From Jail

Counsel for the Respondent:
A.G.A.

Held –

Introduction and Conviction
The appellant, Pappu, challenged the judgment of the Additional Sessions Judge, Agra, which convicted him under Sections 376/511 of the Indian Penal Code (IPC) (Attempt to commit rape). He had been sentenced to five years of rigorous imprisonment and a fine of Rs. 20,000/-

Prosecution Case

The prosecution alleged that on October 21, 2010, the appellant abducted an 8-year-old girl and took her to a vacant plot/house near Ankush Dairy. Witnesses claimed to have found the appellant with his trousers open and the victim's Salwar pulled down. The appellant was caught on the spot and handed over to the police.

Key Grounds for Appeal

The Amicus Curiae for the appellant argued that:
The prosecution story was improbable and inconsistent.
There was no medical evidence of sexual assault.
The timing and genesis of the FIR were highly suspicious and contradicted by witness testimonies.
The place of occurrence was doubtful (vacant plot vs. vacant house).

Court's Observations and Findings

The High Court identified several fatal discrepancies in the prosecution's evidence:

Contradictory Timelines: The FIR was officially recorded at 2:00 PM. However, the father (PW-1) claimed he was an hour away and only informed at 12:30 PM or 2:00 PM by different sources. One constable (PW-6) even claimed the report was lodged at 12:30 PM, creating a physical impossibility.

Witness Credibility: PW-1, PW-2, and PW-3 admitted they did not see the incident. Their accounts of how they reached the police station and who dictated the FIR (police vs. informant) were contradictory.

Improbability of the Act: The court noted that the alleged site was a busy area surrounded by showrooms and a dairy. It found it highly improbable that the accused would attempt such an act in broad daylight in an open, visible area without the victim raising an effective alarm.

Arrest Discrepancies: While the FIR stated the father caught the accused, PW-5 (the star witness) claimed the police arrived and arrested him before the father even reached the scene.

Conclusion

The Court held that the testimony of the victim and the eyewitnesses was untrustworthy and lacked corroboration. While a conviction can be based on a single credible witness, the witnesses in this case were found to be "full of contradiction." Consequently, the appeal was allowed, the conviction was set aside, and the appellant was ordered to be released.

(Delivered by Hon'ble Bharat Bhushan, J.)

1. This Jail Appeal on behalf of appellant Pappu is directed against the judgment and order dated 17.8.2012 passed by Additional Sessions Judge/Special Judge (E.C.Act), Agra in Session Trial No. 106 of 2010 (State versus Pappu) arising out of Case crime no. 590 of 2010, Police Station Jagdishpura, District Agra, whereby appellant was convicted under sections 376, 511 Indian Penal Code (in short, IPC) and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 20,000/- with default stipulation.

2. Prosecution case, in brief, is that on 21.10.2010, complainant Mukesh Chandra (PW-1) son of Suresh Chandra lodged a First Information Report (in short, FIR) alleging that on 21.10.2010 he was informed by one Smt. Ansuiya Devi (PW-5) that his 8 years old daughter had been abducted by appellant. Neighbour, namely, Sheila, Smt. Ansuiya Devi (PW-5), Smt. Pushpa etc. searched the girl and suddenly found her in a vacant plot of land nearby Ankush Dairy. Appellant was standing there with his trousers fly open. Minor daughter of informant was also present and her lower garment (Salwar) had been pull down. Appellant was caught on the spot. The wife of informant Smt. Radha (PW-3) telephoned her husband. Appellant was questioned, he gave his name and address, thereafter, he was taken to the Police Station Jagdishpura and a report (Ex Ka-1) was lodged at 2:00pm on the same day. The matter was investigated and a charge sheet (Ex Ka-6) under section 376 read with Section 511 IPC was submitted against the appellant.

3. Trial judge framed formal charges against the appellant/accused Pappu under section 376 read with Section 511 IPC, which was denied by accused-appellant. Accused claimed trial. During the course of trial, the testimonies of PW-1 Mukesh Chandra (father of the victim), PW-2 Mukesh Kumar son of Vishambhar Dayal (brother-in-law of PW-1 Mukesh Chandra), PW-3 Smt. Radha (mother of victim), PW-4 Victim, PW-5 Anusuiya Devi (eyewitness), PW-6 Constable Bhem Sen and PW-7 S.I. Amit Kumar, Investigating Officer (in short, I.O.) were recorded. Appellant was also given opportunity to produce evidence in defence but he did not avail this

opportunity. On conclusion of the trial, learned Additional Sessions Judge found the appellant Pappu guilty under sections 376/ 511 IPC and was sentenced to rigorous imprisonment for five years and a fine of Rs. 20,000/- with default stipulation vide judgment and order dated 17.8.2012. This judgment is under challenge in this jail appeal.

4. Heard Sri Amit Dagga. Amicus Curiae on behalf of appellant Pappu and Sri B.D.Nishad, learned Additional Government Advocate (in short, AGA) for the State.

5. Learned Amicus Curiae has submitted that prosecution version is completely improbable and testimonies of victim as well as eyewitness account of Smt. Ansuiya Devi are highly inconsistent with the normal human conduct and basic prosecution story. He would argue that there is no medical evidence of alleged sexual assault on 8 years old victim; that the timing of the FIR is uncertain; that place of occurrence is doubtful; and veracity and credibility of witnesses are under cloud.

6. Per contra, learned AGA has submitted that testimony of minor victim cannot be ignored. The victim has given trustworthy statement in support of her claim. Her testimony has also been supported by evidence of PW-5 Ansuiya Devi. Prosecution evidence cumulatively has established the guilt of the appellant.

7. Perusal of prosecution evidence would indicate that first three stated eyewitnesses were, in fact, not present at the time of occurrence. PW-1 Mukesh Chandra has conceded this fact in the FIR itself. Similarly, both PW-2 Mukesh Chandra son of Vishambhar Dayal and PW-3 Radha mother of the victim have also admitted that they had not witnessed the incident. Their testimonies have shown some discrepancies. The FIR says that incident occurred near Ankush Dairy and this incident was witnessed by PW-5 Ansuiya Devi, Sheila and Smt. Pushpa etc. The FIR further says that when this information was communicated to father of victim PW-1 Mukesh Chandra, he arrived at the spot and questioned accused-appellant who gave his name and address and thereafter, appellant was taken to the Police Station and a report was lodged by PW-1 Mukesh Chandra which was reduced to writing by PW-2 Mukesh Kumar son of Vishambhar Dayal. This story is very simple but testimonies of PW-1 Mukesh Chandra and PW-2 Mukesh Kumar son of Vishambhar Dayal (scribe) have complicated the story. PW-1 Mukesh Chandra has stated that he had gone to work as a labourer (Beldar) and that he was informed by PW-5 Anshiya Devi and one Sheila that his daughter had been raped. According to him, this information was communicated to him at 12:30pm. He rushed towards Ankush Dairy and found appellant Pappu with Ansuiya Devi, Sheila and Smt. Pushpa etc. and they narrated the story of sexual assault by appellant on his minor daughter.

8. PW-1 Mukesh Chandra says that he dictated the FIR to PW-2 Mukesh Kumar son of Vishambhar Dayal and after scribing this report, he went to the Police Station. This FIR is available on record as Ex Ka-1. Up to this point, story of Mukesh Chandra was reasonable and consistent with the contents of FIR. But, his utterances during the course of cross-examination have created doubt regarding his credibility. In the cross-examination he stated that on the date of incident, he

was working at Sikandara as a labourer and it takes about an hour to travel to Sikandara from his residence. Now, initially, he said that information regarding incident was communicated to him by PW-5 Ansuiya Devi but next time he gave new version in which he said that information regarding incident was given to him by one unknown boy. He said that this information was given at 12:00(noon). If this statement is taken into consideration, it would mean that incident occurred prior to 11:00am. The boy would have taken at least one hour to reach Sikandara. After receipt of this information from unknown boy, the informant went back to his house. No one was present at his residence. He was informed that concerned persons had gone to the Police Station. Informant Mukesh Chandra also went to Police Station Jagdishpura, where report was lodged. It is stated that he took half an hour to reach Police Station Jagdishpura from factory. He found several persons including his wife PW-3 Radha, victim (PW-4), Ansuiya Devi (PW-5), and his brother-in-law Mukesh Kumar son of Vishambhar Dayal (PW-2) already present at the Police Station.

9. If this version given by PW-1 Mukesh Chandra is correct, then he would take one hour to travel back to the place of occurrence by cycle and further half an hour to reach police station. It is also apparent that he must have taken some time at Sikandara to grasp the information. It was also natural to make inquiry at the place of occurrence. In such a situation, he would have barely reached the police station before 2:00pm. He then must have gathered the information from victim etc. Thereafter he dictated FIR to PW-2 Mukesh Kumar. It was virtually impossible to lodge FIR at 2:00pm as Chik report indicates. This story itself is contradictory to the prosecution case.

10. Prosecution story says that first PW-1 Mukesh Chandra came to place of incident where he questioned accused-appellant and then all of them left together for the Police Station. During cross-examination, he failed to mention the meeting with accused-appellant at the place of occurrence before reaching Police Station. In fact, this time he says that nobody was present at the residence or place of occurrence. Another interesting averment has been made by PW-1 Mukesh Chandra that says that FIR was dictated by PW-1 Mukesh Chandra to PW-2 Mukesh Kumar son of Vishambhar Dayal at the place of occurrence and thereafter all the prosecution witnesses left together for Police Station. In cross-examination informant said that contents of FIR was dictated by Police personnel.

11. If the FIR had been carved out at the place of occurrence itself, then story of dictation by Police personnel would create discrepancy which has to be explained by prosecution. This discrepancy has not been explained by prosecution. Not only this, the version given by PW-2 Mukesh Kumar, scribe (brother-in-law) of Mukesh Chandra (PW-1) has further created complication. PW-2 Mukesh Kumar son of Vishambhar Dayal first says in examination-in-chief that PW-1 Mukesh Chandra dictated the FIR and thereafter, he went to the Police Station alone and PW-1 Mukesh Kumar, PW-3 Radha, PW-4 victim and other were found at the Police Station. In his cross-examination, he completely gave new story saying that FIR was dictated by PW-1 Mukesh Chandra at the Police Station at 12:00pm but he again says that as he scribed the report as per wishes of the Sub-Inspector of Police. He clearly stated that he was not aware of truthfulness of the story. He wrote whatever was dictated by Sub-Inspector. But his version has created another complication. If PW-1 Mukesh Chandra was present at the Police Station at 12:00 (noon) as stated

by PW-2 Mukesh Kumar son of Vishambhar Dayal, then story given by PW-1 Mukesh Chandra that he received information at Sikandara at 12:30pm and thereafter he came to residence after receiving this information. He travelled one hour to come back to the place of occurrence and then left for Police Station Jagdishpura, meaning thereby FIR could not have been lodged before 2:00pm. Official document and Chik report indicate that report indeed was recorded at 2:00pm. Story of PW-2 Mukesh Kumar son of Vishambhar Dayal is inconsistent with the story given by Mukesh Chandra (PW-1) and contents of FIR. The question is where was this FIR written ? If this FIR was dictated at the place of occurrence by Mukesh Chandra (PW-1) then story of PW-2 Mukesh Kumar son of Vishambhar Dayal, that FIR was dictated by police personnel at Police Station Jagdishpura would become false. The genesis and timing of the FIR is shrouded into mystery. Discrepancies do not stop here. PW-6 Constable clerk Bhim Sain who, in fact, recorded the FIR says that FIR was lodged at 12:30pm and this FIR was given by PW-1 Mukesh Chandra son of Suresh Chandra. He further says that case was registered at 12:30pm. If the story of PW-1 Mukesh Chandra is correct that he had received information about the incident at Sikandara, at a distance of almost one hour from the place of occurrence at 12:30pm then version of PW-6 that report was lodged at the Police Station Jagdishpura at 12:30pm is clearly false. Incidentally chik report says that report was lodged at 2:00pm.

12. The testimony of PW-3 Smt. Radha says that at the time of occurrence, she was not present at her residence and entire story was communicated to her by PW-5 Smt. Ansuiya Devi when Smt. Radha came to her residence at 2:00pm. She says that she came back at 2:00pm and at that time Smt. Ansuiya Devi communicated the entire story to her. She further says that appellant Pappu was present at the place of occurrence and some persons had apprehended him. She further says that she rang up her husband. Her husband came and they went to Police Station for lodging the FIR. If Smt. Radha came to know about the incident at 2:00pm and this information was given to Mukesh Chandra (PW-1) on telephone, it would mean that her husband returned back after 3:00pm inasmuch as he has already admitted that he was at Sikandara and used to take one hour for traversing the distance between Sikandara and place of his dwelling, thereafter, they together went to Police Station. Travel from place of occurrence to police station Jagdishpura would have taken at least Â½ hour as disclosed by witnesses, meaning thereby that FIR must have been recorded after 3:30pm but chik report says that FIR had already been registered at 2:00pm whereas PW-6 Constable clerk Bhim Sain says that FIR was lodged at 12:30pm. If the testimony of PW-3 Radha is believed, then it would mean that FIR was lodged prior to receipt of any information by PW-1 Mukesh Chandra.

13. PW-3 Radha, mother of victim, in cross-examination has further complicated the prosecution case by giving various versions. At one place, she has stated that information was given to her by PW-5 Smt. Ansuiya Devi at about 12:00pm. She specifically asserted that her husband came to Police Station on bicycle and remaining persons came to the Police Station on tempo. There are very significant and vast discrepancies in the testimony of PW-1 Mukesh Chandra son of Suresh Chandra, PW-2 Mukesh Kumar son of Vishambhar Dayal and PW-3 Radha. These discrepancies are significant and fatal to the prosecution story. But this is also true that none of

them were present at the time incident. To that extent, the testimony of PW-3 victim and PW-5 Ansuiya Devi would be much more important.

14. The victim was 8 years old minor girl at the time of incident. She has stated that appellant had promised to give her Rs. 5/- and thereafter, he took her to a vacant house near Ankush Dairy and in this house, he disrobed himself as well as pulled down the Salwar of the victim. She claimed that she tried to raise alarm but appellant forcibly closed her mouth yet people nearby arrived in the house. Her parents also came there. Neighbour and parents took appellant Pappu to the Police Station. This witness could not give time, date and month of incident. Existence of vacant house is completely new addition. No witness has talked of house. She claims that her parents had also arrived at the place of occurrence which of course PW-1 Mukesh Chandra denied and PW-3 Radha also claims that she came at the place of occurrence at 2:00pm while report had already been lodged at 2:00pm as per Chik report (Ex Ka-2). Though PW-6 Constable Bhim Sen categorically stated that report was lodged at about 12:30pm. Either report was lodged at a different time or parents and witnesses were not present on the place of occurrence. In any case, both PW-1 Mukesh Chandra and PW-3 Radha have given contrary statement regarding their presence on the spot in aftermath of the incident. PW-1 Mukesh Chandra has given as many as 3-4 versions. The victim has admitted that she was not medically examined. The story given by victim is highly improbable especially in the light of vital discrepancies available in the testimonies of PW-1 Mukesh Chandra and PW-2 Mukesh Kumar son of Vishambhar Dayal and PW-3 Radha.

15. PW-5 Smt. Ansuiya Devi, in fact, is star witness of the prosecution. She has stated that it was she who had witnessed appellant without his trousers and that PW-4 victim was also present there and she was not wearing Salwar. She claimed to have raised alarm. Several persons arrived there. She claimed that appellant was raping the victim. Now another discrepancy surfaces because of testimony of PW-5 Ansuiya Devi. She says that mother of the victim was present. Mother of the victim Radha has said that she was not present and arrived at the place of occurrence at 2:00pm FIR discloses that information was given by Ansuiya Devi directly to Mukesh Chandra, father of victim. Ansuiya Devi declines it. She says that information was communicated to PW-1 Mukesh Chandra by Radha and not by her (Ansuiya Devi). Radha says that she arrived at the place of occurrence at 2:00pm. The information was given to Mukesh Chandra at about 2:00pm. Admittedly, he must have come after an hour at the place of occurrence from Sikandara. Mukesh Chandra (PW-1) did not find any person at his house and he left for Police Station Jagdishpura. It has come in the evidence at one place that travelling to Police Station Jagdishpura takes about half an hour. Therefore, PW-1 Mukesh Chandra could not arrived at Police Station before 3:30pm but PW-6 Bhim Sen says that FIR was lodged at 12:30pm and Chik report indicate that report was recorded at 2:00pm. The FIR was allegedly lodged by Mukesh Chandra and yet Mukesh Chandra was not aware of the incident at least till 2:00pm. These are fatal contradictions and discrepancies in the prosecution story.

16. PW-5 Ansuiya Devi says that nobody called PW-3 Radha. She came of her own and thereafter telephoned her husband PW-1 Mukesh Chandra. A new and very significant twist has been given to the prosecution story by PW-5 Ansuiya Devi. She says that police arrived at the place

of occurrence prior to arrival of Mukesh Chandra (PW-1) and infact, PW-1 Mukesh Chandra had arrived at the place of occurrence at the time when police was taking away the accused-appellant Pappu to the Police Station, meaning thereby, appellant Pappu had been arrested by the Police from the place of occurrence prior to the arrival of PW-1 Mukesh Chandra but this fact has not been mentioned in the prosecution story at all. This witness says that police had taken accused-appellant Pappu to the Police Station in their vehicle while others went to the Police Station in a tempo. This is contrary to the story given by other witnesses that PW-1 came to the Police Station on cycle.

17. PW-5 Ansuiya Devi has reiterated that Police had arrived at the place of occurrence within half an hour. PW-3 Radha, PW-5 Ansuiya Devi and PW.1 Mukesh Kumar son of Vishambhar Dayal have claimed that their statements were not recorded by the I.O. while PW-7 I.O. says that 6-7 statements were recorded by him on the same day while report was lodged at 2:00pm. He could not explain the discrepancy created by PW-6 Bhim Sen which indicated that the FIR was lodged at about 12:30pm.

18. Learned counsel for the appellant has drawn attention of this Court towards the statement of PW-5 Ansuiya Devi where she says that victim did not raise any alarm. Even the place of occurrence is uncertain. Several witnesses have stated that incident took place on a vacant plot near Ankush Dairy while victim (PW-4) says that she was taken to an abandoned house behind Ankush Dairy. Learned counsel for the appellant rightfully questioned this aspect of the prosecution story. He says that if incident occurred in a vacant house, then there was no occasion for PW-5 Ansuiya Devi to witness the incident from outside. If incident occurred on a vacant plot, as stated by several witnesses, then it is highly improbable conduct on the part of accused. The incident occurred during the day time prior to 12:00 (noon) and yet victim did not try to conceal himself. He openly dis-robbed himself and victim on an open plot of land despite existence of a dairy nearby. He has also drawn attention of this Court towards site plan Ex Ka-5 which indicates that place of occurrence was surrounded by residential houses and showrooms etc. Admittedly, a dairy was nearby. In such a scenario to commit offence of this nature which could easily be witnessed by anyone, is highly improbable. This argument of learned counsel for the appellant can not be ignored.

19. I have carefully perused the prosecution evidence in detail. The victim's and eyewitness account when compared with version given during investigation, certain irregularities and discrepancies are apparent in the evidence. The prosecution story has been demolished by its own witnesses. There is no material to demonstrate that appellant was arrested on the spot in manner disclosed by PW-5 Ansuiya Devi. At least three witnesses namely, PW-1 Mukesh Chandra, PW-2 Mukesh Kumar son of Vishambhar Dayal and PW-3 Radha have specifically conceded that they did not witness the incident. Testimonies of victim and PW-5 Ansuiya Devi are highly improbable and untrustworthy. Their evidence is contrary not only to the testimonies of other witnesses but also in conflict with original prosecution story.

20. Learned AGA has submitted that appellant can be convicted on sole testimony of victim. It is true that evidence is weighed and not counted. Testimony of a single witness if found

credible, can lead to conviction of a person. But in the instant case, the testimony of victim and eyewitness are highly inconsistent with the prosecution story and other witnesses. There is no medical evidence that the rape had been committed. If the evidence of victim is not wholly trustworthy, then courts can search for trustworthy corroboration. In the instant case, as many as five witnesses have been produced but not a single witness is trustworthy. In fact, even the formal witnesses are full of contradiction and discrepancies. These discrepancies have not been explained at all. In fact, no attempt has been made by prosecution to explain these discrepancies.

21. In view of the aforesaid discussion, this criminal appeal is allowed. The judgment and order dated 17.8.2012 passed by Additional Sessions Judge/Special Judge (E.C.Act), Agra in Session Trial No. 106 of 2010 (State versus Pappu) under sections 376 and 511 IPC, arising out of Case crime no. 590 of 2010, Police Station Jagdishpura, District Agra is set aside. Appellant, if still in jail, be released forthwith.

22. Let a copy of this order be sent to the court concerned through the Sessions Judge, Agra within two weeks for compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE ABHAI KUMAR, J.

Jail Appeal No.- 5780 Of 2007

Raju (From Jail) **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsels for the Appellant:
Amicus Curiae

Counsel for the Respondent:
G.A.

Held –

Introduction and Sentencing: The appeal challenges a 2007 order from the Special Judge (E.C. Act), Jalaun, convicting the appellant under Section 21 of the NDPS Act. He was sentenced to 10 years of simple imprisonment and a fine of ₹1,00,000.
The Incident: On January 1, 2006, at Orai Railway Station, police on patrol noticed the appellant acting suspiciously near a water tank. Upon apprehension, he admitted to carrying a psychotropic substance.

Recovery and Seizure: A search led to the recovery of 150 grams of psychotropic substance and a strip of Nitrazepam tablets. The items were sealed, and a recovery memo was prepared at the spot.

Investigation and Trial: Statements were recorded, and the substance was sent for chemical examination, which confirmed the presence of Nitrazepam. Based on the evidence and the statement under Section 313 Cr.P.C., the trial court convicted the appellant.
Prosecution Witness Reliability: The High Court noted that PW-1 (Sub-Inspector) and PW-2 (A.C.P.) consistently supported the recovery version. Their testimonies aligned perfectly with the recovery memo regarding the location and quantity.
Defense Arguments on Procedural Lapses: The appellant's counsel did not dispute the arrest but alleged significant procedural failures: non-compliance with Section 50 NDPS, lack of independent witnesses, failure to produce the Malkhana register, and failure to search the police personnel first.

Crucial Defense Point (Section 313 Cr.P.C.): The defense specifically argued that the Chemical Laboratory Report (Exhibit Ka-7)—the most incriminating evidence—was never put to the accused during his Section 313 examination, causing an "incurable defect."

The Applicability of Section 50: The Court ruled that Section 50 (right to be searched before a Magistrate) only applies to prior information (Section 42). Since this was a chance recovery during a routine patrol (Section 43), Section 50 was not strictly applicable.
Compliance in Fact: Even though not strictly applicable, the Court found that the appellant was given a written option to be searched before a Magistrate, which he declined. Thus, no violation occurred.

Minor Procedural Irregularities: The Court dismissed arguments regarding the lack of independent witnesses (due to the midnight timing/cold) and the non-production of the Malkhana register, noting that the seals were found intact by the laboratory.

Analysis of Section 313 Cr.P.C. Omission: Addressing the failure to mention the lab report to the accused, the Court held that since the appellant was aware of the report and his counsel cross-examined witnesses on it, no real prejudice was caused.

The "Prejudice" Test: Citing Supreme Court precedents, the Court emphasized that technical omissions in Section 313 statements only vitiate a trial if they cause actual disadvantage to the accused's defense.

Conclusion: The Court found the prosecution proved the case beyond reasonable doubt. The appellant failed to explain his presence at the station or provide evidence of false implication. The appeal was dismissed.

List of Citations

Ashok Kumar Sharma Vs. State of Rajasthan, (2013) 2 SCC 67
State of Delhi Vs. Ram Avtar alias Rama, (2011) 12 SCC 207
Myla Venkateswarlu Vs. State of Andhra Pradesh, (2012) 5 SCC 226
Vijaysinh Chandubha Jadeja Vs. State of Gujarat, (2011) 1 SCC 609
State of Orissa Vs. Sitansu Sekhar Kanungo, JT 2002 (8) SC 292
Kamlesh Rai Vs. State of U.P., 2001 (1) A.Cr.R. 21
Shyam Babu Vishwakarma @ Ram Babu @ Shyam Babu Vs. State of U.P., 2012 (1) ACR 620
Pandav Sarkar Vs. State of U.P., 2012 (1) ACR 1122
Suresh Vs. State of M.P., 1997 Cr.L.J. 4210
State of Punjab Vs. Hari Singh, AIR 2010 SC 1966
Avtar Singh and Ors. Vs. State of Punjab, (2002) 7 SCC 419
Ganesh Gogoi Vs. State of Assam, AIR 2009 SC 2955
Basavaraj R. Patil and Others Vs. State of Karnataka and Others, (2000) 8 SCC 740
Sanichar Sahni Vs. The State of Bihar, 2009 (7) SCC 198

Abdul Sayeed Vs. State of M.P., 2010 (10) SCC 259

(Delivered by Hon'ble Abhai Kumar, J.)

1. This Jail Appeal has been preferred against the order dated 29.1.2007 passed by Special Judge (E.C. Act) Jalon, Orai, in Criminal Case No. 23 of 2006, convicting the appellant under Section 21 N.D.P.S. Act, Police Station G.R.P. Orai and sentencing him to undergo 10 years simple imprisonment and fine of Rs. 1,00,000/-. In default of fine, the accused/appellant shall further undergo for one year additional simple imprisonment.

2. Brief facts of the case are that on 1.1.2006 Sub Inspector N.K. Singh alongwith other police personnel was on patrol on Platform No. 1 of the Railway Station Orai in search of suspected persons when they reached near water tank, one person who was sitting at the bench, after seeing the police personnel stood and started walking. On suspicion he was apprehended near office of Junior Engineer at about 0.20 in the night. Apprehended person revealed his name as Raju of District Kanpur Dehat and on enquiry he also revealed that he is having psychotropic substance that is why he was running away. On being searched 150 gm of psychotropic substance as well as one strip Nitrazepam Tablets 100 mg were also recovered. Same was sealed on the spot and recovery memo was also prepared on the spot, and accused alongwith seized item was taken to police station where FIR was lodged and entry regarding that was made.

3. During investigation statement of witnesses were taken and seized item was sent for chemical examination. In the report psychotropic substance as well as Nitrazepam Tablets were found containing banned substance Nitrazepam. After completion of enquiry charge-sheet was submitted against the accused appellant.

4. On the basis of evidence produced by the prosecution and after taking the statement under Section 313 Cr.P.C. of the accused and hearing the parties, trial court convicted the appellant under Section 21 of the NDPS Act. Being aggrieved, this appeal has been filed.

5. Heard learned amicus curiae, Sri Ashutosh Yadav Advocate for the appellant, learned AGA for the State and perused the record. From the record it is clear that PW-1 Sri N.K. Singh, Sub-Inspector as well as PW-2 Sri Bharat Singh, A.C.P., have supported the version of recovery and seizure as has been observed by the learned trial court. There is no discrepancy between the statement of both the witnesses. The statements of both the witnesses are as per recovery memo and have also narrated the exact location of the incident as well as the recovery of 150 gm of psychotropic substance as well as one strip nitrazepam tablet from the possession of the accused.

6. During the course of argument, learned counsel for the appellant did agree that so far as arrest and recovery is concerned, nothing can be inferred otherwise from the statement of both the recovery witnesses, but learned counsel for the appellant insisted upon the various procedural latches that were made during the recovery of the psychotropic substance.

7. Learned counsel submitted that compliance of Section 50 of the N.D.P.S. Act is not made. He further argued that recovered item was not measured and that police personnel did not give their search prior to recovery. He next submitted that malkhana register was not produced, therefore, it cannot be ascertained as to the recovered article which was sent for chemical examination was kept in a regular way and there was no chance of it being tampered. It is also submitted by the learned counsel that no independent witness was taken prior to recovery and lastly submitted that learned trial court convicted the appellant on the basis of the report of chemical laboratory that is Exhibit – Ka-7 but this incriminating fact was not put to the appellant when the statement under Section 313 Cr.P.C. of the accused was recorded and thereby causing incurable defect. Besides some other points were also taken like sample was not taken and signature of appellant was not taken upon sealed recovered item.

8. Learned counsel for the appellant fortified his arguments regarding Section 50 of the NDPS Act as well as other submissions by producing various laws of Hon'ble Apex Court as well as High Court, reproduced hereinbelow:-

1. Ashok Kumar Sharma Vs. State of Rajasthan, (2013) 2 SCC 67;

2. State of Delhi Vs.Ram Avtar alias Rama, (2011) 12 SCC 207;

3. Myla Venkateswarlu Vs. State of Andhra Pradesh, (2012) 5 SCC 226;

4. Vijaysinh Chandubha Jadeja Vs. State of Gujrat, (2011) 1 SCC 609;

5. State of Orissa Vs. Sitansu Sekhar Kanungo, JT 2002 (8) SC 292;

6. Kamlesh Rai Vs. State of U.P., 2001 (1) A.Cr.R. 21;

7. Shyam Babu Vishwakarma @ Ram Babu @ Shyam Babu Vs. State of U.P., 2012 (1) ACR 620;

8. Pandav Sarkar Vs. State of U.P., 2012 (1) ACR 1122;

9. It is not necessary to go through all the judgments that are being produced in support of the submission regarding compliance of Section 50 of the N.D.P.S. Act by the learned counsel because it is settled principle that compliance of Section 50 of N.D.P.S. Act is mandatory and arresting officer is legally obliged to inform suspected of his rights under Section 50 of the N.D.P.S. Act to be searched before a Magistrate/Gazetted Officer and non compliance of said mandatory provision, vitiates all solemn proceeding initiated against accused and entitles him acquittal. Hon'ble Apex Court in the case of Ashok Kumar (supra) observed as follows:

"This Court in Vijaysinh Chandubha Jadeja (supra) answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his

right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. This Court also held that it is mandatory on the part of the authorized officer to make the accused aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer concerned, an obligation is cast on him under Section 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate."

10. Learned AGA combated the argument of the learned counsel for the appellant on two counts, firstly that there was compliance of Section 50 of the N.D.P.S. Act because accused was given option to be searched before a Magistrate or Gazetted Officer and accused did not opt for that then his search was taken. The option given to the accused was written one and accused himself denied his right by saying that he would not go to Magistrate for search. This paper is Exhibit K-1 and secondly it is argued by learned AGA that Section 50 of the Act is not applicable in this case. For ready reference, Section 50 of the N.D.P.S. Act is reproduced below:-

"***Section 50. Conditions under which search of persons shall be conducted:***

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 42 or Section 43, he shall, if such person as requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974)

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]"

11. Under Section 50 of the Act a person can be taken to Magistrate/Gazetted Officer if conditions mentioned in Section 42 or Section 43 of the Act is fulfilled which runs as follows:-

"**Section 42. Power of entry, search, seizure and arrest without warrant or authorisation.**

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c)seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

Section 43. Power of seizure and arrest in public place. Any officer of any of the departments mentioned in section 42 may

(a)Seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act;(b) detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation. – For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

12. From the bare reading of Section 42, it can be said that this section only applicable when any police personnel or official is acting on the prior information either personal or given by any other person that psychotropic substance may be recovered from accused/suspected. In this case, there was no prior information with the police personnel that the accused was having any psychotropic substance rather they were patrolling on the platform and after suspecting accused, arrested him, therefore, Section 50 of the N.D.P.S. Act is not applicable in the case in hand. Secondly, accused was given option for being searched before a Magistrate or Gazetted Officer and this option was to him in writing but he did not avail that and when accused did not choose to exercise his right then he was searched by the officer and in that case it cannot be said that there was any violation of Section 50 of the N.D.P.S. Act.

13. The contention of the learned counsel that mere saying to the appellant that he can get himself searched before a Magistrate or a Gazetted Officer is not sufficient rather he should have been apprised the exact right as has been held by Apex Court in above referred laws but contention is having little force as witness PW-2 in very clear terms stated that accused was apprised that search might be done before a Magistrate/Gazetted Officer that too in writing but accused did not avail that. In the context, I am disinclined in accepting the contention of the learned counsel regarding non compliance of the Section 50 of the N.D.P.S. Act.

14. There is no provision regarding taking of sample at the time of seizure more particularly in the cases where recovered item is of small in quantity like 150 gm. Similarly, taking signature of the accused on the sealed item is also not mandatory and weighing by measurement is also not mandatory and if measurement is written on the basis of guess then it cannot be said that any irregularity or illegality has been committed although in the case of **Suresh Vs. State of M.P., 1997 Cr.L.J. 4210, Madhya Pradesh High Court** has laid down various measures that ought to be taken during the search and recovery of any contraband so as to rule out any false implication but those principles laid down by Madhya Pradesh High Court, more advisory in nature rather mandatory.

15. Hon'ble Apex Court in the case of State of Orissa Vs. Sitansu Sekhar Kanungo (supra) has observed that non-production of the malkhana register have given a fatality to the prosecution case but the facts of that case were different and in that case several defects were there regarding sending of seized item to the chemical laboratory and in that case witnesses did not state that recovered articles were deposited in the malkhana at the concerned police station and in that context Hon'ble Apex Court found that non-production of malkhana register was one of the vital missing links but a little difference in facts can make wide difference in the result and that is the case in hand. In this case witnesses in clear terms stated that recovered article was deposited in the police station as stated in clear term by PW-3 Narendra Singh. It is further stated by Investigating Officer PW-4 S.I. B.P. Rakesh that recovered article was sent to the chemical laboratory and as per laboratory report Exhibit K-7, sealed item was found intact and the sample seal was also received and seal was not tampered.

16. All the safeguards that are to be taken is regarding safe custody of seized item and it is to be seen whether there was any chance of tampering and it is also to be seen whether the same recovered and sealed item reached to the chemical laboratory and in this particular case, I do not find any such infirmity.

17. It is already stated above that incident is of midnight of 1st January, there was extreme cold and it was secluded place and at that time nobody was there to be taken as a witness and in the circumstances if no witnesses were found and taken then this fact cannot be taken as fatal for the prosecution.

18. So far as the fact that police personnel did not search each other prior to search of the accused/appellant and in this regard witnesses stated that arrest and recovery was spontaneous and there was no time for giving search of each other and in the circumstances I find that the observation of another bench of this court in the case of Kamlesh Rai Vs. State of U.P. (supra) cannot of any help to the appellant. Had have been prior information regarding suspected recovery and even then search of each other by personal not taken, it could have fatal.

19. Another bench of this court in case of Shyam Babu Vishwakarma (supra) and in the case of Pandav Sarkar (supra) has discussed the matter regarding the questions that are required to be put to the accused in his examination under Section 313 Cr.P.C. and held that if all the

incriminating facts are not being put to the accused in that statement then it will be deemed that prosecution failed to anoint appellant's surety successfully. Hon'ble Mr. Justice Vinod Prasad in the above cases based its decisions on various laws of Hon'ble Apex Court and few of them needs to be incorporated.

"In State of Punjab versus Hari Singh: AIR 2010 SC 1966 it has been held by the apex court as under:-

"When the accused was examined under Section 313 Cr. P.C., the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singh and Ors. V. State of Punjab (2002 (7) SCC 419). The effect of such omission vitally affects the prosecution case."

In Ganesh Gogoi versus State of Asaam:AIR 2009 SC 2955 it has been held by the apex court as under:-

"It does not appear that any witness has deposed that the appellant is a member of ULFA. Therefore, it is a very unfair question. The Court has allegedly convicted the appellant under Section 3(2)(i) but the ingredients of the Section 3(2)(i) were not been put to him. Therefore, there has not been a fair examination under Section 313 of the Cr.P.C. at all. The provisions of Section 313 are for the benefit of the accused and are there to give the accused an opportunity to explain the "circumstances appearing in the evidence against him". In Basavaraj R. Patil and others v. State of Karnataka and others – (2000) 8 SCC 740, this Court held that those provisions are not meant to nail the accused to his disadvantage but are meant for his benefit. These provisions are based on the salutary principles of natural justice and the maxim 'audi alteram partem' has been enshrined in them. Therefore, the examination under Section 313 has to be of utmost fairness. But that has not been done here. This is also a factor vitiating the trial."

20. On the basis of that Court observed as under:

"Another disturbing feature of prosecution case is that report by Forensic Science Laboratory was never put to the appellant in his examination U/S 313 Cr.P.C. This is a grave lapse on the part of the prosecution. Without putting contents of the report to the appellant, it could not have been used against him. Trial Judge had also not considered this important aspect of the case. It is trite law that incriminating evidence not put to the accused cannot be utilised against him to fasten the guilt. If trial Judge wanted to rely upon report by Forensic Science Laboratory, it should have afforded an opportunity to the appellant in statement under Section 313 Cr.P.C. to rebut. That having not been done, it is too late in the day to rectify that mistake. In this respect, I am of the view that prejudice certainly has been caused to the appellant has his defence is that of total denial. If report had been put to the appellant, he would have offered an explanation of sample not being of that article which the prosecution alleged to have recovered from his possession especially looking to the fact that quantity alleged to have been drawn as sample was added by twice when seal was opened in Forensic Science Laboratory. Trial Judge, therefore, wrongly relied upon Forensic

Science Laboratory report. Since 313 Cr.P.C. statement is being considered, I may point out that other questions also framed by trial Judge were not in conformity with law. Regarding evidence of fact witnesses only this much was asked that accused-appellant had heard depositions of those witnesses and what he had to say about it. Besides this, there are mentions of various exhibits. Every question is lengthy and in fact is no questioning of the accused regarding incriminating circumstances. Every incriminating circumstances appearing against the accused in the statement of the prosecution witnesses has to be put separately one by one and accused has to be given an opportunity to accept or negate the same. That having not been done, statement of the accused under Section 313 Cr.P.C. is very unsatisfactory. Hon'ble Apex Court has time and again held that non-compliance with provisions of Section 313 Cr.P.C. in tune with its legislative intent will be sufficient to abjure conviction of the accused."

21. In the statement under Section 313 Cr.P.C. accused not put question regarding chemical laboratory report but from the facts it is clear that all along the trial he was aware of this report. Questions regarding this report is also put to the witnesses and PW-1 in reply to question stated that seized articles were sent for chemical examination on 27.1.2006 and were received on 28.1.2006 and the Ex- 7 corroborates that seized item was received on 28.1.2006 for examination. Therefore, this is to be seen as to how far accused appellant was affected by non putting this question or what prejudice is caused to him. Chemical laboratory report is one of the prime evidence against the accused in NDPS cases and without this report offences cannot be proved and if this report is lacking or report is against the prosecution then prosecution could not be allowed to prosecute. In the circumstances, it can be inferred that appellant was all along aware of this report and no prejudice or disadvantage has been caused to him by not putting this question to the appellant in the statement under Section 313 Cr.P.C.

22. Hon'ble Apex Court in **Sanichar Sahni Vs. The State of Bihar, 2009 (7) SCC 198** has observed that on the basis of mere technicalities conviction cannot be reversed while discussing the matter regarding the framing of the charges. It is observed by the apex court that it is to be seen whether that has caused real prejudice to the accused and that he was not informed as to what was the real case against him and that he could not defend himself properly no interference is required. Hon'ble Apex Court observed as follows:

"In the instant case learned counsel for the appellant, Mr. Sahay could not point out as to what prejudice has been caused to the appellant. Charge has been framed against the appellant under Section 120-B IPC. He never raised any grievance against the same at the time of framing of the charge or during the course of the trial or by filing any petition for quashing the charge. The issue was not agitated before the High Court also. On this very issue of conspiracy, the prosecution led evidence of impeccable character of two witnesses, namely, Ashok Paswan PW.2 and Ashok Kumar Verma PW.5. The appellant was given full opportunity to defend himself only on this very point of conspiracy as there was no other allegation against him. He was asked specific question by the trial court on the point of conspiracy while recording his statement under Section 313 Cr.P.C. Therefore, it cannot be held even by any stretch of imagination that any prejudice has been caused to the appellant on this very issue."

23. A similar view has been reiterated in ***Abdul Sayeed Vs. State of M.P., 2010 (10) SCC 259.***

24. As narrated above by not putting the above referred question to the appellant in the statement under Section 313 Cr.P.C., no prejudice is being caused and on mere technicality conviction made cannot be interfered.

25. Before parting it can be observed that during trial appellant failed to explain his presence on the railway station although one of the suggestions of the appellant to the witnesses was that he was vendor at the railway station and due to some money dispute he was falsely implicated but that fact has not been corroborated by any cogent evidence rather this fact was not at all narrated by the appellant in the statement under Section 313 Cr.P.C. There was no reason for false implication of the appellant. Learned trial court did not accept the explanation given by the accused. Incident took place in the district Orai whereas the appellant is resident of District Kanpur Dehat far away from the place of incident. Seeing the circumstances it was incumbent upon the appellant to explain his presence his false implication. Although this is not precondition for conviction of the appellant but once prosecution established its case against the appellant then certain explanations were required from the appellant.

26. The prosecution has successfully proved his case beyond reasonable doubt that psychotropic substance was recovered from the possession of the appellant.

27. The appeal lacks merit and is liable to be dismissed. It is accordingly dismissed.

28. Sri Ashutosh Yadav, learned Amicus Curiae shall be paid Rs. 10,000/- within a month for assisting the Court.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 8313 Of 2013

Smt. Kiran Singh & Anr. ...Applicants
Versus
State Of U.P. & Anr. ...Opposite parties

Counsel for the Applicants:
Shri Praveen Kumar Singh

Counsel for the Opposite parties:

G.A., Shri A.K. Srivastava

Held –

Challenge to Cancellation and Sealing Orders

The petitioners challenged two orders issued by NOIDA (dated 24.2.2015 and 18.3.2015) which cancelled a 1990 lease deed and ordered the sealing and resumption of Plot No. U-01, Sector 11. NOIDA alleged that the land, allotted for an "Institute to organize the youth," was being used for unauthorized purposes and featured illegal constructions.

Allegations of Procedural Irregularity

The Jawaharlal Nehru National Youth Centre argued that they had indeed filed multiple replies to NOIDA's show-cause notice (dated 13.1.2015). They contended that NOIDA passed the cancellation order by wrongly claiming no reply had been filed, thereby failing to consider their defense.

Dispute Over Permissible Land Use

The petitioners claimed that NOIDA was aware of and had implicitly consented to the running of a school on the premises. They pointed to corrections in the lease deed substituting "Office" with "Institution" and "Youth Centre." However, NOIDA maintained the land was strictly for an "office complex."

Involvement of Third Parties (AETS and NIPS)

A second writ petition was filed by the Nehru International Public School (NIPS) and the Atari Educational and Technological Society (AETS). They revealed a "joint venture agreement" with the Youth Centre to run the school, an arrangement that was notably absent from the Youth Centre's own initial petition.

Criticism of NOIDA's Delay

The Court expressed strong dissatisfaction with NOIDA for failing to file a counter-affidavit for over 15 months. Due to this "uncaring attitude," the Court could not verify factual claims and directed the Secretary of the department to take action against the responsible officials.

Referral to Chief Executive Officer (CEO)

The Court identified three core factual issues: the legality of running a CBSE school under the lease, the validity of the third-party agreement with AETS, and the extent of unauthorized construction. It directed the CEO of NOIDA to resolve these issues within eight weeks.

Protection and Final Directions

The impugned cancellation and sealing orders were kept in abeyance for ten weeks to allow the CEO to conduct a personal hearing and pass a reasoned speaking order. The Court declined to examine allegations of "mala fides" against the CEO because he was not impleaded by name.

Preliminary Objections and Disposal

The Court left the question of whether AETS/NIPS had the legal standing to maintain the petition (given their lack of direct privity with NOIDA) to be decided by the CEO. Both writ petitions were disposed of with directions to adhere to a strict time schedule.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard Praveen Kumar Singh, learned counsel for the applicant, learned AGA for the State and perused the records.

2. The applicant, through the present application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the order dated 2.3.2013 passed by Additional Session Judge, Court No.2, Varanasi in Crl. Revision No.377 of 2012 whereby the learned revisional court has dismissed the revision filed by the applicant and has confirmed the order dated 24.9.2012 of the Magistrate rejecting the application moved by the applicant under Section 210 Cr.P.C. The further prayer of the applicant is to club the proceeding of Case No.538 of 2010, under Section 138 N.I. Act and Case No.518 of 2011, under Sections 406,504,506 I.P.C., Police Station Cantt., District Varanasi.

3. Learned counsel for the applicant has submitted that earlier on 09.3.2010 a complaint was filed by the O.P. No.2 which was registered as Case No.538/2010 under Section 138 of the Negotiable Instruments Act, 1881, P.S. Cantt, District-Varanasi. The allegations in the aforesaid complaint case was that on 23.10.2009, O.P. No.2 gave the applicant Rs.9 lakhs as loan. The said amount was transferred into the account of the applicant on 21.01.2012. A cheque of Rs.7,18,000/- was given by the applicant to the O.P. No.2 which subsequently was dishonoured.

4. Learned counsel for the applicant has submitted that in the aforesaid case the applicant was summoned under Section 138 of the N.I. Act vide order dated 23.6.2010 and is facing trial in the aforesaid case. However, in order to mount pressure upon the applicant, another F.I.R. under Section 138 of the N.I. Act and under Sections 406,504 and 506 I.P.C. was lodged by the O.P. No.2 on 28.8.2010 with almost same allegations and as no F.I.R. can be registered under Section 138 of the N.I. Act, the police submitted charge sheet under Sections 406,504 and 506 I.P.C. on 02.11.2010.

5. The submission of the learned counsel for the applicant is that as a result two cases i.e. Case No.538/10 U/s 138 of N.I. Act and Case No.518 of 2011 are pending in two different courts at Varanasi with regard to the same cause of action.

6. The learned counsel for the applicant has submitted that the applicant had preferred an application under Section 210 Cr.P.C. before the C.J.M. Varanasi which was arbitrarily dismissed by the learned Magistrate vide order dated 03.6.2011. Against the aforesaid order, the applicant preferred Criminal Revision No.2350 of 2011 before this Court which was dismissed as not pressed vide order dated 18.9.2012. Thereafter, the applicant preferred Criminal Revision No.377 of 2012 before the Court of Additional Sessions Judge, IInd Varanasi which was admitted vide order dated

20.10.2012 relying upon the judgment passed in the case of **Veer Singh Yadav Vs. State of U.P. 2010.(6) A.L.J. 210**. However, the aforesaid revision was dismissed by the Court below vide impugned order dated 02.3.2013 in a totally mechanical fashion without application of judicial mind and without mentioning any ground for deviating from the previous view taken by the lower revisional court while admitting the aforesaid revision. Thus, the aforesaid order is in the teeth of the order dated 20.10.2012.

7. Learned counsel for the applicant has submitted that it would be a travesty of justice and gross abuse of the process of the Court, if both the cases are not clubbed together and their trial be not conducted jointly. Hence, it has been prayed that the present application be allowed and the order dated 02.3.2013 passed by the Additional Sessions Judge, Court No.2, Varanasi in Crl. Revision No.377/12 be set-aside and the proceedings of Case No.538 of 2010 (Pushpa Singh Vs. Kiran Singh) under Section 138 of N.I. Act P.S. Cantt District-Varanasi be clubbed together with the proceedings of Case No.518/11 (State Vs. Kiran Singh) u/s 406,504 and 506 I.P.C., P.S. Cantt District-Varanasi.

8. Learned counsel for the O.P. No.2 and the learned A.G.A. have opposed the application.

9. In the counter affidavit filed by the learned counsel for the O.P. No.2 it has been submitted that the application under Section 210 Cr.P.C. for clubbing both the cases has rightly been rejected by both the courts below and there is no illegality in the aforesaid order because both the cases are separate. One case is in the nature of complaint and the another case is State Case in which charge-sheet has been filed and as such the State Case and Complaint Case cannot be clubbed together.

10. Considered the rival submissions of the parties.

11. Section 210 Cr.P.C. is reproduced below:

"210.Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.-(1) When in a case instituted otherwise then on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

12. A perusal of the record shows that the place, date, time and the parties involved in the occurrence are the same and in respect of the same occurrence, a State Case and Complaint Case are pending in two different Courts and the police has submitted charge-sheet in the State Case, hence in view of sub-section (2) of Section 210 of the Cr.P.C. as cited above and to avoid contradictory findings by two different court's on the same issues, this application deserves to be allowed and the impugned order is liable to be set-aside.

13. Accordingly, the application is allowed.

14. The impugned order dated 2.3.2013 passed by Additional Session Judge, Court No. 2, Varanasi in Crl. Revision No.377 of 2012 is set-aside and the trial of both the cases are directed to be clubbed together and be disposed of in accordance with law.

15. Copy of this order be sent to the Courts below for further compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ B No.- 8689 Of 1971

Gulzari Lal **...Petitioner**
Versus
Babu Ram & Ors. **...Respondents**

Counsel for the Petitioner:
Shri S.M. Dayal, Shri A.P. Srivastava, Shri J.N. Yadav, Shri Kamlesh Kumar Gangawar, Shri M.N. Singh, Shri Radhey Shayam, Shri Satyendra Naryan Singh.

Counsel for the Respondents:
Shri VBL Srivastava, Shri Ajay Srivastava, Shri Arun Srivastava, S.C.

Held –

Para 1: The court heard the petitioner's counsel and proceeded ex parte (without the presence of the respondents) as no one appeared for the respondents despite the case being called.

Para 2: The petitioner, Gulzari Lal (represented by legal heirs), challenged the Deputy Director of Consolidation (DDC) order dated 17.09.1971. The DDC had declared Respondents 1–3 as "Sirdars" and directed they be recorded as "Asamis" for three years under the 1947 Amendment Act.
Para 3: The dispute involves Khata No. 135 (Plots 221, 224, 225) in Village Chilsari. The petitioner claimed "Sirdar" rights based on a 1943 lease from the Zamindar and continuous cultivation since then.
Para 4: Consolidation proceedings under the U.P. Consolidation of Holdings Act, 1953, commenced in the village.
Para 5: Respondents 1–3 filed objections claiming they were co-tenure holders with the petitioner. They admitted being ejected via a 1942 compromise decree but claimed a right to reinstatement under Section 27 of the 1947 Amendment Act.
Para 6: The Consolidation Officer (CO) initially rejected the objections. After an appeal and a remand order (which was unsuccessfully challenged by the respondents in High Court), the matter returned to the CO.
Para 7: Before the CO, the respondents added a plea that the 1942 compromise was obtained through fraud. They produced various historical land records (Dakhalnama, Khasra) to support their claim for reinstatement.
Para 8: The CO framed four specific issues to determine who—among the various claimants—was entitled to be declared "Sirdar" of the disputed land.
Para 9: Respondent 2 admitted they had been out of possession since 1943 but maintained the ejectment was due to fraud by the Zamindar's agent.
Para 10: The court lists the documentary evidence considered, including the 1942 decree, 1943 Dakhalnama, and subsequent orders from the Board of Revenue.
Para 11: The CO found no evidence of fraud and noted that the State and Zamindar were not impleaded as required. Finding the petitioner was in possession in 1356 and 1359 Fasli, the CO declared the petitioner the "Sirdar" under Section 19 of the 1951 Act and rejected the respondents' claims.
Para 12: The respondents appealed. The Settlement Officer Consolidation (SOC) upheld the CO's decision, confirming that fraud was not proved and that the recorded occupants (including the petitioner) had become "Sirdars."
Para 13: On revision, the DDC reversed the lower orders. Relying on specific case law, the DDC held that the respondents were protected by Section 27 of the 1947 Amendment Act despite the 1951 Act.
Para 14: This paragraph reproduces the text of Section 27 of the Amendment Act, 1947, detailing the conditions under which ejected tenants can apply for reinstatement.
Para 15: The Court analyzes Section 27, noting that sub-section (2) (regarding fraud) does not apply here because the DDC himself found that the respondents failed to prove any fraud or coercion.
Para 16: Regarding Section 27(1), the record shows the respondents were not forcibly ejected but left via a mutual compromise decree in 1942.
Para 17: This paragraph reproduces Section 171 of the U.P. Tenancy Act, 1939, which deals with ejectment for illegal transferring or sub-letting.
Para 18: The Court concludes that because there was no finding of illegal sub-letting and the tenants vacated voluntarily via compromise, Section 27(1) is not attracted. The DDC erred in applying this law.
Para 19: The writ petition is allowed. The DDC's order is set aside, and the original orders of the CO and SOC (favoring the petitioner) are restored.
Para 20: No costs were awarded.

Case Laws Cited:-
Ram Surat Mishra Vs. Ram Lagan Tewari, 1958 RD 15.
Gopal Narain and another Vs. Kanchanlal and others, AIR 1971 All 556.

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

1. Heard Sri S.N. Singh, learned counsel for the petitioner. None appeared on behalf of respondents though the case is called in revised, hence I have proceeded ex parte against respondents.

2. This writ petition has been filed by petitioner, Gulzari Lal (now deceased and substituted by legal heirs) assailing the order dated 17.09.1971 passed by Deputy Director of Consolidation, Jalaun, Camp at Farrukhabad (hereinafter referred to as the "DDC"), whereby it has allowed Revisions No. 220, 221 and 222 declaring Babu Ram, Munshi Lal and Kanauji Lal as "Sirdars" of land in dispute. It has further held that under United Provinces Tenancy (Amendment) Act, 1947 (hereinafter referred to as the "Amendment Act, 1947") persons recorded in basic year are entitled to retain possession upto three years from the date of reinstatement and such recorded persons shall retain possession of disputed land for a period of three years from the date of Revisional order and during such period they shall be recorded as "Asamis" over disputed land recorded in their names in the basic year.

3. The dispute initially raised related to Khatas No. 135, 261 and 273 but petitioner claim is in respect of Khata No. 135 of which he claims to be a Sirdar. The land is situated in Village Chilsari, Pargana Shamsabad West, District Farrukhabad. Patta of land was taken from erstwhile Zamindar in 1943 and he was cultivating same since then. Khata No. 135 comprised of Plots No. 221 (area 0.60 acres), 224 (area 0.72 acres) and 225 (area 0.63 acres).

4. Consolidation operations commenced in village under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the "Act, 1953").

5. Respondents-1 to 3, i.e., Babu Ram, Munshi Lal and Kanauji Lal, all are brothers and sons of Mewa Ram, filed objections under Section 9(2) of Act, 1953 alleging that they were co-tenants of disputed plots in Khata No. 273 and other plots comprised in Khatas no. 261 and 135. They further alleged that they were co-tenure holders alongwith Sarnam Singh, Bramha Nand and petitioner, Gulzari Lal. A suit was filed by the then Zamindar against all co-tenure holders in respect of land comprised in Khatas no. 273, 261 and 135 under Section 171 of United Provinces Tenancy Act, 1939 (hereinafter referred to as the "Act, 1939"), which was decreed in terms of compromise dated 25.08.1942. Possession was obtained by Zamindar on 02.06.1943 under the decree. Respondents-1 to 3 claimed that they are entitled to get restoration of possession under Section 27 of Amendment Act, 1947. They further said that an application for reinstatement under Section 10 of Amendment Act, 1947 was filed by them, which was decided against them upto Board of Revenue but a writ petition filed by them was pending when village came under consolidation operation.

6. The objections were rejected by Consolidation Officer (hereinafter referred to as the "CO") vide order dated 28.06.1964. Matter went in appeal and Appellate Authority remanded matter directing CO to frame issues, record additional evidence and thereafter decide matter. Revision against remand order of Appellate Authority was rejected and writ petition thereagainst was also dismissed.

7. The matter again reached to CO. Objectors, Respondents-1 to 3, filed an amendment application before CO adding plea of fraud and undue influence in respect of compromise dated 25.08.1942. Amendment was allowed. Respondents-1 to 3 filed before CO, copy of decree of suit under Section 171 of U.P. Tenancy Act, 1939 (hereinafter referred to as the "Act, 1939"), copy of Dakhalnama dated 02.06.1943, Khasra of 1348 Fasli and some other documents. It was also brought before CO that after ejectment of Respondents-1 to 5, under decree dated 25.08.1942, opposite parties 4 and 5 got a subsequent lease and plots are still in their names which are being claimed by Respondents-1 to 3. Plots of Khata no. 135 were resettled with petitioner but same were also claimed by Respondents 1 to 3.

8. CO formulated following four issues:

"1. Whether applicants Babu Ram, Munshi Lal alongwith Kanauli Lal are entitled to be declared as Sirdar of the land in suit. If so its effect.

2. Whether Vidhya Ram, Puttu Lal and Hirday Ram are Sirdars of the land in suit. If so its effect.

3. ***Whether Gulzari Lal is the Sirdar of the land in suit. If so, its effect.***

4. Whether op. Sarnam Singh and Brahmanand are the Sirdars of the land in suit. If so its effect."

9. Objector-Munshi Lal-Respondent-2, had admitted that since 02.06.1943 he and his two brothers are out of possession. He however pleaded that said ejectment pursuant to compromise decree dated 25.08.1942 was result of fraud and undue influence was exercised by Mukhtar-e-am of Zamindar.

10. The documentary evidence included copy of decree dated 25.08.1942, Dakhalnama dated 02.06.1943, extract of Khasra 1348 Fasli, uncertified copy of order of Additional Distirct Magistrate (J) in Appeal No. 1/1960-61, copy of Board of Revenue's order dated 02.11.1961, copy of order of J.O. Kaimganj dated 12.09.1960 and summons and copy of special writ petition filed before High Court.

11. CO found that neither solitary oral evidence of Respondent- 2 was sufficient nor any documentary evidence has been brought on record to prove plea of fraud. He also found that under Section 27 of Amendment Act, 1947, Zamindar was necessary party but he was not impleaded. Even State of U.P. and Gaon Sabha were not made parties. Petitioner-Gulzari Lal contesting matter deposed that there was no fraud played by Mukhtar-e-Am of Zamindar. It was also brought to notice of CO that Babu Ram, (Respondent 1), i.e., one of the objectiors, had taken some land from Mukhtar-e-Am after eviction. Nathu Lal, Ex-Mukhtar-e-Am of Zamindar also deposed and proved Dakhalnama in favour of Zamindar. He also proved Patta in favour of Vidhya Dhar; and Kabuliat in favour of petitioner-Gulzari Lal and respondent 5-Brahma Nand. He also deposed that no fraud was

played. Land in suit was occupied by Asamis, so they were ejected. Respondent-8-Vidhya Dhar, also deposed that he took patta on 06.09.1943 from Zamindar which was executed by Mukhtar-e-Am in respect of twelve plots wherein he has planted guava grove. In view of evidence discussed above, CO held that recorded tenants were in possession over land in suit in 1356 and 1359 Fasli and became "Sirdar" automatically under Section 19 of U.P. Zamindari Abolition and Land Reforms Act, 1951 *(hereinafter referred to as the "Act, 1951").* He concluded that objectors have failed to prove that they were ejected under Section 171 of Act, 1939 under fraud and influence. They have also failed to prove that they were in possession over disputed land at the time of ejectment. Compromise shows that they were not in possession, hence not entitled for benefit under Section 27(2) of Amendment Act, 1947. While rejecting objections, CO passed following order:

"The existing entries of plot 251 (0.3), 251/2.02, 254/1/.37, 223/.22 of khata no. 261 in the names of Sarnam Singh and Brahma Nand son of Kamta and plot no. 80/.16, 81/.16, 217/.29, 218/.81 and 220/.92 of khata 273 in the name of Hirday Ram and others and plot 221/0.60, 224/.72, and 225.60 of khata 135 in the name of Gulzari Lal recorded tenants be continued in the same capacity.

The claim of Baburam, Munshi Lal and Kanauji Lal objectors over the above plots is rejected."

12. The objectors preferred three appeals being Appeals No. 43, 44 and 45 under Section 11(1) of Act, 1953. Settlement Officer (Consolidation) (hereinafter referred to as the "SOC") observed that in basic year, Khata No. 135 is recorded in the name of Gulzari Lal. Khata No. 261 was recorded in the names of Sarnam Singh and Brahmanand and Khata No. 273 was recorded in the names of Hriday Ram, Putti Lal and Vidhya Dhar. Ejectment, however, pleaded on the basis of fraud and misrepresentation was not proved in absence of any evidence, hence findings recorded by CO were correct. He also found that all respondents before him were occupants of land in dispute in 1356 Fasli and 1359 Fasli and became "Sirdars". All appeals accordingly were dismissed vide order dated 18.05.1971.

13. Three Revisions No. 220, 221 and 222 were taken by objectors before DDC under Section 48 of Act, 1953. DDC has held that under Section 171 of Act, 1939, tenants who have illegally sub-let land to others had to be ejected. Relying on **Ram Surat Mishra Vs. Ram Lagan Tewari, 1958 RD 15,** he has held that order of reinstatement could be made in favour of persons applying for reinstatement and not in favour of others. DDC has reversed orders of CO and SOC by relying on a Division Bench judgment of this Court in **Gopal Narain and another Vs. Kanchanlal and others, AIR 1971 All 556** observing that even if proceedings could not be finalized upto the enactment of Act, 1951, still protection of Section 27 of Amendment Act, 1947 could have been given.

14. Section 27 was inserted vide Amendment Act, 1947 in Act, 1939 with a view to give relief to certain tenants who had suffered at the hands of Zamindars. It reads as under:

*"**27. Reinstatement of certain ejected tenants.**—(1) If, on or after the first day of January, 1940, any person was ejected from his holding or any part thereof-*

*(a) **Under section 165 of the said Act for the non-payment of any amount** not exceeding one fourth of his annual rent after taking into account the payment, if any, made by him outside the court, provided that such payment is supported by a receipt,*

Or

*(b) **Under section 171 of the Act, otherwise than on the ground of an illegal transfer by way of sale or gift**,*

Or

(c) Under section 180 of the said Act notwithstanding his having been recorded as an occupant after the first day of January, 1938 in a record revised under Chapter IV of the United Provinces Land Revenue Act, 1901, or corrected by an officer specially appointed by Government for the correction of annual registers in any tract,

He may apply, within six months from the date of the commencement of this Act, to the Court, which passed the decree for his ejectment for reinstatement in such holding or part thereof, as the case may be:

Provided that if such holding or part thereof was subject to a mortgage on the date of ejectment under section 171 of the said Act, the mortgagor and not the mortgagee shall be entitled to apply for re-instatement under this sub-section.

*(2) If, on or after the first day of January, 1940, any tenant of sir, who had become a hereditary tenant in accordance with the provisions of sub-section (1) of section 16 of the said Act was ejected from his holding or any part thereof, or any tenant was dispossessed of his holding or any part thereof, **through surrender or otherwise, in consequence of any fraud, misrepresentation, undue influence or coercion practised upon or against him by the landholder or by any person acting on behalf of the landholder**, he may apply, within six months from the date of the commencement of this Act, to the court in which a suit would lie under section 183 of the said Act in respect of such holding for his reinstatement in such holding or part thereof, as the case may be.*

(3) On receipt of an application under sub-section (1) or sub-section (2), the court shall give notice to the landholder and to the tenant, if any, in possession of the whole or part of such holding. After making such enquiry as may be necessary if the court is satisfied that the applicant was so ejected or dispossessed, if shall order that the

applicant be re-instated in such holding or part thereof, as the case may be, and that any other person in possession of it be ejected therefrom:

Provided that if such holding or any part thereof is in possession of any person to whom the landholder had let it out before the first day of September, 1946, such person not being a relation, dependent or servant of the landholder, the court, instead of ordering the ejectment of such person, shall notwithstanding the provisions of any law for the time being in force, declare him to be the sub-tenant of the application in respect of such holding or such part. The person so declared as a sub-tenant shall not be liable to ejectment until after the expiry of three years from the date of the declaration. In such a case, the rent payable by the applicant to the landholder shall be the rent payable by him for such land before his ejectment or the amount calculated according to the circle rates; whichever is less, and the rent payable to the applicant by the person declared as sub-tenant shall be the amount payable by such person to the landholder immediately before the declaration of twelve and a half per cent, over and above the amount calculated according to the circle rates application to hereditary tenants, whichever is higher.

(4) The applicant shall not be reinstated in such holding or in any part thereof, unless within such time as may be allowed by the court, he pays to the landholder—

(i) any amount that may have been paid to him by the landholder as compensation for improvements when he was so ejected;

(ii) in a case in which the landholder has made any improvement on such land since such ejectment, compensation for such improvement calculated in accordance with the provisions of the said Act; and,

(iii) in a case falling under clause (a) of sub-section (1) the amount that may be found to be due in accordance with that clause.

(5) On reinstatement, the right and liabilities of the applicant existing on the date of his ejectment or dispossessed in respect of the holding or any part thereof from which he was ejected or dispossessed, shall revive subject to the proviso to sub-section (3).

(6) An appeal against an order passed under this section shall lie to the Collector whose appellant order shall be final."

15. Section 27(1) intends to give relief to the tenants who have been ejected under Sections 165, 171 or 180 of Act, 1939. Section 27(2) intends to give relief to such tenants who had surrendered their plots on account of fraud, undue influence or coercion on the part of Zamindars. Even DDC has found that objectors could not adduce any evidence to

prove fraud, undue influence or coercion hence Section 27(2) was not at all attracted in the case in hand.

16. So far as Section 27(1) is concerned, record shows that though suit was filed seeking ejectment under Section 171 of Act, 1939 but parties entered into compromise and suit was decreed in terms of compromise on 25.08.1942.

17. Section 171 of Act, 1939, reads as under:

"171. Ejectment for illegal transfer, sub-letting.—(1) If a tenant transfers, or sub- lets, the whole or any portion of his holding otherwise than in accordance with the provisions of this Act, and the transferee or sub-lessee has entered into possession *in pursuance of such transfer of sub-lease,* ***both the tenant and any person who may have thus obtained possession of the whole or any part of the holding shall, on the suit of land-holder, be liable to ejectment from the area so transferred or sub-let at the date of the institution of the suit:***

*Provided that, in the case of a voidable sub- lease, if the suit succeeds, the Court shall pass a decree permitting the tenant to apply in the same proceedings****, within a time not exceeding one month from the date of the decree, for the ejectment of the person in whose favour the voidable sub-lease has been made****, and directing that if the tenant so applies and if he ejects such person and resumes occupation of the land within such further time as the Court, either in the decree itself or by means of a subsequent order, may fix having regard to the provisions of Section 182, the decree shall not be executed against the tenant except in respect of costs. In such a case, the decree shall direct that, if the tenant either fails to apply for the ejectment of such person within the time fixed in this behalf or fails to resume occupation within the further time allowed by the Court for that purpose, the tenant as also the sub-lessee shall be ejected from the area sub-let at the date of the institution of the suit."*

(2) To every suit under this section both the tenant and the sub-tenant or the person in whose favour the transfer purports to have been made shall be made parties."

18. There is no finding recorded by Revenue Court regarding alleged illegal transfer, sub-letting etc. And on the contrary erstwhile tenants agreed to vacate land through a compromise pursuant whereto suit was decreed in terms of compromise. It thus cannot be said that ejectment of tenants was on account of the reasons justifying ejectment under Section 171 of Act, 1939 and that being so I am of the view that even Section 27(1) is not attracted in the case in hand and DDC in taking a view otherwise has erred in law.

19. In the result, writ petition is allowed. Impugned order dated 17.09.1971 passed by DDC is hereby set aside and the orders passed by CO and SOC are here by restored.

20. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE SHAMSHER BAHADUR SINGH, J.

Criminal Misc. Writ Petition No.- 15609 Of 2016

Brahm Singh & Ors. **...Petitioners**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Shri Chandra Prakash Singh

Counsel for the Respondents:
G.A., Shri D.S. Pandey

Held –

Para 1-2: The Court heard counsel for the petitioners, respondent no. 3, and the State. The petitioners sought to quash an FIR lodged under Sections 420, 406, 504, and 506 IPC at P.S. Sector-58, Noida.

Para 3: The FIR alleges that the petitioners entered into an agreement to sell land for Rs.39 lacs and received Rs.16 lacs in advance. The informant later discovered the land had already been acquired by NOIDA authorities.

Para 4: Petitioners argued the land was "Abadi land" (residential) and not acquired. They claimed they were still ready to execute the sale deed if the respondent honored the agreement.

Para 5: Respondent no. 3 countered that the petitioners knowingly committed fraud by taking money for land that had been acquired and could not be legally transferred.

Para 6-8: Citing Ajit Singh @ Muraha and Bhajan Lal, the Court noted it cannot interfere with investigations if a cognizable offence is prima facie visible. The Court found that the FIR allegations did disclose a cognizable offence.

Para 9: The petition to quash the FIR was dismissed for lack of merit.

Para 10: Following the dismissal, the petitioners requested a direction for the lower court to consider their bail on the same day, citing the Amrawati and Lal Kamlendra Pratap Singh precedents.

Para 11-12: The Court initially found this apprehension unfounded as the petitioners had not yet applied for bail or surrendered. It noted that the law on this is already settled by a 7-Judge Bench.

Para 13: The Court observed that many litigants feel the Amrawati guidelines are not being followed by District Courts, leading to a "flood" of petitions in the High Court seeking the same directions.

Para 14-15: The Court highlighted that circulars (2004 and 2014) had already been issued by the Registrar General to all judicial officers to ensure strict compliance with the Amrawati judgment.
Para 16: The Court expressed frustration that despite circulars, these petitions remain a "regular feature." It ruled that the Amrawati guidelines must be followed for all accused, whether or not they have a specific High Court order.

Para 17-18: Sessions Judges are directed to ensure compliance. The Court warned that "adverse inference" and "appropriate action" would be taken against judicial officers who fail to follow these binding precedents.

Para 19: The Registrar General is ordered to circulate this judgment to all Sessions Judges in Uttar Pradesh for immediate compliance.

List of Citations:

Ajit Singh @ Muraha v. State of U.P. and others, (2006 (56) ACC 433)
Satya Pal v. State of U.P. and others, (2000 Cr.L.J. 569)
State of Haryana v. Bhajan Lal and others, (AIR 1992 SC 604)
Joginder Kumar v. State of U.P. and others, (1994) 4 SCC 260 / (1994 Cr. L.J. 1981)
Amrawati and another Versus State of U.P., (2004 (57) ALR 290) / (Cri. Misc. Application No. 2154 of 1995)
Lal Kamlendra Pratap Singh versus State of U.P., (2009 (3) ADJ 322 (SC))
Dr. Vinod Narain v. State of U.P., (1995 (32) ACC 375)
Munawwar and others Versus State of U.P. and another, (Criminal Misc. Application No. 21679 of 2014)

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

1. Heard Sri Chandra Prakash Singh, learned counsel for the petitioners, Sri D.S. Pandey, learned counsel for respondent no.3, learned A.G.A. for the State and perused record.

2. This petition has been filed by the petitioners with a prayer to quash the F.I.R. Dated 11.06.2016 in Case Crime No. 361 of 2016 under Sections 420, 406, 504 and 506 I.P.C. at Police Station Sector-58, Noida, District Gautam Budh Nagar.

3. Prosecution case in brief is that F.I.R. was lodged by informant, respondent no.3, Surendra against petitioners alleging that an agreement to sell was executed by petitioner nos. 1 and 2, namely, Brahm Singh and Budhram on 7.5.2014 in his favour by which it was agreed that sale deed would be executed of Khasra No. 324 situated in Village Bishanpur, District Gautam Budh Nagar within three months for total consideration of Rs.39 lacs for which he also made a part payment of Rs.11 lacs and further gave Rs.5 lacs to petitioner nos.1 and 2. Petitioner no.3, Sant Ram is a witness of said agreement to sell. It is further alleged that when respondent no.3 required

petitioner nos.1 and 2 to execute sale deed, he came to know that said land has been acquired by NOIDA authorities, hence he lodged F.I.R. against petitioners for the aforesaid offences at the concerned police station.

4. It is argued by learned counsel for the petitioners that it was the respondent no.3 who has not come forward to honour the agreement to sell and the allegation of respondent no.3 that plot in question has been acquired by NOIDA authorities is absolutely incorrect as the same being Abadi land, the NOIDA authorities have not acquired the same. He submitted that petitioners are still ready to execute the sale deed provided terms and conditions of agreement to sell is honoured by respondent no.3.

5. Per contra, learned counsel for respondent no.3 has vehemently opposed argument of learned counsel appearing for petitioners and has submitted that as the land in question has been acquired by NOIDA authorities and he was also not informed about said fact and Rs.11 lacs has been given by him to petitioner nos. 1 and 2 and further Rs.5 lacs has also been parted with but petitioners themselves have not come forward to execute the sale deed in view of agreement to sell entered into between the parties. In spite of the fact that land has been acquired by NOIDA authorities, petitioners played fraud upon respondent no.3 and they fraudulently and dishonestly have taken Rs. 16 lacs from him knowing fully that said agreement to sell cannot be executed.

6. The Full Bench of this court in **Ajit Singh @ Muraha v. State of U.P. and others (2006 (56) ACC 433)** reiterated the view taken by the earlier Full Bench in **Satya Pal v. State of U.P. and others (2000 Cr.L.J. 569)** that there can be no interference with the investigation or order staying arrest unless cognizable offence is not ex-facie discernible from the allegations contained in the F.I.R. or there is any statutory restriction operating on the power of the Police to investigate a case as laid down by the Apex Court in various decisions including **State of Haryana v. Bhajan Lal and others (AIR 1992 SC 604)** attended with further elaboration that observations and directions contained in **Joginder Kumar's case (Joginder Kumar v. State of U.P. and others (1994) 4 SCC 260** contradict extension to the power of the High Court to stay arrest or to quash an F.I.R. under article 226 and the same are intended to be observed in compliance by the Police, the breach whereof, it has been further elaborated, may entail action by way of departmental proceeding or action under the contempt of Court Act. The Full Bench has further held that it is not permissible to appropriate the writ jurisdiction under Article 226 of the constitution as an alternative to anticipatory bail which is not invokable in the State of U.P. attended with further observation that what is not permissible to do directly cannot be done indirectly.

7. The learned counsel for the petitioners has not brought forth anything cogent or convincing to manifest that no cognizable offence is disclosed prima facie on the allegations contained in the F.I.R. or that there was any statutory restriction operating on the police to investigate the case.

8. Having scanned the allegations contained in the F.I.R. the Court is of the view that the allegations in the F.I.R. do disclose commission of cognizable offence and, therefore, no ground is made out warranting interference by this Court. The prayer for quashing the same is refused.

9. The petition lacks merit and is accordingly, dismissed.

10. After passing of aforesaid order, learned counsel for the petitioners submitted that a direction be given to courts below for consideration of bail of the petitioners in the light of 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P. reported in 2004 (57) ALR 290** and as approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. reported in 2009 (3) ADJ 322 (SC)**. It is submitted by him that it is prevalent practice in District Court at Gautam Budh Nagar as well as in other district courts of the State that bail applications normally filed are not being heard and disposed of in the light of Amrawati and another Versus State of U.P.(supra) as also approved by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh versus State of U.P. (supra) and are posted for some other date and the accused has to go to jail unnecessarily and his fundamental right to liberty as enshrined under Article 21 of the Constitution of India is violated. Hence necessary direction be given to courts below by this Court.

11. We have examined the above contention of learned counsel for the petitioners and find that said apprehension of petitioners' counsel appears to be unfounded as the petitioners have neither yet moved bail application before the court below nor surrendered.

12. The law in this regard has been settled by 7 Judges' Bench decision dated 15.10.2004 in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** and is not being followed by the courts below, hence the learned counsel for the petitioners prayed for a direction to be given therefor. Moreover, there is no material before us to accept the contention of learned counsel for the petitioners in the instant case that the law which has been propounded by 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** are not being followed in the State of U.P. also appears to be not correct as we have not come across any such case that law of 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** has been placed by the accused before court below and the same was not complied with by the courts below. Therefore, said prayer is also hereby refused.

13. Before parting with the case we find to observe that apprehension which is in the mind of legal fraternity and the litigants in the concerned district of the State that law which has been settled by 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** is not being followed by the District Courts appears to be some time

correct also as this Court is flooded with criminal misc. Writ petitions under Articles 226/227 of Constitution of India, 482/483 Cr.P.C. Applications and criminal revisions. When such petitions are being rejected on merits, very often prayer is made by learned counsel for the parties that direction be given to the court below to consideration bail application in the light of 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** and it has become a normal feature these days because some slackness on the part of courts below in not following guidelines and directions given in 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra).**

14. We find that after passing of judgement in 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** a circular has also been issued by Registrar General of this Court to the judicial officers in judgeship for their guidance vide C.L. No.44/2004 Dated: 16th October, 2004 for strict compliance of the directions given by the Hon'ble Court in **Cri.Misc. Application No.2154 of 1995 (Smt. Amarawati and another Vs. State of U.P.)** and the same is quoted below:

"I am directed to say that the Full Bench comprising of seven Judges of the Court in Cri.Misc. Application No.2154 of 1995-Smt. Amarawati and another Vs. State of U.P. has considered to following questions:-

1. Whether the arrest of an accused is a must if cognizable offence is disclosed in the FIR or in a criminal complaint;

2. Whether the High Court can direct the Subordinate Courts to decide the Bail Application on the same day it is filed; and

3. Whether the case Dr. Vinod Narain v. State of U.P., Writ Petition No.3643 of 1992, reported in 1995 (32) ACC 375, has been correctly decided by the five Judges Full Bench of this Court.

Upon consideration of the above questions, the Full Bench has ordered as under:-

(1) Even if cognizable offence is disclosed, in the FIR or complaint the arrest of the accused is not a must, rather the police officer should be guided by the decision of the Supreme Court in Joginder Kumar v. State of U.P., 1994 Cr. L.J. 1981 before deciding whether to make an arrest or not.

(2) The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that would be interfering with the judicial discretion of the Court hearing the bail application. However, as stated above, when the bail application is under Section 437 Cr.P.C. ordinarily the Magistrate should himself decide the bail application the same

day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under 439 Cr.P.C., it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.

(3) The decision in Dr. Vinod Narain v. State of U.P. (supra) is incorrect and is substituted accordingly by this judgment.

I am, therefore, directed to send herewith a copy of the judgement and order dated 15.10.2004 passed by the Full Bench of this Court in Cri. Misc. Application No. 2154 of 1995,aforesaid for your information and strict compliance of the directions as contained therein. The directions of the Court may kindly be brought to the notice of all the Judicial Officers in the Judgeship for their guidance."

15. But filing of writ petitions before this Court for this purpose shows that guidelines are not being strictly complied with by the courts below. Moreover, seeing slackness on the part of the courts below in not complying with the directions issued in 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)**. Learned Single Judge of this Court in **Criminal Misc. Application No.21679 of 2014 (Munawwar and others Versus State of U.P. and another)**, after considering all aspects of aforesaid non compliance, passed order dated 3.7.2014, disposing of 482 Cr.P.C. application wherein a prayer was made for consideration of bail application expeditiously, if possible on the same day in the light of 7 Judges' decision in the case of Amrawati and another Versus State of U.P.(supra) as also approved by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh versus State of U.P. (supra). Learned Single Judge, seeing a large number of such petitions coming before him, appears to have heard learned members of bar and their contentions for justifying the prayer seeking direction from this Court for expeditious disposal of bail application in the light of 7 Judges' Bench decision in the case of Amrawati and another Versus State of U.P.(supra) as also approved by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh versus State of U.P. (supra) has also rejected said prayer and had once again directed courts below in State of Uttar Pradesh through Registrar General for strict compliance of guidelines 7 Judges' Bench decision in the case of Amrawati and another Versus State of U.P.(supra) as also approved by Hon'ble Apex Court in the case of Lal Kamlendra Pratap Singh versus State of U.P. (supra) in letter and spirit and also gave direction that said judgement be transmitted to the District Judges of all judgeships in Uttar Pradesh through Registrar General forthwith, who in pursuance of the same issued Circular Letter No.12869/Admin.'G-II' Dated: Allahabad: 04.09.2014, for compliance of order dated 03.07.2014, passed by this Court in **Criminal Misc. Application (482) No.21679 of 2014(Munawwar and others Versus State of U.P. and another)** which is quoted below:-

"Sir,

While deciding the above mentioned Criminal Misc. Application Hon'ble Court has taken a serious note upon not following up the guidelines laid down by the Hon'ble Full Bench of this Court in the matter of Smt. Amarawati (supra) and by the Hon'ble Apex Court in the matter of Lal Kamlendra Pratap Singh (supra) in connection with considering the applications of the bail.

It is therefore directed by Hon'ble Court that the guidelines laid down by the Hon'ble Apex Court and by the Hon'ble High Court in the matter of Lal Kamlendra Pratap Singh (supra) respectively be followed up in letter and spirit.

I am, therefore, directed to request you to circulate a copy of the enclosed order dated 03.07.2014, passed by Hon'ble Court in Criminal Misc. Application (482) No.21679 of 2014 titled Munawwar and others Vs. State of U.P. and another amongst all the Judicial Officers working under your supervision and control highlighting those aspect which require compliance by them."

16. It is very surprising and painful to note that in spite of issuance of two circulars in compliance of this Court's order, petitions are regularly coming before this Court and written or oral prayer is being made seeking direction for consideration of bail in the light of 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as well as by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra).** Such petitions have become regular feature and has flooded High Court in its various criminal jurisdictions, filing of such petitions has to be discouraged as the law has already been settled in 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)**, hence no separate order is required to be passed in each and every case for a direction of this Court. Decisions of the Full Bench of this Court as well as of Hon'ble Apex Court are binding upon courts below which have to be followed by them in letter and spirit and this Court cannot allow such petitions and prayer made therein on behalf of accused who can approach this Court and deny such benefit of said order to the accused who could not approach this Court. Therefore, time has come that this Court in order to discourage such types of petitions for a direction of bail in the light of 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra)** must pass appropriate direction/order in the matter so that precious time of this Court is not wasted in passing of innocuous orders in each and every case. Hence we are of the opinion that law which has been settled for consideration of bail application expeditiously by 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of **Lal Kamlendra Pratap Singh versus State of U.P. (supra**) shall be complied with strictly in letter and spirit by the subordinate courts all over the State irrespective of fact that accused has obtained such orders from this Court or not and decide the same as soon as the same is filed before it in accordance with law as has been laid down in 7 Judges' Bench decision in the case of **Amrawati and another Versus State of U.P.(supra)** as also approved by Hon'ble Apex Court in the case of

Lal Kamlendra Pratap Singh versus State of U.P. (supra), failing which adverse inference would be drawn and necessary action may be taken against erring officers of Subordinate Courts.

17. The Sessions Judges in the State of Uttar Pradesh are also directed to ensure that aforesaid guidelines which are binding on the courts below are followed in letter and spirit, failing which adverse inference would be drawn against erring officers and this Court would be compelled to take appropriate action against them, if any non-compliance is found in this regard.

18. Moreover, there is no rule of law that a judgement of the Apex Court and this Court, if not strictly complied by the courts below, a petition or an application may be entertained by this Court and order be passed for getting the same complieSd with.

19. Let a copy of this order be circulated forthwith through Registrar General to all the Session Judges in State of Uttar Pradesh who shall also circulate the same to all the concerned Judicial Officers in that Judgeship for necessary compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE SUNITA AGARWAL, J.

Writ C No.- 16066 Of 2015
&
Writ C No.- 15949 Of 2015

Nehru International Public School (Nips) & Anr. ...Petitioners
Versus
Noida & Ors. ...Respondents

Counsel for the Petitioners:
1.Shri Shri Chandan Sharma, Shri Sunil Kumar Bharti
2.Shri P.H. Vashishtha

Counsel for the Respondents:
1.Shri Shivam Yadav, Shri H.P. Vashishtha, Shri Praveen Singh, S.C.
2.Shri Shivam Yadav

Held –

Challenge to Cancellation and Sealing Orders
The petitioners challenged two orders issued by NOIDA (dated 24.2.2015 and 18.3.2015) which cancelled a 1990 lease deed and ordered the sealing and resumption of Plot No. U-01, Sector 11. NOIDA alleged that the

land, allotted for an "Institute to organize the youth," was being used for unauthorized purposes and featured illegal constructions.

Allegations of Procedural Irregularity

The Jawaharlal Nehru National Youth Centre argued that they had indeed filed multiple replies to NOIDA's show-cause notice (dated 13.1.2015). They contended that NOIDA passed the cancellation order by wrongly claiming no reply had been filed, thereby failing to consider their defense.

Dispute Over Permissible Land Use

The petitioners claimed that NOIDA was aware of and had implicitly consented to the running of a school on the premises. They pointed to corrections in the lease deed substituting "Office" with "Institution" and "Youth Centre." However, NOIDA maintained the land was strictly for an "office complex."

Involvement of Third Parties (AETS and NIPS)

A second writ petition was filed by the Nehru International Public School (NIPS) and the Atari Educational and Technological Society (AETS). They revealed a "joint venture agreement" with the Youth Centre to run the school, an arrangement that was notably absent from the Youth Centre's own initial petition.

Criticism of NOIDA's Delay

The Court expressed strong dissatisfaction with NOIDA for failing to file a counter-affidavit for over 15 months. Due to this "uncaring attitude," the Court could not verify factual claims and directed the Secretary of the department to take action against the responsible officials.

Referral to Chief Executive Officer (CEO)

The Court identified three core factual issues: the legality of running a CBSE school under the lease, the validity of the third-party agreement with AETS, and the extent of unauthorized construction. It directed the CEO of NOIDA to resolve these issues within eight weeks.

Protection and Final Directions

The impugned cancellation and sealing orders were kept in abeyance for ten weeks to allow the CEO to conduct a personal hearing and pass a reasoned speaking order. The Court declined to examine allegations of "mala fides" against the CEO because he was not impleaded by name.

Preliminary Objections and Disposal

The Court left the question of whether AETS/NIPS had the legal standing to maintain the petition (given their lack of direct privity with NOIDA) to be decided by the CEO. Both writ petitions were disposed of with directions to adhere to a strict time schedule.

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. These two writ petitions have been filed challenging the two orders of the New Okhla Industrial Development Authority (hereinafter referred to as 'NOIDA') dated 24.2.2015 and dated 18.3.2015.

2. By means of the first order dated 24th February, 2015, the National Secretary, Jawaharlal Nehru National Youth Centre, New Delhi and the President of Jawaharlal Nehru National Youth Centre, NOIDA have been informed that plot no. U-01, Sector 11, NOIDA was allotted in favour of the Jawaharlal Nehru National Youth Centre for the purposes of establishing an "Institute to organize the youth of India". A lease deed for the purpose was executed on 12.2.1990 between the parties. Under the lease deed, it was contemplated that the demised land would be utilised for the purposes of "Construction of the Office Complex" (reference Clause XVII of the lease) but in fact the land was being used for other purposes and that unauthorised constructions were also being

raised. A notice dated 13th January, 2015 was issued for stopping the wrongful use of plot as well as for unauthorised construction being removed. No reply has been filed.

3. Therefore, in exercise of powers conferred under Clauses I (XVII) and II (VIII) of the lease deed read with Clause I (XVI), a decision has been taken to cancel the lease and to resume possession of the plot after forfeiting the money deposited by the aforesaid Jawaharlal Nehru National Youth Centre. For the purposes of demolition of unauthorised construction made over the premises, the same shall be sealed on 16.3.2015. The recipients of the letter were required to remove their affects and belongings from the premises.

4. By means of the subsequent letter dated 18th March, 2015, the aforesaid recipients were informed that the sealing of the premises could not take place on the date fixed i.e. 16th March, 2015. The sealing shall now be affected on 25th March, 2015.

5. In Writ Petition No. 15949 of 2015 (Jawaharlal Nehru National Youth Centre vs. New Okhla Industrial Authority), it has been contended that reply to the notice dated 13.1.2015 referred to above was forwarded to the NOIDA authorities followed by letter dated 3.3.2015 for which receipts were issued on the same date i.e. 3.3.2015. Letters dated 11.3.2015 and 13.3.2015 were also forwarded in reply to the allegations made. Without considering the reply so submitted by the petitioner, the impugned order has been made wrongly stating that reply has not been filed. It is also submitted before us that over the plot construction, where raised by the NOIDA itself and money was charged from the petitioners for such constructions. It is also stated that the petitioners were permitted to use the premises for the purposes of running of the school which will including other activities which are being run from the centre. The crust was taken through the letter of the NOIDA authorities dated 6.4.1994 page '97' of the writ petition and the minutes of the meeting dated 29.8.1989 as well as the approval granted by the Central Board of Secondary Education under the letter dated 23.11.2004 enclosed as page '105' of the paper book.

6. Sri Shashi Nandan, learned Senior Advocate suggested before us that the running of the institution/school alongwith other activities was always in the knowledge of the NOIDA authorities and, therefore, their consent in the manner of use of such premises was established, although there may not have been any specific order in writing in that regard.

7. Reference has also been made to the letters and the correction incorporated at internal page '20' of the lease deed whereby in Clause (viii), words "Office" as recorded earlier has been deleted and substituted by "Institution" and the expression "for the office purpose" has been deleted and be replaced as "for the purpose of running youth centre".

8. We may record that the writ petition filed by Jawaharlal Nehru National Youth Centre is completely silent about any arrangement/agreement with M/s Atari Educational and Technological Society (AETS) for any of the public school from the centre. The writ petition does not make mention of any written agreement entered into with the said society for running of the institution in the name and style of "Nehru International Public School (NIPS)", NOIDA.

9. Writ Petition No. 16066 of 2015 [Nehru International Public School (Nips) And Another vs. Noida And 2 Ors.] has been filed by Nehru International Public School (NIPS), through Ex-President of the Executive Committee as well as Atari Educational and Technological Society (AETS) through its Secretary AETS. In this writ petition, Jawaharlal Nehru National Youth Centre has been impleaded as respondent no. 3.

10. It has been stated that Atari Educational and Technological Society (AETS) is a society registered under the Societies Registration Act, 1860. The society was registered on 13.11.2001 for running of the various training institute/centre and for the purpose it shall be affiliated to appropriate authority so as to give proper certification to the beneficiaries of various training and educational programme which were being conducted at the NOIDA centre of respondent no. 3 i.e. Jawaharlal Nehru National Youth Centre in the name and style of the "Nehru International Public School (NIPS)" namely the petitioner no. 1. It has been then stated that the programme and training institute were being run at the centre under the banner of NIPS. It is then stated that affiliation with Central Board of Secondary Education was applied for by Nehru International Public School (NIPS) on 28th June, 2004 and it was granted on 23.11.2004.

11. In paragraph '14', it is stated that between 2004-2014 petitioner no. 1 and respondent no. 3 continued to impart quality education to the youth and children.

12. In paragraph '15', it is stated that on 10th May, 2014 a joint venture agreement was executed between the petitioner no. 2 and respondent no. 3 for running of the institution i.e. petitioner no. 1.

13. Rest of the paragraphs are more or less repetition of the facts qua use of the land being in conformity with the lease deed. Unauthorised construction having not been raised and that reply having been submitted to the notice dated 13.1.2015 by Jawaharlal Nehru National Youth Centre and lastly the reply having not been considered before passing of the order impugned.

14. This Court vide order dated 26.3.2015 required the NOIDA authorities to respond to the allegations made in the writ petition that on that date, NOIDA was represented by an Advocate. Writ Petition No. 16066 of 2015 (Nehru International Public School (Nips) And Another vs. Noida And 2 Ors.) was connected with Writ Petition No. 15949 of 2015 (Jawaharlal Nehru National Youth Centre vs. New Okhla Industrial Authority) on 1st April, 2015 time was granted to the counsel for the respondents to file reply to the second petition.

15. Even after more than one year and three months NOIDA has not been able to file response to the petitions. Such uncaring attitude of NOIDA authorities of not responding in the matter by filing the counter affidavit for over a year cannot be approved of. Because of non-filing of counter affidavit the Court is not able to examine the correctness/veracity of the statement of facts made in the petition specifically those pertaining to submission of reply to the notice dated 13.1.2015 and the same being not considered by the authorities and that a wrong factual recital has been made in the orders impugned.

16. We direct that the copy of this order, must be placed before the Secretary of the concerned department who must take action against all those responsible for not responding to the notice within reasonable time. The practice must stop and the authorities must be asked in no uncertain terms to file their response in writ petitions within reasonable time.

17. Now turning to the merits of the order that has been challenged before us, we find that there is a serious dispute qua the particular purpose for which the land was let out under the lease deed.

18. It is not disputed that under Clause XVII and VIII of the lease deed, the land could be utilised for the purpose of construction of office complex only with a further condition that if the land is to be used for any other purpose then the consent of the lessor would be a must.

19. We may also refer to the Clause VII (internal page '19') of the lease deed which mentions that powers to be exercised by the lessor under the lease shall be exercised by the Chief Executive Officer or an officer nominated by him.

20. At least on record of both the writ petitions, there is no order in writing of the Chief Executive Officer permitting the change in the user of the land. What has been referred to us is the correction in Clause VII (as already noticed above), the authenticity of the said correction has to be ascertained after reference to the original lease deed.

21. Sri Umesh Narain Sharma, learned Senior Advocate for the petitioners referred to us Clause VII of deed and stated that it provides, the Chief Executive Officer may authorise any other person to exercise the powers which were exercisable by him. The contention has been raised without any pleading in any of the two writ petitions, to the effect that the Chief Executive Officer had delegated his powers under the lease deed upon any other officer at any point of time.

22. The issue as to whether Jawaharlal Nehru National Youth Centre had submitted its reply to the notice dated 13.1.2015 and as to whether the use of demised land for running of the public school affiliated to CBSE is in conformity with the terms and conditions of the lease deed or not are basically issues of fact.

23. Since no counter affidavit has been filed on behalf of the NOIDA despite time being granted as early as in the month of March/April 2015, we for the present accept that reply had been submitted by the petitioner to notice dated 13.1.2015 and that there has been non-consideration of the reply by the NOIDA Authority while passing the orders impugned. But the dispute does not end here inasmuch as some authority must examine.

(a) as to whether the use of the land for running of a public school affiliated to CBSE is in conformity with the terms and conditions of the lease deed as executed between the parties or not.

(b) as to whether under the terms of the lease the Jawaharlal Nehru National Youth Centre could enter into any agreement with a private society for running of the institution in terms of the lease or not.

(c) as to whether there has been any unauthorized constructions over the premises in question and if so to what extent.

24. The aforesaid issues must be resolved by the an authority under the U.P Industrial Development Act, 1976 after affording opportunity to the petitioners.

25. We, therefore, direct that the petitioners must submit there response to the aforesaid three issues by means of the representation preferably within a period of ten days alongwith certified copy of this order before the Chief Executive Officer, NOIDA.

26. If the petitioners file their representation before the Chief Executive Officer as directed above within the time provided, the officer shall decide the same within eight weeks of its receipt.

27. We make it clear that the time schedule must be adhered in letter & spirit and no unnecessary adjournment shall be granted.

28. All consequential action shall be taken accordingly.

29. For a period of ten weeks from today, the orders impugned shall remain in abeyance and shall abide by the order of the officer concerned as indicated above.

30. In case representation is not filed within time permitted, the petitioners shall not be entitled to the benefits of this protection.

31. The Chief Executive Officer NOIDA as aforesaid shall decide the issues after summoning the original records from the NOIDA by means of a reasoned speaking order after affording opportunity of personally hearing to both the parties to the joint venture agreement.

32. Supplementary Affidavit has been filed today making allegations against Chief Executive Officer NOIDA. These allegations of mala fide need not be gone into by us as the Chief Executive Officer has not impleaded by name as one of the respondents to any of these petitions.

33. The Apex Court has held that allegations of mala fide need not be examined in absence of person against whom allegations are made being impleaded as party.

34. We, however, in the interest of justice provide that if the petitioners so desire, they may approach the State Government under Section 41(3) of the U.P Urban Planning and Development Act which stands incorporated by adoption under Section 12 of U.P. Industrial Development Act, 1976.

35. Sri Shivam Yadav learned counsel for the respondent has raised a preliminary objection with reference to the right of the petitioners of Writ Petition No. 16066 of 2015 to maintain the present writ petition. As according to him, they had entered into a mutual agreement with the lease holder without the consent of NOIDA.

36. We need not enter into the said issue and leave the same to be examined by the Chief Executive Officer as directed above.

37. With the above observations and directions the writ petitions are **disposed of.** Interim orders are discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Writ A No.- 43400 Of 2002

Ajay Prakash Dwivedi & Anr. ...Petitioners
Versus
Union Of India & Ors. ...Respondents

Counsels for the Petitioners:
Shri Vikash Budhwar, Shri S.C. Budhwar

Counsel for the Respondents:
S.S.C., Shri D.B. Kauser, Shri G.K. Singh, Shri Manoj Kumar Sharma, Ms Rollie Kauser, Shri V.K. Singh, Shri Vivek Misra

Held –

1. Appearances: The court heard counsel for the petitioners and respondent-4; other respondents remained unrepresented.

2. Background of Petitioner-1: Petitioner-1 was appointed as a Technical Assistant (T-II-3) by the Indian Council of Agricultural Research (ICAR) on December 2, 1989, following an advertisement dated July 27, 1989.

3. Background of Petitioner-2 and Respondent-4: ICAR advertised more posts in March 1991. Petitioner-2 and respondent-4 both applied; Petitioner-2 was declared successful on September 4, 1991.

4. Initial Challenge: Respondent-4 initially filed an Original Application (OA) in 1991 before the Tribunal, challenging only the appointment of Petitioner-2.

5. Delayed Impleadment: Years later, respondent-4 sought to implead Petitioner-1. A first application was rejected in 1998, but a second was allowed in 2001, despite the significant time lapse.

6. Tribunal Decision: On March 18, 2002, the Tribunal declared both petitioners' appointments illegal. It directed that respondent-4 be appointed and placed above Petitioner-2 in seniority, prompting this writ petition.

7. Termination During Pendency: Following the Tribunal's order, the petitioners' services were terminated on October 5, 2002. The petitioners subsequently amended their writ to challenge these terminations.

8. Ruling on Petitioner-1 (Jurisdiction & Limitation): The High Court held that the Tribunal exceeded its jurisdiction. The challenge to Petitioner-1 was barred by the statute of limitations (being 8–9 years late) and the principle of res judicata. Furthermore, respondent-4 had no locus standi as he did not participate in the 1989 selection process.

9. Grounds for Invalidating Petitioner-2: The Tribunal had previously voided Petitioner-2's appointment on two grounds: excessively high viva-voce marks and lack of requisite qualifications.

10. Viva-Voce Proportions: The High Court found that 30% marks for viva-voce (30 out of 100) is not inherently arbitrary for a technical post in a selection involving both written and oral tests.

11. Policy Decisions: The court noted that the allocation of marks for interviews is a policy decision and there is no "hard and fast rule" that 15–20% is the maximum limit.

12. Case Law Distinction (Education vs. Employment): The court highlighted the legal distinction between admissions to educational institutions (where high interview marks are discouraged) and public employment.

13. Employment Criteria: In matters of employment, the appropriate allocation of marks depends on the nature of the post and the specific recruitment rules.

14–17. Judicial Precedents: The court cited several Supreme Court rulings where interview weightages ranging from 20% to 50% were upheld as valid depending on the context of the recruitment.

18. Tribunal's Error on Marks: The High Court criticized the Tribunal for failing to consider established legal authorities that allow higher interview percentages and for applying a "straightjacket formula."

19. Comparative Merit: Record showed Petitioner-2 scored higher than respondent-4 in both the written exam and the viva-voce. Even if interview marks were excluded, respondent-4 would not have surpassed Petitioner-2.

20. Qualifications: The court confirmed Petitioner-2 held a relevant degree (B.Sc. Agri & AH) from a recognized university, making the Tribunal's finding on lack of qualification incorrect.

21. Conclusion: The High Court quashed the Tribunal's judgment and set aside the termination orders. The writ petition was allowed, restoring the petitioners to their positions.

List of Citations

Ajay Hasia Vs. Khalid Mujib Sehravardi, 1981(1) SCC 722
State of U.P. Vs. Rafiquddin, AIR 1988 SC 162

Anzar Ahmad Vs. State of Bihar, 1994(1) SCC 150
Jasvinder Singh Vs. State of Jammu and Kashmir, 2003(2) SCC 132
Bishnu Biswas and others Vs. Union of India and others, 2014(5) SCC 774

(Delivered by Hon'ble Sudhir Agarwal, J.
&
Hon’ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Vikash Budhwar, learned counsel for petitioners and Ms. Lollie Kauser, learned counsel for respondent-4. None appeared for other respondents.

2. The Indian Council of Agricultural Research (the ICAR) published an advertisement for selection on various categories of posts on 27.7.1989. One of the post was a Technical Assistant T-II-3. Petitioner-1 was one of the applicant. He was selected and appointed as Technical Assistant T-II-3 on 2.12.1989.

3. Subsequently, ICAR again advertised for selection of candidates for some more posts including the post of Technical Assistant T-II-3 on 23/29.3.1991. In this selection, petitioner-2 as well as respondent-4 appeared. The result of above selection was declared. Petitioner-2 was declared successful on 4.9.1991.

4. Respondent-4 filed an Original Application no.1081 of 1991 before Central Administrative Tribunal, Allahabad (the Tribunal) challenging appointment of petitioner-2 only.

5. During pendency of the aforesaid application before Tribunal, respondent-4 filed an application no. 4032 of 1997 for impleladment of petitioner-1 challenging his appointment also. This application was rejected on 13.5.1998. Respondent-4 filed another application no. 4736 of 2000 for impleladment of petitioner-1 challenging his appointment. This application was allowed on 27.2.2001 and petitioner-1 was also impleaded in the original application.

6. The original application filed by respondent-4 was allowed by Tribunal on 18.3.2002. By this order, Tribunal held that appointments of petitioners are illegal. However, it further observed that it would not like to disturb appointments and leave it to ICAR to decide thereon. Tribunal also directed that respondent-4 should be appointed and be placed over and above petitioner-2. Hence this writ petition.

7. During pendency of writ petition, services of petitioners were terminated vide order dated 5.10.2002 pursuant to directions of Tribunal vide impugned judgement dated 18.3.2002 . The petitioners have amended the writ petition and challenged this order also.

8. After hearing learned counsel for parties and perusing the record we find no hesitation in holding that Tribunal exceeded its jurisdiction, acted wholly illegally when not only it permitted impleadment of petitioner-1 by allowing second amendment application after rejection of first one

and without considering the fact that challenge to appointment of petitioner after more than 8-9 years by way of amendment and impleadment application was barred by limitation under Administrative Tribunals Act, 1985. Petitioner-1 was selected on 2.12.1989 in pursuance of advertisement dated 27.7.1989. Respondent-4 was not a candidate in this selection. Respondent-4 did not challenge this selection. He filed OA before Tribunal challenging appointment of petitioner-2 only after respondent-4 remained unsuccessful in selection held in 1991 in which petitioner-1 was not a candidate at all. The appointment of petitioner-1 was challenged for the first time by means of amendment application in 1997. This application was rightly dismissed. However, respondent-4 filed second application which was allowed on 27.2.2001. The limitation for challenging appointment of petitioner-1 before Tribunal is one year. Respondent-4 was not an applicant in the selection held in 1989 in which petitioner-1 was selected. Respondent-4 thus had no locus-standi to challenge selection and appointment of petitioner-1. This was not a public interest litigation before Tribunal and it ought not to have allowed second amendment application when one it was already rejected. Second application was also barred by the principles of res judicata. Even otherwise, there was no justification to entertain challenge regarding legality of appointment of petitioner-1. We also wish to clarify that petitioner-1 had requisite qualification according to the advertisement published in 1989. In view of above, impugned judgement and order of Tribunal in so far as it has declared selection and appointment of petitioner illegal, cannot be sustained and has to be set aside. Now, we proceed to consider impugned judgement and order to the extent it relates to petitioner-2 as well as respondent-4.

9. Petitioner-2 and respondent-4 appeared in the selection of Technical Assistant T-II-3 in pursuance of advertisement dated 23/29.3.1991. This selection was done on the basis of written examination as well as interview. Tribunal has observed that selection of petitioner-2 is illegal on the following grounds:

(i) The marks in viva-voce were high.

(ii) Petitioner no. 2 did not possess requisite qualification.

10. Tribunal has observed that marks for viva voce were high but has not clearly indicated as to how many marks were assigned for viva voce and how many marks were for written examination. It appears from judgment that 30 out of 100 marks were allocated for viva and 70 marks for written examination. 30 out of 100 is not such a high percentage for which a selection on the post of Technical Assistant T-II-3 in ICAR could be held illegal.

11. Prescription of marks in a selection for written and interview, all constitute policy decision and there is no hard and fast rule that aforesaid prescription of marks of 15-20% for interview is per arbitrary.

12. In the matter of admission to education institutions in **Ajay Hasia Vs. Khalid Mujib Sehravardi, 1981(1) SCC 722**, Court observed that allocation of more than 15% marks for oral interview would be arbitrary and unreasonable.

13. Since then this question has been considered in a large number of cases and Courts have explained proposition that appropriate allocation of marks for interview where selection is to be made by written test as well as interview would depend on nature of post and no straight jacket formula can be laid down. It has been held that there is a distinction in cases relating to employment and that of admission in academic course. Courts have emphasized time and again that for the purpose of admission in educational institution allocation of interview marks should not be very high but for the purpose of employment, allocation of marks for interview would depend on the nature of post as well as procedure of selection under the Rules.

14. In **State of U.P. Vs. Rafiquddin, AIR 1988 SC 162** which was a matter relating to recruitment in judicial service of State of U.P., fixation of 35% marks as minimum qualifying marks in viva was upheld.

15. In **Anzar Ahmad Vs. State of Bihar, 1994(1) SCC 150**, which was a matter pertaining to recruitment and appointment of Unani Medical Officers, Court upheld allocation of 50% marks for viva and 50% marks for academic performance.

16. In **Jasvinder Singh Vs. State of Jammu and Kashmir, 2003(2) SCC 132**, for selection to the post of Sub-Inspector of Police, allocation of 20% marks for viva test against 80% marks of written test was held valid.

17. The above decisions have been reiterated recently in **Bishnu Biswas and others Vs. Union of India and others, 2014(5) SCC 774.** In that case Rules did not envisage holding of interview at all but after holding written test interview was included and this has been held to be bad.

18. Looking to nature of institution, post in question which involves 30% marks for interview per se cannot be said to be bad. Further, respondent-4 had also been considered with same standard as petitioner-2 and that being so, in our view Tribunal was not justified to interfere with selection on the ground that marks of viva voce were high. It is also unfortunate that though Tribunal has deprecated marks of viva voce but has not discussed the matter in the light of various authorities on the subject wherein it has clearly been held that there is no hard and fast rule to show that in every case more than 15% marks for interview would be bad or arbitrary. As we have already said, in **State of U.P. v. Rafiquddin (supra**), Court upheld 35% marks for interview; in **Anzar Ahmad (supra)** 50% marks for interview and in **Jasvinder Singh (supra)** 20% marks for interview were upheld.

19. Further petitioner-2 had scored 29.4 and 20.7 marks in written examination and viva voce whereas respondent-4 had obtained only 27.8 and 18.8 marks in written examination and viva voce. Petitioner-2 had obtained more marks than respondent-4, not only in viva voce but also in written examination. In case marks of viva voce are ignored and marks of written examination are taken, even then, respondent-4 could not have been selected in place of petitioner-2.

20. Petitioner-2 had requisite qualification as advertised in the advertisement. In any case petitioner-2 was B.Sc. (Agri) (AH) from GB Pant Agricultural University, Pant Nagar. According to Tribunal, agricultural is relevant field so it can not be said that the petitioner did not possess degree in the relevant subject. Both the reasons given by Tribunal for invalidating selection of petitioner-2 are incorrect. Hence, findings of Tribunal with respect to appointment of petitioner-2 as well as respondent-4 are also bad and cannot be sustained.

21. In view of our findings above, part of the judgment holding selection of petitioner-1 and 2, irregular/illegal and putting respondent-4 above petitioner-2 in merit list is illegal and the same is quashed. Consequently, termination order passed by ICAR, pursuant to observations made by Tribunal is also set aside. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Writ A No.- 47479 Of 2015
&
Connected With Other Cases

Home Guard No. 0384 Ram Nath Gupta & Ors. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shri Shailesh Verma, Shri Vijay Gautam, Shri Vinod Kumar Mishra , Shri P.N. Shukla, Shri P. N.Shukla

Counsel for the Respondents:
C.S.C.

Held –

Procedural Orders: The Court accepted the rejoinder affidavit and allowed an oral prayer to amend the description of petitioner no. 1 to "Home Guard No. 0384."
Consolidation of Cases: Since all petitions sought similar relief regarding pay parity and regularization, the Court decided to adjudicate all matters through this common judgment.
Petitioners' Prayer: The Home Guards requested pay and benefits equal to regular police personnel based on a 2015 Supreme Court precedent. Some also sought regularization of services and regular salary instead of an honorarium.
State's Initial Defense: An Expert Committee (formed in 2013) argued that Home Guards are a "voluntary force" and not "civil post" holders. They claimed duties, recruitment, and training were not comparable to regular police constables.

The Specific Grievance: The Court noted that the State was paying a duty allowance of only ₹225 per day, asserting that no parity could be granted to a voluntary force.
Application of Supreme Court Precedent: The Court compared the U.P. Home Guards Adhiniyam, 1963 with the laws of other states. It concluded that the U.P. Home Guard organization is functionally identical to those discussed by the Supreme Court in the Grah Rakshak case.
Statutory Analysis: Under Section 9 of the U.P. Act, Home Guards called for duty have the same "powers, privileges, and protection" as police officers. Section 10 deems them "public servants" under the IPC.
Rejection of State's Objections: The Court held that the State's reasons for denying higher duty allowance were contrary to the findings of the Hon'ble Supreme Court.
Ruling on Regularization: Following the Supreme Court's stance, the Court denied the prayer for regularization of services or the grant of a regular scale of pay.
Final Direction on Pay Parity: The Court directed the State Government to provide duty allowance at rates where the monthly total equals the minimum pay of a State police constable.
Timeline for Compliance: The State must pass appropriate orders within three months of receiving the certified copy of this judgment.

Case Laws Cited:-

Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others, Civil Appeal No. 2759 of 2015 (arising out of SLP © No. 12858 of 2009), decided on 11.03.2015.

Shri Krishna @ Keshan Yadav & others vs. State of U.P. and others, Writ-A No. 18839 of 2012, decided on 16.04.2012.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Rejoinder affidavit filed in Writ-A No.47479 of 2015 is taken on record.

2. On an oral prayer made by the learned counsel for the petitioners, let petitioner no.1 of this writ petition be described as Home Guard No.0384.

3. Necessary amendment shall be incorporated by the learned counsel for the petitioners during course of the day.

4. Heard learned counsel for the petitioners and learned Standing Counsel for the State-respondents.

5. Since the issue which has been sought to be adjudicated by this Court in all these petitions is the same, with the consent of learned counsel for the parties, the Court proceeds to decide all these matters by the following common judgment and order.

6. For convenience Writ-A No.47479 of 2015, Ram Nath Gupta and others vs. State of U.P. and others, shall be treated to be the leading writ petition.

7. All these petitions have been filed with the prayer to direct the State-respondents to give the benefit to the petitioners of pay and other benefits equal in amount to the pay and other benefits

which are admissible to police personnel in the light of the judgment and order dated 11.03.2015 rendered by Hon'ble Supreme Court in the case of ***Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others, Civil Appeal No.2759 of 2015 arising out of SLP (C) No.12858 of 2009.***

8. In some of the writ petitions yet another prayer has been made for regularizing the services of the petitioners as a regular cadre of Home Guards.

9. In one of the writ petitions, the petitioners have prayed that they should be paid regular salary in place of honorarium which is otherwise being paid at present to the Home Guard volunteers.

10. This Court on 24.08.2015 passed an order requiring the learned Standing Counsel representing the State-respondents to seek instructions in the matter in the light of the observations made by Hon'ble Supreme Court in para 22 of the judgment in the case of ***Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others (supra)***.

11. A counter affidavit was filed on 16.11.2015 by the State-respondents, whereby a decision taken by an Expert Committee in its meeting held on 14.01.2013 has been annexed. The said Expert Committee in its meeting dated 14.01.2013 appears to have taken a decision for ensuring compliance of the order dated 16.04.2012 passed by this Court in Writ-A No.18839 of 2012, Shri Krishna @ Keshan Yadav & others vs. State of U.P. and others.

12. The said Expert Committee was constituted by the State Government in terms of the order dated 16.04.2012, passed by this Court in the case of Shri Krishna @ Keshan Yadav & others vs. State of U.P. and others, Writ A No.18839 of 2012. The aforesaid writ petition was filed by certain Home Guards alleging therein that they have been discharging practically the same duties as are required to be discharged by any other police constable and as such they are also entitled to be paid atleast minimum of the salary, which is being paid to a regular constable of police force. It is in the background of the aforesaid facts pleaded by the petitioners of Writ -A No.18839 of 2012 that this Court by means of its order dated 16.04.2012 directed the State Government to constitute an Expert Committee and take decision qua the claim of the petitioners therein.

13. The minutes of meeting of the Expert Committee held on 14.01.2013 have been perused. The said Committee has concluded that the Home Guard volunteers discharge their functions as assistance to the regular police force and thus, it cannot be said that they perform the same duties as are being performed by the members of the regular police force. Referring to the provisions of Section 9 of the Uttar Pradesh Home Guards Adhiniyam, 1963, the Expert Committee has observed that a Home Guard can be required to serve as auxiliary to the police or to help the regular police in maintaining public order or internal security and further that if the Home Guards are required to perform the said duties only then they will have the same powers, privileges and protection as a member of the police force appointed under any enactment for the time being in force.

14. The Committee has further observed that the said privileges will not be available to the Home Guard if he is assigned duties not as an auxiliary to the police force. Comparing the procedure for recruitment of a member of the police force with the procedure for engagement of Home Guards and educational qualification required therefor and also comparing the nature of training imparted to Home Guards and to the members of regular police force, the Expert Committee concluded that since the Home Guard volunteers are members of voluntary force and do not draw salary, as such they are not the employees of the State Government and hence, they are not entitle to be paid minimum of the salary or the pay which is admissible to a police constable who is member of regular police force.

15. This Court on a perusal of the counter affidavit, passed an order on 16.11.2015 with the observation that in the counter affidavit there is no mention as to what is the duty allowance being paid to the Home Guards and whether it conforms to the duty allowance as contemplated by Hon'ble Supreme Court in para 22 of the judgment in the case of ***Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others, passed in Civil Appeal No.2759 of 2015***. The said order dated 16.11.2015, passed by this Court in this petition is quoted below:

"Counter affidavit filed on behalf of the State is taken on record.

Heard Sri Shailesh Verma, learned counsel for the petitioners and Sri Mata Prasad, learned Standing Counsel assisted by Sri Vikram Bahadur Yadav, learned Standing Counsel for the respondents.

In the counter affidavit there is no mention as to what is the duty allowance being paid to the Home Guards and whether it confirms to the duty allowance as contemplated by the Supreme Court in para 22 of the judgment in the case of Grah Rakshak, Home Guards Welfare Association Vs State of Himachal Pradesh and others passed in Civil Appeal No. 2759 of 2015.

As prayed by the learned Standing counsel list on 24.11.2015."

16. After the aforesaid observations made by this Court in this case in its order dated 16.11.2015, State-respondents have filed another supplementary counter affidavit on 01.12.2015, wherein mention of the observations has been made by Hon'ble Supreme Court in para 22 of the judgment rendered in the case of ***Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others (supra)***, has been made, however, it has been stated that since in terms of the provisions contained in Section 3 of the Home Guards Act, 1963, Home Guard is a volunteer force and since the said provision has not been amended till date and Home Guards serve as auxiliary to the police force when required and also function as an emergency force as such duty allowance of Rs.225 per day has been fixed which is paid to the Home Guards throughout the State of U.P.

17. A perusal of the counter affidavit filed by the State-authorities dated 01.12.2015 reveals that main objection to the claim of the petitioners in respect of payment of duty allowance equal to that being paid to constables of police force is that the Home Guard is a voluntary force whereas

the constables are working in the police force which is a regular police force hence, no parity can be granted to the Home Guard volunteers.

18. Having perused the aforesaid two counter affidavits filed by the State-authorities and having gone through the judgment of Hon'ble Supreme Court in the case of ***Grah Rakshak, Home Guards Welfare Association vs. State of H.P. and others (sup***ra), this Court is not convinced with the objections being taken by the State Government in so far as the same relate to payment of duty allowance at such rates, total of which thirty days (a month) comes to minimum of the pay to which the police constable of the State are entitled to.

19. Hon'ble Supreme Court in the aforementioned case of **Grah Rakshak, Home Guards Welfare Association (supra)** has traced the genesis of Home Guard organization in India, according to which, Home Guard as a voluntary citizen organization for local defence was raised in U.K. during Second World War. On similar lines in our country as well, Home Guards were raised in Bombay in the year 1946 to assist the police force in controlling civil disturbances and communal riots etc. Subsequently, the concept of a voluntary citizen's force as auxiliary to the police for maintenance of law and order and for meeting emergencies like floods, fires and famines etc. Was adopted by several other States by different names.

20. Hon'ble Supreme Court has referred to the provisions relating to Home Guard organization in various States including the State of Himachal Pradesh, Bombay, State of Punjab and National Capital of Delhi. The provisions relating to various enactments under which Home Guard organization has been raised in different States have also been mentioned by Hon'ble Supreme Court in this judgment.

21. From a perusal of provisions contained in U.P. Home Guards Adhininyam, 1963 and rules framed thereunder, I am completely convinced that the Home Guard organization in the State of U.P. is no different than the Home Guard organization in the State of Himachal Pradesh.

22. The State legislature by passing U.P. Act No.XXIX of 1963 enacted U.P. Home Guards Act, 1963. Section 3 of the said Act provides as under:-

3.Constitution of Home Guards.-*There shall be raised and maintained a volunteer force to be designated the Uttar Pradesh Home Guards, hereinafter called the Home Guards and it shall be constituted in the manner prescribed.*

23. Function of Home Guards have been defined in Section 4 of the Act which is extracted hereinbelow:-

4. Functions*.-The Home Guards will have the following functions:-*

(a) they will serve as auxiliary to the police, and, when required, help in maintaining public order and internal security;

(b) they will help the community in air raids, fires, floods, epidemics and other emergencies;

(c) they will function as an emergency force for such special tasks as may be prescribed;

(d) they will provide functional units for essential services; and

(e) they will perform such other duties relating to any measure of public welfare as may be prescribed.

24. Section 9 of the Act provides for powers, privileges and protection of Home Guards which runs as under:-

"9. Powers, privileges and protection of Home Guards.-*(1) Subject to the provisions of this Act and the rules made thereunder, a home guard when called out under section 8 to serve as auxiliary to the police or to help in maintaining public order or internal security shall have the same powers, privileges and protection as a member of the police force appointed under any enactment for the time being in force, and shall, subject to such adaptations and modifications as may be made therein by the State Government by notification in the Gazette, be subject to the provisions of the Police Act, 1861 (Act V of 1861) and the rules or regulations made thereunder in the same manner and to the same extent as he would, if such home guard held a corresponding rank in the police force to the one he holds for the time being in the Home Guards.*

(2) No prosecution shall be instituted against a home guard in respect of anything done or purporting to be done by him in the discharge of his duty as a home guard, except with the previous sanction of the District Magistrate having jurisdiction over the area in which the home guard was enrolled or in which the act was committed."

25. Section 10 of the Act provides that a Home Guard acting in discharge of his functions under the Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. However, he will not be deemed to be a holder of a civil post. The Act even provides for certain penalties if a home-guard indulges into certain kinds of misconducts including desertion and act of cowardice or if he indulges into unwarranted personal violence to any person in his custody.

26. Looking into the nature of organization and also looking into the nature of duties the home-guard performs, as has been elaborated by Hon'ble Supreme Court in the case of **Grah Rakshak, Home Guards Welfare Association (supra)** and as has been enumerated in the various provisions quoted hereinabove of U.P. Home Guards Act, 1963, I have no hesitation to hold that the petitioners are also entitled to be given the benefit of the judgment of Hon'ble Supreme Court dated 11.03.2015 passed in the case of **Grah Rakshak, Home Guards Welfare Association (supra).** The reasons, which have been assigned by the State Government while filing the counter affidavits

in this case and also the reasons given by the Expert Committee in its decision held on 14.01.2013, thus, run contrary to the reasons given by Hon'ble Supreme Court in the case of **Grah Rakshak, Home Guards Welfare Association (supra)** for issuing the direction to the State Governments, who were party therein, in relation to entitlement of the daily allowance to the Home Guards.

27. It is also noteworthy that Hon'ble Supreme Court has negatived the prayer for regularization of the services or grant of regular appointments to the Home Guards.

28. For the reasons given above and in view of the judgment of Hon'lble Supreme Court in the case of ***Grah Rakshak, Home Guards Welfare Association (supra)***, this bunch of writ petitions is disposed of with the following observations and directions:

(A.) No relief to the petitioners for regularization of their services or grant of regular appointments can be granted and hence, the prayer made in this respect in this bunch of writ petitions is declined.

29. As a corollary, the prayer made by some of the petitioners for grant of salary in the regular scale of pay is also rejected.

B. The State Government is directed to consider the claim of the petitioners and other Home Guards for grant of duty allowance at such rates, total of which, thirty days (a month) comes to minimum of the pay to which a police constable in the State Government is entitled to in terms of the directions issued by Hon'ble Supreme Court in the case of ***Grah Rakshak, Home Guards Welfare Association (supra)***. The State Government shall pass appropriate orders expeditiously, say within a period of three months from the date of production of certified copy of this order.

30. However, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 57737 Of 2015

Santosh Kumar **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Shri Raj Kumar Shukla, Shri Anil Kumar Shukla

Counsel for the Respondents:
C.S.C.

Held –

Introduction: The petitioner, a collection Amin in Gautam Budh Nagar, filed a writ petition seeking a direction for the District Collector (respondent no. 2) to decide his long-pending appeal.
Background of the Case: The petitioner was suspended in 2001 following disciplinary proceedings. A major punishment was imposed, involving the permanent withholding of three annual increments and non-payment of salary for the suspension period.
The Pending Appeal: Governed by the U.P. Collection Amin's Service Rules, 1974, the petitioner filed an appeal on July 25, 2001, under Rule 11 of the U.P. Govt. Servant (Discipline and Appeal) Rules, 1999.
Grievance of Petitioner: The petitioner argued that despite numerous applications, his appeal has remained pending for over 15 years, citing the case of Tilakdhari Ram vs. State of U.P. as precedent for timely disposal.
Legal Provisions (Rule 11): The Court examined Rule 11 of the 1999 Rules, noting that while it sets a 90-day limit for filing an appeal, it is silent on the time limit for the authority to decide it.
Defining "Reasonable Time": The Court explored the legal definitions of "reasonable time" from The Law Lexicon and Black's Law Dictionary, concluding it means as soon as circumstances permit to fulfill a duty.
Judicial Precedents on Delay: Referencing Supreme Court rulings (Mansaram and Bhatinda District Coop.), the Court emphasized that statutory power must be exercised within a reasonable period, even if the statute doesn't specify a deadline.
The Three-Month Benchmark: Citing Ashok Kumar Sahu and Tilakdhari Ram, the Court noted that three months is generally considered a reasonable period for deciding such matters.
Constitutional Implications: The Court observed that administrative delays violate Article 14 (against arbitrariness) and Article 21 (Right to Livelihood) of the Constitution.
Court's Observation on Alternative Remedy: Since the High Court often refuses writ petitions when an alternative remedy (like an appeal) exists, the failure of authorities to decide those appeals causes undue suffering to employees and their families.
Findings on the Current Case: The Court found the 15-year delay in the petitioner's case to be arbitrary, illegal, and unjustifiable.
Mandatory Guidelines: The Court ruled that for major punishments, appeals should ideally be decided within three months, and under no circumstances later than six months. If delayed beyond six months, reasons must be recorded in writing.
Final Order: The Collector of Gautam Budh Nagar is directed to decide the appeal within three months.
Systemic Instruction: The Court directed the Principal Secretary (Revenue) to issue instructions to all Commissioners and Collectors to follow these timelines for all pending appeals, revisions, and reviews.

Case Laws Cited:-

Tilakdhari Ram Vs. State of U.P. and others, Writ Petition No. 49235 of 2015 (decided on 1.9.2015).
Mansaram Vs. S.P. Pathak, (1984) 1 SCC 125.
State of Punjab Vs. Bhatinda District Coop. Milk Producers Union Ltd., (2007) 11 SCC 363.
Ashok Kumar Sahu Vs. Union of India, (2006) 6 SCC 704.
Maneka Gandhi Vs. Union of India, AIR 1978 SC 597.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner is a collection Amin. He has instituted this writ proceeding for a direction to the second respondent- Collector, district Gautam Budh Nagar to decide his appeal within a stipulated time.

2. Essential facts are that petitioner was initially appointed as collection Amin in the year 1997. While he was posted at Dadri, district Gautam Budh Nagar, he was placed under suspension on 10.1.2001 and disciplinary proceedings was initiated against him. Charge sheet was served upon him on 10.2.2001 and after completion of the disciplinary proceedings, major punishment was imposed on him of withholding three annual increments permanently and it was also provided that he would not be paid any salary during the suspension period. Services of the petitioner are governed under statutory Rule namely U.P. Collection Amin's Service Rules,1974. The petitioner preferred an appeal under rule 11 of the U.P. Govt. Servant (Discipline and Appeal) Rules,1999, before the second respondent on 25.7.2001.

3. Grievance of the petitioner is that inspite of several applications for disposal of his appeal, the same is still pending before the second respondent.

4. Learned counsel for the petitioner submits that there is no justifiable reason for keeping his appeal pending for the last more than 15 years and he has placed reliance upon judgment of this Court in the case of **Tilakdhari Ram Vs. State of U.P. and others**, (Writ Petition No. 49235 of 2015, decided on 1.9.2015).

5. Learned standing counsel submits that this Court may issue direction to the District Magistrate to decide the appeal within a reasonable time.

6. I have heard learned counsel for the petitioner and learned standing counsel. Perused the record.

7. The petitioner claims that he has filed appeal on 25.7.2001. Rule 11 of the 1999 Rules provides that against the order of disciplinary authority , appeal lies to the next higher authority. Rule 11 is extracted hereinunder:

"11. Appeal: (1) Except the orders passed under these rules by the Governor, the Government servant shall be entitled to appeal to the next higher authority from an order passed by the disciplinary authority.

(2) The appeal shall be addressed and submitted to the appellate authority. A Govt. Servant preferring an appeal shall do so in his own name. The appeal shall contain all material statements and arguments relied upon by the appellant.

(3) The appeal shall not contain any intemperate language. Any appeal, which contains such language may be liable to be summarily dismissed.

(4) The appeal shall be preferred within 90 days from the date of communication of impugned order. An appeal preferred after the said period shall be dismissed summarily.

8. Against the order of the appellate authority, Rule 13 of the 1999 Rules provides a revision to the State Government and Rule 14 further provides review before the Governor.

9. From the reading of Rule 11, it is evident that its sub clause (4) provides 90 days' limitation for filing of the appeal but it does not provide any time limit within which the appeal has to be decided.

10. Although no time limit has been provided under Rule 11 to decide the appeal, it is a trite that if no period is provided in the statute, then Tribunal/appellate authority/authority concerned should take decision within a reasonable time. "Reasonable time" is not defined under the Rules. P. Ramnatha Aiyar's "The Law Lexicon, 3rd Edition", defines reasonable time as under :

"Reasonable time": That is a reasonable time that preserves to each party the rights and advantages he possesses and protects each party from losses that he ought not to suffer.

"Reasonable time" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

11. If it is proper to attempt any definition of the words "reasonable time" as applied to completion of a contract, the distinction given by Chief Baron Pollock may be suggested, namely, that a "reasonable time" means as soon as circumstances will permit.

12. In determining what is reasonable time or an unreasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the fact of the particular case.

13. A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly"; such length of time as may fairly, and properly and reasonable be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.

14. Black's law dictionary, defines "reasonable time" as under:

1.**Contracts**. The time needed to do what a contract requires to be done, based on subjective circumstances. If the contracting parties do not fix a time for performance, the law will usu. Presume a reasonable time. **2. Commercial law**. The time during which the UCC permits a party to accept an offer, inspect goods, and the like.

15. In the case of **Mansaram Vs. S.P. Pathak,** (1984) 1 SCC 125, the Supreme Court held that when the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner and reasonable time. The Court held as follows :

"But when the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner. Exercise of power in a reasonable manner inheres the concept of its exercise within a reasonable time. Undoubtedly, no limitation is prescribed in this behalf but one would stand aghast that a landlord to some extent in pari delicto could turn the tables against the person who was in possession for 22 years as a tenant."

16. Similar view has been taken in the case of **State of Punjab Vs. Bhatinda District Coop. Milk Producers Union Ltd.**, 2007 11 SCC 363, wherein the Supreme Court held that when there is no period of limitation prescribed under the Statute, the authority must exercise its jurisdiction within a reasonable time. It would depend upon the nature of the Statute, rights,,liabilities and other relevant factors. Relevant part of the aforesaid judgment reads as follows:

17. A bare reading of Section 21 of the Act would reveal that although no period of limitation has been prescribed therefor, the same would not mean that the suo motu power can be exercised at any time.

18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What,however, shall be the reasonable period would depend upon the nature of the Statute, rights and liabilities thereunder and other relevant factors."

17. Word "reasonable time" has been considered in various judgments of the Supreme Court and it depends upon facts of the each case.

18. The Supreme Court in the case of **Ashok Kumar Sahu v. Union of India,**(2006) 6 SCC 704 at page 715, has observed in paragraph no. 32 of the said decision as under:-

"32. We may observe that an appropriate order should be passed within a reasonable period. Normally, three months' notice is required to be given as the said period is considered to be reasonable and it is expected that a decision would be taken within the said period. But the rule is not an inflexible one. It would depend upon the facts and circumstances of each case."

19. This Court in the case of **Tilakdhari Ram (supra)** while dealing with identical situation, has held that whenever there is no reasonable time fixed in the statutory rules to decide the appeal/revision/review, the reasonable time should be treated to be three months and in case the authority concerned fails to dispose of appeal/revision/review within the said period from the date of its filing, he should record brief reasons for the delay. Relevant part of the order reads thus :

"wherever there is no reasonable time fixed in the statutory rules of the State Government the reasonable period as held by the Supreme Court in the Ashok Kumar Sahu's case (supra) should be treated to be three months and in case the officer concerned fails to dispose of the appeal, revision or review within three months of the date of filing of the same the reasons should be recorded by the concerned."

20. It is pertinent to mention here that State Government in exercise of the powers conferred by proviso to Art. 309 of the Constitution, has framed U.P. Govt. Servant (Discipline and Appeal) Rules,1999, which are applicable to all Govt. Servants except officers and servants of the High Court of Judicature at Allahabad.

21. As can be seen from the reading of Rule 11 that no time limit has been provided for disposal of the appeal. In some of the Service Regulations of Govt. Corporations, period has been provided i.e. ordinarily three months, but the 1999 Rules is silent about the period for disposal of the appeal.

22. It is common experience that a large number of petitions are filed in this Court for only prayer that direction be issued to the Tribunal/Administrative authority/Quasi judicial authority to decide the appeal which is provided under statute/regulations /rules, within a stipulated period of time. Keeping in view huge volume of work of this Court, there is a need to lay down authoritatively a reasonable time, under which all statutory appeals/revision may be decided.

23. In addition to the above, the aggrieved govt. Servant against whom punishment has been awarded, particularly a major punishment, is required to file appeal as this Court ordinarily do not entertain the writ petition if the aggrieved Govt. Servant approaches this Court bypassing the statutory appeal, on the ground of availability of alternative remedy. In case the appeal is not decided within a reasonable period, not only the Govt. Servant but his whole family is made to suffer especially in case of the major punishment. If the appeal remains pending for a long time, the Govt. Servant and his family is made to suffer without their any fault. The Supreme Court in long line of decisions has established the law that livelihood is a fundamental right and it is protected under Art. 21 of the Constitution. Thus, keeping the appeal/revision pending for unreasonable period violates fundamental right of the employee.

24. Concept of arbitrariness has been dealt with by the Supreme Court in the case of **Maneka Gandhi Vs. Union of India**, AIR1978 SC 597, wherein Constitution Bench of Seven Judges has held that any action on the part of the executive which is unreasonable,is arbitrary and violative of Art. 14 of the Constitution. This decision has been followed by the Supreme Court in unbroken line of decisions.

25. Having regard to the law laid down above, it is evident that if appeal/revision is not decided for a long time, it is violative of Art. 14 and 21 of the Constitution.

26. Reverting to the case in hand, the appeal of the petitioner is pending for the last 15 years. There can not be a justification for keeping the appeal/revision pending for such inordinate period. Even if the appellant/revisionist is not cooperating or delaying the matter, the authority should after giving no more opportunity, should decide the matter ex-parte.

27. As a sequel to above, I find that action of the respondents in keeping the petitioner's appeal pending for the last 15 years, is arbitrary and illegal.

28. In view of the above, I hold that in the matter of major punishment, the appellate authority should make endeavour to decide the appeal within a reasonable time i.e. three months but it should not be later than six months. In case there is delay beyond six months, the authority concerned would record reasons for the delay occurred.

29. Accordingly a direction is issued upon the second respondent no. 2- Collector, district Gautam Budh Nagar to decide the petitioner's appeal expeditiously but not later than three months from the date of communication of the order.

30. With the above direction, the writ petition stands finally disposed of.

31. The office is directed to send a copy of this order to first respondent- Principal Secretary (Revenue), to issue necessary directions to all the appellate authorities/revisional authorities (Commissioners and Collectors) to decide the appeals/revisions/review in the light of judgments of Supreme Court, referred hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Matters Under Article 227 No.- 4227 Of 2016

Sushil Kumar **...Petitioner**
Versus
Kanvar Sain Garg **...Respondent**

Counsel for the Petitioner:
Sri Abhijeet Mukherji, Sri Anil Kumar Jaiswal

HEADNOTE:
Civil Procedure Code, 1908 — Section 115 (U.P. Amendment) — Revision — Pecuniary jurisdiction — Amendment of plaint — Valuation exceeding Rs.5,00,000/- — Revision lies before High Court and not District Judge — Government notification enhancing appellate jurisdiction does not

affect revisional jurisdiction under Section 115 C.P.C. — Stamp Reporter bound by judicial pronouncement.

PROCEDURE:
Petition under **Article 227 of the Constitution of India** challenging:
Order dated **23.02.2016** passed by the Civil Judge (Senior Division), Meerut allowing amendment of plaint in **Original Suit No. 736 of 2015**, and

Order dated **17.05.2016** passed by the District Judge, Meerut returning the revision memo on the ground of lack of pecuniary jurisdiction.

RESULT:
The order of the District Judge returning the memo of revision is held to be **legal and valid**.
The petitioner has an **efficacious remedy** of filing revision under Section 115 C.P.C. before the **High Court**.
The Court declined to examine the validity of the trial court's order dated 23.02.2016 on merits.
It is clarified that if the revision is filed again before the High Court, the **Stamp Reporter shall be guided by this judgment**.

A copy of this order shall be communicated to the Stamp Reporter Section for compliance.
Order accordingly.

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

1. The instant petition has been filed by the petitioner challenging the order dated 23.2.2016 passed by Civil Judge (Senior Division), Meerut allowing the amendment application filed by the plaintiff-respondent seeking amendment of the plaint in Original Suit No. 736 of 2015. The order dated 17.5.2016 passed in Civil Revision No. Nil of 2016 (Misc. No.773 of 2016), whereby the District Judge has returned the memo of revision for being presented before proper court in view of the fact that the valuation thereof was Rs.9,10,000/-, which according to the revisional court was beyond its pecuniary jurisdiction, is also under challenge. The petitioner has prayed for a direction being issued to the District Judge to decide the revision himself in view of the Uttar Pradesh Civil Laws (Amendment) Act No.14 of 2015.

2. It is pointed out by learned counsel for the petitioner that initially the petitioner sought to challenge the order of the trial court dated 23.2.2016 allowing the amendment application by filing a revision under Section 115 C.P.C. before this Court. However, the Stamp Reporter reported the revision to be not maintainable as the valuation is below Rs.25,00,000/-. He has also placed on record a notice affixed outside the Stamp Reporter Section which is to the following effect:-

"NOTICE

The learned counsels and their clerks are hereby, informed that as per Government Notification No.:1599/ 79-V-1-15-1(ka) 19/2015 dated 07.12.2015 the F.A.F.O. & Civil Revisions etc. will lie in this Hon'ble Court against the judgements/orders passed by the Civil Judge in which the valuation is above Rs.25,00,000/- (Rs. Twenty Five Lakhs) and S.C.C. Revision above valuation of One Lakh (1,00,000/-).

This is with immediate effect.

Dated: 21.01.2016 By Order of Registrar (S.R.)"

3. Counsel for the petitioner submitted that in view of the report of the Stamp Reporter, the petitioner was compelled to file revision before the District Judge, Meerut who has now passed the impugned order returning the memo of revision. It is urged that the petitioner is being shunted from one court to other and is being rendered remediless.

4. The filing of revision against the order of the subordinate court is governed by Section 115 C.P.C. which in its application to the State of U.P., reads as under :-

"115. Revision-(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has-

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I.- In this section,-

(i) the expression 'superior court' means-

(a) the district court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the district court exceed five lakh rupees;

(ii) the expression 'order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II.- The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement. [Vide U.P. Act 14 of 2003, S.2]*

5. A revision against the order of the subordinate court where no appeal lies against the order is to be preferred before the superior court as defined under Explanation I to Section 115 C.P.C. Thus, the expression 'superior court' refers to the District Court where the valuation of the case decided by a court subordinate to it does not exceed Rs.5,00,000/- and the High Court where the order sought to be revised was passed in a case decided by the District Court or where the value of the original suit or of other proceedings in a case decided by the court subordinate to the District Court exceeds Rs.5,00,000/-.

6. Concededly, in the instant case, the trial court which passed the order on the amendment application is a court subordinate to the District Court. However, the valuation of the suit is Rs.9,10,000/- which is above Rs.5,00,000/-. Consequently, in view of the definition of the 'superior court', it would be the High Court which would be competent to entertain the revision.

7. The 'Notice' following which the Stamp Reporter appears to have submitted the report that revision is not maintainable refers to the Government Notification No. :1599/79-V-1-15-1(ka)19/2015 dated 07.12.2015. By the aforesaid notification, certain provisions of the Bengal, Agra and Assam Civil Courts Act, 1887 and Provincial Small Causes Courts Act, 1887 were amended. Section 3 of the said Act is reproduced for sake of reference :-

"3. In section 21 of the principal Act, in sub-section (1), in clause (b)—

(a) for the words "one lakh rupees" the words "five lakh rupees" shall be substituted; and

(b) for the words "five lakh rupees" the words "twenty-five lakh rupees" shall be substituted."

8. Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887 speaks of appeals from orders of Civil Judges and Munsifs and reads thus :-

21. Appeals from Subordinate Judges and Munsifs.- *(1) Save as aforesaid, an appeal from a decree or order of a Civil Judge shall lie,--*

(a) to the High Court in any case other than a case referred to in clause (b);

(b) to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made (whether instituted or commenced before or after the relevant date) did not exceed one lakh rupees or such higher amount not exceeding five lakh rupees as the High Court may fix from time to time by notification in the official Gazette.

Explanation.-- For the purposes of this sub-section and sub-sections (1-A) and (1-B) relevant date means the date of commencement of the Uttar Pradesh Civil Laws (Amendment) Act, 1991 or as the case may be, the date of commencement of notification made under clause (b) of sub-section (1).

(1-A) .....

(1-B) .....

(2) Save as aforesaid, an appeal from a decree or order of a Munsif shall lie to the District Judge.

(3) .....

(4) The High Court may, [* * *], direct, by notification in the official Gazette, that appeals lying to the District Judge under sub-section (2) from all or of the decrees or orders of any Munsif shall be preferred to the Court of such Civil Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly."*

9. The aforesaid section deals with the filing of appeals before the High Court and the District Court and is not concerned with filing of revisions, which as noted above, is governed by Section 115 C.P.C. The notification referred to above seeks to amend Section 21 of the Parent Act and as a result thereof an appeal shall lie to the District Judge where the value of original suit in which or in other proceedings arising out of decree or order was made did not exceed Rs.1,00,000/- or such amount not exceeding Rs.25,00,000/- as the High Court may fix from time to time by notification in the official gazette. In pursuance thereof, the High Court has issued a notification on 05.02.2016 fixing the pecuniary jurisdiction of the District Judge for purposes of entertaining appeal as Rs.25,00,000/-. However, the same again does not in any manner repeal or amend Section 115 C.P.C.

10. In the considered opinion of the Court, the 'Notice' by the Registrar (S.R.) notifying that the revisions will lie in this Court against the order of the Civil Judge only in cases where

valuation is above Rs.25,00,000/- is based on misreading and misinterpretation of the notification in question.

11. In view of the foregoing discussion, this Court does not find any illegality in the order of the District Judge returning the memo of revision for being presented before the court of competent pecuniary jurisdiction.

12. Since the petitioner has the remedy of filing revision under Section 115 C.P.C. and thus, this Court declines to go into the validity of the order of the trial court dated 23.2.2016 and leaves it open to the petitioner to present the memo of revision before the court of competent jurisdiction.

13. It is clarified that in case the memo of revision is presented by the petitioner again before this Court, the Stamp Reporter shall be guided by the pronouncement made by this Court in the instant matter.

14. A copy of this order shall be communicated to the Stamp Reporter Section for information and necessary action.

15. The petition stands disposed of accordingly.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.07.2016

BEFORE

THE HON'BLE ABHAY MAHADEO THIPSAY, J.

Application U/s 482/378/407 No.- 4413 Of 2016

Akash Mishra @ Vakeel. **...Applicant**
Versus
State Of U.P. **...Respondent**

Counsel for the Applicant:
Abhishek Singh

Counsel for the Respondent:
Govt. Advocate

The petitioner is one of the accused in the charge-sheet No.262 of 2014 filed on 08.11.2014 in the court of Additional Chief Judicial Magistrate-IV, Court No.28, District Lucknow. Initially, the crime was registered in respect of the offences punishable under Sections 380, 411 of the IPC. The accused was arrested and was released on bail by the Court of Sessions. However, subsequently, when the charge-sheet came to be filed, one more offence viz.- offence punishable under Section 413 of the IPC, was added therein. The Magistrate

observed that the petitioner had not obtained bail with respect to that offence and, therefore, issued a non-bailable warrant for the arrest of the petitioner. Being aggrieved thereby, the petitioner has approached this Court by filing the present petition, invoking the inherent powers of this Court and praying that the order issuing non-bailable warrant as passed by the learned Magistrate, be quashed.

The petitioner should be allowed to remain on the same bail, unless the Magistrate thinks it necessary to cancel the bail granted to him in view of the addition of a new charge. It is made clear that in a such case the Magistrate shall issue a notice to the petitioner and give him an opportunity of being heard against the cancellation of bail; and then pass an order in accordance with the law. The petition is disposed of in the aforesaid terms.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Abhay Mahadeo Thipsay, J.)

1. Heard the learned counsel for the petitioner and the learned Additional Government Advocate.

2. By consent, heard finally.

3. The petitioner is one of the accused in the charge-sheet No.262 of 2014 filed on 08.11.2014 in the court of Additional Chief Judicial Magistrate-IV, Court No.28, District Lucknow. Initially, the crime was registered in respect of the offences punishable under Sections 380, 411 of the IPC. The accused was arrested and was released on bail by the Court of Sessions. However, subsequently, when the charge-sheet came to be filed, one more offence viz.- offence punishable under Section 413 of the IPC, was added therein. The Magistrate observed that the petitioner had not obtained bail with respect to that offence and, therefore, issued a non-bailable warrant for the arrest of the petitioner. Being aggrieved thereby, the petitioner has approached this Court by filing the present petition, invoking the inherent powers of this Court and praying that the order issuing non-bailable warrant as passed by the learned Magistrate, be quashed.

4. It is not in dispute that when the petitioner was released on bail, the Investigating Agency had not mentioned anything about the offence punishable under Section 413 of the IPC. Thus, it is not that the bail obtained by the petitioner was by suppressing the facts.

5. The learned Additional Government Advocate submits that it was open for the Investigating Officer to delete some of the charges, or to add some of the charges, which were not initially levelled, as a result of the investigation. This proposition cannot be faulted.

6. However, the procedure adopted by the learned Magistrate was not proper or legal. *The petitioner is on bail in the same case and by adding one offence in the list of the offences, the case does not become a different case.* The bail in this case had been granted by the Court of Sessions. It

is not the case that the petitioner had committed any breach of the terms and conditions of the bail. The proper course, for the Magistrate, therefore, would have been to summon the petitioner and to hear him on the question of bail in view of the additional accusation of a more serious offence, i.e., of an offence punishable under Section 413 of the IPC.

7. In the circumstances, the order issuing non-bailable warrant is not just and proper.

8. The learned counsel for the petitioner submits before me that the petitioner is ready to appear before the Magistrate.

9. In my opinion, the petitioner should be allowed to remain on the same bail, unless the Magistrate thinks it necessary to cancel the bail granted to him in view of the addition of a new charge. It is made clear that in a such case the Magistrate shall issue a notice to the petitioner and give him an opportunity of being heard against the cancellation of bail; and then pass an order in accordance with the law.

10. The petition is disposed of in the aforesaid terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE PANKAJ MITHAL, J.

Matters Under Article 227 No.- 4469 Of 2016

Jamuna Prasad **...Petitioner**

Versus

Thakur Ji Mahamaya Devi Virajman Temple & Ors. **...Respondents**

Counsel for the Petitioner:
Jainendra Kumar Mishra

Counsel for the Respondents:
S.C.

Civil Law — Decree – S.C.C. suit – Execution – Judgement debtor Ramdei died – Heirs and legal representatives – Substitution – Application – Order dated 05.03.2016 – Revision dismissed 27.05.2016 – Substitution application moved long after her death – Condonation of delay – Execution stood abated – Rules 3 and 4 Order XXII C.P.C. – Rule 12 Order XXII C.P.C. – Proceedings in execution of a decree – Not applicable – Execution proceedings would not abate – Heirs and legal representatives not brought on record within time – Filing of execution proceedings in time – Death of decree-holder/judgement debtor – No abatement – Remain pending – Brought on record at any time – No time limit – Proceedings would not abate – Remain

pending – No provision prescribing time – No necessity for moving any application for seeking condonation of delay – Petition dismissed.

The decree passed in S.C.C. suit has been put in execution against one of the judgement debtors Ramdei.The petitioner is one of the sons of the aforesaid judgement debtor Ramdei.During the pendency of the above execution proceedings as the judgement debtor Ramdei died, the decree holders applied for bringing on record her heirs and legal representatives including the petitioner. The said application has been allowed by the order dated 05.03.2016 and the revision of the petitioner preferred against the same has been dismissed on 27.05.2016.The petitioner has come up in this petition against the above orders dated 05.03.2016 and 27.05.2016.(Para 2-5)

In challenging the above orders, the argument is that the substitution application in respect of the deceased judgement debtor Ramdei was moved long after her death without an application for seeking condonation of delay in filing it but even then the court has permitted substitution.It is not the case of the petitioner that he is not the son or the heir of the deceased judgement debtor and is not liable to be substituted in her place.Once the above aspect of the matter is not disputed and the petitioner has rightly been substituted, he suffers no prejudice except for contending that as the delay in fling the substitution application was not condoned, the execution stood abated and cannot proceed against him.(Para 6-8)

Held: (Paras-12-16)

It can be explained in a different manner so as to mean that if after the filing of a execution proceedings in time, either the decree-holder or the judgement debtor dies and their legal representatives do not come on record, there would be no abatement of the execution proceedings. If there is no abatement of the execution proceedings they would remain pending on record of the court and as and when the heirs or legal representatives of the deceased party are brought on record, the execution would proceed further.

In view of the aforesaid position in law the execution once started within time would not abate due to death of a party or for want of substitution of the heirs and legal representatives rather it would remain pending with no progress until and unless someone as the heir or legal representative of the party comes on record and starts pursuing the same.

This is also the opinion of the Supreme Court in (1998) 3 Supreme Court Cases 149 V. Uthirapathi Vs. Ashrab Ali and others wherein it has been held that no time limit is prescribed for bringing on record the heirs and legal representatives of the parties in execution and therefore the proceedings would not abate and remain pending leaving it open in case of death of decree holder/judgement debtor to bring on record the heirs and legal representatives at any time.

In view of the aforesaid facts and circumstances, as the provisions of Rule 3 and 4 of Order XXII C.P.C. are not applicable to execution proceedings and there is no provision prescribing time for bringing on record the heirs and legal representatives of any deceased party to the execution or for the abatement of the proceedings, there was no necessity for moving any application for seeking condonation of delay for the purposes of substitution and the petitioner could have been brought on record at any time, notwithstanding the time gap between the death of the party and the filing of the application.

Accordingly, I find no merit in this petition and the same is **dismissed** with no order as to costs.

Case Law discussed:

1.Uthirapathi Vs. Ashrab Ali and others (1998) 3 Supreme Court Cases 149 V. (Para 14)

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

1. Heard Sri J.K. Mishra, learned counsel for the petitioner.

2. The decree passed in S.C.C. suit has been put in execution against one of the judgement debtors Ramdei.

3. The petitioner is one of the sons of the aforesaid judgement debtor Ramdei.

4. During the pendency of the above execution proceedings as the judgement debtor Ramdei died, the decree holders applied for bringing on record her heirs and legal representatives including the petitioner. The said application has been allowed by the order dated 05.03.2016 and the revision of the petitioner preferred against the same has been dismissed on 27.05.2016.

5. The petitioner has come up in this petition against the above orders dated 05.03.2016 and 27.05.2016.

6. In challenging the above orders, the argument is that the substitution application in respect of the deceased judgement debtor Ramdei was moved long after her death without an application for seeking condonation of delay in filing it but even then the court has permitted substitution.

7. It is not the case of the petitioner that he is not the son or the heir of the deceased judgement debtor and is not liable to be substituted in her place.

8. Once the above aspect of the matter is not disputed and the petitioner has rightly been substituted, he suffers no prejudice except for contending that as the delay in fling the substitution application was not condoned, the execution stood abated and cannot proceed against him.

9. The above contention or suggestion has no legal legs to stand.

10. The procedure of substitution of the parties in the event of death of either the plaintiff or the defendant or the appellant or the respondent as the case may be is provided under Rules 3 and 4 of Order XXII C.P.C. which also provides if substitution is not carried out within time, the proceedings of the suit or the appeal as the case may be shall abate.

11. Rule 12 of Order XXII C.P.C. inter alia lays down that nothing in Rules 3 and 4 of Order XXII shall apply to proceedings in execution of a decree. In other words, the provisions of Rules 3 and 4 of Order XXII are not applicable to execution proceedings meaning thereby that the execution proceedings would not abate if the heirs and legal representatives of the deceased party to the execution proceedings are not brought on record within the time, if any, specified.

12. It can be explained in a different manner so as to mean that if after the filing of a execution proceedings in time, either the decree-holder or the judgement debtor dies and their legal representatives do not come on record, there would be no abatement of the execution proceedings. If there is no abatement of the execution proceedings they would remain pending on record of the court and as and when the heirs or legal representatives of the deceased party are brought on record, the execution would proceed further.

13. In view of the aforesaid position in law the execution once started within time would not abate due to death of a party or for want of substitution of the heirs and legal representatives rather it would remain pending with no progress until and unless someone as the heir or legal representative of the party comes on record and starts pursuing the same.

14. This is also the opinion of the Supreme Court in **(1998) 3 Supreme Court Cases 149 V. Uthirapathi Vs. Ashrab Ali and others** wherein it has been held that no time limit is prescribed for bringing on record the heirs and legal representatives of the parties in execution and therefore the proceedings would not abate and remain pending leaving it open in case of death of decree holder/judgement debtor to bring on record the heirs and legal representatives at any time.

15. In view of the aforesaid facts and circumstances, as the provisions of Rule 3 and 4 of Order XXII C.P.C. are not applicable to execution proceedings and there is no provision prescribing time for bringing on record the heirs and legal representatives of any deceased party to the execution or for the abatement of the proceedings, there was no necessity for moving any application for seeking condonation of delay for the purposes of substitution and the petitioner could have been brought on record at any time, notwithstanding the time gap between the death of the party and the filing of the application.

16. Accordingly, I find no merit in this petition and the same is **dismissed** with no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE PRABHAT CHANDRA TRIPATHI, J.

Criminal Revision No.- 4617 Of 2011

V.S. Mittal **...Revisionist**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for Revisionist:
Sri Dharmendra Singhal

Counsel for Opposite Parties:
Government Advocate

Prevention of Food Adulteration Act -- Sections 7/16 -- Proprietary Food -- Rule 37-A and Rule 37-D of Prevention of Food Adulteration Rules, 1955 -- Summoning Order -- Application of Judicial Mind -- Revisionist-manufacturer of 'Deep Classic Mild Fat', a proprietary food, challenged the summoning order dated 06.08.2011 passed by the Additional Chief Judicial Magistrate Ist, Saharanpur in Complaint Case No. 2185 of 2011 under Sections 7/16 of the Prevention of Food Adulteration Act -- contended that 'Deep Classic Mild Fat' being a proprietary food as defined under Rule 37-A of the Prevention of Food Adulteration Rules, 1955 (meaning food not standardized under the said Rules), the Magistrate had summoned him mechanically without application of judicial mind and the order is a cyclostyled/typed order with only a date filled in -- Held: Public Analyst, U.P., Lucknow in his report categorically stated that the sample contains less amount of milk fat and more amount of other edible fat; the manufacturer declared it as 'not Ghee & tastier than Deshi Ghee', which is a violation of Rule 37-D of the Prevention of Food Adulteration Rules, 1955, rendering the sample 'misbranded' -- the complaint was filed by the Food Inspector, District Jhansi before the Magistrate who, after considering the material available on record, took cognizance and summoned the accused -- the learned Magistrate applied complete judicial mind -- the decisions cited by the revisionist are based on different facts and do not apply.

Criminal Revision Dismissed -- Impugned order dated 06.08.2011 passed by the Additional Chief Judicial Magistrate Ist, Saharanpur summoning the revisionist under Sections 7/16 of the Prevention of Food Adulteration Act in Complaint Case No. 2185 of 2011 upheld -- impugned order suffers from no illegality or infirmity -- no interference warranted -- revision dismissed -- interim order, if any, vacated. (Para 3)

Case Law Discussed:
1. Ram Pratap Singh and others v. State of U.P., 1991 JIC 333
2. M/s Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, decided on 4.11.1997 (Supreme Court)

(Delivered by Hon'ble Prabhat Chandra Tripathi, J.)

1. Heard Sri Dharmendra Singhal, learned counsel for the revisionist and learned A.G.A. for the opposite parties.

2. The instant criminal revision has been preferred by the revisionist for setting aside the order dated 06.08.2011 passed by the learned Additional Chief Judicial Magistrate Ist, Saharanpur in **Complaint Case No. 2185 of 2011-State Vs. Naresh Jain and others**, whereby the revisionist has been summoned under Section 7/16 of the Prevention of Food Adulteration Act.

3. It is submitted by the learned counsel for the revisionist that the revisionist is the manufacturer of Deep Classic Mild Fat, which is a proprietary food and Rule 37-A of the Prevention of Food Adulteration Rules, 1955 defines the proprietary food and the proprietary food means a food which has not been standardized under the Prevention of Food Adulteration Rules, 1955. It is further submitted that the learned Magistrate has summoned the revisionist in a mechanical manner without any application of mind to the facts of the case and the material available on record. It is next submitted that this is not a chalani report and the impugned order is a cyclostyled/typed one. Simply a date has been filled up in the order dated 6.8.2011.

4. Learned counsel for the revisionist has relied upon a decision of this Court in the case of ***Ram Pratap Singh and others Vs. State of U.P., 1991 JIC 333*** and also a decision of the Apex Court in the case of ***M/s Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others, decided on 4.11.1997.***

5. I have perused the record which clearly shows that a complaint was filed by Sri Chandrakant Bajpayee, Food Inspector, District Jhansi and a report was submitted by the Public Analyst U.P. Lucknow in which it has been categorically mentioned that "the sample contains less amount of milk Fat and more amount of other edible fat. Manufacturer has declared as it is not Ghee & tastier than Deshi Ghee, which is violation of Rule 37-D of the Prevention of Food Adulteration Rules, 1955. Hence the sample is misbranded." The complaint has been filed by the Food Inspector, District Jhansi before the learned Magistrate which has been registered and after considering the material available on record, cognizance has been taken by the learned Magistrate. Thereafter the accused Naresh has been summoned by the court concerned through summons.

6. Moreover, the accused-revisionist has been summoned through summons and the case is at the stage of appearance of the accused persons. The order sheet dated 21.9.2011 of the concerned Magistrate reveals that the bail application of the accused Naresh has been allowed.

7. So far as the non-application of judicial mind by the Additional Chief Judicial Magistrate, Court No. 6, Jhansi is concerned, the learned Magistrate has taken cognizance upon the complaint filed by the Food Inspector and passed the impugned order after applying complete judicial mind.

8. The decisions cited by learned counsel for the revisionist are based on different facts and do not apply in the present case.

9. In view of the above, the impugned order 6.8.2011 passed by the learned Magistrate suffers from no illegality or infirmity. No interference is warranted by this Court at this stage. The revision sans merits and is accordingly dismissed. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE VIPIN SINHA, J.

Criminal Appeal No.- 4922 Of 2006
&
Criminal Appeal No.- 5089 Of 2006

Amar Singh **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for Appellant:
Sri Kamal Krishna, Sri Anubhav Trivedi, Sri Dilip Kumar, Sri M.D. Singh Shekhar, Sri R.M. Singh, Sri R.N. Pandey, Sri Rajarshi Gupta, Sri Rajeev Gupta, Sri Rakesh Pandey, Sri Ravindra Sharma, Sri Satish Trivedi, Sri Shashi Nandan, Sri Suresh Singh, Sri Sushil Kumar Dwivedi, Sri V.S. Chaudhary

Counsel for Respondent:
Government Advocate, A.G.A., Sri A.K. Srivastava, Sri Narendra Kr. Singh Yadav, Sri Vishnu Pratap

Murder -- Section 302 read with Section 34 I.P.C. -- Three Accused on Motorcycle -- Broad Daylight Shooting -- Motive -- Plot Dispute and Extortion -- Accused-appellants Jai Singh, Amar Singh and Dayaram Lodh were convicted and sentenced to life imprisonment under Section 302/34 I.P.C. and fine of Rs. 10,000/- each by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur; Amar Singh additionally convicted under Section 25 Arms Act to 3 years R.I. with Rs. 5,000/- fine -- prosecution case is that on 4.7.2003 at 6:15 P.M., the three accused arrived on one motorcycle at the spot near the plot of deceased Ram Bahadur, Jai Singh and Amar Singh fired upon the deceased while Dayaram exhorted 'the work is done, let's go' -- motive was that accused persons Amar Singh and Jai Singh were demanding Rs. 80,000/- from deceased Ram Bahadur on account of plotting business dispute which the deceased had refused -- evidence of PW-2 Ram Khelawan (cousin brother of deceased) and PW-3 Smt. Shiv Pyari (wife of deceased) held to be consistent, natural and trustworthy -- their presence at the place of occurrence was natural and could be easily explained -- medical evidence of PW-4 Dr. N.K. Saxena corroborates the FIR case. (Paras 5-11)

Murder -- Evidence -- Hostile Witness -- Independent Witness -- PW-1 Turned Hostile -- Effect on Prosecution Case -- Held: PW-1 Hari Shanker Lodh, the only independent witness (in front of whose house the incident took place) was declared hostile as he did not support the prosecution -- however, where remaining eyewitnesses PW-2 and PW-3 are natural witnesses whose presence is explained and whose testimony is consistent with the medical evidence and the FIR, the prosecution case does not fail merely because the only independent witness turned hostile -- courts must not acquit accused merely on account of a hostile witness if the rest of the prosecution evidence is cogent, consistent and credible. (Paras 6-8)

Murder -- Evidence -- FIR Anti-Dated/Anti-Timed -- Overwriting in Chik Report -- Defective Investigation -- Defence contended that the FIR is anti-dated and anti-timed, there is overwriting in the original chik report, no investigation was done on 4.7.2003 and the panchayatnama was done on the next day -- Held: the nakal rapat (G.D. Entry No. 18 dated 4.7.2003 at 20:35 hrs) clearly shows that the FIR was lodged promptly on the evening of the incident at 8:35 P.M. -- panchayatnama was done the next morning as it was dark at night, which was also admitted by defence witness DW-1 -- defective investigation by itself cannot be made a ground for acquitting the accused if the ocular and medical evidence is consistent and credible -- in the presence of sufficient ocular and medical evidence, acquittal is not proper only because investigation is defective -- courts must ensure that criminal justice is salvaged despite defects in investigation. (Paras 9-11)

Murder -- Section 25 Arms Act -- Recovery of Country-Made Pistol (Tamancha) -- Conviction Upheld -- Held: PW-7 H.C. 3 Mohd. Sayyaddin who is the witness of the recovery of tamancha and PW-5, PW-6 and PW-8 who are the investigating officers and police personnel have supported the prosecution case -- the empty cartridge was also recovered from the place of occurrence -- prosecution has proved the possession of the country-made pistol by appellant Amar Singh -- conviction under Section 25 of the Arms Act along with conviction under Section 302/34 I.P.C. is upheld. (Para 12)

Both Criminal Appeals Dismissed -- Judgment and order dated 22.08.2006 passed by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur in Session Trial Nos. 569 of 2003 and 570 of 2003 arising

out of Case Crime Nos. 137 of 2003 and 139 of 2003 affirmed -- Criminal Appeal No. 4922 of 2006 (Amar Singh) and Criminal Appeal No. 5089 of 2006 (Jai Singh and another) both dismissed (Paras 12-13)

Case Law Discussed:
1. State of M.P. v. Brij, 2005 (2) Crimes 300 (D.B.) (M.P.)
2. Allarakha K. Mansuri v. State of Gujarat, (2002) 1 Crimes 322; AIR 2002 SC 1051
3. Ram Bali v. State of U.P., (2004) 2 Crimes 493; AIR 2004 SC 2329
4. State of W.B. v. Mir Mohammad Omar, (2000) 4 Crimes 1; AIR 2000 SC 2988
5. State of U.P. v. Hari Mohan, (2000) 4 Crimes 234; AIR 2000 SC 3157
6. State of Karnataka v. K. Yarappa Reddy
7. V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 606

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Vipin Sinha, J.)

1. Heard learned counsel for the appellants and learned AGA for the State.

2. With the consent of learned counsel for the parties, the present two appeals are being heard together and disposed off finally.

3. These criminal appeals arise out of the judgment and order dated 22.08.2006 passed by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur in Session Trial Nos. 569 of 2003 and 570 of 2003 arising out of case crime nos. 137 of 2003 and 139 of 2003 whereby accused-appellants, namely, Jai Singh, Amar Singh and Dayaram Lodh have been convicted and sentenced to life imprisonment under Section 302/34 IPC and a fine of Rs. 10,000/- each and in default of payment of fine, they would further undergo two years additional rigorous imprisonment. Accused-appellant Amar Singh was convicted and sentenced to undergo three years rigorous imprisonment under Section 25 of the Arms Act and a fine of Rs. 5,000/- and in default of payment of fine, the accused-appellant Amar Singh was to further undergo one year additional rigorous imprisonment and all the sentences of accused-appellant Amar Singh was to undergo separately.

4. Brief facts, as per the prosecution case as set up in the FIR are that on 4.7.2003 the cousin brother of the complainant, namely, Ram Bahadur had gone to brickkiln of the Barkat Singh to deposit the money of the brick. The complainant along with his cousin brothers, namely, Ram Pratap, Sohan Lal, wife of Ram Bahadur, namely, Shiv Pyari and Gulab was sitting near the house of Hari Shankar Lodh @ Badku. At about 6:15 in the evening, when Shyam Bahadur came back by tempo from the brickkiln of Barkat Singh and started talking to the complainant and other persons, at that time Jai Singh came on a motorcycle on which the accused Amar Singh and Dayaram Lodh were sitting behind him. Accused Jai Singh and Amar Singh had fired upon Ram Bahadur on account of which Ram Bahadur had fallen down and thereafter accused Jai Singh having reloaded had again fired upon the deceased, whereupon the other accused Dayaram said that the work is done and lets go. Thereafter the accused persons had gone towards Fatehpur on their motorcycles after threatening the witnesses. Due to fear, the complainant had not chased the accused persons

and Hari Shankar Lodh had shut down the shutter of his house and door and the people on the road had started running away here and there. The brother of the complainant, namely, Ram Bahadur had been doing business of plotting along with the accused persons, namely, Amar Singh and Jai Singh at Fatehpur. There was also a dispute with regard to plot between the parties and a case is also pending between them in the Court. Accused persons, namely, Amar Singh and Jai Singh wanted to take Rs. 80,000/- forcibly from the brother of the complainant and the brother of the complainant had refused to do so on account of which, accused persons, namely, Amar Singh in collusion with Jai Singh and Dayaram Lodh had murdered the brother of the complainant. Accused Dayaram is a close friend of Jai Singh. The said incident had occurred near the house of Hari Shankar Lodh, gram Madariyapur P.S. Shah Thana Ghazipur, District Fatehpur. The complainant on 4.7.2003 at about 20:35 in the night had given written taharir to the P.S. Shah Thana Ghazipur District Fatehpur (Exhibit-ka-1) with regard to the said incident and a case under Sections 302/34, 506 IPC and 7 Criminal Law Amendment Act being case crime no. 137/03 has been registered at Chauki Shah, Thana Ghazipur, District Fatehpur.

5. Before the Court proceeds to examine the evidence on record, it would be appropriate to briefly summarize the contentions as raised by learned counsel for the appellants.

6. It has been contended by learned counsel for the appellants that the only independent witness, namely, Hari Shanker Lodh in front of whose house the alleged incident took place though examined as PW-1 before the trial court, but he did not support the case of the prosecution pertaining to the participation of the accused-appellants in the alleged incident and he was declared as hostile. It has further been contended that two other eye witnesses, namely, Ram Khelawan who was examined as PW-2 and Smt. Shiv Pyari who was examined as PW-3 are the family members of the deceased, namely, Ram Bahadur (cousin brother and wife respectively) and the other three witnesses, namely, Ram Pratap and Sohan Lal who are the real brothers of the deceased and Gulab who is the cousin brother of the deceased, namely, Ram Bahadur have not been examined by the prosecution. Similarly another brother of the deceased, namely, Ram Prakash who was the scribe of the FIR was also not examined by the prosecution. It has also been contended that the FIR is anti-dated/anti-timed documents and there are manipulation with the original chick report inasmuch as overwriting is there.

7. A number of contentions have been raised on the part of the appellants with regard to the conduct of the Investigating Agency and with regard to the availability of the 'jild panchayatnama', it is contended that even in the case diary there is no mention of any investigation being carried out by the police personnel in the evening of 4.7.2003 even then they claim that the FIR was lodged and they had reached the place of occurrence. It is further contended that the investigation of the police is defective and there are laches in the investigation and in fact it has been seriously pointed out to that the FIR is anti-dated and anti-timed and thus, the report being anti-timed, the entire story of the prosecution becomes doubtful. It is also contended that a number of contradictions exist on record with regard to the medical report, testimony of PW2 and PW-3. It is next contended that the conduct of the eye witnesses was unnatural inasmuch as while the deceased was being fired upon, all the real brothers including his wife and cousin brother were present at the place of incident,

however, no attempt was made to help the deceased or to catch the assailants. It is further contended that there are material contradictions in the testimony of PW-1 and PW-2 which creates a doubt with regard to the presence of PW-1 and PW-2 at the place of occurrence. It is also contended that in fact no investigation was done on 4.7.2003 and the entire investigation has been done on 5.7.2003 and thus it has been pointed out that the entire prosecution story is false and fabricated and thus the appellants are entitled to grant of indulgence of this Court and the appeal is allowed.

8. Keeping in view the aforesaid contentions, we now proceed to examine the evidence on record.

9. The prosecution has examined as many as nine witnesses in support of its case;

10. The witness of fact, namely, Hari Shanker Lodh has been examined as PW-1 who however has been declared as hostile.

11. Ram Khelawan, who is the eye witness, has been examined as PW-2 who in his statement has clearly stated that *"घटना 4 जुलाई 2003 की है। शाम के 6 सवा 6 बजे की घटना है। मृतक राम बहादुर मेरा चचेरा भाई था। मैं प्लाट के पास बैठा था जहाँ पर मकान बन रहा था। मेरा भाई मृतक भी उस समय टेम्पो से उत्तरकर प्लाट की तरफ आ रहे थे। सड़क से दस कदम पर मकान बनाने का काम हो रहा था। तो मृतक ने हम लोगों से पूछा कि मकान का मोरम आदि इकठ्ठा करने का काम हो गया। हमने कहा कि काम हो गया। तभी तीनों मुलजिमान एक ही मोटर साइकिल से घटनास्थल की ओर आये। मुलजिमान ने सम बहादुर को गोली मार दी। पहली गोली जय सिंह ने चलाई जो मृतक के लगी। उससे मृतक मौके पर गिर गया। फिर अमर सिंह ने गोली चलायी। जो गोली मृतक की छाती पर लगी। तीसरी (का०फ०) भी जय सिंह ने ही मारी वह गोली भी मृतक को लगीं।दयाराम ने गोली नहीं चलायी।"* He Further stated that *"मौके पर ही राम प्रकाश ने तहरीर मुलजिमान के खिलाफ लिखायी, जिसको सुनकर मैने दस्तखत किये। कागज सं० 3 अ/2 पर मेरे हस्ताक्षर है। इस प्रदर्श क-1 डाला गया। तहरीरी रिपोर्ट को ले जाकर शाह चौकी पर दिया।"* He further stated that *"मैने मुलजिमान को मोटर साइकिल पर आते हुये 20,22 कदम से देख लिया था। मृतक हमसे 10,12 कदम दूर था। मुलजिमान ने अलग-अलग फायर किये। जय सिंह ने दक्षिण की ओर से मृतक पर फायर किया। मैं मृतक के पूरब तरफ था। मृतक का मुँह उत्तर पूरब की आर था। जय सिंह द्वारा किया गया फायर मृतक की पीठ पर लगा। मृतक वः जय सिंह के बीच लगभग दो कदम का फासला था। फायर लगने पर मुंह के बल गिरा।* He further stated that *"पहले फायर पर मृतक जिन्दा था। चिल्लाया था, दूसरे फायर के बाद नहीं चिल्लाया। वह मर चुका था। उसके बाद तीसरा फायर हुआ। घटना के समय में, रामप्रताप, गुलाब, शिवप्यारी, मोहन लाल थे। शिवप्यारी मृतक से 10,12. कदम दूर होगी। मृतक के शरीर से खून गिरा था जो कपडे पर लगकर व जमीन पर गिरा था। मृतक के मरने के बाद शिवप्यारी मृतक के पास जब पहुंची तब मुलजिमान चले गये थे। शिवप्यारी भी अपने पति की लाश से लिपटी थी। शिव प्यारी के कपडे पर लिपटने के कारण खून लग गया था। मैं लाश से लिपटा था। मेरे भी कपड़ों पर खून लग गया था। वही कपड़े पहने में थाने गया था। शिवप्यारी थाने नहीं गयी। मैंने बताया था कि हमारे कपड़ों पर भी खून लगा है। लेकिन दरोगा जी ने कंपड़े हमारे नहीं लिये। जीप में लाईट की रोशनी थी। रात की वजह से पंचायतनामा तैयार नहीं हुआ।"* He further stated t *"जो पहली गोली जयसिंह ने राम बहादुर को मारी वह उसके पीठ में लगी। बहादुर के पीठ की तरफ से गोली मारी गयीं थी। और वह मुंह के बल गिरा था सीधा हो गया था। जब मृतक की पीठ में गोली लगीं उस समय उसका मुह उ पूरब के कोने की तरफ था। गोली दो कदम दूर से मारा था। तीनों फायर दो कदमकी दूरी से हुये थे।"*

12. Shiv Pyari, who is the wife of the deceased and also the eye witness has been examined as PW-3 and in her statement she stated that *"मुल्जिमान हाजिर अदालत अमर सिंह, जयसिंह का दयाराम को घटना के पहले से जानतीं पहचानती हूँ मुलजिम दयाराम मेरे गांव का रहने वाला है। मुल्जिम जयसिंह ग्राम गुढ़ोरा का रहने वाला है जो वर्तमान*

समय में खुशवंत राय शहर को ही में रहता है तथा अमर सिंह भी गुढोरा का रहने वाला हैं तथा इस समय खुशवंत राय शहर में रहता है।

मृतक स्व० राम बहादुर उर्फ राम औतार मेरे पती थे घटना के पहले से मेरे पतीं व मुल्जिमान अमर सिंह व जय सिंह से जमीन के सम्बन्ध में रजिश थी जिस जमीन के वावत रंजिश थी वह प्लाट की जमीन थी मुल्जिमान जयसिंह वः अमर सिंह व मेरे पती जमीन के प्लाट बनाकर बेचते थे। मुलजिमान जयसिंह व अमर सिंह मेरे पती से लड़ते थे। तुमने ज्यादा जमीन बेंच लिया है मेरे पती से 80 हजार रुपये की मांग करते थे। जिसे मेरे पती ने देने को इन्कार किया इसी पर मेरे पती व मुल्जिमान से रंजिरा थीं। मुल्जिम दयाराम, जयसिंह व मुलजिम अमर सिंह का मेली हैं।

घटना 4 जुलाई सन् 2003 समय 6 वा सवा छह बजे शाम की है घटना के समय अपने प्लाट में थी मेरे साथ राम खेलावन, राम प्रताप, सोहन लाल व गुलाब भी मौजूद थे। मेरे पती स्व० राम बहादुर वरकत सिंह के भठ्ठे में ईटा का पैसा जा करने गये थे वहाँ से जमा करके टैम्पों से वापस लौटकर प्लाट की तरफ जा रहे थे और हमसे पूछा कि मौरंग व ईटा काम हो गया उसे इकठ्ठा कर दिया कि तभी एक मोटर साइकिल से दक्षिण दिशा से हाजिर अदालत मुल्जिमान आये। मोटर साइकिल रोड के किनारे खडी किया और उतर कर आये और तीनों मोटर साईकिल से उतर कर मेरे पति की तरफ आये और जय सिंह ने पहले मेरे पती को पीछे से गोली मार दिया मेरे साईकिल से दक्षिण दिशा से हाजिर अदालत मुल्जिमान आये। मोटर साइकिल रोड के किनारे खड़ीं किया और उत्तर कर आये और तीनों मोटर साइकिल से उत्तर कर मेरे पति की तरफ आये और जय सिंह ने पहले मेरे पत्ती को पीछे से गोली मार दिया मेरे पतीं मुंह के बल चिल्लाते हुये गिर पड़े फिर तुरन्त तड़पते हुये चित हो गये तब मुलजिम अमर सिंह ने तमंचे से गोली मार दी जिसकी गोली मेरे पती की छाती में लगी तीसरी फायर जयसिंह ने किया जो चेहरे में लगी, मुलजिम दयाराम ने कहा चलो काम हो गया है। मुल्जिमान यह धमकी देते हुये चले गये कि अगर किसी ने हमारे खिलाफ गवाहीं दिया तो उसका भी यहीं हाल होगा और यह कहते हुए हाथों में तमचा लिये हुए फतेहपुर की तरफ चले गये।" She further stated that "यह भी कहना गलत है कि घटना के दूसरे दिन सुबह में न रही हूँ और न लाश नहीं हो। मैं अपने पति को अपने जान से ज्यादा चाहती थी मैं अपने पति के साथ बातचीत कर रहीं थी मुझसे 10-12 कदम दूरी पर मेरे पति थे। एक ही जगह पर मैं तथा मेरा पति बात नहीं कर रहे थे। मेरे पति घटना के समय 10-12 कदम कि दूरी पर आकर खड़े हो गये तथा पूछने लगे।

पति को जब मैने पहिले पहल देखा तो पति मुझसे 10-12 कदम दूरी पर पश्चिम दक्षिण दिशा में थे। एक दो मिनट लगभग उसी स्थान पर खड़े हो गये।

मोटर साइकिल को 20-22 कदम दूरी पर पहली बार देखा था। जहाँ पर मैने देखा वहीं पर मोटर साईकिल खड़ी हो गयीं। और मुल्जिमानों को मोटर साइकिल खड़ी करते समय देख लिया। तब उत्तर कर मेरे आदमी के तरफ जाने लगे तब मैं समझ गयी कि नियत खराब है।

जब मुझे समक्ष में आया कि मुल्जिमानों कि नियत खराब है तब उस वावत मुल्जिमान मुझसे 10-15 कदम की दूरी दक्षिण दिशा में थे उस समय मुल्जिमानों से मेरे पति दो तीन कदम दूर दक्षिण दिशा में थे में नहीं बता सकती कि मुल्जिमान उस स्थान से कितने कदम चलकर फायर किया फायर लगते ही मेरा आदमी जमीन में गिर गया गिरने के पहिले मुल्जिमानों ने कुल तीन गोली मेरे पति को मारे थे। मेरा पति मुह के बल गिरा था। जिसके बाद मुल्जिमान ने मेरे पति के ऊपर दो गोली मारी थी।" She further stated that "मुझे यह जानकारी नहीं है कि प्लाटिंग के अलावा हमारे पति के पास कमाने का और कोई जरिया नहीं है। 10-12 साल से हम पति पत्नि के रूप में रहते थे। जय सिंह ने जमीन के सम्बन्ध में घटना के पहले मेरे पति के विरूद्ध एक मुकदमा दाखिल किया था जिसमें अमर सिंह भी शामिल थे।"

13. Dr. N.K. Saxena, who had conducted the postmortem on the body of deceased, has been examined as PW-4 and he found the following injuries on the body of the deceased;

"दि० 5.7.03 को शव विच्छेदन गृह में चिकित्साधिकारी के रूप में मेरी ड्यूटी थी। उस दिन मृतक राम बहादुर सविता उम्र लगभग 58 वर्ष पुत्र श्री भुइयादीन नि० ग्राम मदरिमापुर थाना गाजीपुर जिला फतेहपुर के शव को सर्व मुहर हालत में

एस०ओ० थाना गाजीपुर ने भेजा था जिसकी शिनाख्त कां० नं0 709 शिवाजी सिंह थाना गाजीपुर जिला फतेहपुर ने की थीं जो शव को लाए थे। शव का विच्छेदन उक्त दिनांक 3 पी०एम० पर मैने किया था।

बाह्य परीक्षण

मृत्यु के पश्चात की अकड़न उपरी हिस्से जा चुकी थी एवं निचले हिस्से में कागज फटा थी। दाहिनी आँख खुली थी, बायी आँख तथा मुँह बन्द थे।

मृत्यु पूर्व आयी चोटें

1- आग्नेयास्त्र का प्रवेश घाव नाक में दाहिनी ओर दाहिनी नथुने के निचले हिस्से से 25 से.मी उपर था। तथा दाहिनी आँख के अन्दर के कोण से एक से०मी० नीचे था जिसकी नाप 1.5 से०मी० 1 से०मी० गुहा की गहराई तक था। जलन बर्निंग मौजूद थी तथा घाव के चारो तरफ खरास के निशान थे।

2- आग्नेयास्त्र के निकास का घाव दाहिनी खोपड़ी में पीछे की ओर दाहिने कान से 7 से०मी० पीछे की तरफ जो 6 से०मी० 5 सं०मी० कूप तक गहरा था जिसके किनारे बाहर की तरफ थे जो चोट न०। से संबद्ध थी।

3 आग्नेयास्त्र प्रवेश का घाव पीट पर बायीं तरफ बाये पखौरे के निचले कोण से 5 से०मी० नीचे था। जिसका साइज 1 से०मी० कूप तक गहरा था जिसमें वर्निंग मौजूद थी। घाव के किनारे खरास मौजूद थीं।

4- आग्नेयास्त्र के निकास का घाव दाहिने सीने में दाहिने निपूल से 4.5 से०मी० अन्दर की तरफ था जो 3 से०मी० 2 से०मी० कूप तक गहरा था जिसके किनारे बाहर की ओर थे। यह चोट, चोट नं03 से संबद्ध थी।

5 आग्नेयास्त्र के पुराने का पाक सीन में की तरफ स निपुल से 6 से०मी० नीचे व बाहर की तरफ था जो चार बजे की स्थिति में था। जिसका साइज 1 से०मी० 1 से०मी० कूप तक गहरा था। उस पर बर्निंग मौजूद थी। घाव के किनारे पर खरास मौजूद थीं।

6 आग्नेयास्त्र के निकास का घाव बाये सीने पर बाये निपुल से 7 से०मी० नीचे 6 बजे की स्थिति में था जो 3 से०मी० 2 से०मी० कूप तक गहरा था जो चोट नं05 से संबद्ध था और उसके किनारे बाहर की ओर थे।

ऑतरिक परीक्षण

नाक के दाहिने तरफ की हड्डी टूटी हुयी थी। तथा शिर के पीछे की तरफ की हड्डी टूटी थी। (sic) क मस्तिष्क फटा हुआ था। शर के बेस की दाहिनी बीच (मध्य) की जेनियल कोसा की आगे व पीछे की दीवार टूटी थी। तथा पीछे की जेनियल कोसा आगे व पीछे की दीवाल भी टूटी थी। दाहिनी दूसरी, तीसरी चौथी व पॉचवी पसलियों टूटी थी। बाये तरफ की 3, 4 व 5 वीं पसलियों टूटी थी। प्लूरा दोनों, फेफड़े दोनो, के ऊपर की झिल्ली एवं हृदय फटे हुये थे। बच्छ कूप में 1500 एम०एल० रक्त मौजूद था। दाँत 16/15 थे। आमासय में 250 एम०एल० पचा हुआ अर्थ तरल पदार्थ मौजूद था। छोटी ऑत में पेस्ट जैसा खाद्य पदार्थ एवं गैस जगह जगह मौजूद थी। बडी ऑत में मल व गैश जगह जगह मोजूद थी। पित्तासय आधा भरा था। लीवर तिल्ली एवं मौजूद थी। पित्तासय आधा भरा था। लीवर, तिल्ली एवं दोनो गुर्दे फेल थे। पेशाब की थैली आशिक रूप से भरी थीं।

मेरी राय में मृतक की मृत्यु मृत्यु पूर्व पहुँचायीं गयीं आग्नेयास्त्र से हुये रक्त स्राव व सदमा के कारण हुयी थी। मृतक की मृत्यु लगभग एक दिन पूर्व हुयी थी।

शव से पेट एक, शर्ट एक, बनियायन एक, अन्डर वियर एक, सफेके धागा में रुद्राक्ष, सफेद धातु का छल्ला, एक बेल्ट कुल सात वस्तुये कब्जे में लिया था और उनको सर्व मुहर व सील मुहर करके शव लाने वाले सिपाही को दे दिया था।

शव विच्छेदन आख्या मैने वरवक्त शव विच्छेदन अपने लेख व हस्ताक्षर में तैयार किया था जो शामिल मिशिल कागज से 14 अ है व मेरे सामने है जिसकी मिशिल कागज से 14अ है व मेरे सामने है जिसकी मैं पुष्टि करता हूँ। इस पर प्रदर्श क 2 डाला गया।

मृतक की मृत्यु आग्नेयास्त्र मसलन तमंचा से दि० 4.7.03 को 6:15 बजे शाम को होना संभव है। शवः विच्छेदन आख्या में उल्लिखित मृत्यु पूर्व चोटे प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिए पर्याप्त है।"

14. Vimal Singh (Sub Insptector) has been examined as PW-5 who had prepared the panchnama of the deceased, namely, Ram Bahadur and in his statement he stated that *"दि० 4.07.03 को जब मे चौकी से अन्य पुलिस फोर्स के साथ चला उसके पन्द्रह मिनट बाद में घटनास्थल पर पहुँच गया था। इसके बाद घटनास्थल पर हम लोग करीब एक घंटा तक रुके रहे। इस एक घंटा में हम लोग मृतक को गोली मारने वालो को पता करते रहे तथा परिवार वालों से पूछताछ करते रहे। इसके बाद खुशवंत राय नगर मुलजिम अमर सिंह के घर आये और उसके घर के अंदर तलाशी लिया। अमर सिंह के घर करीब साढ़े ग्यारह बजे बारह बजे पहुँच गये थे। दुबारा घटनास्थल पर मैं दि० 5:07.03 को साढ़े नौ बजे सुबह मय एस०ओ० व अन्य पुलिस फोर्स जो मेरे साथ श्रा, पहुँचा। दि० 5.07.03 को सूरज कितने बजे उदय हुआ था मैं नहीं बता सकता। सूर्य उदय के समय दुबास मै घटनास्थल पर नहीं पहुँचा था। साढ़े नौ बजे सुबह पहुँचा था। यह कहना गलत है कि पंचायतनामा प्रदर्श क 3 के पेज एक में ऊपर मु० अपराध संख्या व दफाये मैने बाद मे लिखा हो। पंचायतनामा के पेज सं० एक में ऊपर यू एस 506, 306, 34 आई०पी०सी० एवं 7 किमी० ला० एमेन्डमेंट की धाराये लिखी है। यह कहना गलत है कि पंचायतनामा के पेज सं० 2 में नियुक्ति पचान के ऊपर की दो लाइने मैने बाद बढ़ाई हो। चिट्ठी आर०आई० प्रदर्श क 4, चिट्ठी सी०एम०ओ० प्रदर्श क 5, फोटो नाश क-6 व चालान नाश क 7 में कोई दफाये व काइम नम्बर नहीं लिखीं। He further stated that "घटनास्थल थाना गाजीपुर से दक्षिण पूर्व चौदह किलोमीटर दूर पड़ेगा। चौकी शाह से घटनास्थल चार किलोमीटर उत्तर तरफ है। मुकदमा मेरे सामने कायम हुआ और उसी समय अपराध संख्या पड़ गया था।" He further stated that "यह भी कहना गलत है कि चौकी से स्वानगी के समय में कोई जिन्दः पंचायतनामा वा अन्य आवश्यक कागजात लेकर न चला हूँ बल्कि बाद में दूसरे दिन पंचायतनामा के समय का० शिवाजी सिंह द्वारा पंचायतनामा जिल्द वा अन्य कागजात लाकर मुझे दिया हो।"*

15. Sri K.B. Singh, who is the Station Officer of P.S. Bhalva, District Fatehpur and is also the Investigating Officer of the present case, has been examined as PW-6 who in his statement stated that "*में दि० 4:7:03 को थानाध्यक्ष गाजीपुर के पद पर कार्यरत था। उस दिन में अपने हमराही का०. मो० असलम व चालक बदन सिंह के साथ सरकारी जीप से थाना क्षेत्र के गांव पमरौली पखरौली व शाह मोहम्मद का भ्रमण करते हुये चौकी शाह के सामने पहुँच कर इजहार बरियत लेते समय ग्राम मदरियापुर में हत्या होने की सूचना प्राप्त हुयी एवं घटना से सम्बधित नु०अ०सं० 137/03 वारा 302 आई०पी०सी० 34 व 504 आई०पी०सी० की नकल चिक व नकल स्पट प्राप्त हुयी। वादी मुकदमा श्री राम खेलावन पुत्र रामेश्वर सविता निं० मदरियापुर थाना गाजीपुर फतेहपुर चौकी के सामने मिला। जिसको घटना के सम्बध में बयान लेने के उपरान्त चौकी इंचार्ज एस०आई० श्री विमल सिंह व चांकी के सिपाही सुनीश कुमार हुकुम सिंह व जीतेन्द कुमार को नय वादी को साथ लेकर बहद ग्राम मदरियापुर फतेहपुर वादा मार्ग मदरियापुर नोड़ घटनास्थल पर पहुंचे। जहाँ हरिशंकर लोध के मकान के सामने मृतक राम बहादुर की लाश पड़ी थी। टार्च की रोशनी में देखा गया तो लहूलुहान लाश के पास दो खोखा कारतूस पड़े थे। दो खोसे कारतूस इस 315 बोर के थे। लाश से अलग हटकर मृतक की पत्नी व परिवार के लोग बिलख रहे थे। वहाँ पर एक बिक्री जल रहीं थी भय तथा आतंक का वातावरण था। गवाह बयान देने की स्थिति में नहीं थे। हरिशंकर लोध काफी बुलाने पर भी घर से नहीं निकला। टार्च की राशेनी से अन्य साक्ष्य तलासने का प्रयास किया गया। पर्याप्त प्रकाश की व्यवस्था न होने के कारण पंचायतनामा आदि की कार्यवाही सुचारू रूप से सभव न होने की स्थिति में घटनास्थलकी सुरक्षा हेतु का० सुनील कुमार व जीतेन्द कुमार को घटनास्थल पर रोक कर एस०आई० विमल सिंह व काठ हुकुम सिंह को हमराह लेकर अभि०गण की तलाश में खुशवतराम नगर पहुंच कर नामजदयू अमि० अमर सिंह के मकान में दबिश दी गयी परन्तु दस्तयाब नहीं हुआ। He further stated that "दूसरे दिन दि० 5:07:03 को में विवेचक मय हमराही जाए मोठ असलम एस०आई० विमल सिंह, काठ तुकुम सिंह, चालक बदन सिंह, सरकारी जीप से पुन घटनास्थल पर पहुंचा जहाँ मृतक के लोग मौजूद व अन्य लोग सीजू थे। He further stated that मांड पर ही जून आसूदा मिट्टी महान शार पटल पुराताल विवेचक मय हमराहीं का० मोठे असलम, एस०आई० विमल सिंह, का० हुकुम सिंह, चालक बदन सिंह, सरकारी जीप से पुनः घटनास्थल पर पहुंचा जहाँ मृतक के परिवार के लोग मौजूद व अन्य लोग मौजूद थे।" He further stated that "इसके पश्चात मौके पर हीं खून आलूद*

व सादा मिट्टी समक्ष गवाहान रामकिशोर पटेल पुत्र रामलाल व रामकिशोर पुत्र भोला नि०गण मदरियापुर कब्जे में ली गयीं। उन्हें अलग अलग डिब्बों में रखकर सर्व मुहर किया गया एवं नमूना मुहर तैयार किया। फर्द मौके पर तैयार कर सुनाकर गवाहान के हस्ताक्षर बनवाये गये। उक्त फर्द मेरे लेख व हस्ताक्षर में शामिल मिसिल हैं इस पर प्रदर्श क-10: डाला गया। केस डायरी में इन फर्द की नकल की गयी।

चौकी शाह से बुलाया गया आरक्षी का० शिवाजी सिंह द्वारा लाये गये पंचायतनामा जिल्द को एस०आई० श्री विमल कुमार सिंह को देकर पंचायतनामा की कार्यवाही मेरी मौजूदगी में एस०आई० विमल कुमार सिंह द्वारा की गयी थी। जिस पर मैने अपने हस्ताक्षर बनाये थे। पंचायतनामा प्रदर्श क 3 को देखदार गवाह ने कहा इस पर मेरे हस्ताक्षर है।" He further stated that *"में फिर चौकी शाह पहुंचा और पंचायतनामा के गवाहान एस०आई० विमल कुमार सिंह के बयान किये तथा का० शिवाजी सिंह का बयान लिया। इसके पश्चात ग्राम अथह में बरकत सिंह के भट्टे पर पहुँच कर मुनीम श्री फतेह बहादुर सिंह का बयान लिया। तथा मुनीम ने मृतक द्वारा दि० 4-07-03 को पाँच हजार रूपये जमा किये जाने की रसीद की छायाप्रति दिया। मुनीम ने बताया कि मृतक उस दिन रूपये जमा करने के बाद शाम साढे पाँच बजे टैम्पों से वापस घर चला गया था। स्सीन को सलग्न सी०डी० किया।"* He further stated that *"इस शव के पंचायतनामा भरने के लिये पंचायतनामा जिल्द व आवश्यक कागजात का0 709 शिवाजी सिंह दि० 5-07-03 को घटनास्थल पर पंचायतनामा भरने हेतु लेकर आये थे। उक्त का० शिवाजी सिंह चौकी शाह में कार्यरत थे। चौकी साह से मैं व एस०आई० विमल कुमार सिंह साथ साथ 4-07-03 को घटनास्थल के लिये चले थे। जब हम लोग चौकी से चले थे तब अपने साथ जिल्द पंचायतनामा व अन्य आवश्यक कागजात साथ लेकर चले थे।"* He further stated that *"इसके बाद उसी दिन केस डायरी में मैंने लिखा है कि "चौकी शाह के का0 709 शिवाजी सिंह मय पंचायतनामा जिल्द व दीगर कागजात के घटनास्थल पर उपस्थित आया है।"*

16. H.C. 3. Mohd. Sayyaddin has been examined as PW-7 and who is also the witness of the recovered tamancha

17. Constable no. 241 Akhilesh Tripathi has been examined as PW-8 who is also the writer of chik and G.D. and Sub Inspector Wanja Lal has been examined as PW-9 before the trial court and they have supported the case of the prosecution

18. Statements of the accused, namely, Amar Singh, Jai Singh and Daya Ram under Section 313 Cr.P.C. were recorded on 26.7.2006 respectively.

19. Reliance has also been placed in the statement of accused Jai Singh recorded under Section 313 Cr.P.C. wherein in response to question no: 4 he replied that *मुकदमा चला था, शेष गलतः है।*

20. Accused-appellants in their defence has examined the three witnesses, namely, Bajrang as DW-1, Jageshwar as DW-2, and Ganesh Prasad as DW-3 before the trial court

21. DW-1 Bajrang has totally denied the prosecution version and in his statement he stated that *"मेरे खेत हरीशंकर लोध के मकान के सामने फतेहपुर बहुआ रोड (बांदा सागर रोड) के पश्चिम लगे हुये है। मेरे खेतों में उत्तर लगा हुआ मेरे गाँव के श्री केशन नाई का ट्यूबवेल है। हरीशंकर लोघ के मकान के उत्तर रामबहादुर का प्लाट है। यह प्लाटः मेरे खेत से दिखाई देता है। आज से करीब तीन साल कुछ दिन हुये रात में रामबहादुर को किसी ने गोली मारने की बात मैने घर में रात में करीब 9-10 बजे सुनी थीं। उस दिन में दिन में 9-10 बजे अपने खेतों में धान लगवाने के लिये पानी लगाने व लेव करने गया था। उस दिन मैने अपने खेत में शाम आठ बजे तक काम किया था। इस बीच में कहीं गया नहीं था। आठः बजे शाम के बाद घर गया था। दिन में उस दिन समबहादुर के प्लाट में क हरीशंकर लोध के मकान के बगल में जब से मैं खेत गया तब से जब तक घर वापस नहीं गया तब तक वहाँ पर मैंने अपने गांव के राम खेलावन, राम प्रताप, सोहन लाल, गुलाब क रामबहादुर की ओर औरत को नहीं देखा न ये लोग वहाँ मौजूद*

थे। और न हीं मैने कोई वहाँ पर गोली यानीं फायर की आवाज सुनी और न हीं आठ बजे शाम तक राम बहादुर को गोली ही मारी गयी। और न हीं आठ बजे शाम तक कोई लाश ही पड़ी देखी।"

22. DW-2 Jageshwar in his statement stated that *"सत्यवान कोरी मेरे गांव में रामबहादुर के घर अक्सर आता जाता था। उसका आना जाना राम बहादूर को अच्छा नहीं लगता था। इसी बात को लेकर मेरे सामने कई बार रामबहादुर वः सत्यवान कोरों के बीच झगडा हुआ था। जिस रात रामबहादुर की लाश मिली थी उस दिन सत्यवान कोरी गांव मदरियापुर आया था। तब दिन में 10-11 बजे मेरे सामने राम बहद्युदर व सत्यवान कोरी के बीच झगडा हुआ था जिसका मैने बीच बचाव करा दिया था। सत्यवान कोरी सम बहादुर के घर अक्सर आता था। राम बहादुर एतराज करता था। इसी बात को लेकर झगडा अक्सर हुआ करता था। रामबहादुर की मृत्यु के बाद भी सत्यवान गांव आता जाता था।*

23. As far as the contentions of the leamed counsel for the appellants that the FIR is anti-timed and in fact no investigation was done on the date of alleged incident has been strongly refuted by the learned A.G.A.

24. Reliance has also been placed on the Nakal Rapat no. 18 which is Exhibit-K-5 and the same reads as follows:-

"नकल रपट रोज० आम स्पट नं0 18 समय 20.35 दि0 4/7.2003 पी० शाह पी०एस० गाजीपुर, फतेहपुर।

आगमन अगन्तुकगण वः दाखिला एक अदद तहरीर वा कायमी मु०अ०सं० 137/03 धारा 302/506/34 आई०पी०सी० 7 कि लॉ अमेण्डमेन्टः एक्ट।

इस समय श्री राम खेलावन एसओ० रामेश्वर सविता आर/ओ० ग्राम मदरियापुर एच/ ओ० केवई पी०एस० गाजीपुर फतेहपुर मय हमराहीं गुलाब सिंह एस/ओ० जागेश्वर व राम प्रकाश एस/ओ० मुझ्यादीन निवासीगण ग्राम मदरियापुर एच/ओ० केवई पी०एस० मदरियापुर फतेहपुर उपस्थित चौकी आकर हिन्दी लिखित व दस्तखतीं स्वयं के व लेखक राम प्रकाश एस/ओ० मुझ्यादीन आर/ओ० ग्राम मदरियापुर एच/ओ० केवई पी०एस० गाजीपुर फत्तेहपुर प्रा०पत्र बाबत स्वयं के चचेरे भाई राम बहादुर एस/ओ० भुझ्यादीन आर/ओ० उपरोक्त जमीनी विवाद व पैसे लेन देन के विवाद लेकर गोली, तमंचों से मारकर हत्या कर देना व जान से मारने की धमकी देकर भय व्याप्त करना सम्बन्ध दाखिल किया कि दाखिला तहरीर के आधार पर जरिये आर०टी० सेट कमांक पूछकर वसिराहत चिक द०पु०नं० 14/03 मु०अ०सं० 137/03 कित्ता कर धारा 302/506/34 आई०पी०सी० व तारीख घटना 4.7.03 समय 6:15 बजे शाम व सूचना रपट हाजा प्रचलित कायमी घटनास्थल हरिशंकर लोध के मकान के पास वहद ग्राम मदरियापुर वाफासला करीब 4 किमी० उत्तर दिशा। वमुद्दयत श्री राम खेलावन उपरोक्त बनाम (1) जय सिंह एस ओ० अज्ञात आर/ओ० खुशवन्तराय नगर पी०एस० कोतवाली फतेहपुर (2) अमर सिंह पटेल एस ओ० केवल प्रसाद आर/ओ० ग्राम गोदवरा पी०एस० किशनपुर फतेहपुर हाल पतोडखुशवन्तराय नगर पी०एस० कोतवाली फतेहपुर (3) दयाराम लोब एस/ओ० छिद्दू आर/ओ० मदरियापुर एच/आं० केंवई पी०एस० गाजीपुर फतेहपुर बतफतीशी अभियोग एस०ओ० कुँवर बहादुर सिंह थाना गाजीपुर फतेहपुर पंजीकृत किया गया, डेली जरायम रवाना होगी तकमीला तकमीला सम्बन्धित रजिस्ट्रान किया जावेगा, जरिये आर०टी० सेट सूचना अफसरान वाला दी गयी, चूंकि समय नाववत होने कारण पंचायतनामा कार्यवाही प्रातः की एस०ओ० कुँवर बहादुर सिंह थाना गाजीपुर फत्तेहपुर पंजीकृत किया गया, डेली जरायम रवाना होगी तकमीला तकमीला सम्बन्धित रजिस्ट्रान किया जावेगा, जरिये आर०टी० सेट सूचना अफसरान बाला दी गयी, चूंकि समय नावक्त होने कारण पंचायतनामा कार्यवाहीं प्रातः की जावेगी। इस सूचना पर मैं एस०आई० विमल कुमार सिंहः अन्दर मालगृह से एक जरब रिवाल्वर वः कारतूस लेकर मय हमराहीं कर्म०गण का0 617 हुकुम सिंह का0 286 सुनील कुमार कां0 184 जितेन्द्र सिंह एक-एक जरब राइफल व कारतूस दिलाकर मय हमराही थानाध्य क्ष महोदय जो कि चौकी हाजा पर मौजूद है नकल चिंक नकल रपट लेकर घटना स्थल पर मय आगन्तुकगण रवाना हुआ। आगन्तुकगण पठनीय कार्बन कापी चिक सुपुर्द किया गया। ताला माल गृह बंद ठीक सन्तरी प्रहरा दिखाया गया चाभी पूर्ववत पास काठमु० है एस०आर० तैयार कर प्रातः स्वाना किया जावेगा। चूंकि समय नांवक्त है चार्ज चौकी बजुम्मे अफसर मातहत किया गया।

जिल्द पंचायतनामा अन्य कागजात भी लिये गये।"

25. We find that the evidence of Ram Khelawan PW-2 and Shiv Pyari PW-3 who is the wife of the deceased is consistent and their presence at the place of occurrence cannot be disputed. The injuries as shown and the statement of the doctor the same being Dr. N.K. Saxena who has examined as PW-4 corroborates the case of the prosecution as set up in the FIR itself with regard to the nature and site of injuries. Similarly PW-5 S.I. Vimal Singh and PW-6 Sri K.B. Singh has also supported the case of the prosecution.

26. It may also be appreciated that there is laches on the part of the investigating agency, however, if we look at the law as laid down by the Apex Court in the case of ***State of MP v. Brij 2005 (2) Crimes 300 (DB) (MP)*** with regard to the defective investigation, if any, wherein it has been held as follows:

"In the presence of sufficient ocular and medical evidence, acquittal is not proper only if the investigation is defective. In the matter of defective investigation, the Court should be circumspect in evaluation the evidence but the prosecution case cannot be rejected on that ground."

27. Similarly in the case of ***Allarakha K. Mansuri v. State of Gujarat, 2002(1) Crimes 322, AIR 2002 SC 1051*** wherein it has been held by the Hon'ble Apex Court that "Defective investigation by itself cannot be made a ground for acquitting the accused." The same view has been expressed in the case of ***Ram Bali v. State of U.P. 2004(2) Crimes 493; AIR 2004 SC 2329*** wherein it has been held that "in a case of defective investigation, Court has to be circumspect in evaluating the evidence."

28. In the case of ***State of W.B. v. Mir Mohammad Omar, 2000 (4) Crimes 1: AIR 2000 SC 2988*** wherein it has been held by Hon'ble Apex Court that "Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation."

29. Similarly it has been held in the case of ***State of U.P. v. Hari Mohan, 2000(4) Crims 234: AIR 2000 SC 3157*** that *"Defective investigation cannot be made a basis for acquitting the accused if despite such defects and failures of the investigation a case is made out against all the accused or any one of them."*

30. A reference has also been made to the case of ***State of Karnataka v. K. Yarappa Reddy*** wherein the Hon'ble Apex court has held that *"It can be a guiding principle that as investigation is*

not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well nigh settled that even if the investigation is illegal or even suspicious the rest of evidence must be scrutinized independently of the impact of it. Otherwise criminal trial will plummet to that level of the investigating officers ruling the roost. The Court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made the casually for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit investigating officer's suspicious role in the case." The said judgment has been relied upon in the case of ***V.K. Mishra v. State of Uttarakhand 2015 (9) SCC 606.***

31. It may further be appreciated that even the defence witness Bajrang has admitted that on the date of incident it was a dark night and thus it is apparent that in view of the absence of light the actual punchayatnama was done on the next day in the morning since it was not possible to carry out the investigation in the darkness. The empty cartridge was also recovered and taken into possession on the next day. However, merely on account of some laches on the part of the investigating agency the entire prosecution story could not be disbelieved.

32. The court below while going through the evidence has rightly concluded that *"साक्षी 1 बजरंग अपने प्रतिपरीक्षण में यह स्वीकार करता है कि घटना वाली सरात अंधेरी थीं। इस साक्षी का खेत मृतक के प्लाट के पास हीं बताया गया है। इसके अतिरिक्त विवेचक, साक्षी एक पंचायतनामे के लेखक अभियोजन साक्षी 5 ने भी अपने साक्ष्य के पृष्ठ 7 पर यह कथन किया है कि घटना वाली रात अंधेरी थी। इस प्रकार अभियोजन पक्ष एवं बचाव पक्ष दोनों के हीं साक्ष्य से यह स्पष्ट होता है कि घटना वाली रात अंधेरी रात थी। अभियोजन साक्षी 5 इसी क्रम में आगे कथन करता है कि मौके पर प्रकाश की व्यवस्था न होने के कारण हम लोगों ने पंचायतनामे की कार्यवाही नहीं की थी। मौके पर लालटेन जल रही थी। जीप मोटरसाइकिल की लाइट में पंचायतनामा नहीं भरा जा सकता था। इसी प्रकार अभियोजन साक्षी-6 विवेचक ने भी मुख्य परीक्षण में बताया है कि पर्याप्त प्रकाश की व्यवस्था न होने के कारण पचायतनामा आदि की कार्यवाही सुचारू रूप से सभव न होने की स्थिति में उस दिन कार्यवाही नहीं हुई थी। मांक पर दो खोख्खा कारतूस उसने टार्च की रोशनी में देखा था। उसके द्वारा खोखा कारतूस कब्जे में उस दिन नहीं लिया गया किन्तु उसने घटनास्थल की सुरक्षा के लिये का० सुनील कुमार और जितेन्द्र कुमार को मौके पर ही रोक दिया था। जैसा विवेचक साक्षी कथन करता है। चूंकि मौके पर विवेचना की अन्य कोई कार्यवाही अंधेरे के कारण उस दिन नहीं की गयी और अभियुक्तगण की गिरफ्तारी के लिये विवेचक चले गये। इसलिये खोखा कारतूस भी कब्जे में उस दिन नहीं लिया गया और दूसरे दिन कब्जे में लेकर इसकी फर्द बनायी गयी। इससे यह नहीं कहा जा सकता कि खोखे को बाद में मौके पर बढ़ा दिया गया हैं क्योंकि तहरीर प्रदर्श क-1 में यह उल्लेख है कि मौके पर दो खोखा कारतूस पड़े हैं। विवेचक के अनुसार अंधेरे के कारण मौके पर उसी दिन फर्द इत्यादि न बनाया जाना विवेचक की लापरवाही कहा सकता हैं। इसके अतिरिक्त दूसरे दिन पंचायतनामें की कार्यवाही देर से प्रारम्भ करना भी पुलिस की उपेक्षा कहा जा सकता है किन्तु इससे सम्पूर्ण अभियोजन कथानक को तिरस्कृत नहीं किया जा सकता।"*

33. Thus after going through the entire evidence on record we find that the presence of the deceased at the place of occurrence cannot be disputed, there is a prompt FIR. Moreover, the presence of the eye witnesses can also not be disputed as they are natural witnesses and their presence at the spot was very apparent and could be easily explained. The statements of PW-2 Ram Khelawan and PW-3 Shiv Pyari who were the eye witnesses are consistent with each other as well as with the postmortem report.

34. In view of the aforesaid facts and circumstances of the case and also keeping in view the well discussed findings recorded by the court below, to which no perversity can be attributed, this Court finds no reason to interfere with the judgment and order dated 22.08.2006 passed by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur in Session Trial Nos. 569 of 2003 and 570 of 2003 arising out of case crime nos. 137 of 2003 and 139 of 2003 and accordingly, the same is affirmed. Both the two appeals are dismissed. Consequences to follow. No order as to costs.

35. Let a copy of the order be placed on record in connected Criminal Appeal No. 5089 of 2006.

36. A copy of the order be communicated to the CJM concerned for onward compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Jail Appeal No.- 5202 Of 2005

Narvedeshwar **...Appellant**
Versus
State Of U.P. **...Respondent**

Counsel for the Appellant:
Sri Danish Faridi, amicus curie

Counsel for the Respondent:
Govt. Advocate

Criminal Appeal – Conviction and sentence order dated 29.10.2003 – Sections 302, 307, 326 and 120B IPC – Sections 3/25 and 4/25 Arms Act – Countrymade pistol – Knife – Firearm injuries – Multiple stab wounds – Graveyard – 7.00 p.m.-7.30 p.m. – Twilight glow – Previously known – Independent and non partisan witness – Injured witnesses – Presence of appellant – Firing with firearm – Stabbing the deceased – Post mortem report – Injury reports – X-ray reports – Haemorrhagic shock – Ante mortem injuries – Minor inconsistencies – Contradictions – Improvements – No source of light – Pitch dark – Delay in commencing investigation – Ante time FIR – Blood stained and plain soil – Inquest report – Mere irregularities – Beyond reasonable doubt – Appeal dismissed.

Challenge in this appeal by the appellant Narvedeshwar is to his conviction and sentence order dated 29.10.2003 recorded by Additional Sessions Judge, Fast Track Court, Court No.2, Ghazipur in Sessions Trial No. 166 of 2001(State Vs. Narvedeshwar and another) under Sections 302, 307, 326 and 120B IPC arising out of case crime no. 128 of 2001, Sessions Trial No. 167 of 2001 (State Vs. Narvedeshwar) under Section 3/25 Arms Act arising out of case crime no. 150 of 2001 and Sessions Trial No. 165 of 2001 (State Vs. Narvedeshwar) under Section 4/25 Arms Act arising out of case crime no. 151 of 2001. By the impugned

judgment learned trial judge has convicted the appellant and sentenced him to life imprisonment and fine of Rs. 5000/-, in case of default in the payment of fine three years additional rigorous imprisonment under Section 302 IPC, seven years imprisonment and a fine of Rs. 2000/- and in default of payment of fine three years additional rigorous imprisonemnt under Section 307 IPC, seven years rigorous imprisonment and a fine of Rs. 2000/- and in default of payment of fine additional rigorous imprisonment of two years under Section 326 IPC, two years rigorous imprisonment and a fine of Rs. 1000/- and in case of default of payment of fine six months additional rigorous imprisonment under Section 3/25 of the Arms Act and one year rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine additional rigorous imprisonment of three months under Section 3/25 Arms Act. Learned additional Sessions Judge has further directed that all the sentences shall run concurrently.
(Para 2)

Prosecution story was unfolded through written complaint Ex. Ka-1 scribed by Ram Dular at informant's dictation and lodged at P.S. Suhwal, District Ghazipur. From the perusal of the aforesaid it emerges that Mohan Ram (deceased) son of the informant Ram Adhar son of Banarasi, resident of Rewatipur Patti Bheekhamdev Rai (Domderwa), P.S. Suhwal, District Ghazipur, Jagjeevan, son of Doodhnath Ram and Shiv Kumar son of Ram Gahan Ram had gone towards the graveyard at about 7.30 p.m. on 11.04.2001 for easing themselves. As soon as they reached there, Narvedeshwar Ram, Chaturi Ram, Babban Ram and Bagedu Ram son of Shiv Nath Ram all residents of the same village also reached the graveyard and Narvedeshwar ordered Jagjeevan to clear out of his way as he intended to finish Mohan Ram. The other culprits exhorted to eliminate Mohan on which Narvedeshwar who was armed with a countrymade pistol (Katta) fired with his firearm with the intention of causing death which hit Jagjeevan Ram and Shiv Kumar causing firearm injuries to them. Thereafter Narvedeshwar took out a knife and stabbed both Mohan and Shiv Kumar with it. Mohan was very seriously injured. On hearing the hue and cry raised by the victims, the informant, Doodhnath son of Deepchand and Sri Niwas son of Shyamlal rushed to the place of occurrence and interceded but the assailants made good their escape. The informant took his injured son to Sadar Hospital, Ghazipur for treatment where the doctor declared him dead. Old enmity was cited as the motive for committing the crime in question and hand of one Dablu Ram son of Bagedu Ram in the commission for the crime was also alleged. On the basis of the aforesaid written complaint case crime no. 6444301-128 of 2001 under Sections 302, 307 and 120B IPC was registered against the appellant, Chaturi Ram, Babban Ram, Bagedu Ram and Dablu Ram.
(Paras 3-4)

Held:-(Paras 43-45)

1. As far as the challenge to the appellant's conviction by the learned counsel for the appellant on the ground that the delay of more than 12 hours in commencing the investigation is a strong indication of the fact that the FIR is ante time is concerned, we find that the same has no legs to stand, as it has come on page 10 of the evidence of PW-10 Balram Mishra that he had gone to the place of occurrence and collected plain and blood stained soil from the place of occurrence and after packing and sealing the same in two separate boxes, he had got the recovery memo Ex. Ka-26 prepared on the spot. Ex. Ka-26 contains a clear recital that the same was prepared on 11.04.2001 after recovery of plain and blood stained soil from the place of occurrence and it contains the signature of PW10. Thus we do not find that the FIR is ante time as pleaded by learned counsel for the appellant.

2. The failure of the police officer who had conducted the inquest report to record the name of the deceased in the inquest report and mentioning of wrong name of the person who had brought the dead body in the inquest report by him and proseuction's failure to lead any link evidence for proving that the ante mortem injuires which caused the deceased's death were inflicted on him from the knife recovered on the alleged pointing out of the appellant, in our opinion and under the facts and circumstances of the present case, where

the prosecution case stands fully proved by the evidence of eye witnesses, are mere irregularities which do not effect the core of the prosecution case.

3. In view of the foregoing discussion, we do not find any force in the submissions made by the learned counsel for the appellant. The prosecution, in our opinion has succeeded in proving its case against the appellnat beyond all reasonable doubts and the impugned judgement and order warrants, no interference by this Court. Thus this appeal which is devoid of any merit is hereby **dismissed**.

Case Law discussed:

(Delivered by Hon'ble Bala Krisnha Narayana, J.)

1. Heard Sri Danish Faridi, amicus curie for the appellant and Sri J.K.Upadhyay, learned AGA for the State.

2. Challenge in this appeal by the appellant Narvedeshwar is to his conviction and sentence order dated 29.10.2003 recorded by Additional Sessions Judge, Fast Track Court, Court No.2, Ghazipur in Sessions Trial No. 166 of 2001(State Vs. Narvedeshwar and another) under Sections 302, 307, 326 and 120B IPC arising out of case crime no. 128 of 2001, Sessions Trial No. 167 of 2001 (State Vs. Narvedeshwar) under Section 3/25 Arms Act arising out of case crime no. 150 of 2001 and Sessions Trial No. 165 of 2001 (State Vs. Narvedeshwar) under Section 4/25 Arms Act arising out of case crime no. 151 of 2001. By the impugned judgment learned trial judge has convicted the appellant and sentenced him to life imprisonment and fine of Rs. 5000/-, in case of default in the payment of fine three years additional rigorous imprisonment under Section 302 IPC, seven years imprisonment and a fine of Rs. 2000/- and in default of payment of fine three years additional rigorous imprisonemnt under Section 307 IPC, seven years rigorous imprisonment and a fine of Rs. 2000/- and in default of payment of fine additional rigorous imprisonment of two years under Section 326 IPC, two years rigorous imprisonment and a fine of Rs. 1000/- and in case of default of payment of fine six months additional rigorous imprisonment under Section 3/25 of the Arms Act and one year rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine additional rigorous imprisonment of three months under Section 3/25 Arms Act. Learned additional Sessions Judge has further directed that all the sentences shall run concurrently.

3. Prosecution story was unfolded through written complaint Ex. Ka-1 scribed by Ram Dular at informant's dictation and lodged at P.S. Suhwal, District Ghazipur.

4. From the perusal of the aforesaid it emerges that Mohan Ram (deceased) son of the informant Ram Adhar son of Banarasi, resident of Rewatipur Patti Bheekhamdev Rai (Domderwa), P.S. Suhwal, District Ghazipur, Jagjeevan, son of Doodhnath Ram and Shiv Kumar son of Ram Gahan Ram had gone towards the graveyard at about 7.30 p.m. on 11.04.2001 for easing themselves. As soon as they reached there, Narvedeshwar Ram, Chaturi Ram, Babban Ram and Bagedu Ram son of Shiv Nath Ram all residents of the same village also reached the graveyard and Narvedeshwar ordered Jagjeevan to clear out of his way as he intended to finish Mohan Ram. The other culprits exhorted to eliminate Mohan on which Narvedeshwar who was armed with a

countrymade pistol (Katta) fired with his firearm with the intention of causing death which hit Jagjeevan Ram and Shiv Kumar causing firearm injuries to them. Thereafter Narvedeshwar took out a knife and stabbed both Mohan and Shiv Kumar with it. Mohan was very seriously injured. On hearing the hue and cry raised by the victims, the informant, Doodhnath son of Deepchand and Sri Niwas son of Shyamlal rushed to the place of occurrence and interceded but the assailants made good their escape. The informant took his injured son to Sadar Hospital, Ghazipur for treatment where the doctor declared him dead. Old enmity was cited as the motive for committing the crime in question and hand of one Dablu Ram son of Bagedu Ram in the commission for the crime was also alleged. On the basis of the aforesaid written complaint case crime no. 6444301-128 of 2001 under Sections 302, 307 and 120B IPC was registered against the appellant, Chaturi Ram, Babban Ram, Bagedu Ram and Dablu Ram.

5. Constable No. 424 Nagendra Singh PW-13 prepared the Chek FIR Ex. Ka-19 and G.D. Entry Ex. Ka-20 on the same date at 21.35 hours in the presence of the Investigating Officer, Balram Mishra, SHO, Suhwal (PW-10) who commenced the investigation on 12.04.2001 with the interrogation of the complainant Ram Aadhar Ram, Doodhnath (eye witness), Sri Niwas scribe of the FIR and Harikesh Ram and after recording their statements reached the place of occurrence and at the instance of the complainant and other witnesses inspected the same and prepared the site plan of the place of incident (Ex. Ka-6). After recording the statements of the other witnesses present on the spot he proceeded to arrest the accused on 12.04.2001. He also recorded the statements of Jagjeevan, Shiv Kumar, Ram Gahan Ram and Smt. Sugia Devi, wife of the complainant in the police station. On the same day he also recorded the statements of Survan, Ram Dular Ram, Constable Mohrrir Nageshwar Singh PW-13, the scribe of the chik FIR. The post mortem of the dead body of the deceased Mohan Ram was conducted on 12.04.2001 at 5.15 p.m. and the post mortem report is on the record of the case as Ex. Ka-3. The injuries of injured Shiv Kumar and Jagjeevan were examined by the Dr. D.S.Chauhan, PW-14 who prepared their injuries reports which are on record as Ex. Ka-22 and Ex. Ka-24. The X-ray report of injured Shiv Kumar is on record as Ex. Ka-23 and Ka 4a while the X-ray report of the injured Jagjeevan has been brought on record as Ex. Ka-5a.

6. Statements of Bal Kunwar and Ram Ajor witnesses of recovery of blood stained and plain soil from the place of occurrence, on 23.04.2001, S.I. V.V. Singh who had prepared the inquest report, Constable Vijay Shanker Yadav and Dr. P.K. Srivastava Medical Officer were also recorded. After obtaining 24 hours remand of appellant Narvedeshwar from C.J.M., Ghazipur on 28.04.2001, countrymade pistol, knife and fired empty cartridge were recovered on the same date by the Investigating Officer from shrubs of Sarpat in the northern corner of the graveyard on the alleged pointing out of appellant Narvedeshwar in the presence of Constable Nabi Ahmad, Radhey Shyam Kushwaha, Bhajan Ram, Ram Gahan and Dev Nath. Recovery memo and site plan of the place of recovery were prepared on the spot and which are on the record of the case as Ex. Ka-7 and Ex. Ka-8. On the basis of the aforesaid recovery memo case crime no. 150 of 2001, under Sections 25 Arms Act and case crime no. 151 of 2001, under Section 4/25 Arms Act were registered against the appellant at P.S. Suhwal, District Ghazipur. The blood stained and plain soil

recovered from the place of incident and which were packed and sealed in separate packet were sent to the Vidhi Vigyan Prayogshala, Lucknow.

7. After completion of investigation charge sheet Ex. Ka-9 was submitted by the Investigating Officer against the appellant Narvedeshwar and co-accused Chaturi Ram under Sections 302, 307, 326 and 120B IPC in case crime no. 128 of 2001. Similarly after completing the investigation charge sheets were submitted against the appellant Narvedeshwar in case crime no. 150 of 2001 and 151 of 2001 also Ex. Ka-16 and Ex. Ka-18 respectively.

8. Since the offences enumerated in case crime no. 128 of 2001 were triable by the Court of Sessions, the same was committed for trial of the accused to the Sessions Court by C.J.M., Ghazipur by his commital order dated 02.08.2001 and registered as S.T. No. 166 of 2001.

9. The two other cases registered against the appellant, namely, case crime no. 150 of 2001, under Sections 3/25 Arms Act and case crime no. 151 of 2001 under Section 4/25 of the Arms Act which also arose from the same incident were also committed for trial of the accused to the Court of Sessions by order dated 02.08.2001 passed by the C.J.M., Ghazipur. Since all the three cases were related to the same crime, the learned Sessions Judge, passed an order on 15.09.2001 in S.T. No. 166 of 2001 for deciding all the aforaesaid three sessions trials together and S.T. No. 166 of 2001 was directed to be treated as leading case. After framing of charge, accused pleaded not guilty and claimed trial.

10. The prosecution in order to prove its case examined as many as 15 witnesses, complainant Ram Aadhar, PW-1, Sugia Devi, wife of complainant PW- 2, Shiv Kumar, (injured) PW- 3, Jagjeevan Ram, (injured), PW- 4, Sri Niwas, PW- 5, Harikesh PW- 6, Dr. V.K.Singh, PW-7, Nabi Ahmad PW-8, Dr. Anil Kumar PW-9, Balram Mishra PW-10, Nanku Prasad PW-11, Sub-Constable Subash Prasad Sonkar PW-12, Nagendra Prasad, PW-13, Dr. D.S. Chauhan, PW-14 and Virendra Pratap Srivastava PW-15.

11. Both the accused in their statements recorded under Section 313 Cr.P.C. denied the prosecution case and alleged that they were falsely implicated in the present case because of their enmity with the witnesses. The accused did not examine any witness in defense.

12. It is submitted by the learned counsel for the appellant that the prosecution having miserably failed to prove its case against the appellant beyond reasonable doubt and the trial judge having acquitted co-accused Chaturi Ram although the evidence against both the accused is same, the appellant's conviction cannot be sustained.

13. Advancing his submissions further learned counsel for the appellant argued that according to the prosecution case itself as spelt out in the FIR and in the depositions witnesses of facts examined during the trial it emerges that the occurrence had allegedly taken place between 7.00 p.m.-7.30 p.m. on 11.04.2001 in a graveyard existing in the north of village Rewatipur of which the deceased was a resident, when he along with his cousin brothers Shiv Kumar and

Jagjeevan had gone there to ease himself and before the deceased and his companions could ease themselves, the appellant Narvedeshwar alongwith other co-accused arrived at the place of occurrence and appellant Narvedeshwar who was armed with a countrymade pistol ordered Jagjeevan and Shiv Kumar to clear out of his way as he intended to commit the murder of Mohan Ram and on the exhortation of other co-accused he fired with his firearm with the intention of causing death but his shot hit both Jagjeevan and Shiv Kumar causing firearm injuries in their right palms but before he took out a knife and stabbed Mohan Ram repeatedly inflicting multiple stab wounds on him, as a result of which he fell on the ground both PW-3 and PW-4 had run away from the place of occurrence to their village and on hearing the shrieks of the victims, the informant Ram Adhar, Doodhnath, father of the injured, Shiv Kumar and Sri Niwas reached the place of occurrence who claim to have seen the appellant stabbing the deceased with knife tried to intervene whereupon the appellant and the other assailants left the place of occurrence. Although under the circumstnces of the case and considering the time taken by them in reaching the place of incident from their village it was not possible for them to have witnessed the stabbing of the deceased by the appellant. Since neither PW-3 nor PW-4 have deposed that they had seen the appellant stabbing the deceased, it can safely be inferred that no one had seen the occurrence and all the eye witnesses are lying. The prosecution has further failed to furnish any explanation for the inordinate and explained delay of more than 15 hours in commencing the investigation, and holding inquest specially in view of the claim of the prosecution that the FIR of the occurrence was registered on 11.04.2001 at P.S. Suhwal at 21.35 hours in the presence of the Investigating Officer, Balram Mishra, PW-10 who has stated on page 1 of his statement recorded before the trial court that FIR was registered in his presence on 11.04.2001 and after obtaining the copy of chek FIR, he commenced investigation on 12.04.2001, which is a strong indication of the fact that the FIR is ante time and It appears that some unknown persons had committed the murder of Mohan Ram in the night of 11/12.04.2001 and after his dead body was recovered in the morning either by the informant or by the police, the informant sprung into action and taking it as an opportunity to settle his score with the appellant and his other family members for the appellant having eloped with Shiv Kumari daughter of his brother in law (Saddhu) and solemnized marriage with her agianst the wishes of the informant and the girl's parents, falsely implicated the appellant and his brothers in the present case in consultation with the police. He also invited our attention to several irregularities committed by the Investigating Officer during investigation and omissions in the inquest report.

14. He further submitted that out of the six witnesses of fact examined on behalf of the prosecution, PW-1 Ram Adhar informant, PW-2 Smt. Sugia Devi, wife of Ram Adhar, PW-3 Shiv Kumar and PW-4 Jagjeevan are all interested and partisan witnesses being closely related to each other and the deceased and their testimonies are wholly unreliable and the evidence of PW-3 and 4 further appears to be tutored and their injuries fabricated for the reason that both of them could not have received injuries on the palms of their right hands by a single shot allegedly fired by the appellant and also on account of delay of about 20 hours in examination of their injuries. The date of their medical examination mentioned in their injury report has been altered from 14 to 12 without being initialled by any doctor. The presence of PW-5 Sri Niwas and PW-6 Harikesh the two other eye witnesses on the crime seen at the time of occurrence is also highly doubtful. He also submitted that it was not possible for the so called eye witnesses to have seen and identified the

assailants as it has come in the evidence of PW-3 Shiv Kumar on record that at the time of incident it was so dark that it was not possible for him as well as the deceased and Jagjeevan who were sitting at a distance of two or three hands to see each other, in the absence of their being any proof of any source of light on the spot.

15. He next submitted that as far as the recovery of crime weapons and the used empty cartridge from a bush near the place of occurrence on the alleged pointing out of the appellant is concerned the same has been fabricated by the police and further the prosecution has totally failed to connect the aforesaid weapons with the commission of the crime in question by leading any link evidence. He lastly submitted that in view of the above, the appellant's conviction and the sentences awarded to him cannot be sustained and the impugned judgment and order is liable to be set aside.

16. Per contra Sri J.K.Upadhyay, learned AGA very streneously submitted that the charges framed against the appellant stand fully proved from the evidence on record and the appellant's conviction is not liable to be set aside only on account of there being some delay in commencing the investigation. The prosecution has examined as many as six eye witnesses including injured witnesses PW-3 and PW-4 who have fully supported the prosecution case as narrated in the FIR which stands further corroborated from the post mortem report of the deceased and the injury reports of the injured witnesses PW-3 and PW-4. He further submitted that the appellant had a very strong motive to commit the murder of Mohan Ram as is evident from the evidence on record and the facts and circumstances of the case. The impugned judgement and order which are based upon cogent evidence and supported by relevant consideration are not liable to be set aside.

17. We have considered the arguments raised by both the sides and have analysed and examined the entire trial court record including the oral and documentary evidence.

18. The only question which arises for consideraion is whether the prosecution has been able to prove its case against the appellant beyond reasonable doubt. Before we undertake and analyze the rival submissions, glimpses of the testimonies of the fact witnesses indicate that all the six of them, informant Ram Adhar PW-1, Sugia Devi, wife of the informant, PW-2, Shiv Kumar and Jagjeevan PW-3 and PW-4 both the injured witnesses, Sri Niwas PW-5 and Harikesh PW-6 have corroborated the prosecution case as spelt out in the FIR Ex. Ka-1 in extenso with inconsistencies, contradictions and improvements in their evidence which have been pointed out by and to which, learned counsel for the appellant has invited our attention. Besides PW-5 Sri Niwas has stated in his examination-in-chief that he had identified the accused in the light of the torch which he always carries with him. We now proceed to examine and evaluate the testimonies of the fact witnesses examined on behalf of the prosecution during the trial in the light of the inconsistencie, contradictions and improvements in their evidence highlighted by the learned counsel for the appellant for ascertaining whether the inconsistencies, contradictions and improvements in the evidence of the fact witnesses are so material that they go to the core of the prosecution case and render it unbelievable, unworthy and unreliable.

19. PW-1 informant in his statement made before the trial court has apart from reiterating the facts spelt out by him in the FIR has stated that the name of his wife is Sugia Devi and name of his brother is Ram Gahan. Shiv Kumar is the son of Ram Gahan. The name of his wife's sister is Chandrawati. Shiv Kumari is the daughter of Chandrawati. The name of his brother in law is Sarwan. He had been living separately from his brothers since before the incident. On the date of the incident his son Mohan along with Jagjeevan son of Doodhnath and Shiv Kumar son of Ram Gahan had gone to ease himself in the graveyard at about 6.00 - 7.00 p.m. on 11.04.2001. After some time he heard sound of gun shot coming from the side of the graveyard as well as the shrieks of his nephew on which he, Sri Niwas and Doodhnath rushed to the place of occurrence and saw Narvedeshwar and other co-accused beating his son. Narvdeshwar was armed with a countrymade pistol and a knife and he was stabbing his son Mohan Ram with his knife with the intention of causing his death. He also saw that his nephew Shiv Kumar had lost one of his fingers of his right hand. On seeing the first informant and the other witnesses the culprits ran away from the place of incident. Upon noticing the serious condition of his son he took him to Govt. Hospital, Ghazipur on the same night where the doctor declared him dead. The written complaint of the incident Ex. Ka-1 was scribed by a resident of village Tthathani on his dictation and lodged at P.S. Suhwal on the same night. He identified and proved his signatures on the written report which was marked as Ex Ka-1. He further stated that in his evidence that after the incident he had gone to the hospital from the police station and the Investigating Officer had arrived at the place of incident on the next date. He also stated that he did not remember the name of the person who has scribed the FIR.

20. PW-2 Sugia Devi who is the wife of first informant and a blind lady has stated those facts in her evidence which she had heard from the others and her evidence is not of much significance.

21. PW-3 Shiv Kumar, injured witness has supported the prosecution case in his examination in chief. Similarly PW-4 has also supported the prosecution case in his examination in chief.

22. PW-5 Sri Niwas has more or less reiterated the same facts in his examination in chief which were stated by PW-3.

23. Similarly PW-6 Harikesh also reiterated the facts stated in the FIR. He further stated that the deceased was taken from the place of incident to the bus stop of Rewatipur on a cot from where he was taken in a Jeep to the Sadar hospital, Ghazipur, accompanied by Sri Niwas, Doodhnath and Ram Adhar. They had reached the hospital at about 9 p.m., Ram Adhar had gone to the hospital while others had returned back to their village. Ram Adhar alone had gone to the police station.

24. PW-7, Dr. V.K. Srivastava, Medical Officer, Sadar Hospital, Ghazipur, who had conducted the post mortem on the dead body of the deceased Mohan was examined as PW-7. The post mortem report of the deceased indicates following injuries:-

बाह्य परीक्षण– मृतक दुबला पतला कद कॉठी का था, शरीर से अकडन समाप्त हो चुकी थी, ऑख व मुंह आधा खुला हुआ था।

मृत्यु पूर्व चोटें–(1) पंचर्ड इन्साइज्ड घाव जिसकी लम्बाई 4 सेमी ग 2 सेमी ग छाती की गहराई अन्दर तक जो दाहिने छाती पर स्टर्नम हड्डी के 3 सेमी बाहर की ओर व दाहिने क्लेविकल हड्डी से 7 सेमी नीचे।

(2) इनसाईज्ड घाव 4 सेमी ग 2 सेमी ग हड्डी के गहराई तक दाहिने कंधे के अग्र भाग पर।

(3) इनसाईज्ड घाव डेढ़ सेमी ग एक सेमी ग मांस की गहराई तक दाहिने छाती पर दाहिने निपुल से 10 सेमी बाहर की ओर।

(4) इन्साईज्ड घाव डेढ़ सेमी ग एक सेमी ग मांस पेशी की गहराई तक पीठ के दाहिने भाग पर 6 सेमी चोट नं0 3 के बाहर की ओर।

(5) इन्साईज्ड घाव दो सेमी ग एक सेमी ग मांस पेशी की गहराई तक पेट पर नाभी से 6 सेमी ऊपर व बाहर की तरफ ।

(6) इन्साईज्ड घाव 2 सेमी ग 1 सेमी ग हड्डी की गहराई तक पीठ के दाहिने भाग के स्कैपलर रीजन पर।

(7) इन्साईज्ड घाव 2 सेमी ग 1 सेमी ग हड्डी की गहराई तक पीठ के दाहिने भाग पर। स्कैपलर रीजन पर चोट नं 6 से 2 सेमी नीचे।

(8) इन्साईज्ड घाव 2 सेमी ग 1 सेमी ग हड्डी की गहराई तक पीठ के दाहिने भाग पर। स्कैपलर रीजन पर चोट नं 6 से 2 सेमी अन्दर की तरफ।

आन्तरिक परीक्षण– सिर, गर्दन व ब्रेन में कोई चोट नहीं पायी गयी। दाहिना प्लूरा फटा हुआ व बॉया सामान्य। दाहिना फेफड़ा फटा था। दाहिने छाती के कैविटि में लगभग 7.50 एम0 एल0 खून मौजूद था। बॉया फेफड़ा सामान्य था। हृदय दाहिना भरा हुआ, बांया खाली था। दांत 14/13 था, आमाशय भरा हुआ था जिसमें अधपचा भोजन मौजूद था। छोटी आंत में गैस व तरल पदार्थ मौजूद था। बड़ी आंत में मल पदार्थ व गैस मौजूद था। यकृत सामान्य , वजन 800 ग्राम, पित्ताशय खाली था। मुत्राशय खाली था। दोनों गुर्दे का वजन 160 ग्राम था।

25. The cause of death opined by the doctor was haemorrhagic shock as a result of antemortem injuries. The time of the death was estimated to be about one day before the date of post mortem.Thus the time and cause of death stands fully corroborated from the medical evidence.

26. PW-7 deposed that the deceased had died due to ante mortem injuries as a result of injury no.1. His injuries could have been sustained on 11.04.2001 at about 2.30 p.m. and could have been caused by knife. He proved the post mortem report as Ex. Ka 3. No suggestion was put by the defense to him that the ante mortem injureis found on the cadevar could not have been caused by one person or a single weapon considering the large number of ante mortem injures found on the dead body of the deceased and their varying dimensions.

27. PW-8 Nabi Ahmad proved the recovery memos of recovery of countrymade pistol and blood stained knife, blood stained and plain soil Ex. Ka-26 and Ex. Ka-27. He also proved material Ex. Ka-4 and Ex. Ka-5, weapons allegedly used in committing the murder.

28. PW-9 Anil Kumar, radiologist proved the X-ray reports of the injured witnesses PW-3 and PW-4, Ex. Ka-4a and Ex Ka-5.

29. PW-10 Balram Mishra, SHO, Suhwal, the Investigating Officer of the case proved the site plann of the place of occurrence as Ex. Ka-7.

30. PW-11, Constable 641 Nanku Prasad proved the FIRs of case crime no. 150 and 151 of 2001 under Sections 3/25 and 4/25 Arms Act, Ex.Ka-13 and Ex.Ka-14.

31. PW-12 Subhash Prasad Sonkar, Officer in charge police out post Rewatipur, P.S. Suhwal, District Ghazipur proved the charge sheets filed by the Investigating Officer of this case in case crime nos. 150 and 151 of 2001, Ex.Ka-16 and Ex.Ka-18 and the letter dated 22.06.2001 issued by the District Magistrate, Ghazipur, Ex. Ka-7 granting sanction for prosecution of the appellant for the offences under the Arms Act.

32. PW-13 Nagendra Singh proved the chek FIR Ex. Ka- 19 and the G.D. Entry made by him at sl. no. 49 at 21.35 hours on 11.04.2001.

33. PW-14 Dr.D.S.Chauhan proved the injury report dated 12.04.2001 of PW-3 Shiv Kumar and reference letter by which he had advised X-ray of the injuries of PW-3 Shiv Kumar, Ex. Ka-24, the injury report of PW-4 Jagjeevan dated 12.04.2001 and reference letter advising X-ray of the injuries of PW-4 Jagjeewan Ex. Ka-25. In his opinion, the injuries received by PW-3 and PW-4 could have been caused by a firearm including katta and the duration of injuries was estimated to be around 36 hours, he also stated that the injuries may have been caused on 11.04.2001 at about 7.30 p.m.

34. Strangely the defense counsel did not put any suggestion to PW-14 with regard to the uninitialled alterations made in the injury reports of PW-3 and PW-4 Ex. Ka-22 and Ex. Ka-24 with regard to the date on which PW- 3 and PW-4 were examined and the date on which the injury reports were prepared, from 14 to 12 and the injury reports Ex. Ka-22 and Ex. Ka-4 cannot be discarded on the ground urged by the appellant's counsel in view of the oral evidence of injured witness PW-3 and PW-4.

35. PW-15 S.I. Virendra Prasad Singh proved the inquest report Ex.Ka-2, photograph of the cadaver, Ex.Ka-26, police form 13 Ex.Ka-27, specimen of seal Ex.Ka-28, letter addressed to R.I., Ex.Ka-29 and letter addressed to C.M.O. Ex. Ka-30.

36. After having very carefully scanned the testimony of the eye witnesses examined by the prosecution during the trial, we have found that as far as the evidence of PW-3 Shiv Kumjar and PW-4 Jagjeevan is concerned, the same is material only for proving the presence of the appellant armed with katta and knife at the place of incident and his firing with his firearm which caused injuries to PW-3 and PW-4. Neither PW-3 Shiv Kumar nor PW-4 Jagjeevan have stated in their evidence that they had seen the appellant stabbing the deceased as after being injured from the gun

shot fired by the appellant they had run away from the crime scene as stated by PW-3 and PW-4 in their cross examination.

37. Now we are left with the evidence of PW-1 Ram Adhar, complainant, PW-5 Sri Niwas and PW-6 Harikesh who claim to have reached the place of incident from their village on hearing the sound of gun shot and the shrieks of the victims and seen the appellant stabbing the deceased. In order to ascertain whether PW-1, PW-5 and PW-6 are speaking the truth. We have to examine whether considering the distance between the village and the graveyard from the place of incident, it was possible for them to have arrived at the crime scene under time to enable them to witness the incident and identify the accused considering also the fact that the incident had taken place in pitch dark and there is no cogent evidence proving that there was any source of light on the crime scene under which the accused could have been identified by the witnesses.

38. On page 31 of the paper book, PW-1 Ram Adhar in his cross examination has stated that 10 or 12 houses separate the graveyard from his house. When he had heard the sound of gun shot, he was kneading the dough in the kitchen and he thought that some other people may be fighting, however, when he heard the shrieks of Shiv Kumar PW-3 and Jagjeevan PW-4, he washed his hands and ran towards the graveyard and saw that Shiv Kumar had lost his one fingure. He further stated that he alongwith Sri Niwas PW-5 and Doodhnath were the first to reach the place of occurrence and all the accused had escaped taking benefit of darkness. He had first gone towards the north of the graveyard then to the western portion of the graveyard and in the meantime the accused had escaped. He has not disclosed in his evidence the time taken by him in reaching the place of occurrence but it does transpire from his evidence that even he had reached the place of incident after the accused had run away.

39. PW-3 in his cross examination has stated that it was pitch dark at the place of occurrence and although the deceased and Jagjeevan were sitting at a distance of about 2-3 hands but they were unable to see each other. He denied the presence of Bavvan, Babedu and Daglu at the place of incident. In his cross examination PW-3 further stated that after he had been hit by the pellet fired from the countrymade pistol of Narvedeshwar, he ran to his village along with Jagjeevan and when they reached their village, people including the first informant Doodhnath and Sri Niwas, inquired from them about what had happened and upon being told about the incident by them they rushed towards the graveyard but neither he nor Jagjeevan had accompannied them back to the graveyard. Similarly PW-4 in his cross examination on page 3 of his evidence has stated that Narvedeshwar who was armed with pistol and a knife had come from behind and had picked up Mohan by his collar whereupon, he and Shiv Kumar had got frightened had retreated about three hands behind Mohan and after Narvedeshwar had fired at him and Shiv Kumar, both he and Shiv Kumar had run away from the place of incident and hid themselves behind a Vamar tree planted in the eastern portion of the graveyard. He also admitted in his cross examination that they had not returned back to the place of occurrence when the other villagers had gone there after knowing about the incident. Thus neither PW-3 Shiv Kumar nor PW-4 Jagjeevan had seen the appellant stabbing the deceased.

40. The evidence of PW-5 Sri Niwas (page 3 of his cross examination) further shows that he has stated that the distance between the graveyard and his house is about 15-16 latthas and when he heard sound of gun shot, he was standing infornt of the door of his house and then he said that he was resting in his courtyard. In his cross examination he further stated that PW-1 Ram Adhar on meeting him while they were going towards the graveyard had told him that his son has been murdered by Narvedeshwar which fully corroborates the evidence of PW-3 Shiv Kumar who had categorically stated in his cross examination that after being shot by the appellant he had rushed back to his village and on reaching there he had met several villagers including PW-1 and had told them about the incident. He further stated that it took them about 10 minutes to reach the place of occurrence. PW-5 in his cross examination also stated that he had seen and identified the culprits in the light of torch but the same was neither produced by him before the Investigating Officer nor before the Court. Thus the evidence of PW-5 not only renders his own testimony but also that of the PW-1 that had seen the appellant stabbing the deceased untrustworthy. If the evidence of PW-5 is to be believed then we have to accept PW-1 Ram Adhar was already aware of the fact that his son had been murdered when he had met PW-5 and it had taken him and other witnesses about ten minutes to reach the place of occurrence giving sufficient time to the assailant to commit the offence and escape from the place of incident.

41. PW-6 in his examination in chief as well as in his cross examination consistently stated that on hearing the sound of gun shot, he had reached the place of occurrence and seen the appellant stabbing the deceased. He has also stated in his evidence that he was the first person to reach the place of incident and thereafter PW-1 Ram Adhar, Sri Niwas PW-5 and Doodhnath had arrived and it had taken him about five minutes to reach the place of occurrence and on reaching the crime scene he saw Narvdeshwar stabbing the deceased Mohan Ram. The prosecution has cross examined PW-6 at great length but he has stuck to the version of the incident as described by him in his examination in chief. Thus even if we exclude from consideration the evidence of PW-1 Ram Adhar and PW-5 Sri Niwas, we have on record the evidence of PW-6 Harikesh who is an absolutely independent and non partisan witness and who has fully corroborated the part of the prosecution case as spelt out in the FIR that the appellant had repeatedly stabbed the deceased with knife. Apart from the evidence of PW-6 there is unimpeachable eye witness account of injured witnesses PW-3 and PW-4 proving to the hilt the presence of appellant armed with katta and knife at the place of occurrence and his having caused firearm injuries to both PW-3 and PW-4. Both of them have fully corroborated the prosecution case as spelt out in the FIR during their cross examination. Although much emphasis has been laid by the learned counsel for the appellant that there was absolutely no source of light at the crime scene which would have facilalted the so called eye witnesses including the injured witnesses to witness the incident and identify the accused and it is apparent that they are not speaking the truth and no reliance can be place on their evidence for holding the appellant guilty of the murder of Mohan Ram.

42. We, however, are unable to accept the aforesaid contention of the learned counsel for the appellant. It is true that the evidence of PW-1 and PW-5 does not inspire much confidence in view of the contradictions noted in their statements herein above but the eye witness account of PW-3, PW-4, PW-6 has remained intact and reliable throughout. Even if for the sake of argument

we exclude the statement of PW-6 from consideration, although we do not find any convincing reason to discard the same, the evidence of PW-3 and PW-4 cannot be discarded for any reason whatsoever. It has come in the evidence of PW-3 Shiv Kumar and PW-4 Jagjeevan that they were sitting very close to the deceased and hence it was quite possible for them to have recognized the appellant when he had come from behind and lifted the deceased by his collar and warned PW-3 and PW-4 to clear up as he intended to finish the deceased as there is sufficient twi light glow of the sky between 7.00 p.m.- 7.30 p.m. in the month of April which witnesses a prolonged dusk even in a dark night. Moreover Sri Niwas PW-5 on page 1 and 2 of his examination in chief has deposed that there was some light at the place of incident apart from the light of torch in which he and the other witnesses had seen the accused stabbing the appellant. Further the appellant was admittedly previously known to PW-3 and PW-4 and it was but natural for them to be acquainted with his voice and there is no reason to disbelieve their testimony or assume that they are lying. Both PW-3 and PW-4 were at the time of incident 9 and 14 years old respectively and the defense has failed to come up with any reason for PW-3 and PW-4 to falsely implicate the appellant. It is true that there are minor inconsistencies in their statements viz a viz the sequence in which they and the deceased had sat down for easing themselves and the direction from where the appellant and the other co-accused reached the place of incident but despite being subjected to a gruelling cross examination by the defense, they have stuck to the version of the occurrence as stated by them in their examination in chief and the prosecution failed to elicit anything from them which may even remotely discredit their testimony. The minor discrepancies in their evidence as pointed out by the learned counsel for the appelant, in our opinion do not go the core of the prosecution case making it unreliable or untrustworhty. The testimony of PW-3 and PW-4 further stands fully corroborated from the medical evidence, their injury and X-ray reports.

43. As far as the challenge to the appellant's conviction by the learned counsel for the appellant on the ground that the delay of more than 12 hours in commencing the investigation is a strong indication of the fact that the FIR is ante time is concerned, we find that the same has no legs to stand, as it has come on page 10 of the evidence of PW-10 Balram Mishra that he had gone to the place of occurrence and collected plain and blood stained soil from the place of occurrence and after packing and sealing the same in two separate boxes, he had got the recovery memo Ex. Ka-26 prepared on the spot. Ex. Ka-26 contains a clear recital that the same was prepared on 11.04.2001 after recovery of plain and blood stained soil from the place of occurrence and it contains the signature of PW-10. Thus we do not find that the FIR is ante time as pleaded by learned counsel for the appellant.

44. The failure of the police officer who had conducted the inquest report to record the name of the deceased in the inquest report and mentioning of wrong name of the person who had brought the dead body in the inquest report by him and proseuction's failure to lead any link evidence for proving that the ante mortem injuires which caused the deceased's death were inflicted on him from the knife recovered on the alleged pointing out of the appellant, in our opinion and under the facts and circumstances of the present case, where the prosecution case stands fully proved by the evidence of eye witnesses, are mere irregularities which do not effect the core of the prosecution case.

45. In view of the foregoing discussion, we do not find any force in the submissions made by the learned counsel for the appellant. The prosecution, in our opinion has succeeded in proving its case against the appellnat beyond all reasonable doubts and the impugned judgement and order warrants, no interference by this Court. Thus this appeal which is devoid of any merit is hereby dismissed.

46. There shall however be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Service Single/ Writ Petition No.- 13404 Of 1990

Vikram Singh (died) & Ors. ...Petitioners

Versus

Indian Telephone Industries Limited, Rae Bareli & Anr. ...Opposite Parties

Counsel for the Petitioners:
Mr. Saurabh Lavania

Counsel for the Opposite Parties:
Mr. Krishna Chandra

PROCEDURE:
Petition under **Article 226 of the Constitution of India** challenging the dismissal order dated 17.07.1989 passed by the Manager Inspection (Strouzer), Indian Telephone Industries Ltd., Rae Bareli, pursuant to departmental enquiry conducted under the Certified Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946.

CASE LAW DISCUSSED:
Radhey Kant Khare v. U.P. Cooperative Sugar Factories Federation Ltd.
Roop Singh Negi v. Punjab National Bank
Indian Telephone Industries Ltd. v. Devi Shankar Kumar Shukla
Union of India v. P. Gunasekaran
C. Jacob v. Director of Geology and Mining
(Other authorities cited in the judgment)

HEADNOTES:
Departmental Enquiry — Validity — Competency of Disciplinary Authority — Appointment of Advocate as Enquiry Officer — Scope of Judicial Review — Natural Justice — Loss of Records —
Charge-sheet issued by Deputy Manager (Strouzer) for Manager Inspection (Strouzer) was valid in view of Office Order dated 29.03.1981 delegating disciplinary powers.

Appointment of an Advocate as Enquiry Officer is not barred under Standing Order 16(2)(b). In view of the law laid down in *Indian Telephone Industries Ltd. v. Devi Shankar Kumar Shukla*, such appointment is legally permissible.
Petitioner was afforded adequate opportunity during enquiry proceedings. Notices were duly served; petitioner failed to appear on scheduled dates. Proceedings conducted ex parte cannot be faulted.
High Court, in exercise of jurisdiction under Article 226, cannot re-appreciate evidence or interfere with findings of fact recorded in departmental enquiry unless perverse or violative of statutory provisions.
Where disciplinary authority concurs with findings of the Enquiry Officer, separate elaborate reasoning is not mandatory.
Plea regarding loss/destruction of departmental records after long lapse of time does not vitiate proceedings in absence of specific pleading and proof of prejudice.

RESULT:
Writ Petition dismissed.
No interference under Article 226 of the Constitution of India warranted.
(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

1. Heard Mr. Saurabh Lavania, learned Counsel for the petitioner and Mr. Krishna Chandra, learned Counsel for the opposite parties.

2. Being aggrieved by the order of dismissal dated 17.7.1989 passed by the Manager Inspection (Strounzer), Indian Telephone Industries Ltd., Raebareli contained in Annexure No.12 to the writ petition, petitioner-Vikram Singh has filed the present writ petition under Article 226 of the Constitution of India.

3. The facts of the case, in brief, as culled out from the petition at hand, entail as under :

According to the petitioner, while working as a Technical Machinist, Category "B' in the Indian Telephone Industries Limited, Rae Bareli Unit, he (Vikram Singh) was placed under suspension vide order dated 3.6.1988 on the grounds i.e. (1) non-compliance of the transfer order; and (2) withdrawal of salary during absence without prior intimation, and, on the same day i.e. on 3.6.1988, a charge-sheet was issued to him under the signature of Mr. M.C. Tripathi, who was at that time Deputy Manager Inspection (Strouzer) but signed the same for "Manager Inspection (Strouzer)". On receipt of the charge-sheet, the petitioner has sent his reply to the charge-sheet on 26.7.1988 to the Manager Inspection (Strouzer), Indian Telephone Industries Ltd., Raebareli.

4. It has been stated that during the course of enquiry, the petitioner fell sick from 6.2.1989 to 13.2.1989 and his condition deteriorated in between 10.2.1998 to 12.2.1989. His sickness was informed to the Inquiry Officer and made request to the Inquiry Officer to give opportunity to produce defence evidence after recovery of sickness but the Inquiry Officer, after examining M.K. Shukla, D.C. Bansal, C.C. Jha and C.P. Shukla as witnesses, closed the inquiry proceedings on 11.2.1989. Thereafter, the Inquiry Officer, without affording any opportunity of hearing to the petitioner, submitted its report. On the basis of the said report, opposite party No.2-Manager

Inspection (Strouzer), Indian Telephone Industries Ltd., Raebareli, dismissed the petitioner from services vide order dated 17.7.1989. Feeling aggrieved, the present writ petition has been filed by the petitioner.

5. Submission of learned Counsel for the petitioner Mr. Saurabh Lavania is that Para 16:3 of the Standing Order, the Director alone could pass the major punishment of dismissal but in the present case, the Manager Inspection (Strouzer), Indian Telephone Industries Ltd., Raebareli, who is not vested with the power to award/inflict major punishment, has passed the order of dismissal. His submission is that in any case, it was the Director, his Deputy or representative or an officer authorized by the Director, is competent to pass punishment order against the petitioner whereas the opposite party No.2 is neither the deputy of the Director or representative nor has been authorized by the Director, therefore, the opposite party No.2 had exceeded its jurisdiction while passing the order of dismissal.

6. Elaborating his submission, Mr. Lavania has submitted that as per para 1:2 of the Standing Order read with para 16:2 (b), any officer of opposite party No.1-the Director could conduct the inquiry against the petitioner but in the present case, inquiry has been entrusted to be conducted by an Advocate. Therefore, dismissal order on the basis of report submitted by an incompetent inquiry officer is illegal and arbitrary.

7. Mr. Lavania has further submitted that impugned order of dismissal has been passed without considering reply to the charge-sheet tendered by the petitioner and also without affording opportunity of hearing to the petitioner as the Inquiry Officer had fixed 11.2.1989 only for Management evidence. He submitted that if the evidence of Management had been completed, then the Inquiry Officer ought to have fixed a date for defence evidence but in utter disregard of the principles of natural justice, the proceeding of evidence were closed by the inquiry officer on 11.2.1989 and, thereafter, no date was fixed for the evidence of the petitioner and personal hearing after closure of the prosecution witness.

8. Learned Counsel for the petitioner further submitted that the Disciplinary Authority just agreed with the Inquiry Report and passed a non-speaking order without giving any reason. Therefore, the impugned order of dismissal is liable to be quashed and the writ petition deserves to be allowed.

9. Counsel for the petitioner has submitted that the missing of the service record as well as record of departmental proceeding in the office of opposite parties is a serious matter and to this effect, department has not proceeded against responsible officer, therefore, action against the erring officer/official ought to be taken.

10. To strengthen his arguments, Mr. Lavania has placed reliance upon ***Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation Ltd. :*** 2003 (21) LCD 610***; Roop Singh Negi Vs. Punjab National Bank and others* :** 2009 (2) SCC 570***; M.M. Siddiqui Vs. State of U.P. and others*** : 2015 (33) LCD 836***; Moti Ram Vs. State of U.P. and others :*** 2013 (31) LCD 1319***;***

Baij Nath Saroj Vs. State of U.P. and others : 2014 (32) LCD 594***; Satish Chandra Shukla Vs. State Cadre Authority and others :*** 2014 (32) LCD 1808***; Kaptan Singh Vs. State of U.P. & another :*** 2014 (4) ALJ 440; ***G. Vallikumari Vs. Andhra Education Society and others :*** 2010 (2) SCC 497**; *Chairman, Disciplinary Authority Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharan Varshney and others* :** 2009 (1) SCC (L&S) 806***; Shiv Kumar Vs. State of U.P. and others :*** 2013 (31) LCD 686; and ***Mahaveer Prasad Verma Vs. Central Administrative Tribunal, Lucknow and others* :** 2013 (31) LCD 351.

11. Per contra, Mr. Krishna Chandra, learned Counsel for the respondent submits that petitioner's services were dismissed vide order dated 17.7.1989 after conducting a domestic enquiry against him. In the inquiry, the petitioner had initially participated but he had neither submitted his written explanation to the charge-sheet dated 3.6.1988 before the competent authority nor had he submitted any explanation/ defence before the Inquiry Officer. His submission is that the departmental inquiry was conducted against the petitioner to prove the charges leveled against him in conformity with the principle of natural justice. Thus, punishment of dismissal awarded to the petitioner is commensurate to the misconduct committed by the petitioner and as such, the writ petition is liable to be dismissed.

12. Mr. Chandra has submitted that charge with regard to non-joining at transferred place of posting has been proved and the Inquiry Officer gave cogent finding on the basis of evidences available on record, therefore, it cannot be said that the findings of the enquiry officer were perverse. In support of his submission, he has relied upon **General Manager (P), Punjab & Sind Bank and others Vs. Daya Singh :** (2010) 11 SCC 233**, Director General of Police and others Vs. R. Janibasha :** (1998) 9 SCC 490**, State of T.N. Vs. Thiru K.V. Perumal :** (1996) 5 SCC 474**, Principal Secretary, Govt. of A.P. and another Vs. M. Adinarayana :** (2004) 12 SCC 579**, U.P. SRTC Vs. Mitthu Singh :** (2006) 7 SCC 180, **State Bank of India and others Vs. Ramesh Dinkar Punde** : 2006 (7) SCC 212, **Chairman, LIC of India and others Vs. A. Masilamani :** 2013 (31) LCD 30, and **Mayank Agarwal Vs. Bareilly Kshetriya Gramin Bank and others :** (2013) 1 UPLBEC 633**.**

13. So far as the plea of the petitioner that an Advocate cannot be appointed as an inquiry officer, Mr. Chandra has placed reliance upon the judgment of the Apex Court in **Indian Telephone Industries Ltd. Vs. Devi Shankar Kumar Shukla :** (1997) 11 SCC 193 and submitted that in Devi Shankar Kumar Shukla (Supra), the Apex Court, upon taking into consideration the Standing Order 16 (2) (b), has held that since Standing Order provides for appointment of a person other than from the Security Department as Enquiry Officer, therefore, such a provision does not bar appointment of an outsider as Inquiry Officer. Thus, the plea of the petitioner in this regard has no substance.

14. Mr. Chandra has further contended that the petitioner has filed writ petition against dismissal order dated 17.7.1989 in the year 1990 and notice on behalf of ITI Limited was received by the Standing Counsel on 18.11.2008 i.e. after a lapse of about 18 years. Due to long lapse of time, original enquiry file and personal file of the petitioner could not be traced despite sincere

efforts. Moreover, the burden is on the petitioner to prove what he alleges in the writ petition and the Court cannot be persuaded to draw adverse inference against the Department on presumptions. In support of his submission, he relied upon the case reported **in (2008) 10 SCC 115 : C. Jacob Vs. Director of Geology** and **Mining and another** and **Poonam Rani alias Poonam Vs. State of Haryana and another** : 2012 (6) SCC 596.

15. I have heard learned Counsel for the parties and perused the record.

16. It is not in dispute that services of the petitioner were governed by Standing Order for M/S. ITI Ltd., Raebareli Plant, certified under the Industrial Employment (Standing Orders) Act, 1946. Para 1:2 of the Standing Order provides 'Domestic Enquiry' and it means an enquiry held by the Management to investigate into any charge of misconduct levelled against any employee. Para 1:4 provides that "Manager" means Factory Manager in terms of factory Act, 1948 or any officer or officers authorised by the Manager to perform some specific function of the Manager. Para 15 of the Standing Order deals with punishment, which reads as under :

"15. Punishment

The following minor and major punishment may be awarded by the Manager or any person duly aurhorized by him for good adequate reason.

1. MINOR PUNISHMENT

1. Censure or Reprimand

1. A censure/reprimand/warning is an admonition given to an employee by an officer of the Company. All censures/reprimands/warnings will be communicated in writing to the employee concerned. An employee is liable to be dismissed if he has been censure reprimanded/warned three times a year.

2. Fine which may be imposed subject to the provisions of the Payment of Wages Act and Rules.

3. Suspension without wages for a period not exceeding four days.

4. Postponement of annual increment by three months or less with or without affecting the date of increment.

2. MAJOR PUNISHMENT

1. Postponement of annual increment for more than three months but not more than one year, with or without effecting the date of increment.

2. Reduction in grade or reversion or demotion to a lower grade.

3. Removal or dismissal from service for misconduct without notice or any payment or compensation in lieu of notice whatsoever."

17. Para 16 deals with procedure for punishment, which is reproduced as under:

PROCEDURE FOR PUNISHMENT

1. For minor punishment listed in 15.1 the Manager or persons duly authorised by him, may take such action as may be necessary after giving an opportunity to the employee concerned to explain in writing.

2. For major punishments listed in para 15.2 before the disciplinary action amounting to postponement of annual increment for more than three months or reduction in grade or reversion or demotion to a lower grade or dismissal is taken, action on the following lines will be taken by the Manager.

a) The Manager shall frame a charge sheet against the employee in writing setting out the allegations and the alleged misconduct. The employee shall be given an opportunity of explaining his conduct within a specified time limit.

b) On receipt of the explanation of the employee or on expiry of the time limit whichever is earlier or under special circumstances at the time of issuing the charge sheet, the Manager shall appoint an Enquiry Officer or constitute an Enquiry Committee consisting of one or more than one person, other than from Security Department. The Enquiry Officer/Enquiry Committee shall conduct the enquiry as speedily as possible. The employee shall be all access to such documents, if any, which the management proposes to rely upon in support of allegations and produce before the Enquiry Officer/Enquiry Committee. The employee shall also be allowed to produce such evidence in his defence as may be necessary and relevant subject to the approval of the Enquiry Officer/Enquiry Committee. The employee shall also be allowed to produce such evidence in his defence as may be necessary and relevant subject to the approval of the Enquiry Officer/Enquiry Committee. The reasons for not admitting a particular evidence sought to be produced by the workman shall be recorded by the Enquiry Officer/Enquiry Committee as the case may be. The employee shall be entitled to be assisted by any other employee of the Establishment from any of its departments other than Personnel, Administration and Security Department. However, an employee may be represented by an Advocate if the Presenting Officer appointed is a Legal practitioner. (Amended vide order dt. 4.7.96)

c) The Manager shall be entitled to appoint a Presenting Officer to present the Management's case before the Enquiry Officer/Enquiry Committee. The Presenting Officer so appointed shall be an employee of the company. However, in cases investigated by the Central

Bureau of the Investigation/Special Police establishment an Officer of the Central Bureau of the Investigation or Special Police Establishment can also be appointed as Presenting Officer.

d) On receipt of the finding and/or recommendations of the Enquiry Officer/Enquiry Committee, the Manager may either except or disagree with the findings and/or recommendations.Whenever the Manager disagrees with the findings and/or recommendations, he will record his reason for such disagreement, if the evidence on record is sufficient for the purpose. If not, he may conduct such further enquiry or refer it for re-enquiry as he may consider necessary. The Manager shall then decide the punishment to be awarded. In awarding the punishment, the Manager shall take into account the gravity of misconduct, the previous record, if any, of the workman and any other extenuating or agravating circumstances that may exist. The decision of the Manager regarding the punishment shall be communicated to employee in writing. A copy of enquiry report may be supplied to the workman if requested. In case where the manager has disagreed with the findings and/or recommendations of the Enquiry Committee his reasons for such disagreement may also be communicated to the workman alongwith the findings of the Enquiry Committee. The workman shall also be supplied with copies of statements and documents made/admitted before the Enquiry Committee in case the punishment is one of dismissal. (Amended vide order dt.4.7.96).....

j) If on the conclusion of the enquiry the workman has been found guilty of the charges framed against him and it is considered that an order of dismissal or discharge or fine or stoppage of annual increment or reduction of rank would meet the ends of justice, the Manager shall pass an order accordingly....."

18. In the present case, admittedly, the petitioner was placed under suspension vide order dated 28.1.1988. Thereafter, a charge-sheet dated 3.6.1988 under the signature of Deputy Manager (Strouzer) for Manager Inspection (Strouzer) was served upon the petitioner on 23.7.1988. According to the petitioner, the Deputy Manager (Strouzer) was not the competent authority to issue charge-sheet as in view of Standing Order, the Manager was the competent authority, therefore, issuance of charge-sheet by the incompetent authority is illegal. In this regard, Counsel for the respondent Mr. Krishna Chandra has placed an Office Order dated 29.3.1981, which deals with the delegation of powers by the disciplinary authority.

19. A perusal of the Office Order dated 29.3.1981 reveals that the concerned authority for misconduct under Standing Order 14-2, 3, 4, 6, 24, 25, 28, 29, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 54 or any other misconduct as also disciplinary case coming under jurisdiction of two or more authority was Administrative Officer/Manager. It is not in dispute that the petitioner was charge-sheeted for the act of misconduct as per clauses 14 (1), (12), (21), (31), (53) & (54) and at the time of issuing charge-sheet, the Administrative Officer of the petitioner was Deputy Manager (Strouzer). In these backgrounds, if the Deputy Manager (Strouzer) has issued the charge-sheet on behalf of Manager (Inspection) Strouzer, then, the plea of the petitioner that the charge-sheet was issued by an incompetent authority, has no substance and is hereby rejected.

20. The second plea of the petitioner is that the Inquiry Officer so appointed was an Advocate, which is contrary to the Standing Order. In this context, it would be apt to mention that the Apex Court in ***Devi Shankar Kumar Shukla (supra),*** after noting Standing Order 16 (2) (b), observed as under:

"4. It is clear from the above provision in the Standing Order that the requirement is to appoint an Enquiry Officer who is not from the Security Department. There is no other prohibition about choice of the person to be appointed Enquiry Officer in the above provision. The reason for excluding a person belonging to the Security Department is obvious. Such a person who is in the Security Department may have some interest in the successful conclusion of the domestic inquiry against the delinquent employee. His exclusion, therefore, is to eliminate the likelihood of any bias. Such a provision cannot be construed to mean that a person who is not even an employee in any other department and being an outsider having no interest in the outcome of the domestic inquiry is also to be excluded. The view taken by the High Court is, therefore, untenable."

21. Thus, in view of the aforesaid legal proposition, this Court came to the conclusion that the plea of the petitioner that outsider like an Advocate cannot be appointed as Enquiry Officer and only officer of the department can be appointed as Enquiry Officer, has also no substance and accordingly, this plea of the learned Counsel for the petitioner cannot be accepted.

22. So far as the plea of the petitioner that the impugned order of dismissal is violative of natural justice as no date, time and place has been fixed by the Enquiry Officer nor the reply to the charge-sheet has been placed before the Enquiry Officer, is concerned, a perusal of inquiry report clearly indicates that a notice dated 30.6.1988 was sent to the petitioner-Sri Vikram Singh through C.I.S.F. with the direction to appear before the enquiry proceedings on 9.7.1988 at 11 A.M. in the administrative building of the factory, which was duly served upon him but the petitioner did not turn up on the date fixed. Subsequently, another notice dated 12.7.1988 was sent to him through C.I.S.F. with the direction to appear on 23.7.1988 at 3.00 P.M. in the administrative building of the factory before the enquiry proceeding, which was also served upon the petitioner. In pursuance of notice dated 12.7.1988, petitioner-Sri Vikram Singh appeared in person before the enquiry officer, who served the charge-sheet to the petitioner. The charge-sheet was red over and explained to the petitioner, who denied the charges levelled against him. Thereafter, on 13.8.1988, Mr. A.K. Mishra was permitted to represent the case on behalf of the petitioner. However, on the application for the charge-sheeted employee Mr. A.K. Srivastava was allowed to represent the case on behalf of the employee concerned in place of Mr. A.K. Mishra. The presenting officer submitted the photocopies of five documents with a list, the copies of which were given to the employee concerned on 22.10.1988. On 1.2.1989, the enquiry was adjourned on the request of the petitioner and the next date 11.2.1989 at 11.00 A.M. was fixed regarding which a notice dated 1.2.1989 was also sent to the petitioner through C.I.S.F. but neither the petitioner nor his representative Mr. A.K. Srivastava turned up on the date fixed i.e. 11.2.1989. In these backgrounds, the enquiry was proceeded ex parte. It has also been indicated in the enquiry report that the petitioner did not give any reply of the charges, nor any evidence was led on behalf of the defence. In such view of the matter, it is purely

findings of fact that have been recorded by the Enquiry Officer, which cannot be re-appreciated in writ jurisdiction.

23. It is a well settled law that the High Court in exercise of its powers under Articles 226/227 of the Constitution of India shall not venture into re-appreciation of the evidence. Reference may be made in this regard to a recent judgment rendered by the Hon'ble Apex Court in the case of ***Union of India Vs. P. Gunasekaran*** 2015 (2) SCC 610. Relevant paragraphs 19, 20 and 21 of the aforesaid judgment are quoted as under:-

"19. The disciplinary authority, on scanning the inquiry report and having accepted it, after discussing the available and admissible evidence on the charge, and the Central Administrative Tribunal having endorsed the view of the disciplinary authority, it was not at all open to the High Court to reappreciate the evidence in exercise of its jurisdiction under Articles 226/227 of the Constitution of India.

20. Equally, it was not open to the High Court, in exercise of its jurisdiction under Article 226/227 of the Constitution of India, to go into the proportionality of punishment so long as the punishment does not shock the conscience of the court. In the instant case, the disciplinary authority has come to the conclusion that the respondent lacked integrity. No doubt, there are no measurable standards as to what is integrity in service jurisprudence but certainly there are indicators for such assessment. Integrity according to Oxford dictionary is "moral uprightness; honesty". It takes in its sweep, probity, innocence, trustfulness, openness, sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, cleanness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a code of moral values.

21. The impugned conduct of the respondent working as Deputy Office Superintendent in a sensitive department of Central Excise, according to the disciplinary authority, reflected lack of integrity warranting discontinuance in service. That view has been endorsed by the Central Administrative Tribunal also. Thereafter, it is not open to the High Court to go into the proportionality of punishment or substitute the same with a lesser or different punishment. These aspects have been discussed at quite length by this Court in several decisions including B.C. Chaturvedi v. Union of India and others, 1995 (6) SCC 749, Union of India and another v. G. Ganayutham, 1997 (7) SCC 463, Om Kumar and others v. Union of India, 2001 (2) SCC 386, Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association and another, 2007 (4) SCC 669, Coal India Limited and another v. Mukul Kumar Choudhuri and others, 2009 (15) SCC 620 and the recent one in Chennai Metropolitan Water Supply (supra)."

24. In view of the aforesaid legal proposition and considering the facts and circumstances of the case, in my opinion, when the punishing authority agrees with the findings of the Inquiry Officer and accepts the reasons given by him in support of such findings, then it is not imperative upon the punishing authority to again discuss evidence. Therefore, the question of non-compliance

with the principle of natural justice does not arise. It is also incorrect to say that the impugned order is not a speaking order.

25. Insofar as plea of the petitioner with regards to loss/destruction of record of disciplinary proceedings is concerned, it is relevant to add that in the case of ***C. Jacob V. Director of Geology and Mining and another***: (2008) 10 SCC 115, the Apex Court in paragraphs 15 & 16 has held as under:

15. The present case is a typical example of `representation and relief'. The petitioner keeps quiet for 18 years after the termination. A stage is reached when no record is available regarding his previous service. In the representations which he makes in 2000, he claims that he should be taken back to service. But on rejection of the said representation by order dated 9.4.2002, he filed a writ petition claiming service benefits, by referring the said order of rejection as the cause of action. As noticed above, the learned Single Judge examined the claim, as if it was a live claim made in time, finds fault with the respondents for not producing material to show that termination was preceded by due enquiry and declares the termination as illegal. But as the appellant has already reached the age of superannuation, the learned Single Judge grants the relief of pension with effect from 18.7.1982, by deeming that he was retired from service on that day. We fail to understand how the learned Single Judge could declare a termination in 1982 as illegal in a writ petition filed in 2005. We fail to understand how the learned Single Judge could find fault with the department of Mines and Geology, for failing to prove that a termination made in 1982, was preceded by an enquiry in a proceedings initiated after 22 years, when the department in which appellant had worked had been wound up as long back as 1983 itself and the new department had no records of his service.

16. The petitioner neither produced the order of termination, nor disclosed whether the termination was by way of dismissal, removal, compulsory retirement or whether it was a case of voluntary retirement or resignation or abandonment. He significantly and conveniently, produced only the first sheet of a show cause notice dated 8.7.1982 and failed to produce the second or subsequent sheets of the said show cause notice in spite being called upon to produce the same. There was absolutely no material to show that the termination was not preceded by an enquiry. When a person approaches a court after two decades after termination, the burden would be on him to prove what he alleges. The learned Single Judge dealt with the matter as if he the appellant had approached the court immediately after the termination. All this happened, because of grant of an innocuous prayer to `consider' a representation relating to a stale issue."

26. Thus, the loss/destruction of record pertains to disciplinary proceeding would also not help the petitioner in any manner as it is for the petitioner to establish that how each and every document was relevant to the charges and what prejudice has been caused to him. No where there is averment in the pleading about prejudice caused to the petitioner due to loss of certain papers. Therefore, it can easily be inferred that there is no violation of principle of natural justice.

27. For the reasons aforesaid, no interference under Article 226 of the Constitution of India is made out.

28. The writ petition is, accordingly, ***dismissed***.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.07.2016

BEFORE

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Misc. Single No.- 15837 Of 2016

Lal Krishna Verma ...Petitioner

Versus

Cholamandalam Investment & Finance Co. Ltd. ...Respondent

Counsel for the Petitioner:
Sri Vikas Verma

Counsel for the Respondent:
Learned Standing Counsel

PROCEDURE:
Petition under **Article 226 of the Constitution of India** seeking:
Quashing of demand notice issued by respondent-finance company; and
Direction for release of repossessed tractor financed through loan.

FACTS IN BRIEF:
Petitioner obtained a loan of **Rs. 3,50,000/-** for purchase of a tractor for agricultural purposes.
Default occurred in payment of instalments.
Respondent-company issued demand notice and repossessed the tractor.
Petitioner had already paid Rs. 2,00,000/-.
Petitioner also moved an application under **Section 156(3) Cr.P.C.** regarding repossession.

CASE LAW DISCUSSED:
Federal Bank Ltd. v. Sagar Thomas & Ors., (2003) 10 SCC 733
Dharmendra Kumar Yadav v. Manager, Commercial Auto Sales (P), W.P. No. 66283 of 2010, decided on 06.12.2010 (All HC)

HELD:
A **private non-statutory company incorporated under the Companies Act** is ordinarily **not amenable to writ jurisdiction under Article 226**.
Writ may lie against a private body only when:
It performs a statutory/public duty; or
There is violation of statutory obligation enforceable by mandamus.
Mere regulatory control over private financial institutions does not confer public duty status.

Disputes arising out of purely contractual/commercial transactions do not justify issuance of writ.

RESULT:
Writ petition **dismissed as not maintainable**.
However, liberty granted to petitioner to avail appropriate criminal or other remedies available under law.

(Delivered by Hon'ble Dr. Devendra Kumar Arora, J.)

1. Petitioner, Lal Krishna Verma, had taken a loan amounting to Rs. 3,50,000/- from Cholamandalam Investment and Finance Company Limited, Deokali Branch, District Faizabad for agricultural purposes i.e. for purchasing a Tractor

2. The aforesaid amount was to be paid in installment as agreed upon between the parties but the petitioner defaulted in making regular payment as such a demand notice contained in Annexure-1 to the writ petition has been issued by the respondent-company. It is said that the possession of the Tractor has also been taken by the agent/representative of the Company, causing serious prejudice to the petitioner, who had already deposited Rs. 2,00,000/- towards loan amount.

3. In the backdrop of the aforesaid facts, this writ petition has been filed for quashing the aforesaid demand notice and for a direction to release the tractor.

4. In contrast, learned Standing Counsel submitted that the respondent-financial institution being a non-statutory private company, no writ petition for a mandamus or an order in the nature of mandamus could lie against the Company.

5. I have considered the submission of the learned Counsel for the petitioner and perused the record.

6. The allegations made in the writ petition are against the Cholamandalam Investment and Finance Company Limited, Deokali Branch, District Faizabad, which is a private body and its agent, who had repossessed the vehicle. However, it transpires from the record that when the recovery agent had repossessed the vehicle, the petitioner has moved an application under Section 156(3) of the Code of Criminal Procedure.

7. It may be observed that the respondent-company being a non-statutory body and one incorporated under the Companies Act, there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus.

8. The jurisdiction of High Court to issue writ under Article 226 of the Constitution of India has come up for consideration on several occasions before the Apex Court. The Apex Court ***in the case of Federal Bank Ltd. Vs. Sagar Thomas & Ors. (2003) 10 SCC 733*** again considered the scope of issuance of Writ under Article 226 of the Constitution against a private Bank and held in paragraphs 27 and 33 as under:-

"27.Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

9. The aforesaid principle has been reiterated by a Division Bench of this Court in ***Dharmendra Kumar Yadav vs. Manager, Commercial Auto Sales (P);*** Writ Petition No. 66283 of 2010 decided on 6.12.2010.

10. In view of the aforesaid legal position, the writ petition being not maintainable is hereby dismissed. However, it would be open to the petitioner to take such criminal action or any other action against the respondent as may be permissible under law.

11. With the aforesaid observations, the writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 16365 Of 2016

Rajkumar & Ors. **...Applicants**
Versus
State Of U.P. **...Opposite Party**

Counsel for the Applicants:
Vishesh Kumar

Counsel for the Opposite Party:
G.A.

Headnote:
Para 13 to 22
At the stage of framing of charge under Sections 227/228 Cr.P.C., the Court is only required to examine whether there exists a prima facie case or strong suspicion against the accused; meticulous appreciation of evidence is impermissible. Where death of a married woman occurs within seven years of marriage under unnatural circumstances and material collected during investigation discloses allegations of dowry demand and cruelty, framing of charge under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act is justified.

Alternative charge under Section 302/34 IPC can be framed in light of the direction issued in **Rajbir @ Raju v. State of Haryana**, subject to clarification in **Jasvinder Saini v. State (NCT of Delhi)**, that such direction is not to be followed mechanically but depends upon the evidence available at the stage of framing charge.

Where the case is at initial stage and no finding has been recorded that there is absence of material for charge under Section 302 IPC, framing of alternative charge cannot be said to be illegal or mechanical.
Application under Section 482 Cr.P.C. seeking quashing of order framing charges — **Dismissed**.

Case Law Discussed:
State of Bihar v. Ramesh Singh, AIR 1977 SC 2018
Sachin Saxena @ Lucky v. State of U.P., 2008 (62) ACC 454
Rajbir @ Raju v. State of Haryana, 2010 (71) ACC 920
Jasvinder Saini v. State (NCT of Delhi), 2013 (83) ACC 132

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. The applicants by means of this application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the order dated 31.8.2015 passed by Additional Sessions Judge, Court No. 3, Jaunpur in Session Trial No. 359 of 2011 (State Vs.

Rajkumar and others) whereby the learned trial court has framed charges under Sections 498A, 304B I.P.C. and 3/4 of D.P. Act alongwith alternative charge under Section 302/34 I.P.C. against the applicants.

2. Heard learned counsel for the applicants and learned A.G.A. for the State. Perused the records.

3. Learned counsel for the applicants has submitted that the death of the deceased was mere an accident. When she was pouring kerosene oil in the burning lamp, her 'Saari' suddenly caught fire and she received severe burn injuries on her body. She was immediately admitted to the hospital on 8.4.2011 by her father-in-law (applicant no. 3). She remained admitted in the hospital for about one month and a total cost of Rs. 1,36,600/-, incurred in her treatment, was borne by the applicants but unfortunately on 9.5.2011 she succumbed to her injuries. It is further submitted that during the aforesaid period of one month when she was remained admitted in the hospital, the police did not record her statement. The father and other relatives of the deceased were immediately informed about the accident and they reached the hospital on 10.4.2011 where the father of the deceased also donated blood to his daughter. It is further submitted that considering all these facts and circumstances the police submitted charge-sheet against the applicants under Sections 498A, 304B I.P.C. and 3/4 of D.P. Act. The applicants were enlarged on bail by this Court.

4. The applicants moved an application under Section 227 Cr.P.C. for their discharge under the aforesaid sections but the learned trial judge vide order dated 14.8.2015 rejected their discharge application and vide impugned order dated 31.8.2015 framed charges against the applicant not only under Sections 498A, 304B I.P.C. and 3/4 of D.P. Act but also framed alternative charge under Section 302/34 I.P.C.

5. The submission of learned counsel for the applicants is that the trial court without considering the facts and circumstances has arbitrarily rejected the application of discharge and framed additional charge under Section 302/34 I.P.C. only in obedience of the direction/circular issued by Hon'ble Apex Court in the case of **Rajbir @ Raju and another V. State of Haryana; 2010 (71) ACC 920**. Learned counsel has submitted that from the perusal of the entire record it is evident that there is no iota of evidence about culpable homicide amounting to murder punishable under Section 302 of I.P.C. There is neither any direct nor any circumstantial evidence to primafacie support the charge under Section 302/34 I.P.C. However, the trial court, acting mechanically has framed the additional charge under Section 302/34 I.P.C. simply in compliance of the direction issued by Hon'ble Apex court.

6. Learned counsel for the applicant has placed reliance on the law laid down in the case of **Jasvinder Saini and others Vs. State (Govt. of N.C.T. Of Delhi); 2013 (83) ACC 132.**

7. Per contra learned A.G.A. has opposed the application by contending that the instant application is without any force and the judgment of Jasvinder Saini (supra) cited by the applicants has no application to the present case, the facts and situation of the two being entirely different.

8. Considered the submissions.

9. In a catena of judgments the Hon'ble Apex Court has laid down the law that at the initial stage of framing charge even if there is a strong suspicion which leads the court to think that there is ground for assuming 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. In **State of Bihar Vs. Ramesh Singh; AIR 1977 SC 2018** the Hon'ble Apex Court has held as under:-

"The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction."

10. In **Sachin Saxena @ Lucky Vs. State of U.P. ; 2008 (62) ACC 454** a coordinate bench of this Court has held as under:

"14. At the stage of framing a charge neither the defence case nor a meticulous examination of the evidence is needed and it has only to be seen by the Court whether there is sufficient material to proceed with the trial against the accused. Even if the material collected by the police during investigation casts a strong suspicion of the complicity of an accused, that is sufficient for framing the charge."

11. The police has submitted charge-sheet against the applicants under Sections 498-A, 304-B I.P.C. and 3/4 of D.P. Act after concluding the investigation. In the F.I.R. itself, lodged by the father of the deceased, it has been alleged that the daughter of the informant was married to applicant no. 2-Balraj on 3.6.2010 as per the Hindu rites and rituals. Soon after the marriage, the husband and the in laws started making demand of a Hero Honda motorcycle and 50,000/- cash. On non fulfillment of the same they attempted to kill his daughter by putting her to flames on 8.4.2011 and thereafter they admitted her in Jeevan Joyti Hospital where she succumbed to her injuries on 9.5.2011. In the inquest and the post-mortem reports the cause of death is shown as burn injuries. The witnesses have stated about the culpability of the applicants during their interrogation under Section 161 Cr.P.C. hence the police submitted charge-sheet against the applicants. At the time of framing of charge the prosecution produced all these evidence collected during investigation alongwith the entire case diary before the trial judge, who, taking into consideration, framed charges under Sections 498-A, 304-B I.P.C. and 3/4 of D.P. Act.

12. There appears no illegality in framing of charges, in so far as the aforesaid sections are concerned as there was sufficient primafacie evidence which is required at the stage of framing of charge against the accused.

13. In so far as the alternative charge under Section 302/34I.P.c. is concerned, in **Rajbir @ Raju's** case (supra) the Hon'ble Apex court directed all the trial courts in India to ordinarily add section 302 I.P.C. to the charge of Section 304-B I.P.C. so that the death sentence can be imposed in such heinous and barbaric crime against woman. The copy of the aforesaid judgment of Hon'ble Supreme Court was sent to the Registrar Generals of all the High Courts with direction to circulate it to all the trial courts. Therefore, if the learned trial court in the present case, in compliance of the order of Hon'ble Apex Court, framed alternative charge under Section 302/34 I.P.C. no illegality was done by it as the compliance of the orders of the Hon'ble Apex Court is mandatory not only for the trial courts but also for the High Courts.

14. Placing reliance on **Jasvinder Saini's** case (supra), the learned counsel for the applicants has submitted that the Apex Court in the aforesaid case has clarified the law as laid down by its earlier bench in **Rajbir's** case (supra).

15. The Apex Court in **Jasvinder Saini's** case has held as under :-

"the aforesaid direction in Rajbir's case was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 I.P.C. can also be framed if the evidence otherwise permits."

16. According to the Hon'ble Apex Court the question whether it is murder punishable under Section 302 I.P.C. or a dowry death punishable under Section 304-B I.P.C. depends upon the facts, situation and the evidence in the case. If there is evidence whether direct or circumstantial, to primafacie support the charge under Section 302 of I.P.C., the trial court indeed and ought to frame the charge of murder punishable under Section 302 of I.P.C.

17. Testing the facts of the instant case on the anvil of the law laid down by the Apex Court in **Jasvinder Saini's** case, it clearly appears that the facts of instant case are entirely distinguishable from **Jasvinder Saini's** case. In **Jasvinder Saini's** case charge-sheet was filed under Section 498-A, 304-B and 406 readwith 34 I.P.C. against four accused persons and later on a supplementary charge-sheet followed, implicating 4 more accused persons under Section 302 I.P.C. The case was committed to the sessions and the Sessions Judge, who heard the matter for framing of the charges, came to the conclusion by recording a clear finding that there was no evidence or material to justify the framing of charge under Section 302 of I.P.C. Charges were accordingly framed under Sections 498-A and 304-B readwith 34 I.P.C. The trial proceeded and the prosecution examined as many as 18 witnesses. Meanwhile, the judgment of **Rajbir's** case (supra) was passed by the Apex Court whereby directing all the trial courts of India to add Section 302 I.P.C. as an alternative charge in every case punishable under Section 304-B IP.C. It was in the above

background that the trial court had to frame the alternative charge under Section 302 of I.P.C. at such belated stage, only in compliance of the order of Hon'ble Apex Court. The accused persons challenged that order before the High Court but the High Court also dismissed their claim finding itself to be duty bound to comply with the direction of Hon'ble Supreme Court. The accused persons approached the Supreme Court against the order of this Court and the Apex Court held that the directions issued in Rajbir's case were not meant to be followed mechanically without due regard to the nature of evidence available in the case. The Apex Court in **Jasvinder Saini's** case held that the evidence assembled during the course of investigation and presented to the trial court was not sufficient to call for framing of charge under Section 302 of I.P.C.

18. Under the aforesaid facts and circumstances when as many as 18 witnesses have already been examined and there was also a clear finding earlier recorded by the trial court that there was no evidence or material on record to justify the framing of charge under Section 302 I.P.C. that the Supreme Court held that **Rajbir's** case was not meant to be followed mechanically.

19. So far as the facts of the instant case are concerned it shows that it is pending at the initial stage, no prosecution witness has been examined as yet. There is no earlier finding of learned trial judge to such effect that primafacie there is no evidence to support the charge of Section 302 of I.P.C. The primafacie evidence available on record shows that the deceased has met an untimely death within 7 years of her marriage under unnatural circumstances. No doubt her father-in-law had got her admitted to the hospital and her husband had also sustained burn injuries in the same occurrence but whether the incident was accidental, suicidal or homicidal, this can not be ascertained at this very initial stage, without availability of evidence, to be led by both the parties during trial. If the applicants were found innocent they may be acquitted. Neither any view can be expressed by this court with regard to their culpability nor about their innocence. The trial judge in its wisdom and after finding a primafacie case and also in compliance of the direction issued by the Apex Court in **Rajvir's** case, has framed alternative charge under Section 302/34 I.P.C. against the applicants. Hence it cannot be said that the trial court has acted illegally or mechanically.

20. Every criminal case stands on its independent footing and its decision depends on its peculiar facts and circumstances. The Apex Court in **Jasvinder Saini's** case has already held that it depends upon its own facts, situation and evidence of the case whether to frame additional alternative charge under Section 302 of I.P.C. or not.

21. In every case under Section 304-B of I.P.C. death of a young bribe is involved, who had to leave this world in her prime years. In every such case the death occurs within the four corners of her matrimonial home. In order to convict a person under Section 304-B, the prosecution has to prove the existence of some essential ingredients, one of such being *"that she was subjected to cruelty in connection with dowry demand soon before her death."*

22. It is very difficult to prove an incident taking place inside the four corners of a house. Though by a deeming provision, the legislature has shifted this burden on the accused, but the initial burden to prove the existence of all the essential ingredients of section 304-B is always on

the prosecution. In absence of alternative charge under Section 302 I.P.C., some times it happens that despite unnatural death of a young bride inside their house, all the accused go scot free only for the reason that the prosecution fails to lead any evidence regarding her maltreatment "soon before her death". As a result, even a case where "death" is involved, ends in acquittal merely due to lack of evidence regarding an essential ingredients of Section 304-B I.P.C.

23. It is for this reason also, that framing of an alternative charge under Section 302 of I.P.C. alongwith charge under Section 304-B of I.P.C. is necessary at the initial stage.

24. In view of the above discussion, the application under Section 482 Cr.P.C. appears to be without any force and it is liable to be dismissed.

25. The application under Section 482 Cr.P.C. is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 16789 Of 2016

Ritesh Singh @ Lav Kush Singh & Anr. ...Applicants

Versus

State Of U.P. & Ors. ...Opposite Parties

Counsel for Applicants:
Sri Arvind Srivastava, Sri Raj Kumar Singh

Counsel for Opposite Parties:
Government Advocate

Criminal Procedure -- Section 482 Cr.P.C. -- Quashing of Investigation -- Scope of Interference at Investigation Stage -- Applicants sought quashing of investigation and all consequential proceedings in Case Crime No. 3 of 2016 under Sections 147, 148, 149, 352 and 307 I.P.C. on the ground that they had not formed any unlawful assembly, injuries were simple and concocted in collusion with the medical officer, and no charge-sheet had been submitted despite investigation pending since January 2016 -- Held: ordinarily a court cannot direct the investigating agency to carry out investigation in a particular manner and can interfere with the functioning of investigating agency only in exceptional cases -- the court and judicial process should not interfere at the stage of investigation save in exceptional cases where non-interference would result in miscarriage of justice -- no such exceptional case is made out on the facts -- investigation ongoing; no ground to quash or stay investigation. (Paras 1-3)

Criminal Procedure -- Section 482 Cr.P.C. -- Investigation -- Time Bound Completion -- Section 167 Cr.P.C. -- Statutory Bail -- Applicants submitted that the investigation has been pending for more than

six months and it should be directed to be concluded within a time-bound period -- Held: the court cannot direct the investigating officer to conclude investigation within a time-bound period -- however, the court can and does expect the Investigating Officer to conclude the investigation in a fair, impartial and expeditious manner -- if investigation is not concluded within ninety days as provided under Section 167 Cr.P.C., the applicants can avail the benefit of statutory bail under the said provision. (Para 3)

Application U/S 482 Cr.P.C. Disposed of -- Investigation not stayed -- investigating officer directed to conclude investigation fairly, impartially and expeditiously -- applicants Ritesh Singh @ Lav Kush Singh and another directed not to be arrested in Case Crime No. 3 of 2016 under Sections 147, 148, 149, 352 and 307 I.P.C., P.S. Sureri, District Jaunpur, until credible evidence is collected by the Investigating Officer during investigation against them. (Para 4)

Case Law Discussed:
1. Shashikant v. C.B.I., (2007) 1 SCC 630
2. Eastern Spinning Mills v. Rajiv Poddar, 1989 Supp. (2) SCC 385
3. Joginder Kumar v. State of U.P., 1994 Cr.L.J. 1981
4. Ajay Mitra v. State of M.P., 2003 Law Suit (SC) 110

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

2. The applicants, by means of this application under section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with prayer to quash the investigation and all consequential proceedings being conducted by the S.H.O., P.S. Sureri, District Jaunpur, in pursuance of the F.I.R. dated 2.1.2016 bearing Case Crime No. 3 of 2016 under section 147, 148, 149, 352, 307 I.P.C. P.S. Sureri, District Jaunpur.

3. Learned counsel for the applicants has contended that the applicants have never formed any unlawful assembly with any deadly weapon nor they have participated in the present crime with common object. All the alleged injuries are simple in nature and there is no supplementary x-ray report. It is further contended that the injury report has been concocted with the collusion of medical officer in order to falsely implicate the applicants. It is next submitted that the applicants have no criminal history and the investigation is pending since 2.1.2016 but up till this date no charge-sheet has been submitted. It is further submitted that the alleged firearm injury is on the non-vital part of the body of the injured and even if the charges are found to be proved, sentence of more than 7 years cannot be awarded. It is next submitted by learned counsel that in view of this, arrest of the applicants should not be effectuated by the police personnel mechanically. Reliance has been placed on ***Ajay Mitra Vs. State of M.P., 2003 Law Suit (SC) 110.***

4. Learned AGA has opposed the application by contending that the investigation is still going on and pending investigation the courts have no jurisdiction to inferfere in a criminal case. Learned AGA has further contended that Ajay Mitra's case relates to quashing of FIR and it has no application in the present case.

5. Considered the submissions.

6. In the case of ***Shashikant Vs. C.B.I. (2007) 1 SCC 630*** the Apex Court has held as under:-

"Ordinarily a writ court cannot direct investigation agency to carry out investigation in a particular manner. It can interfere with functioning of investigating agency only in exceptional cases."

7. No such case is made out in the present case.

8. In the case of ***Eastern Spinning Mills Vs. Rajiv Poddar, 1989 Supp.(2) SCC 385*** the Apex Court has held as under:-

"Save in exceptional cases were non interference would result in miscarriage of justice, the court and the judicial process should not interfere at the stage of investigation of offences."

9. The allegations against the applicants as per FIR version are that when the fields of the complainant were being measured under the orders of the S.D.M. Madiyahun, the accused persons reached there and exhorted with words "Jaan se mar dalo. Koi bachna nahin chahiye". Hearing this the applicants opened fire causing injuries to Suraj Singh and Ziledar Singh. The injury reports of Suraj Singh and Ziledar Singh have been annexed by the applicants as Annexure no. 2 to the affidavit filed in support of the application, which shows that all the injuries of Suraj Singh were kept under observation and x-ray was advised. Injury no. 1 of Ziledar Singh was also kept under observation and x-ray was advised. However, there is no supplementary x-ray report on the record. The investigation is going on and in the facts and circumstances of the case there appears no ground to stay the investigation.

10. Even the investigation cannot be directed to be concluded within a time bound period and if it has not been concluded within the period of ninety days as provided under section 167 Cr.P.C. the applicants can avail the benefit of statutory bail. Though it cannot be directed that the investigation be concluded within a time bound period, however, it is expected from the Investigating Officer that he will try his best to conclude the investigation, (which according to the applicants is pending since more than six months, in a fair and impartial manner expeditiously).

11. Keeping in view the facts and circumstances of the case and considering the nature of the allegations made in the F.I.R., the provisions of section 157 Cr.P.C. and the view taken by the Apex Court in the case of ***Joginder Kumar Vs. State of U.P. 1994 Cr.L.J 1981*** it is also directed that the applicants shall not be arrested in above mentioned case, till some credible evidence is collected by the Investigating Officer during Investigation against them.

12. The application under section 482 Cr.P.C. stands disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Writ A No.- 17534 Of 1998

Sadhana Yadav ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioner:
Hariom Khare, A. Khare, S. Khare, V.K. Singh

Counsel for Respondents:
C.S.C

1. U.P. Police Officers of Subordinate Ranks (Punishment & Appeal) Rules, 1991 – Rule 8(2)(b) – Dismissal Without Departmental Inquiry – Conditions Precedent – Recording of Reasons Mandatory – Absence of Germane Grounds – Order of Dismissal Unsustainable.
Rule 8(2)(b) of the U.P. Police Officers of Subordinate Ranks (Punishment & Appeal) Rules, 1991, which is pari materia with Article 311(2)(b) of the Constitution of India, empowers the disciplinary authority to dispense with a regular departmental enquiry and impose punishment of dismissal, removal or reduction in rank only where it is satisfied that it is not reasonably practicable to hold such an inquiry. Two conditions are essential for the valid invocation of this rule: (i) there must exist a situation which renders the holding of an inquiry not reasonably practicable; and (ii) the disciplinary authority must record in writing its reasons in support of such satisfaction. The recording of reasons is mandatory and is not a mere formality — its object is to prevent arbitrary, capricious and mala fide exercise of power. The satisfaction of the authority must be based on germane grounds and not on the ipse dixit of the disciplinary authority. In the present case, no reasons were recorded in the impugned order justifying why the holding of a regular departmental inquiry was not reasonably practicable, and the authority resorted to Rule 8(2)(b) without any plausible basis. Held: The invocation of Rule 8(2)(b) was wholly unjustified. The impugned order of dismissal dated 19.02.1998 was set aside. Relied upon: Union of India v. Tulsi Ram Patel, AIR 1985 SC 1416; Om Prakash Yadav v. State of U.P. & Others, Writ-A No. 3625 of 2010.

2. Constitution of India – Article 311(2)(b) – Test of Reasonable Practicability – What Constitutes 'Not Reasonably Practicable' – Illustrative Instances – Dismissal Merely to Avoid Inquiry or on Account of Weak Departmental Case Impermissible.
The test of 'not reasonably practicable' under Article 311(2)(b) of the Constitution of India does not require total or absolute impracticability. What is required is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. Instances where it would not be reasonably practicable to hold an inquiry include: where the government servant, through associates, terrorises or intimidates witnesses; where the disciplinary authority or members of his family are threatened; or where a general atmosphere of violence, indiscipline or insubordination prevails. A disciplinary authority is not expected to dispense with a departmental inquiry lightly, arbitrarily, out of ulterior motives, merely to

avoid the holding of an inquiry, or because the department's case is weak. The finality conferred by Article 311(3) upon the disciplinary authority's decision does not oust judicial review; the court will strike down the order dispensing with inquiry if it is found to be arbitrary or mala fide or made on extraneous considerations. Relied upon: Union of India v. Tulsi Ram Patel, (1985) 3 SCC 398 (para 130).

3. Service Law – Departmental Proceedings – Reasons must Appear in the Order – Supplementation through Affidavit Impermissible – Validity of Order Tested only on Grounds Stated Therein.

When a statutory authority makes an order based on certain reasons or grounds, the validity of that order is to be tested solely on the reasons or grounds stated therein. It is not open to the authority to supplement or supply reasons through a counter affidavit filed before the court. The reasons must either appear on the face of the order itself or must at least be available on record at the time the order is passed. In the present case, the disciplinary authority failed to disclose in the impugned order any reason or ground for invoking the extraordinary power under Rule 8(2)(b) and no such reason was forthcoming even from the record; such deficiency cannot be cured through the averments in the counter affidavit. Relied upon: Mohinder Singh Gill & Another v. Chief Election Commissioner, New Delhi & Others, AIR 1978 SC 851 (para 8).

4. Service Law – Departmental Proceedings vis-à-vis Criminal Proceedings – Acquittal in Criminal Trial – Effect – Law of Evidence Not Applicable in Departmental Proceedings – Regular Departmental Inquiry Permissible Despite Acquittal.

It is well-established in law that the law of evidence applicable in criminal proceedings does not govern departmental proceedings. The standard of proof in departmental proceedings is the preponderance of probabilities, whereas in criminal proceedings it is proof beyond reasonable doubt. Accordingly, an acquittal by a criminal court on the same charge does not per se bar the holding of a regular departmental inquiry in respect of the same allegations. However, where the U.P. Police Regulations contain specific provisions governing reinstatement and the conduct of proceedings following judicial acquittal — such as Regulation 493(c) — the disciplinary authority is required to take those provisions into due consideration while deciding the course of action after acquittal. Held: Although the petitioner's acquittal by the trial court in Criminal Case No. 586 of 1998 does not automatically entitle her to reinstatement simpliciter, it is open to the respondents to conduct a regular departmental proceeding, which must be conducted having due regard to the provisions of Regulation 493(c) of the U.P. Police Regulations.

5. U.P. Police Regulations – Regulation 493(c) – Judicial Acquittal – Obligation to Reinstate – Limited Exception for Departmental Inquiry for Negligence or Unfitness – Consideration by Authority Directed.

Regulation 493(c) of the U.P. Police Regulations mandates that where an accused police officer has been judicially acquitted or discharged, and the period for filing an appeal has elapsed or no appeal has been filed, the Superintendent of Police must at once reinstate him if he is under suspension. A limited exception exists: where the findings of the court are not inconsistent with the view that the accused was 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 seek permission from the Deputy Inspector General to try the accused departmentally for such negligence or unfitness. Held: The implications of Regulation 493(c) must be examined and given effect to by the authority concerned while taking a decision on the further course of departmental proceedings following the petitioner's acquittal. The respondents are left at liberty to conduct a regular departmental proceeding in accordance with law, subject to due compliance with Regulation 493(c).

Result: Writ petition disposed of. The impugned order of dismissal dated 19th February, 1998 passed by the Senior Superintendent of Police, Jhansi under Rule 8(2)(b) of the Rules, 1991 set aside. The respondents left at liberty to conduct a regular departmental proceeding against the

petitioner in accordance with law, with due regard to the provisions of Regulation 493(c) of the U.P. Police Regulations. No order as to costs.

Cases Referred:

1. Union of India v. Tulsi Ram Patel, AIR 1985 SC 1416 / (1985) 3 SCC 398 – Applied.
2. Mohinder Singh Gill & Another v. Chief Election Commissioner, New Delhi & Others, AIR 1978 SC 851 – Applied.
3. Om Prakash Yadav v. State of U.P. & Others, Writ-A No. 3625 of 2010, decided on 23.04.2012 (Allahabad HC) – Followed.
4. State of U.P. & Others v. Chandrika Prasad, 2006(1) ESC 374 – Referred.
5. Pushpendra Singh & Others v. State of U.P. – Referred.
6. Yadunath Singh v. State of U.P. & Others, 2009(9) ADJ 86 – Referred.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner was initially recruited as a lady Constable in Civil Police in August, 1986. She completed her training and was posted as a lady constable in District Jhansi. It is stated that due to family feud a complaint was made to the Director General of Police, Uttar Pradesh on 13th August, 1995 to the effect that the petitioner has secured the employment on the basis of fabricated documents. The allegation made against the petitioner was that the petitioner is Draupadi Yadav and Sadhna Yadav was her younger sister and the petitioner has secured employment on the basis of the certificates of her younger sister Sadhna Yadav, who died about 16 years earlier.

2. It is stated that on the aforesaid allegation a first information report was lodged against the petitioner, which was registered as Case Crime No. 716 of 1996, under Sections 420, 467, 468 and 471 I.P.C., Police Station Nababad, District Jhansi, pursuant to which Criminal Case No. 586 of 1998 was registered before the trial Court.

3. It is further stated that the Senior Superintendent of Police, Jhansi, the second respondent, on the basis of the aforesaid allegations placed the petitioner under suspension on 10th September, 1997 and issued a direction for initiating disciplinary proceedings against the petitioner. However, the said proceeding was not initiated and the second respondent has resorted to Rule 8(2)(b) of the Uttar Pradesh Police Officers of Subordinate Ranks (Punishment & Appeal) Rules, 1991 (for short, the "Rules, 1991") and by the impugned order dated 19th February, 1998 dismissed the petitioner from service. Aggrieved by the said order, the petitioner has preferred this writ petition.

4. A supplementary affidavit has been filed on behalf of the petitioner wherein it is stated that in the aforesaid criminal trial the petitioner has been acquitted by the judgement and order dated 10th December, 2004 and the charge against the petitioner about the forgery has not been found to be true. A copy of the judgement of the trial Court is on the record as annexure-1 to the supplementary affidavit.

5. A counter affidavit has been filed on behalf of the respondents, wherein it is stated that there was serious allegation of fraud against the petitioner. In fact, the correct name of the petitioner is Draupadi daughter of Jhagru Prasad Yadav but she has impersonated herself as Sadhna Yadav, daughter of Banke Lal. Hence, the petitioner has committed a fraud and the authority concerned has rightly invoked the provisions of Rule 8(2)(b) of the Rules, 1991.

6. I have heard learned counsel for the petitioner and learned Standing Counsel.

7. Learned counsel for the petitioner submits that the petitioner was implicated in the criminal case due to family dispute. The detailed facts have been averred in the writ petition in this regard. He has further submitted that now in the trial the petitioner has been acquitted and the criminal case itself was initiated against the petitioner as Sadhna Yadav and not as Draupadi Yadav.

8. Learned counsel for the petitioner contends that Regulation 493 (c) of the Uttar Pradesh Police Regulations enjoins that any finding recorded in the judicial proceedings is final and it cannot be reopened by the department. Lastly, he submitted that the exercise of power under Rule 8(2)(b) of the Rules, 1991 was completely illegal in the facts of this case and this Court in a catena of decisions has held that the power of Rule 8(2)(b) can be invoked when the ingredients mentioned in the said rule are attracted. He further submitted that ingredients of Rule 8(2)(b) do not attract in the present case and it has wrongly been invoked in the case of the petitioner.

9. Learned Standing Counsel submits that the petitioner has been given benefit of doubt by the trial Court, therefore, she is not entitled for her reinstatement as there is allegation of fraud against her.

10. I have heard learned counsel for the parties and perused the record.

11. The services of the petitioner have been dismissed exercising the power under Rule 8(2)(b) of the Rules, 1991 after 12 years of service. The exercise of power under Rule 8(2)(b) of the Rules, 1991 came to be considered by this Court in a long line of decisions. This Court in the case of **Om Prakash Yadav v. State of U.P. and others, Writ-A No. 3625 of 2010**, decided on 23rd April, 2012, has considered three Division Bench decisions of this Court and held as under:

"The three Division Benches of this Court in the Cases of State of U.P. and others Vs. Chandrika Prasad, 2006(1) ESC 374, Pushpendra Singh and other Vs. State of U.P. and Yadunath Singh Vs. State of U.P. and others, 2009(9) ADJ86 have followed the principles laid down by the Supreme Court in the aforementioned cases. In the case of Pushpendra Singh (supra), this Court held as follows:-

"Thus, in order to dispense with the regular departmental proceeding for inflicting punishment of dismissal, removal or reduction in rank, recording reasons is condition precedent. The idea or object of recording reasons is obviously to prevent arbitrary, capricious and mala fide

exercise of power. Therefore, recording of reason is mandatory and in its absence the order becomes laconic and cannot sustain. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes. The Hon'ble Apex Court in the case of Union of India v. Tutsi Ram Patel, AIR 1985 SC 1416 while considering Articles 310 and 311 of the Constitution of India held that two conditions must be satisfied to uphold action taken under Article 311 (2) of the Constitution of India, viz., (i) there must exist a situation which renders holding of any enquiry not reasonably practicable, (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. The Hon'ble Apex Court further observed that though Clause (3) of Article 311 makes the decision of the disciplinary authority in this behalf final, yet such finality can certainly be tested in the Court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous considerations or merely a rule to dispense with the enquiry.

The satisfaction that it is not reasonably practicable to hold such enquiry has to be spelled out either in the order itself or at least it has to be available on record. Learned Standing Counsel also during his submission could not show us any such reason recorded by the competent authority in the. record to show any ground or reason for invoking the provisions contained in Rule 8 (2)(b) of the Rules. It is well settled legal position that when a statutory functionary makes an order based on some reasons or grounds, its validity is to be tested on the ground or reasons mentioned therein and cannot be supplemented by giving reasons through affidavit filed in the case (See Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851, para 8)."

11. The similar view has been taken by the another Division Bench in Yadunath Singh Vs. State of U.P. and others. In the said case also the disciplinary proceeding was dispensed with without any plausible reason. The only reason mentioned in the order was that the departmental inquiry shall consume sufficient time and on the said ground the Rule 8(2)(b) was invoked. This Court set aside the order of the disciplinary authority and held as under:-

"Here in the present case, the disciplinary authority had recorded its satisfaction but it is well settled that that satisfaction has to be based on germane grounds and not ipse dixit of the disciplinary authority. Here the only ground to dispense with the inquiry is that if the writ petitioner-appellant is allowed to continue in service, a departmental inquiry shall consume sufficient time and, therefore, such continuance will have bearing on the moral of the other police personnel. We are of the opinion that the ground recorded by the disciplinary authority while dispensing with the inquiry is not germane nor is it on any material that may be relevant, as such, the ground set forth cannot justify dispensing the inquiry at all.

5. The provisions contained under Rule 8 (2)(b) have been incorporated keeping in view the provisions of Article 311 (2)(b) of the Constitution of India. The power conferred on the authority to dispense with an inquiry in a given situation where it is reasonably not practicable to hold an inquiry, has been envisaged therein. The Apex Court in the case of Union of India and another v. Tulsi Ram Patel, (1985) 3 SCC 398, had the occasion to consider the scope of the

aforesaid provision and the Apex Court laid down the test of reasonableness in the said case to be reflected by the authority while proposing to dispense with an inquiry. Paragraph 130 of the said decision is reproduced below:

Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances byway of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the Court so far as its power of judicial review is concerned and in such a case the Court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India is an instance in point."

The aforesaid decision of the Division Bench have been followed in other cases namely Kuldeep Kumar Vs. State of U.P. and others, 2011(3) UPLBEC 2421; Dharam Pal Singh Chauhan Vs. State of U.P. and others, 2011(4) ADJ 851; Gulabdhar Vs. State of U.P. and others, 2011(5) ADJ 835; Ram Yagya Saroj Vs. State of U.P. and others, 2010(4) AWC 3495; Umesh Kumar Vs. State of U.P. and others, 2009(5) ADJ 405; and Bishambher Singh Bhadoria Vs. State of U.P. and others, 2008 (3) UPLBEC 2357."

12. In view of the above, in my view, the exercise of power under Rule 8(2)(b) cannot be justified. The petitioner was placed under suspension and the allegations, which have been made against the petitioner, clearly indicate that the departmental proceedings ought to have been completed against the petitioner.

13. It is a well-established law that the law of evidence is not applicable in the case of the departmental proceedings, whereas it is applicable in criminal cases. Thus, even if a person has been acquitted by the Court on the same charge, regular departmental enquiry can be held. However, learned counsel for the petitioner has drawn the attention of the Court to the provisions of Regulation 493(c) of the Police Regulations, which read as under:

"493. (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 of Police and ask for permission to try the accused departmentally for such negligence or unfitness."

14. However, I find that the submission of learned counsel for the petitioner regarding Regulation 493(c) of the U.P. Police Regulations needs consideration by the authority concerned.

15. For the reasons stated above, the impugned order dated 19th February, 1998 passed by the second respondent is set aside. It is left open to the respondents to conduct a regular departmental proceeding. While taking the said decision the authority concerned shall pay regard to the provisions of Regulation 493 (c) of the U.P. Police Regulations.

16. With the aforesaid observations and directions, the writ petition is disposed of. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 17779 Of 2016

Shiv Kumar & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicants:
Shashank Yadav

Counsel for the Opposite Parties:
G.A.

Headnote:
Criminal Procedure Code, 1973 — Section 482 — Inherent powers — Quashing of criminal proceedings — Compromise between parties — Scope —
Where dispute between parties is essentially private and personal in nature and parties have entered into a genuine compromise, and continuation of criminal proceedings would serve no useful purpose and would amount to abuse of process of Court, High Court may exercise inherent jurisdiction under Section 482 Cr.P.C. to secure ends of justice — Even in non-compoundable offences, proceedings can be quashed if offence does not have serious societal impact — Application allowed.

Case Law Discussed:
Gian Singh v. State of Punjab
Narinder Singh v. State of Punjab
State of Madhya Pradesh v. Laxmi Narayan

Result: Application allowed. Criminal proceedings quashed on the basis of compromise.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the applicants and learned A. G. A. for the State.

2. A Chalani Report dated 10.04.2016 was received by S.D.M., Sirsaganj, district Firozabad who on the basis of such report issued a notice under Section 111 Cr.P.C. dated 12.4.2016 to the applicants asking them to show cause why they may not be required to furnish personal bonds of Rs.50,000/- and two sureties in the like amount for maintaining peace and good conduct for a period of six months.

3. By means of this application u/s 482 Cr.P.C. the applicants have approached this Court praying to quash the aforesaid notice on the ground that it is on a printed proforma with certain blanks which have been filled in with pen and ink by someone and the Magistrate has simply put his initial signatures on it.

4. Learned counsel for the applicants has contended that the notice is ambiguous and it suffers from vagueness, therefore, proceeding on the basis of such notice is a nullity. Learned counsel for the applicants has vehemently argued that the provisions of Section 107/116 Cr.P.C. have not been complied with by the learned Magistrate while issuing the notice hence in wake of the guidelines laid down by the apex court in the case of **Madhu Limaye Vs. S.D.M. Monghyr (2); AIR 1971 SC 2486** case the notice and the entire criminal proceedings be quashed.

5. Learned A.G.A. has opposed the application, but he has fairly conceded that the impugned notice suffers from vagueness and it is on a printed proforma wherein only by filling in the gaps the reason for issuing notice has been communicated to the applicants.

6. The impugned notice which has been issued to the applicants, by filling the gaps on printed proforma signed by the S.D.M., Sirsaganj, district Firozabad shows that the applicants were called upon to show cause in the court as to why they should not be ordered to execute a personal

bond of Rs. 50,000/- and to furnish two sureties, each in the like amount, to keep peace. A perusal of impugned notice shows that no ground is mentioned in this notice to apprehend the breach of peace which is a mandatory requirement of Section 111 Cr.P.C. Section 111 Cr.P.C. provides :-

"When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required."

7. **In Shiv Kant Tripathi Versus State of U.P. & Anr. 2005(3) JIC 477 (All**), this Court while allowing the application under section 482 Cr.P.C., has quashed the notice served on printed proforma and has held such notice is null and void and the proceedings initiated on its basis are not maintainable.

8. In the case of Madhu Limaye's case (supra), the apex court, in para 36 of its judgment has observed as under:-

"We have seen the provisions of Sec. 107. That section says that action is to be taken in the manner here-in-after provided and this clearly indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitous that this liberty should only be curtailed according to its own procedure and not according to the whim of the Magistrate concerned. It behoves us, therefore, to emphasize the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of general public."

9. The Apex Court has further observed in Para 37 as under:-

"Since the person to be proceeded against, has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the "substance' of the information, it does not mean the order should not be full. It may not repeat the information but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word "substance' means the essence of the most important parts of the information."

10. So far as the present case is concerned, it clearly appears that the learned Sub-Divisional Magistrate, while issuing the impugned notice dated 12.4.2016 has thrown the mandatory provisions of Section 111 of the Code to the winds and has prepared a printed

proforma. The learned Magistrate has also not recorded his opinion that there existed sufficient ground to take action under the provisions of Section 107 of the Code.

11. In the impugned notice, the pith and substance of the information received is not given which could have formed the basis for apprehending breach of peace. Therefore, the impugned notice issued by the learned S.D.M., Sirsaganj, district Firozabad may be said to be a vague notice which does not fulfill the requirements of Section 111 of Cr. P. C.

12. This type of notice has been held to be illegal by this Court in the case of **State Versus Baleshwar and others decided on 8-8-2008 and reported in (63) ACC page 374** wherein this Court has held as under:-

"making an order u/s 111 of the code is not an idle formality. It should be clear on the face of the order u/s 111 Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order u/s 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made u/s 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings u/s 104 Cr.P.C. are drawn. It should be borne in mind that the proceedings u/s 107/116 of the Code sometimes cause irreparable loss and unnecessary harassment to the public, who run to the court at the costs of their own vacations of life. Unless it is absolutely necessary proceedings u/s 107/116 Cr.P.C. should not be resorted to. Experience tells that proceedings like the one u/s 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measures."

13. This Court in the case **of Mohan Lal Versus State of U.P., 1977 ACC page 333** has expressed its feeling of dissatisfaction as under:-

"there are series of decisions in which the same principles have been repeated again and again. It is distressing to note that the repeated pronouncement of this Court and also the perception made by the Supreme Court have fallen on the deaf ears of our Executive Magistrates, who still treat the making of order u/s 111 an idle formality."

14. In view of the observations made in the cases mentioned herein above, the impugned notice dated 12.4.2016 which has been issued to the applicants, by filling in the gaps in printed proforma without following the proper procedure, being wholly illegal and void, is liable to be quashed. Accordingly, the application u/s 482 Cr.P.C. deserves to be allowed.

15. The application u/s 482 Cr.P.C. is hereby **allowed** and the impugned notice dated 12.4.2016 (Under Sections 107 and 116 Cr.P.C., Police Station Naseerpur, district

Firozabad) which has been issued to applicants by the S.D.M., Sirsaganj, district Firozabad is quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Application U/s 482 No.- 17784 Of 2016

Smt. Surya Kumari **...Applicant**
Versus
State Of U.P. & Anr. **...Respondents**

Counsel for the Applicant:
Nirvikar Gupta

Counsel for the Respondents:
G.A.

The application under Section 482 Cr.P.C. has been filed for quashing the impugned order dated 6.8.2015, passed by Additional District and Sessions Judge, whereby at the time of disposing of the application 70B of applicant under Section 311 Cr.P.C. for summoning the charge sheeted witness Ravi Shanker Sharma, the learned trial court holding that since the prosecution has not discharged the remaining witnesses after examining PW-1 to PW-7 and statement under Section 313 Cr.P.C. of accused persons has not been recorded as yet, directed the prosecution to examine the rest witnesses mentioned in charge sheet and for issuing summon to the remaining witnesses.

The impugned order dated 6.8.2015 is quashed. The trial court is directed to decide application 70B of applicant afresh after affording reasonable opportunity of hearing to the parties and further opportunity to A.D.G.C. (Criminal) to discharge any of the witnesses he wants to discharge, within one month. It is further made clear that the accused persons shall fully cooperate with the progress of trial and will remain present on each and every date fixed for recording their statements under Section 313 Cr.P.C. and in case any of them fails to appear or delays the disposal of trial in any other manner, the trial court shall be at liberty to pass necessary orders for cancellation of his or her bail and keep him or her under custody till conclusion of trial.

Held: Para-

Case Law discussed:
N.A

(Delivered by Hon'ble Harsh Kumar, J.)

1. Supplementary affidavit filed by applicant be taken on record.

2. The application under Section 482 Cr.P.C. has been filed for quashing the impugned order dated 6.8.2015, passed by Additional District and Sessions Judge, Court No. 10, Allahabad in S.T. No. 843 of 2006, whereby at the time of disposing of the application 70B of applicant under Section 311 Cr.P.C. for summoning the charge sheeted witness Ravi Shanker Sharma, the learned trial court holding that since the prosecution has not discharged the remaining witnesses after examining PW-1 to PW-7 and statement under Section 313 Cr.P.C. of accused persons has not been recorded as yet, directed the prosecution to examine the rest witnesses mentioned in charge sheet and for issuing summon to the remaining witnesses.

3. Learned counsel for the applicant contends that the impugned order is not in accordance with law; that on application 70B the trial court was required either to allow application and summon charge sheeted witness Ravi Shanker Sharma for evidence or to reject the application; that the order for summoning all the remaining witnesses is wrong and appears to have been passed due to some anger against the applicant.

4. Per contra, learned AGA contends that in above case prosecution evidence has been completed long ago and after examination of PW-7 on 12.1.2011 case was fixed for recording statement of accused under Section 313 Cr.P.C.; that despite lapse of over five years after giving last opportunity on 18.5.2011, the accused persons are not co-operating with the trial and have not got their statement under Section 313 Cr.P.C. recorded as yet rather obstructing the progress of trial; that though the evidence of prosecution of witnesses of fact as well as formal witnesses has been completed more than five years ago, accused persons are delaying the disposal of trial either by moving one frivolous application after the other or by seeking exemption from appearance by any of them turn by turn; that since the note regarding discharge of other witnesses left to be mentioned on the order sheet so the trial court has passed the order for examination of remaining witnesses, if any; that the prosecution does not want to produce any witness except those who have already been produced as PW-1 to PW-7 and is not going to produce even, above Ravi Shanker Sharma, and may not be compelled to produce him; that above Ravi Shanker Sharma appears to have been won over by accused and so after a lapse of five years of completion of prosecution evidence, application for summoning him has been moved on the ground of engaging another counsel by accused and that earlier counsel did not go through the names of witnesses mentioned in charge sheet; that the applicant / accused if wants may produce Ravi Shanker Sharma as defence witness; that there is no illegality in impugned order and the same is not liable to be quashed; that the accused applicant is delaying disposal of trial of dowry death case.

5. Upon hearing learned counsel for the parties and perusal of record, I find that though there is no mention on the order sheet by the Government counsel of closing evidence or discharging the remaining charge sheeted witnesses since after examination of PW-1 to PW-7 case was listed for recording statement of accused under Section 313 Cr.P.C., it is not open even to the prosecution to produce any other witness, which fact has also been mentioned in para 2 of the objections 80B filed by A.D.G.C. (Criminal). In the circumstances, even in absence of any such endorsement, it was not just and proper in the interest of justice to pass order for summoning all the witnesses. The perusal of record shows that since the accused persons are delaying the disposal of

trial so without considering the prayer made by the applicant in her application 70B the trial court appears to have passed the impugned order in haste, so that the accused / applicant by engaging another new counsel may not obstruct the trial. It is settled principle of law that prosecution is at liberty to produce as many as witnesses mentioned in the charge sheet and if the prosecution does not want to produce any witness mentioned in the charge sheet, it may not be compelled to produce as has been laid down by Apex Court in the case of Hukum Singh Vs. State of Rajasthan 2001(1) JIC 213 S.C. It is also pertinent to mention that the ground for summoning a witness on engagement of new defence counsel or any mistake of earlier counsel, may not be a valid ground and such a witness may be summoned only if the evidence of such witness is essential of just decision. In such circumstances, I find that impugned order is wrong and incorrect and has been passed without assigning any reason and is liable to be quashed.

6. In view of the discussions made above, the impugned order dated 6.8.2015 is quashed. The trial court is directed to decide application 70B of applicant afresh after affording reasonable opportunity of hearing to the parties and further opportunity to A.D.G.C. (Criminal) to discharge any of the witnesses he wants to discharge, within one month. It is further made clear that the accused persons shall fully cooperate with the progress of trial and will remain present on each and every date fixed for recording their statements under Section 313 Cr.P.C. and in case any of them fails to appear or delays the disposal of trial in any other manner, the trial court shall be at liberty to pass necessary orders for cancellation of his or her bail and keep him or her under custody till conclusion of trial.

7. Application is disposed of accordingly.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 18122 Of 2015

Kailash Gupta **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for Applicant:
Neerad Srivastava, Ankit Agarwal, Sharad Kumar Srivastava

Counsel for Opposite Party:
Govt. Advocate

Indian Penal Code, 1860 – Sections 302 (Murder), 120-B (Criminal Conspiracy); Code of Criminal Procedure, 1973 – Section 164 (Statement before Magistrate), Section 437/439 (Bail).

1. Criminal Procedure – Bail – Sections 302/120-B I.P.C. – Murder Committed within Jail Premises – Government Servant Acting as Conduit for Supply of Firearms and Money to Prisoners – Gravity of Offence – Bail Rejected.

Where a government servant posted as Bandi Rakshak in a District Jail is alleged, on the basis of substantive material collected during investigation, to have supplied firearms (revolver, pistol and cartridges) and a large sum of money to a group of prisoners within the jail premises, which supply directly facilitated the commission of murder of a prisoner and serious injuries to others within the jail on 17.01.2015 as part of a pre-meditated criminal conspiracy, the nature, gravity and seriousness of the offence disentitles the applicant from the relief of bail. The circumstances that (i) the applicant was in continuous telephonic contact with co-accused persons both before and after the incident as disclosed by Call Detail Records; (ii) an eyewitness (Advocate Lavesh Sharma) gave a statement under Section 164 Cr.P.C. narrating the personal delivery of contraband and currency notes by a co-accused to the applicant; (iii) recovery of Rs. 20,000/-, a bottle of oil and a polythene bag was effected from the applicant's own room on his pointing out; and (iv) the applicant used a mobile SIM obtained in a false name — collectively constitute substantive material demonstrating deep involvement of the applicant in the criminal conspiracy. The plea that the applicant is a government employee with a clean service record and has been falsely implicated to protect higher authorities does not, in the face of such material, make out a case for bail. Held: The prayer for bail is rejected.

2. Criminal Procedure – Bail – Relevant Considerations – Nature and Gravity of Offence – Evidence in Support – Overall Circumstances – Primacy of Gravity of Offence in Cases Involving Organised Criminal Conspiracy.

In determining whether bail ought to be granted in cases under Sections 302 and 120-B I.P.C., the Court is required to consider the nature of the offence, its gravity, the evidence in support thereof, and the overall circumstances of the case. Where the offence is of a particularly grave and shocking character — perpetrated in a daredevil manner within the premises of a District Jail as part of a highly orchestrated criminal conspiracy involving inter-gang rivalry, use of illegal firearms, and resulting in the murder of a prisoner and grievous injuries to others — and where the evidence collected during investigation discloses substantive material against the applicant in the form of eyewitness testimony recorded under Section 164 Cr.P.C., recovery of incriminating articles, admissions of the applicant during investigation, and Call Detail Records establishing continuous contact with co-accused persons — the gravity of the offence and the weight of evidence must prevail over the personal antecedents and service record of the applicant. Held: The applicant has not made out a case for bail.

3. Criminal Procedure – Bail – Observations in Bail Order – Strictly Confined to Disposal of Bail Application – Not to be Construed as Reflection on Ultimate Merits of the Case.

It is well settled that any observations made by the Court in the course of deciding a bail application are strictly confined to the disposal of the bail application and do not constitute an adjudication on the merits of the case. Such observations shall not be construed to have any reflection upon the ultimate merits of the case at the time of trial. The Court, while deciding the bail application, undertakes only a prima facie examination of the material on record and does not pronounce upon the guilt or innocence of the accused. Held: The observations made in the order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

Result: Bail application rejected. The applicant is not entitled to be released on bail in Case Crime No. 10 of 2015 under Sections 302/120-B I.P.C., P.S. Sadar Bazar, District Mathura, having regard to the nature and gravity of the offence and the substantive material against him collected during investigation.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application has been filed seeking the release of the applicant on bail in Case Crime No.10 of 2015, u/s 302/120B I.P.C., Police Station-Sadar Bazar, District-Mathura.

2. Heard Shri Dharmendra Singhal, learned counsel for the applicant assisted by Shri Ankit Agarwal, and Shri Vimlendu Tripathi, learned A.G.A. for the State.

3. Submission of counsel for the applicant is that the applicant is a government employee and was posted as Bandi Rakshak in District Jail, Mathura at relevant point of time. Further submission is that the applicant is in government service since 2006 and has never been subjected to any departmental or criminal proceedings and has performed his duties regularly with utmost sincerity. It has been further submitted that the implication of applicant is the result of collusion of higher authorities of Jail Department with the informant in order to save the higher authorities and other employees of the Jail. It has been contended by counsel that one wrangle took place on 17.01.2015 within the premise of District Jail, Mathura between the two set of prisoners, in which firearm was used and few prisoners had received serious injuries resulting into death of one prisoner. It has been also submitted that the said incident, which occurred within the premise of District Jail Mathura, was an outcome of administrative lapses of jail authorities and the applicant had no concern at all with the said incident. The next submission is that a false recovery was planted on the applicant to strengthen the case of informant by showing recovery of Rs.20,000/- and a bottle of oil on the pointing out of accused-applicant. Further submission is that in fact the said amount of Rs.20,000/- belonged to the applicant and said amount was given by the applicant to his bhanja namely Ved Prakash Gupta for his personal work on 21.10.2014 by withdrawing the same from A.T.M. and said money was returned back by his bhanja by withdrawing it from his account through cheque. Submission is also that the mobile number assigned to the applicant during the course of investigation is not allotted in the name of applicant and in fact there is no evidence against the applicant in the entire case diary and the applicant is languishing in jail since 19.01.2015 and hence, the applicant is entitled to be released on bail.

4. Learned A.G.A. has opposed the prayer for bail and has submitted that the offence in question is shockingly serious and has been committed in a daredevil manner within the premise of District Jail, Mathura by the accused persons with the conspiring aid of applicant and the act of accused-applicant contributed a willful substantive aid to the commission of the ghastly crime perpetrated by co-accused persons causing murder of one prisoner and also causing serious injuries to others within the premise of District Jail, Mathura. Further submission is that a serious animosity was going on between two groups of criminals, one headed by Rajesh Sharma @ Tonta and another group headed by Deepak Verma, due to which a wrangle took place on 17.01.2015 within the premise of District Jail, Mathura at about 3.30 O'clock in Hata No.2 of Barrack No.3456 in between Deepak Verma, Deepak Meena and Akshay Solanki on one side and Rajesh Sharma @ Tonta, Raj Kumar Sharma on other side and in the said fierce wrangle firing was also resorted to. But in this incident unexpectedly in the initial fight the group of Deepak Verma got worse hit and above named Akshay Solanki @ Pintu died on spot and the pistol used in the commission of crime was left over the body of deceased Akshay Solanki @ Pintu. Another revolver used in the commission of crime was thrown outside the barrack by co-accused Laurence. In the said incident,

the prisoners Deepak Meena, Rajesh Sharma @ Tonta and Raj Kumar Sharma had also received injuries. The F.I.R. for the said incident was lodged by the Superintendent, Jail, Mathura on 17.1.2015 at about 17.25 P.M. at Police Station-Sadar Bazar, District-Mathura and the district administration as well as higher authorities of Prison Department were immediately informed about the incident. During the course of investigation it was revealed that the accused-applicant who was posted as Bandi Rakshak in District Jail, Mathura, had supplied revolver, pistol, cartridges and an amount of Rs.1,10,000/- in the jail premise to the prisoners Deepak Verma, Deepak Meena and Akshay Solanki @ Pintu. Further submission is that the daredevil act of accused persons and their audacious criminality did not stop with the death of Akshay Solanki and there is evidence that when the injured prisoner Rajesh Sharma @ Tonta was being carried from District Hospital, Mathura to District Agra for specialized treatment under the reference of concerned Medical officer, he was murdered by one Gopal Yadav, Rakesh Chaudhary, Naeem, Raj Kumar and others by taking over the ambulance near Farah Toll Tax. During investigation, it was further revealed that co-accused Gopal Yadav and Rakesh Chaudary were in continuous touch with the accused-applicant Kailash Gupta, and as the accused-applicant was posted as Bandi Rakshak, he was assigned the job to supply firearms and the money in jail premise to Deepak Verma group, which job was successfully done by the accused-applicant. The next submission is that one Lavesh Sharma, who is an Advocate and was having acquaintance with co-accused Gopal Yadav and was pursuing his cases as his counsel, has stated in his statement recorded u/s 164 of Cr.P.C. that he was accompanying Gopal Yadav on 14.01.2015 at about 7.00 P.M., when co-accused Gopal Yadav handed over yellow polythene containing some material and bunches of currency notes to applicant. Witness Lavesh Sharma had further stated that as he was not having any concern with this dealing, he did not ask anything from co-accused Gopal Yadav. He further stated that Gopal Yadav being his client had several times borrowed his mobile phone to talk with the present accused-applicant Kailash Gupta as well as co-accused Rakesh Chaudhary, however, he did not know about the details of conversations having been busy in his court works. Further submission of learned A.G.A. is that during the course of investigation the applicant made crucially relevant admissions as to how the co-accused Gopal Yadav had given him the pistol, revolver, cartridges and huge amount of money (Rs.90,000) to be handed over to co-accused Deepak Verma, Deepak Meena and Akshay Solanki which he did while he kept Rs.20,000/- in his room. The aforesaid amount of Rs.20,000/-, a bottle of oil and a polythene bag were recovered on the pointing out of present accused-applicant Kailash Gupta from the tin box of his own room. It has been further submitted that during the course of investigation, the Call Detail Records (CDRs) of various mobile numbers, which were being used by co-accused Gopal Yadav, Rakesh Chaudhary, the present accused-applicant Kailash Gupta and witness Lavesh Sharma, were obtained by the Investigating Officer and those CDRs clearly disclosed continuous phone calls made in between them on the date of incident i.e. 17.01.2015 as well as prior to the incident and after the incident. The mobile number which was being used by the accused-applicant Kailash Gupta, was obtained by him in the name of another person namely Narendra Singh son of Shri Badam Singh and likewise the co-accused Gopal Yadav and Rakesh Chaudhary also obtained the sim cards of mobile numbers used by them in the name of another person namely Vinod Kumar son of Shri Pradeep whereas the sim card being used by witness Lavesh Sharma was on his own name. Contention is that there is no reason for the false implication of accused-applicant and the exhaustive investigation conducted by the

local police reveals substantive material against the accused-applicant, who despite being a government servant posted as Bandi Rakshak in District Jail Mathura, joined hands with hard core criminals and covertly facilitated the perpetration of this highly orchestrated crime committed on 17.01.2015 within the premise of District Jail, Mathura and outside. Contention therefore is that the involvement of accused-applicant in such a serious and heinous offence dis-entitles him from the relief of granting bail and hence, his bail application is liable to be rejected.

5. Perused the record along with the case diary produced by learned A.G.A. in the light of submissions placed by the rival sides.

6. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the applicant has not made out a case for bail. Therefore, the prayer for bail of the applicant is rejected.

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Application U/s 482 No.- 20401 Of 2016

Atul Singh & Ors. **...Applicants**
Versus
State of U.P. & Anr. **...Opposite parties**

Counsel for the Applicants:
Sunil Kumar Srivastava

Counsel for Opposite Parties:
G.A.

This application u/s 482 Cr.P.C. has been filed seeking the quashing of orders dated 1.6.2016 and 14.6.2016.The perusal of the both these orders show that some order passed previously has been reiterated and the court has observed that the accused may be summoned according to the orders as were passed before. But what are the previous orders and what orders was passed on previous occasion is not known. The previous order which has been reiterated has not been annexed along with this application. So far as the present orders which have been impugned are concerned they seem to be just routine orders passed in order to summon the accused who has not yet obtained bail. If the charge sheet has been submitted and accused does not appear before the court then such kind of orders are routine orders which are to be passed in order to summon the accused so that further procedure in accordance with law may take place and the process of

trial may begin. It was specifically asked from the counsel and he has been fair enough to concede that the accused have not yet appeared or surrendered before the court and have not sought their bail as yet. During the course of the submission made by the counsel though he could not substantiate his submissions by any document but the point which he tried to make was this that on an earlier occasion the applicants had approached this court by way of filing an application u/s 482 Cr.P.C. whereby the order issuing non bailable warrant was challenged. After hearing on this application the court did not find any illegality, impropriety or incorrectness in the same and therefore had dismissed that application. However, in the facts and circumstances of the case a direction was given to the applicants to appear and surrender and seek their bail within two months from date 3.5.2016 and seek their bail which was to be decided in accordance with law. It was also observed by this court that in the aforesaid period of two months or till the date of appearance of accused in the court below whichever is earlier no coercive measures shall be adopted. It has been submitted by the counsel for the applicant that though the applicant has not availed this order dated 3.5.2016 and has chosen not to appear before the court below and obtain bail but as the warrants had been stayed by this court vide its order dated 3.5.2016 the court below should not have repeated or reiterated the previous orders of issuing warrant against the applicants. Submission is that the previous orders which have been repeated in the two impugned orders are nothing but the orders by way of which the non bailable warrants had been issued on the previous occasion by court below. Further it has been submitted that for certain reasons though the applicants could not appear before the court below within the aforesaid period of time as was directed by this court vide its order dated 3.5.2016 but now they intend to appear in the court and so a protective direction in this regard may be once again given to them.

It is hoped that the applicants shall keep it in mind that the solemn jurisdiction of this court is not meant to be misutilised in order to find ways and means to somehow evade the process of law under the garb of some judicial order. Protective directions granted by this court are in the nature of a benevolent exercise of its judicial power intending to safeguard the constitutional rights of individual liberty which are sacrosanct in the view of this court. This Court in order to meet the ends of justice exercises its inherent jurisdiction and ungrudgingly comes forward in appropriate cases to extend its facilitating arm to the accused so that he may submit to the jurisdiction of the court without being harassed by any kind of executive high handedness of the police. But this judicial magnanimity must not be mistaken or misunderstood to be a ploy which can ever be allowed to be abused as a method to gain time and keep fleeing from justice. For any such unscrupulous accused the law courts have enough powers and strong arms to catch them and be brought to justice.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Vakalatnama filed by Sri R.P.S. Chauhan Advocate and Sri Pushpa Raj Singh Advocate on behalf of respondent no.2 is taken on record.

2. This application u/s 482 Cr.P.C. has been filed seeking the quashing of orders dated 1.6.2016 and 14.6.2016 in Case No. 442 of 2015 arising out of Case Crime No.155 of 2012 State of U.P. Vs. Achal Singh and others u/s 395, 427, 506 IPC P.S. Auang district Fatehpur pending in the Court of ACJM Court no.10, District Fatehpur.

3. Heard applicants' counsel as well as the counsel for the opp.party no.2 and learned AGA.

4. Entire record has been perused.

5. Two orders impugned before the court are dated 1.6.2016 and 14.6.2016. The perusal of the both these orders show that some order passed previously has been reiterated and the court has observed that the accused may be summoned according to the orders as were passed before. But what are the previous orders and what orders was passed on previous occasion is not known. The previous order which has been reiterated has not been annexed along with this application. So far as the present orders which have been impugned are concerned they seem to be just routine orders passed in order to summon the accused who has not yet obtained bail. If the charge sheet has been submitted and accused does not appear before the court then such kind of orders are routine orders which are to be passed in order to summon the accused so that further procedure in accordance with law may take place and the process of trial may begin. It was specifically asked from the counsel and he has been fair enough to concede that the accused have not yet appeared or surrendered before the court and have not sought their bail as yet. During the course of the submission made by the counsel though he could not substantiate his submissions by any document but the point which he tried to make was this that on an earlier occasion the applicants had approached this court by way of filing an application u/s 482 Cr.P.C. whereby the order issuing non bailable warrant was challenged. After hearing on this application the court did not find any illegality, impropriety or incorrectness in the same and therefore had dismissed that application. However, in the facts and circumstances of the case a direction was given to the applicants to appear and surrender and seek their bail within two months from date 3.5.2016 and seek their bail which was to be decided in accordance with law. It was also observed by this court that in the aforesaid period of two months or till the date of appearance of accused in the court below whichever is earlier no coercive measures shall be adopted. It has been submitted by the counsel for the applicant that though the applicant has not availed this order dated 3.5.2016 and has chosen not to appear before the court below and obtain bail but as the warrants had been stayed by this court vide its order dated 3.5.2016 the court below should not have repeated or reiterated the previous orders of issuing warrant against the applicants. Submission is that the previous orders which have been repeated in the two impugned orders are nothing but the orders by way of which the non bailable warrants had been issued on the previous occasion by court below. Further it has been submitted that for certain reasons though the applicants could not appear before the court below within the aforesaid period of time as was directed by this court vide its order dated 3.5.2016 but now they intend to appear in the court and so a protective direction in this regard may be once again given to them.

6. I have perused the record in the light of submissions made by the counsel for the parties.

7. As has already been observed that the previous orders of the court which have been repeated by the court below by way of order dated 1.6.2016 and 14.6.2016 have not been annexed along with this application. In any view of the matter even if it is presumed (as it has not disputed by counsel for opposite party) that the previous orders were of issuing warrant then the maximum that can be said in view of the order dated 3.5.2016 passed by this court is that the coercive measures should not have been initiated. But what is so demonstratively clear is this that in pursuance of the order dated 1.6.2016 and 14.6.2016 the applicants have not been touched by the

police and they have not been arrested and coercive process issued against them has just remain unimplemented. What is upsetting to see is that despite the specific direction that was sought from this court the applicants have not appeared before the court and have simply allowed the period of two months after 3.5.2016 to pass over and go by. It is sufficient to demonstrate that the applicants are disinclined to submit to the jurisdiction of the court and by one way or the other are interested only to find ways to evade the process of law. Counsel appearing on behalf of the opp.party no.2 has also shown to the court the order passed by another bench on 8.4.2015 in another application u/s 482 Cr.P.C. No.8685 of 2015 moved on behalf of applicants. The perusal of this order reveals that by way of that application also the non bailable warrants dated 19.3.2015 passed by the court below were challenged but the High court found the applicants guilty of suppressing the material facts and the Bench was pleased to observe as follows:-

"The submission of the learned counsel for the applicants does not appear to be justified particularly because it is the duty of the applicants to place full facts before the court. Once this Court had disposed of the application requiring the applicants to appear before the court concerned, within a specified period, with positive direction that if they do not appear then coercive action would be taken against them, there was no justification for the applicants to remain absent in the proceeding and again come to this Court seeking quashing of non bailable warrant, without disclosing about the earlier order passed by this Court.

In view of the above, I consider it appropriate to dismiss the present application with cost of Rs.5,000/-.

The application is, accordingly, dismissed. The cost of Rs.5,000/- shall be deposited by the applicants before the Registrar General of this Court within 15 days from today. The amount so deposited shall be transferred to the account of Legal Aid Committee. If the amount is not deposited within 15 days from today, the same shall be recovered from the applicant no.4 (Sriram Singh Chauhan) as arrears of land revenue. "

8. It has been further pointed out by counsel appearing for opp.party that before the aforesaid order the applicants had moved yet another application u/.s 482 Cr.P.C. No.34970 of 2014 seeking the quashing of criminal proceedings going on against the applicants. That application was disposed of with the direction to the applicants to appear before the court below within one month and seek their bail. This order was passed by another bench on 29.8.2014. Contention is that applicants are not law abiding citizens and have no respect for the orders of this court and are simply trying to abuse the process of law at different forums of judicial institution and have no intention to submit to the jurisdiction of the court and therefore they have not yet appeared before the court and have not obtained their bail.

9. In the aforesaid circumstances in the considered opinion of the court there is no justification now to issue another protective direction to accused in order to appear before the court as has already been given on previous occasions more than once which remained unavailed and uncared for. But as the counsel for opposite party has not disputed the fact that the order dated

1.6.2016 and 14.6.2016 are the repetition of the previous order which was in the nature of the direction to issue non bailable warrant the aforesaid impugned orders cannot be allowed to stand as coercive process was specifically put in abeyance by way of order passed by this court on 3.5.2016. Therefore, it is deemed proper that the orders dated 1.6.2016 and 14.6.2016 should stand quashed. This court is constrained to pass such order only in order to uphold the Majesty of this court and remind the court below to be more careful in future and ensure that the direction issued by the court must be adhered to.

10. But as the applicants have not surrendered before the court as yet and have not obtained their bail despite ample opportunity having been given to them, the court below shall be at liberty to issue fresh warrants or any coercive measures against the applicants as it may deem fit in order to procure the attendance of the applicants-accused.

11. With the aforesaid observations this application is **disposed of**.

12. It is hoped that the applicants shall keep it in mind that the solemn jurisdiction of this court is not meant to be misutilised in order to find ways and means to somehow evade the process of law under the garb of some judicial order. Protective directions granted by this court are in the nature of a benevolent exercise of its judicial power intending to safeguard the constitutional rights of individual liberty which are sacrosanct in the view of this court. This Court in order to meet the ends of justice exercises its inherent jurisdiction and ungrudgingly comes forward in appropriate cases to extend its facilitating arm to the accused so that he may submit to the jurisdiction of the court without being harassed by any kind of executive high handedness of the police. But this judicial magnanimity must not be mistaken or misunderstood to be a ploy which can ever be allowed to be abused as a method to gain time and keep fleeing from justice. For any such unscrupulous accused the law courts have enough powers and strong arms to catch them and be brought to justice.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 21062 Of 2015

Raj Bahadur **...Applicant**

Versus

State Of U.P. **...Opposite Party**

Counsel for Applicant:
D.P. Singh, Rajiv Dwivedi, Shanker Suan

Counsel for Opposite Party:
Govt. Advocate

Bail — Dowry Death — Accidental Fire — Dying Declaration exonerating accused — Delay in lodging FIR — Period of detention — No likelihood of early conclusion of trial — Sections 498-A and 304-B, Indian Penal Code, 1860 — Sections 3 and 4, Dowry Prohibition Act, 1961.

1. Bail — Dowry death — Grant of bail — Factors to be considered — Overall view of facts and circumstances — Nature of evidence — Period of detention — Likelihood of early conclusion of trial — Possibility of tampering with evidence: In determining a bail application in a case under Sections 498-A and 304-B, IPC read with Sections 3/4 of the Dowry Prohibition Act, the Court must take an overall view of all the facts and circumstances of the case, the nature of the evidence, the period of detention already undergone by the applicant, the likelihood or otherwise of early conclusion of trial, and the absence or presence of any convincing material to indicate the possibility of tampering with the evidence. Bail is not to be refused mechanically in serious cases without due consideration of these factors. Held, on an overall assessment of these factors, bail granted.

2. Dying declaration — Statement of deceased exonerating husband — Husband absent at time of incident — Accidental fire — Effect on bail: Where, before her death, the deceased herself recorded a dying declaration stating that at the time of the incident the applicant-husband was not present in the house and that she caught fire accidentally on account of a kerosene oil lamp falling upon her, and when she raised hue and cry her husband and neighbours rushed to quench the fire, and where the deceased was immediately rushed to hospital by family members of the accused — such a dying declaration exonerating the accused is a significant factor weighing in favour of the applicant at the stage of bail. The Court is not required to conclusively adjudicate upon the weight or admissibility of the dying declaration at the bail stage, but its existence is a relevant circumstance which cannot be ignored.

3. Delay in lodging FIR — No complaint by parents of deceased at the time of incident — Subsequent filing of case — Inference at bail stage: Where the incident is stated to have occurred on 14.11.2014 but the FIR was lodged as late as 05.12.2014 — a delay of approximately three weeks — and where, significantly, the parents of the deceased lodged no complaint at the time of the incident despite being aware of the circumstances of her death, the delay in filing the FIR coupled with the absence of any contemporaneous complaint is a factor that a court may appropriately weigh at the stage of considering bail. The delay, on the facts of the present case, lends credence to the defence submission of false implication after deliberation and confabulation.

4. Period of detention — No criminal antecedents — Inordinate delay in conclusion of trial — Right to personal liberty — Bail granted: The period of detention already undergone by an accused is a material consideration in a bail application. Where the applicant has been in custody since 18.12.2014 (over one and a half years at the time of the application) and has no criminal history whatsoever, and where, in view of heavy pendency of cases in the court, there is no likelihood of early conclusion of trial, the continued incarceration of the applicant would cause serious prejudice to his right to personal liberty. These factors, in the aggregate and read with the other circumstances of the case including the dying declaration and the delay in lodging the FIR, justify the grant of bail subject to appropriate conditions.

5. Bail conditions — Duty to cooperate with trial — Non-tampering with evidence — Personal appearance — Breach of conditions — Power of court below to cancel bail: When enlarging an accused on bail, the Court may impose conditions requiring: (i) the applicant not to tamper with prosecution evidence in any manner whatsoever; and (ii) the applicant to appear personally on each and every date fixed before the trial court, his personal presence not being exempted unless the court itself deems it appropriate in the interest of justice. It is further clarified that in the event of breach of any of the conditions imposed, the court below shall be at liberty to proceed for cancellation of bail. The applicant was directed to execute a personal bond with two sureties each in the like amount to the satisfaction of the court concerned.

6. Observations in bail order — Not to be construed as expression of opinion on merits of the case: Any observations made by the High Court while disposing of a bail application are strictly confined to the disposal of the bail application and shall not be construed to have any reflection on the ultimate merits of the case at the time of trial.

RESULT:
Bail application allowed. The applicant Raj Bahadur, involved in Case Crime No. 243 of 2014, under Sections 498-A and 304-B IPC and Sections 3/4 of the Dowry Prohibition Act, Police Station Raipura, District Chitrakoot, directed to be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, subject to conditions.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1.Heard learned counsel for the applicant and learned A.G.A.

2. Perused the record.

3. Submission of the counsel for the applicant is that the applicant is the husband of the deceased and the incident is said to have taken place on 14.11.2014 while the F.I.R. of the case was lodged on 5.12.2014. Further submission is that actually the deceased has died as a result of accidental burn because the kerosene oil lamp had fallen down upon her. It was also submitted that deceased was rushed to the hospital by the family members immediately after the occurrence, and it was the brother of the applicant, who got her admitted in the hospital. Further submission is that she struggled for life for a few days but ultimately she succumbed to the burn injuries. It has been further submitted that before her death her statement (dying declaration) was recorded in which she had also stated that at the time of the incident, the applicant was not present in the house and she caught fire because of falling of kerosene oil lamp accidentally upon her and when she raised hue and cry, her husband and other neighbours rushed to quench the fire. Submission is that as the fact of accidental fire was known to the parents to the deceased also that is why they did not lodge any complaint against the applicant at that time and it was only after due deliberation and confabulation that this false case has been lodged against the applicant. Much emphasis was laid by the counsel on the period of detention and it has been pointed out that the applicant has already spent more than one and half years in jail and he is languishing behind the bars since 18.12.2014 having no criminal history and that in the wake of heavy pendency of cases in the Court,

there is no likelihood of any early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required.

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

5. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

6. Let the applicant- Raj Bahadur, involved in Case Crime No. 243 of 2014, u/s 498A, 304B I.P.C. and 3/4 D.P. Act, P.S.- Raipura, District- Chitrakoot, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions:-

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

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

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

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 21690 Of 2016

Susheela Devi ...Applicant
Versus
State Of U.P. ...Opposite Party

Counsel for Applicant:
Sri Ravindra Kumar Dwivedi, Sri Dalvir Singh

Counsel for Opposite Party/State:
Government Advocate, Sri Geetam Singh (for Complainant)

Bail -- Section 306 read with Section 120B I.P.C. -- Abetment of Suicide -- Prima Facie Case -- Evidence of Abetment -- Applicant/accused Susheela Devi is the wife of the deceased -- deceased Ranjeet Singh Tomar consumed poison and died while being taken to Medical College, Kanpur -- prosecution case is that applicant and her parental family insisted that deceased should always remain in his in-laws' house and not with his own parents causing unpleasantness and bickering -- on the day of occurrence deceased who had come to take back his wife was humiliated and in that state consumed poison -- applicant is widowed wife with no criminal history, in jail since 01.06.2016 -- Held: abetment requires active instigations, instigation or intentional aiding -- there has to be tangible evidence indicating the act of abetment -- the mere existence of unpleasantness and bickering between parties, even if caused by unreasonable demands of the applicant's family, does not by itself establish abetment -- the evidence collected during investigation falls far short of establishing any prima facie case of abetment -- it would be far-fetched to presume that a widowed wife had intentionally aided or instigated commission of suicide -- prima facie case for bail is made out. (Paras 4)

Bail Application Allowed -- Applicant Susheela Devi involved in Case Crime No. 900 of 2015 under Sections 306 and 120B I.P.C., P.S. Aliganj, District Etah, directed to be released on bail on executing personal bond and two sureties each in like amount to the satisfaction of the court concerned, subject to conditions: (i) not to tamper with prosecution evidence in any manner; (ii) to personally appear on every date in the court below. (Para 5)

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Sri Dalvir Singh, Advocate has filed power on behalf of the applicant today, which is taken on record. Sri Geetam Singh, Advocate has also filed power on behalf of the complainant today, which is taken on record.

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

3. Perused the record.

4. Submission of the counsel for the applicant is that the deceased was the husband of the applicant and during the time of incident, the applicant and the deceased, both were in her parental house. Further submission is that the prosecution story is that the applicant and the family members of her parental side wanted the applicant to stay with his wife in his in-laws' house and not with his own parents. It was because of this background that unpleasantness and bickering started and on the day of occurrence also, it is said that the deceased wanted to take back the applicant to his house but she declined to do so which resulted in further unpleasantness. Counsel has drawn the

attention of the Curt to the statements of Shankar Singh Kushwaha, Vijay Rathore and Vijay Chauhan, who belong to the village of the applicant and whose statements have been recorded in the case diary by the investigating officer. Submission is that even these statements would reveal that as the deceased felt humiliated because of discourtesy shown to him by the applicant and her other family members, he took the extreme step of committing suicide. It was further emphasized that subsequently after the deceased consumed poison, he was rushed to the hospital in order to save his life. Counsel for the applicant has further drawn the attention of the Court to the annexure no. 9, which is a certificate given by Dr. K.M. Dwivedi certifying the fact that the deceased Ranjeet Singh Tomar was admitted to the hospital on 18.12.2015 at 2.25 P.M. as a case of suspected poisoning and he was brought to the hospital by Sri Brijendra Singh, who is the father of the applicant, that is to say father-in-law of the deceased. But as the condition of the deceased deteriorated, he was referred to Medical College, Kanpur for further treatment but while he was still on his way, he succumbed and died. Submission of the counsel is that though the deceased had taken extreme step of committing suicide because of the family discord and the tense relationship, but there was no question for the applicant to abet the deceased to commit suicide. The prosecution evidence whatever has been collected is also falling short of indicating that there was, at all, any abetment done on the part of the applicant. Contention is that though the oversensitivity of the deceased led him to take extreme step of committing suicide, but there has to be some tangible evidence to indicate that the act of abetment was done by the applicant or anybody else. Further submission is that though in certain cases such circumstances may be shown that the fact of abetment may be proved by circumstantial evidence also but in the present case there is no such evidence collected by the investigating officer and what has been collected during the course of investigation shows only the unpleasantness that existed between the applicant and the deceased and nothing more. Contention is that in fact the insistence of the applicant and her family members was that the deceased should stay with his wife all the time in his in-laws' house and not that the applicant ever wanted to get rid of her husband. It is very unfortunate that this demand of the applicant and her family members which may, to a great extent, be said to be unreasonable and extravagant has resulted in the death of the deceased but in the absence of any tangible evidence to conclusively prove the act of abetment, a prima facie case for bail in favour of the applicant is clearly made out. According to the counsel, it shall be overstretching the facts and shall be far fetched to allege or presume that the applicant, who is the widowed wife either intentionally aided or instigated the commission of suicide. The facts as have been collected by the investigating officer in the particular case fall far short of proving any such aid or instigation. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that she is ready to cooperate with the process of law and shall faithfully make herself available before the court whenever required. Lastly, it has also been pointed out that the accused is not having any criminal history and she is in jail since 1.6.2016 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

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

6. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Susheela Devi, involved in Case Crime No. 900 of 2015, u/s 306, 120B I.P.C., P.S.- Aliganj, District- Etah, be released on bail on her executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Application U/S 482 No.- 22137 Of 2016

Ashutosh Pathak ...Applicant
Versus
State Of U.P. & Anr. ...Opposite Parties

Counsel for Applicant:
Santosh Kumar Shukla, Surya Pratap Singh Parmar

Counsel for Opposite Parties:
G.A.

Territorial Jurisdiction — Coal Supply under Sponsorship System — Cause of Action— Evidence Act, 1872 — Section 101 — Burden of Proof — Elementary Rule — Proof of Payment — Bank Drafts — Non-disclosure of Particulars — Adverse Inference — Concluded Contract — Proof of Allotment — Supply of Coal —

Code of Criminal Procedure, 1973 — S. 482 — Cr.P.C. — Locus Standi — Criminal Jurisprudence — Principle of locus standi has no application — Any member of public may initiate criminal proceedings where public money is involved — The principle of locus standi, which governs civil proceedings, has no application in criminal jurisprudence. Where public money is alleged to have been misappropriated, any member of the public has the right to set the criminal law in motion and initiate a complaint case against the persons found to be guilty. The mere fact that the complainant may not be a personally aggrieved party does not deprive him of the right to institute a criminal complaint. The further contention that the accused had already deposited the amount of Rs. 38,980/- each pursuant to directions in other proceedings before this Court, does not ipso facto entitle the accused to have the criminal proceedings quashed, as settlement or deposit of money cannot be a ground for obliterating criminal liability for offences involving public funds. Held: Objection as to locus standi of complainant rejected.

Code of Criminal Procedure, 1973 — S. 197 — Prosecution Sanction — Gram Panchayat Adhikari — Alleged misappropriation of public funds — Whether act done in discharge of official duty — Question of fact — To be decided by trial court — May also be considered at stage of framing of charge — Inherent jurisdiction of High Court under S. 482 — Not to be exercised to interdict proceedings at summoning stage when no illegality or impropriety is apparent — The requirement of prosecution sanction under Section 197 Cr.P.C. arises only when the alleged act is committed by a public servant in discharge of his official duty, or when such act has a reasonable nexus with the official duty. The determination of whether the alleged act of misappropriation of public funds by the applicant — who was posted as Gram Panchayat Adhikari at the relevant time — was done in discharge of his official duty or not, is a question of fact which cannot be decided at the stage of summoning without evidence. This question is appropriately to be determined by the trial court, either upon an application moved by the applicant after his appearance and surrender, or at the stage of framing of charge. The summoning order having been passed after due appreciation of facts, evidence and procedure, and no illegality or impropriety being apparent in the proceedings before the trial court, exercise of inherent jurisdiction under Section 482 Cr.P.C. is not warranted at this stage.

Held: Application dismissed; applicant directed to appear before trial court immediately.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. Heard learned counsel for the applicant, learned AGA and perused the records.

2. Complaint case is being carried out against applicant Ashutosh Pathak and Gram Pradhan, Raipur Pokhta for offences of cheating and misappropriation of public money. In said matter, applicant and co-accused had been summoned for offences under Sections 420, 409 IPC. The proceedings of this concerned complaint case no. 5466/2015 is under challenge through present application under Section 482 Cr.P.C.

3. Learned counsel for the applicant contended that after approaching the matter in different proceeding before this Court and under direction of the Court, both the accused persons including applicant had deposited the amount of Rs. 38,980/- each, for which they were found

liable. His contention was that in these circumstances, no proceeding should be carried out. His further argument was that complainant has no locus standi to file complaint case. His next argument was that the alleged act was done by applicant in discharge of his official duty, because applicant was posted as Gram Panchayat Adhikari at the time of incident, so without prosecution sanction under Section 197 Cr.P.C., the proceedings before trial court cannot be carried out.

4. These contentions were refuted by learned AGA.

5. So far argument of right to institute criminal complaint by private person is concerned, it is settled legal position that principle of locus standi has no application in criminal jurisprudence. Public money was involved in this matter, for which any person of public has right to initiate criminal proceeding against guilty person.

6. So far matter of prosecution sanction and alleged act being done in discharge of official duty is concerned, this is settled legal position that if any overt act is committed during discharge of duty, then prosecution sanction is required. But it has to be decided whether the alleged act of misappropriation of fund comes within official discharge of duty of applicant or not. This matter may be decided by trial court, if application in that regard is moved by applicant after appearance and surrender before the court below. Again this matter may be considered at the stage of framing of charge.

7. The impugned summoning order has been passed after appreciating facts and evidences and after following procedure of law. There appears no illegality or impropriety in the proceedings being carried out before trial court that may require exercise of inherent jurisdiction of this Court at this stage. Therefore, this application is dismissed.

8. Applicant is directed to appear before trial court immediately.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 22281 Of 2015

Gyan Singh **...Applicant**
Versus
State Of U.P. **...Respondent**

Counsel for the Applicant:
Sanjay Srivastava, Satya Dheer Singh Jadaun

Counsel for the Respondents:
Govt. Advocate

Submission of the counsel for the applicant is that according to the statement of first informant the deceased, who was his brother, was accused in a case of murder of one Kamal Singh, but after trial he was acquitted.

After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. Perused the record.

3. Submission of the counsel for the applicant is that according to the statement of first informant the deceased, who was his brother, was accused in a case of murder of one Kamal Singh, but after trial he was acquitted. Co-accused Sitaram is the son of the aforesaid Kamal Singh and because of the murder of his father, co-accused Sitaram nurtured feelings of vengeance against the deceased and was also heard expressing his inclinations to avenge the death of his father. But so far as the applicant is concerned, he was village Pradhan. Further submission is that it was also stated by the first informant before investigating officer that the deceased of this case had also illegally encroached and had taken possession of one guava grove but the applicant being custodian of Gaon Sabha property, had managed to dispossess the deceased from the aforesaid encroachment and after doing so, a pond was created in the place of grove. Contention is that with the aforesaid background of facts, it is clear that the applicant could not have had any motive against the deceased to commit his murder while to the contrary, the conduct of the applicant in getting the deceased dispossessed from his illegal encroachment can certainly be said to be a reason for the first informant to nurture feelings of ill-will against him. Submission is that therefore, the applicant had absolutely no motive to commit the murder of the deceased. It was also submitted that even according to the statement of the first informant, he had not seen the applicant shooting at the deceased and according to him, he had only seen the applicant and the co-accused near the place of occurrence with country made pistols soon after occurrence. Further submission is that there is no incriminating recovery effected from the possession of the applicant or at his instance while the weapon of offence is said to have been recovered at the instance of co-accused Sitaram, who also had the motive to commit the murder of the

deceased. Counsel for the applicant has also tried to argue that from the post mortem report also it does not appear to be a case of two shots and there is a reasonable possibility that the first injury received by the deceased might not have been caused by any gun shot. Contention is that in any view of the matter, in the aforesaid background of the facts, the case of the applicant stands distinguishable from that of co-accused Sitaram and, therefore, on a prima facie basis a case for bail is made out in favour of the applicant. Much emphasis was laid by the counsel on the period of detention and it has been pointed out that the applicant has spent more than a year in jail and he is languishing behind the bars since 22.4.2015 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required.

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

5. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

6. Let the applicant- Gyan Singh, involved in Case Crime No. 80 of 2015, u/s 302 I.P.C. and 3(2)5 S.C./S.T. Act, P.S.- Saini, District- Kaushambi, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ C No.- 23529 Of 2016

C/M, Gautam Buddha Inter College, & Anr. ...Petitioners
Versus
State Of U.P. & Ors. ...Respondents

Counsel for Petitioners:
Sri Bhawesh Pratap Singh, Sri Irshad Ali

Counsel for Respondents:
C.S.C., Sri Mool Chandra Maurya

Education Law -- U.P. Intermediate Education Act, 1921 -- Section 16-D(4) -- Appointment of Authorized Controller -- Opportunity of Show Cause -- Natural Justice -- State Government as Decision-Making Authority -- Committee of Management of Gautam Buddha Inter College, Aliganj, District Etah challenged the order dated 11 April 2016 passed by the State Government under Section 16-D(4) of the U.P. Intermediate Education Act, 1921, approving the appointment of an Authorized Controller to manage the affairs of the institution on a recommendation by the Director of Education (Madhyamik) -- show cause notices under Section 16-D(3) dated 01.10.2015 and 23.11.2015 were issued to the petitioner regarding financial irregularities, which went unreplied -- Director then recommended appointment of an Authorized Controller -- short question: whether the State Government before passing an order under Section 16-D(4) is bound to give an opportunity to the Committee of Management to show cause -- Held: a plain reading of sub-section (4) of Section 16-D is silent regarding the requirement of notice to be served upon the Committee of Management before the State Government passes its order -- however, it would be incumbent upon the State Government to issue notice to the aggrieved party before passing the order -- the decision-making authority under Section 16-D(4) is the State Government and not the Director -- the civil consequence of superseding the Committee of Management flows from the order of the State Government and not from the recommendation of the Director -- the aggrieved party has every right to show cause before the State Government contending that the recommendations made by the Director are either incorrect or per se perverse -- whether the Committee appeared before the Director in response to the notice under sub-section (3) or not is immaterial.

Education Law -- Natural Justice -- Audi Alteram Partem -- Principles of Natural Justice Read Into Statute -- Section 16-D(4) U.P. Intermediate Education Act, 1921 -- Civil Consequence -- Article 14 of the Constitution -- Held: rules of natural justice are not embodied rules -- they may be implied from the nature of the duty to be performed under a statute -- what particular rule of natural justice should be implied depends upon the facts and circumstances, the framework of the statute and the purpose and effect of the exercise of power -- unless a statutory provision either specifically or by necessary implication excludes the application

of principles of natural justice, the requirement of giving reasonable opportunity of being heard before an order is made is generally read into the provisions of the statute, particularly where the order has adverse civil consequences -- the principle holds good irrespective of whether the power conferred is administrative or quasi-judicial -- if the requirement of opportunity to show cause is not read into Section 16-D(4), it would be open to challenge as being violative of Article 14 of the Constitution of India on the ground that the power conferred on the competent authority would be primarily arbitrary.

Writ Petition Allowed -- Order Set Aside -- Direction to Pass Fresh Order After Opportunity to Show Cause -- Impugned order dated 11 April 2016 passed by the State Government in exercise of power under Section 16-D(4) of the U.P. Intermediate Education Act, 1921 appointing an Authorized Controller set aside -- State Government directed to pass a fresh order after giving the petitioner an opportunity to show cause -- petitioners undertook to file representation/objection within six weeks from the date of the order -- State Government expected to pass the order within eight weeks thereafter -- any orders passed pursuant to the impugned order shall abide by the decision of the State Government in pursuance of this order -- no costs.

Case Law Discussed:
1. A.K. Kraipak and others v. Union of India and others, (1969) 2 SCC 262
2. Income Tax Officer and others v. Madnani Engineering Works Ltd., Calcutta, (1979) 2 SCC 455
3. Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I and another, (2008) 14 SCC 151
4. Kesar Enterprises Ltd. v. State of U.P., 2011 (4) AWC 3909 (SC)
5. C.B. Gautam v. Union of India, (1993) 1 SCC 78
6. Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311

(Delivered by Hon'ble Suneet Kumar, J.)

1. Committee of management, Gautam Buddha Inter College, Aliganj, District Etah has approached this Court assailing the order dated 11 April 2016 passed by the State Government in exercise of power conferred under Section 16-D (4) of the Uttar Pradesh Intermediate Education Act, 19211, whereby, appointment of authorized controller to manage the affairs of the institution was approved.

2. The short question for determination is as to whether the State Government before passing the order under Section 16-D(4) is bound to give an opportunity to the Committee to show cause.

3. In the facts of the present case, a show cause notice dated 1 October 2015 was issued purportedly under Section 16-D(3) by the Director of Education (Madhyamik), Allahabad2 to the second petitioner to show cause regarding financial irregularities.

4. It appears that the petitioner Committee failed to submit reply, therefore, another notice dated 23 November 2015 was issued which also went unreplied, consequently, the Director recommended to the State Government that an authorized controller be appointed to manage the institution vide communication dated 18 February 2016. Pursuant thereof,

State Government by the impugned order dated 11 February 2016, passed under Section 16-D(4) appointed an authorized controller for a period of six months.

5. It is sought to be urged by the learned counsel for the petitioner that it would be mandatory for the State to have put the Committee of Management to notice before passing an order under Section 16D(4), as it eventually entails civil consequence.

6. Sri Ashish Singh, learned counsel appearing for the caveator and the Standing Counsel would contend that sub-clause (4) of 16-D does not provide for any notice to the Committee of Management. The State Government is required to merely pass an order on the recommendation of the Director.

7. Rival submissions fall for consideration.

8. The facts are not in dispute, the scheme of the provision contained in Section 16-D(1) provides that Director may cause a recognized institution to be inspected from time to time, sub-clause (2) would provide that the Director may direct the management to remove any defect or deficiency found during the inspection or otherwise, whereas, sub-clause (3) provides the eventualities upon which the Director may refer the case of the institution to the Board for withdrawal of recognition of such institution or issue notice to the Committee of Management to show cause within thirty days from the date of receipt of such notice why an order under sub-section (4) should not be made. Sub-section (4) would provide that where the Committee of Management of an institution fails to show cause within the time allowed under sub-section (3) or within such extended time as the Director may from time to time allow, or where the Director, after considering the cause shown by the Committee of Management, is satisfied that any of the grounds mentioned in sub-section (3) exists, he may, recommend to the State Government to appoint an Authorized Controller for that institution. Thereupon, the State Government may, **"by order, for reasons to be recorded, authorise any person (hereinafter referred to as the Authorized Controller) to take over, for such period not exceeding two years, as may be specified, the Management of such institution and its property."**

9. On plain reading, sub-section (4) is silent regarding requirement of notice to be served upon the Committee of Management before any order is passed by the State Government.

10. In my opinion, it would be incumbent upon the State Government to issue notice to the aggrieved party to show cause before passing an order on the recommendation of the Director. The decision making authority is the State Government and not the Director. Aggrieved party would have every right to show cause before the State Government, contending that the recommendations made by the Director are either incorrect or per se perverse. It would, therefore, be incumbent upon the State Government to pass suitable order considering the objections. It is immaterial whether the Committee of

Management has appeared before the Director pursuant to the show cause notice under sub-section (3). Principle of natural justice would have to be read into sub-section (4) to uphold the vires of the section.

11. Rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action.

12. In **A.K. Kraipak and others. v. Union of India and Ors.3,** the Apex Court observed that the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. (Also see **Income Tax Officer and Ors. v. Madnani Engineering Works Ltd. Calcutta[4].**

13. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held.

14. The question with regard to the requirement of an opportunity of being heard in a particular case, even in the absence of provisions for such hearing, has been considered by the Supreme Court in a catena of cases.

15. In **Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I and Anr.5**, the question for adjudication was whether in the absence of a provision in the Income Tax Act, 1961, an opportunity of hearing was required to be given to an Assessee before an order under Section 142(2A) of the said Act, directing special audit of his accounts was passed? A Bench of three Judges explaining the concept of "natural justice" and the principles governing its application, summed up the legal position as under:

"Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial."

16. I may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle audi alteram partem, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine.

17. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power.

18. Notwithstanding, the fact that the sub-section (4) does not contain any express provision for the affected party being given an opportunity of being heard. Undoubtedly, action under the said sub section is a function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before acting upon the recommendation of the Director, State is bound to put the aggrieved party to notice. Civil consequence of superseding the Committee of Management follows the decision of the State Government and not of the Director.

19. In my view, therefore, if the requirement of opportunity to show-cause is not read into sub-section (4) of Section 16-D it would be open to challenge being violative of Article 14 of the Constitution of India on the ground that power conferred on the competent authority primarily being arbitrary.

20. The Supreme Court in **Kesar Enterprises Ltd. Versus State of U.P.6,** was considering the issue as to whether Sub-rule (7) of Rule 633 of the Excise Manual postulates the requirement of hearing before steps for recovery of penalty under the said Rule are initiated. The Court was of the opinion that though there was no specific provision under the rule to issue show cause notice or to provide opportunity of hearing before the penalty is imposed, the Court, however, was of the view that the order having civil consequence would require necessarily an opportunity of hearing. (Refer- **C.B. Gautam Versus Union of India7 and Mardia Chemicals Ltd. Versus Union of India8.**

21. It is evident from the statement of law that the decision making authority under sub Section (4) is the State Government not the Director, therefore, civil consequence flows from the order of the State Government and not from the recommendation of the Director. Therefore, before any order is passed by the State Government it would necessarily have to put the Committee of Management to notice. As to whether the Committee of Management had responded to the show cause issued by the Director under sub-section (3) or not would have no bearing.

22. The impugned order dated 11 April 2016 passed by the State Government in exercise of power conferred under Section 16-D (4) of the Uttar Pradesh Intermediate Education Act, 1921 is set aside. It is provided that the State Government shall pass a fresh order after giving opportunity to the petitioner to show cause. The petitioner undertakes to

file representation/objection within six weeks from date and it is expected that the State Government shall pass the order within next eight weeks thereafter.

23. Subject to the above, the writ petition is allowed.

24. Any orders passed pursuant to the impugned order shall abide by the decision of the State Government in pursuance of this order.

25. No costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 26038 Of 2015

Iqbal **...Applicant**
Versus
State Of U.P. **...Opposite Party**

Counsel for the Applicant:
Sunil Singh, Avinash Chandra Srivastav

Counsel for the Opposite Party:
Govt. Advocate, Vikas Chand Tiwari

Headnote:
Bail – Kidnapping for ransom – Sections 364-A & 120-B IPC – Alleged recovery of kidnapped child and ransom amount – Defence of false implication on account of business rivalry – Plea of prior agreement for sale to explain possession of Rs.7 lakhs – Alleged forged documents – Applicant not coming with clean hands – Bail refused.
Where the applicant was accused of kidnapping for ransom and recovery of the kidnapped child along with ransom money was allegedly made from the car in which he was arrested, and the prosecution asserted that the ransom currency notes bore identification marks of the informant, the plea of false implication on account of business rivalry and explanation regarding possession of money based on alleged agreement for sale executed on the same date appeared doubtful.

The Court observed that the applicant had not approached the Court with clean hands and had attempted to justify possession of the ransom amount through documents which prima facie appeared fabricated. Considering the gravity of offence under Section 364-A IPC and the totality of facts and circumstances, the case was not found fit for grant of bail.

Bail Application Rejected.

(Delivered by Hon'ble Harsh Kumar, J.)

1. Heard learned counsel for the applicant, learned counsel for the first informant, learned AGA for the State and perused the record.

2. Learned counsel for the applicant contended that the applicant is not named in F.I.R. and has been falsely implicated on account of business rivalry; that after kidnapping of Adnan son of first informant Abdul Gafoor, a demand for ransom of Rs.15 lacs is alleged to have been made from mobile no.9259595380, which does not belong to applicant; that it is wrong to say that the payment of Rs.7 lacs towards ransom money was made and the kidnapped boy was recovered from the custody of applicant and 3 others; that the recovery of money, allegedly paid as ransom money is alleged to have been made from the dicky of car from which the applicant and three others were arrested as well as kidnapped boy was recovered; that the real fact is that the first informant runs a confectionery shop and the applicant's joint family also runs a confectionery shop (registration of which in the name of Ashraf real uncle of applicant) at a distance about 1 km from the confectionery shop of the first informant; that there is cut throat competition in the business of confectionery shop between the first informant and the applicant and due to above business rivalry, the applicant has been falsely implicated; that the recovery of Rs.7 lacs has been falsely planted of which there is no independent witness; that in fact the above sum of Rs.7 lacs has been taken from the house of applicant, which was kept at his home on account of transaction of sale between his uncles Sri Akram and Aslam; that since applicant's uncle Akram was going to Dubai and was in need of money so he agreed to sell his share in the property, and another uncle Aslam agreed to purchase his share in the property for a sum of Rs.7 lacs, paid entire sale consideration in advance and executed an agreement for sale in favour of Aslam on 10.5.2015 through Notary Public, copy of which is filed at Annexure No.5 to the application; that the above agreement was followed by a sale deed dated 7.9.2015, copy filed at Annexure No.6 to the supplementary affidavit dated 21.11.2015; that the above money of applicant's uncle Aslam was kept at home of the applicant, who lives with his uncles in joint family and the same money has been taken by the police and has been falsely shown to have been recovered from the dicky of car as amount which was paid in ransom; that the entire story of recovery of kidnapped boy as well as recovery of ransom money allegedly paid by the first informant, is wrong and concocted; that it is wrong to say that the money recovered was the same money, which was allegedly paid by first informant to the kidnappers; that the payment of ransom money is alleged to have been made at Mussoorie bridge on 10.5.2015 at 00.23 a.m. and the recovery of kidnapped boy has also been made, the same day at 2:30 p.m., after a period about 14 hours from the same place; that the mobile by which the demand of ransom money was made has been recovered from the possession of co-accused Imran; that the applicant is a student of BCA and has no criminal history;that the applicant undertakes that he will not misuse the liberty of bail; that the applicant is in custody since 10.5.2015.

3. Learned AGA and learned counsel for the first informant vehemently opposed the prayer of bail and contended that it is absolutely wrong to say that the applicant has been falsely implicated due to business rivalary of first informant with the applicant's uncle; that it is not disputed that first informant runs a very good confectionery shop and the uncle of applicant also runs the confectionery shop at a long distance, but the first informant believes in healthy competition in business with better quality of confectionery items; that the contention of false implication of applicant due to alleged business rivalry is absolutely wrong and baseless; that had there been any reason for false implication, Mohd. Ashraf, who runs the shop or the applicant could have been named in F.I.R. itself; that it is not disputed that the first informant runs business of confectionery shop and the uncle of applicant also runs a confectionery shop, but despite the healthy business competition, there can be no reason for false implication of the nephew of owner of other confectionery shop leaving the alleged main competitor; that it is clear from the papers filed by the applicant himself that the agreement for sale dated 10.5.2015 allegedly executed before the notary advocate at Civil Court, Ghaziabad, has been forged and fabricated for the purposes of obtaining bail by justifying the concocted story that the recovered money to be belonging to the applicant's uncle Aslam; that it is noteworthy that the above agreement is alleged to have been executed on 10.5.2015 (time not clear) itself, the same day on which the recovery of kidnapped child and money has been made during noon; that the police or first informant could not have prior knowledge of the alleged agreement likely to be executed on payment of Rs.7 lacs, the entire sale consideration within the family members; that the copy of sale deed filed as Annexure No.6 to the supplementary affidavit shows that in the sale deed dated 7.9.2015, the entire amount of consideration is mentioned to have been paid through various cheques detailed at page 13 of the sale deed at page 47 of the supplementary affidavit; that for ascertaining safe return of his son the first informant had to pay ransom money and had put his signatures on top and bottom currency notes of all the bundles of currency notes; that thereafter the first informant had moved an application to the station incharge of police station, that the ransom money of Rs.7 lacs has been paid to the kidnappers at Mussoorie bridge, after mentioning his name Gafoor on top and bottom of every bundle of currency notes and the kidnappers have assured him of returning his son; that the money recovered from kidnappers has been found bearing name of applicant at the top and bottom of each bundle of currency notes; that the applicant has not come with clean hands and has made an attempt to play fraud on the Court and to obtain bail with the help of forged and fabricated papers; that the applicant if released on bail, shall either abscond or tamper with prosecution evidence; that it is wrong to say that applicant is running a confectionery shop with his uncle and his plea of running the confectionery shop is self contradictory to his plea of his being a BCA student.

4. Upon hearing learned counsel for the parties, perusal of record and considering the complicity of accused, severity of punishment as well as totality of facts and circumstances, it appears that applicant has not come with clean hands and without

commenting on the merits of the case, I do not find it a fit case for bail. The bail application of applicant **Iqbal** in case crime no.378 of 2015, under sections 364-A and 120-B IPC, PS. Mussoorie, District Ghaziabad, is **rejected** accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2016

BEFORE

THE HON'BLE RAM SURAT RAM (MAURYA), J.

Writ B No.- 26245 Of 2016

Amrawati ...Petitioner
Versus
D.D.C. & Ors. ...Respondents

Counsel for Petitioner:
Arvind Srivastava, Mahesh Kumar Dubey

Counsel for Respondents:
C.S.C., Arvind Kumar Kushwaha, Gajendra Pratap

U.P. Consolidation of Holdings Act, 1953 – Sections 5(2), 9, 9-A(2), 48; U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) – Sections 20(b), 20(b)(ii), 229-B; U.P. Land Revenue Act, 1901 – Sections 28, 33, 35, 39, 40, 40-A, 44, 54, 54(8)(b), 57; U.P. Land Record Manual – Paragraph 87, Column 5 and Column 6 of Khasra; U.P. Zamindari Abolition and Land Reforms Rules, 1952 – Appendix III, Entry 39-B; U.P. Land Laws Amendment Act, 1961 (U.P. Act No. X of 1961); U.P. Land Reforms (Amendment) Act, 1954 (U.P. Act No. 20 of 1954).

1. U.P. Zamindari Abolition and Land Reforms Act, 1950 – Section 20(b)(ii) – 'Recorded Occupant' – Technical Significance – Entry Must be Made in Column 6 of Khasra – Entry in Remarks Column of Khasra 1359 F Insufficient – No Sirdari Right Accrues.

The phrase 'recorded as occupant' in Section 20(b)(ii) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 carries a technical significance. As authoritatively determined by a Full Bench of five Judges in Basdeo v. Board of Revenue, U.P., AIR 1974 All 337 (FB), approved by the Supreme Court in Chandrika Prasad v. Pullo, (2000) 4 SCC 227, before any entry in the khasra or khatauni can be treated as a record of an 'occupant', two conditions must be fulfilled: (i) the entry must be established to have been made in accordance with the provisions of the U.P. Land Revenue Act, 1901 and the U.P. Land Record Manual governing the making of occupancy entries; and (ii) the entry must be genuine and not fictitious. Under the U.P. Land Record Manual, the relevant entry for recording the name of an occupant must appear in Column 6 of the khasra, which is the column prescribed for recording sub-tenants or occupiers. An entry made merely in the remark column (Column 5) of the khasra, recording the name of a person as a cultivator, does not constitute a record of an 'occupant' for the purposes of Section 20(b) of the Act. In the present case, the name of Ram Surat appeared only in the remark column of Khasra 1359 F and not in Column 6; further, no evidence was adduced to show that Ram Surat was recorded as occupant in Khasra 1356 F. Held: Ram Surat cannot be treated as a 'recorded occupant' under Section 20(b) and no sirdari right accrued in his favour on the basis of Khasra 1359 F alone.

2. U.P. Land Revenue Act, 1901 – Jurisdiction of Tahsildar – Mutation in Khatauni – Permissible Only in Cases of Transfer or Succession – Order Directing Mutation of Name Without Proof of Transfer or Succession – Without Jurisdiction – Nullity.

Under the provisions of the U.P. Land Revenue Act, 1901, a Tahsildar has jurisdiction to mutate the name of a person in the khatauni only in cases of transfer or succession. He has no jurisdiction to delete the name of a recorded tenure-holder and substitute another name in the khatauni in the absence of proof of a valid transfer or succession. As held by the Supreme Court in Jagdeo Singh v. Mithailal, AIR 1981 SC 1005, the Tahsildar cannot record the name of any person in the khatauni except in cases of transfer or succession. In the present case, the petitioner failed to adduce any evidence to establish that the land in dispute was transferred by Mewa to Ram Surat or that Ram Surat was the heir of Mewa. Accordingly, the alleged order of the Tahsildar dated 19.04.1955, directing the mutation of the name of Ram Surat over the land of Mewa, was passed without jurisdiction and the consequent entry in Khatauni 1363 F-1365 F, was found to be a fabricated entry. Held: An order passed without jurisdiction is a nullity and is void ab initio. The U.P. Land Laws Amendment Act, 1961 (U.P. Act No. X of 1961) validated genuine orders only and cannot be invoked to validate forged or fabricated entries.

3. Revenue Records – Presumption of Correctness – Limitation of Presumption – Does Not Apply to Forged or Fraudulent Entries – Fraud and Forgery Rob Entry of All Legal Effect – Possessory Title Cannot be Founded on Forged Entry.

Entries in revenue records ordinarily carry a presumption of correctness under Sections 44 and 57 of the U.P. Land Revenue Act, 1901, and courts should not embark upon an appellate inquiry into their correctness. However, this presumption of correctness attaches only to genuine entries and has no application to entries that are forged or fraudulent. The distinction is well-settled: one cannot challenge the correctness of what a genuine entry records, but an entry is always open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery deprive a document of all its legal efficacy and a claim to possessory title cannot be founded upon a forged or fraudulent entry in the revenue record. A long-standing entry in revenue records holds only presumptory value and does not constitute absolute proof of title. Relied upon: Vishwa Vijay Bharati v. Fakhrul Hassan, AIR 1976 SC 1485; Wali Mohammad v. Ram Surat, AIR 1989 SC 2296; Shri Ram v. DDC & Others, 2011 (4) ADJ 289 (DB).

4. Revenue Records – Mutation – Does Not Create or Extinguish Title – No Presumptive Value on Title – Entry in Revenue Record Not Conclusive Proof of Title.

It is well-established that mutation of a property in the revenue record does not create or extinguish title nor does it carry any presumptive value on the question of title. The only effect of a mutation order is to enable the person in whose favour mutation is made to pay the land revenue in respect of the property. An entry in the revenue record alone is not sufficient as conclusive proof of title and cannot be relied upon as establishing title in a party. Further, orders passed by revenue courts in proceedings relating to mutation and correction under Sections 33, 35, 39, 40 and 54 of the U.P. Land Revenue Act, 1901 can always be challenged in a suit and do not operate as res judicata under Sections 40-A and 54(8)(b) of that Act. For filing a suit for declaration of right under Section 229-B of U.P. Act No. 1 of 1951, no period of limitation is prescribed vide Entry 39-B of Appendix III of the U.P. Zamindari Abolition and Land Reforms Rules, 1952.

5. Jurisdiction – Void Order – Nullity – Can be Disregarded in Collateral Proceedings – No Declaration Necessary Where Order is Ab Initio Void – Distinction Between Void and Voidable Orders.

A decree or order passed by a court or authority without jurisdiction is a nullity; it is void ab initio and can be disregarded even in collateral proceedings without the necessity of a formal declaration setting it aside. A defect of jurisdiction — whether pecuniary, territorial, or relating to subject-matter — strikes at the very authority of the court or tribunal to act, and such a defect cannot be cured even by the consent of the parties. A distinction must, however, be maintained between void and voidable orders: a wholly void order, being one

passed without jurisdiction, is a nullity in the eye of law and principles of res judicata do not apply to it. A voidable order, on the other hand, is good until avoided and must be set aside in appropriate proceedings. Where the initial entry in the revenue record in favour of a party was itself not a genuine entry — having been forged and fabricated — the party cannot claim any legal right or title founded upon such an entry. Relied upon: Kiran Singh v. Chaman Paswan, AIR 1954 SC 340; Govt. of Orissa v. Ashok Transport Agency, (2002) 9 SCC 28; Union of India v. Assn. of Unified Telecom Service Providers of India, (2011) 10 SCC 543.

6. U.P. Consolidation of Holdings Act, 1953 – Section 9-A(2) – Title Proceedings – Writ Jurisdiction – Findings of Fact by Consolidation Authorities – Non-Interference – Scope of Judicial Review Limited.

In exercise of writ jurisdiction under Article 226 of the Constitution of India, the High Court does not re-appreciate findings of fact recorded by the consolidation authorities on the basis of evidence adduced before them. Where concurrent findings of fact have been recorded by the Consolidation Officer, the Settlement Officer Consolidation, and the Deputy Director of Consolidation — to the effect that Smt. Parwati Devi is the daughter and heir of Mewa and was in possession of the land in dispute, and that the entry of the name of Ram Surat in the khatauni was a fabricated entry — and such findings are supported by evidence on record, they are not open to re-appreciation or interference by the High Court in writ jurisdiction. Once both parties have led their evidence, the question of burden of proof becomes largely academic and the dispute falls to be decided on the totality of evidence. Held: Writ petition dismissed. Concurrent findings of facts upheld.

Result: Writ petition dismissed. The orders of the Consolidation Officer dated 31.01.2011, Settlement Officer Consolidation dated 02.06.2011, and Deputy Director of Consolidation dated 14.07.2015, directing deletion of the name of Ram Surat from the land in dispute and recording the names of Smt. Parwati Devi and Banarasi as heirs of Mewa, upheld.

Cases Referred:

1. Basdeo v. Board of Revenue, U.P., AIR 1974 All 337 (FB) – Applied.
2. Chandrika Prasad v. Pullo, (2000) 4 SCC 227 – Applied.
3. Vishwa Vijay Bharati v. Fakhrul Hassan, AIR 1976 SC 1485 – Applied.
4. Wali Mohammad v. Ram Surat, AIR 1989 SC 2296 – Followed.
5. Jagdeo Singh v. Mithailal, AIR 1981 SC 1005 – Applied.
6. Bachan v. Kankar, AIR 1972 SC 2157 – Applied.
7. Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 – Applied.
8. Govt. of Orissa v. Ashok Transport Agency, (2002) 9 SCC 28 – Referred.
9. Ram Harakh v. Hamid Ahmad Khan, (1998) 7 SCC 484 – Referred.
10. Vikram Singh Junior High School v. District Magistrate (Fin. & Rev.), (2002) 9 SCC 509 – Referred.
11. Shri Ram v. DDC & Others, 2011 (4) ADJ 289 (DB) – Referred.
12. Union of India v. Assn. of Unified Telecom Service Providers of India, (2011) 10 SCC 543 – Referred.

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri Arvind Srivastava, for the petitioner and Sri Gajendra Pratap, Senior Advocate, assisted by Sri Arvind Kumar Kushwaha, for respondent-4.

2. This writ petition has been filed against the orders of Consolidation Officer dated 31.01.2011, Settlement Officer Consolidation dated 02.06.2011 and Deputy Director of Consolidation dated 14.07.2015, passed in title proceeding under Section 9-A (2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act).

3. The dispute pertains to the land recorded in basic consolidation year khata 141 (consisting of plots 16/684 (area 0-1-0 bigha), 17 (area 1-13-0 bigha), 25-kha (area 0-5-0 bigha), 34 (area 0-2-0 bigha), 146 (area 0-5-0 bigha), 148-kha (area 0-3-0 bigha), 149 (area 0-3-0 bigha), 160 (area 1-0-0 bigha), 161-kha (area 0-11-0 bigha), 162 (area 1-0-0 bigha), 212-kha (area 1-16-0 bigha), 220-kha (area 0-2-0 bigha), 222 (area 0-3-0 bigha), 223 (area 0-3-0 bigha), 224 (area 0-3-0 bigha), 230-ka (area 0-2-0 bigha), 321-kha (area 0-14-0 bigha), 328-cha (area 0-4-0 bigha), 329 (area 6-3-0 bigha), 340-ka (area 0-10-0 bigha), 368-ka (area 6-2-0 bigha), 371 (area 0-8-0 bigha), 386 (area 1-4-0 bigha), 400-ka (area 0-11-0 bigha), 436-ga (area 0-5-0 bigha), 437-kha (area 0-2-0 bigha), 443-k (area 0-10-0 bigha), 444-kha (area 0-10-0 bigha), total 28 plots (area 24-15-0 bigha), of village Raipura, tahsil Robertsganj, district Sonebhadra, in the name of Smt. Gangi, widow of Ram Surat. During partal following disputes amongst other were raised and noted in CH Form-4:-

(i) Smt. Parwati (respondent-4) and Smt. Nanki filed an objection on 21.08.1991 under Section 9 (2) of the Act, for recording their names over the land in dispute as the heirs of Mewa (being his daughters) and deleting the name of Smt. Gangi and their transferees from khata in dispute. Smt. Nanki died in January 1996 and in her place Banarasi was substituted on 12.03.1996. Now Smt. Parwati is representing him. (ii) Shiv Shankar (respondent-7) claimed for recording his name over plots 160 (area 1-0-0 bigha) and 161 (area 0-11-0 bigha) on the basis of sale deed executed by Ram Surat in his favour. (iii) Smt. Amrawati (the petitioner) claimed for recording her name over plots 371 (area 0-8-0 bigha), 386 (area 1-4-0 bigha), 436-ga (area 0-5-0 bigha), 443-k (area 0-10-0 bigha) on the basis of sale deed executed by Ram Surat in her favour. (iv) Zahruddin (respondent-6) claimed for recording his name over plot 212 (area 1-16-0 bigha) on the basis of sale deed executed by Ram Surat in his favour. Various other disputes were also noted in respect of different plots of khata 141 in CH Form-4 but its reference are not relevant. Assistant Consolidation Officer referred the disputes to Consolidation Officer for decision and issued notices to the parties. Subsequently Smt. Gangi filed various objections on 28.08.1991 under Section 9 (2) of the Act for rejecting the claims of various persons as noted in CH Form-4. Amrawati filed an objection on 20.08.1991, claiming that Smt. Gangi executed two sale deeds 17.02.1989 and 13.07.1996 of the land in dispute in her favour as such her name be recorded over all the plots of the khata in dispute. During pendency of the cases, before Consolidation Officer, Smt. Gangi died in August 1998 and in her place, Amrawati was substituted as her legal representative by order dated 11.08.1999. Zahruddin (respondent-6) and Shiv Shankar (respondent-7) also filed their separate objections under Section 9 (2) of the Act.

4. All the cases were consolidated and tried by Consolidation Officer. Consolidation Officer by order dated 30.10.1991 issued notices to the parties, fixing 11.11.1991. The cases were adjourned on 11.11.1991, 19.11.1991, 29.11.1991, 10.12.1991, 13.12.1991. On 18.12.1991, the parties took time for filing compromise and 20.12.1991 was fixed. On 20.12.1991, none of the

parties or their counsel appeared and Consolidation Officer decided all the cases exparte. Thereafter, Parwati (respondent-4) filed an application dated 20.12.1991 for recall of the order, which was allowed on 20.12.1991. On the application the word "swikrit" has been written. In the order sheet "Restoration application filed by Parwati is allowed. Put up on 30.12.1991 for evidence of the plaintiff" has been written. Amrawati put appearance before Consolidation Officer 12.03.1992. From the order sheet of Consolidation Officer, it appears that Amrawati attended the court on the date fixed in the case up to 12.12.2002. On 24.12.2002, statement of Parwati was recorded and on 05.05.2003, statement of her witness, Hanuman was recorded. On 26.10.2004, Amrawati was given last opportunity to adduce her evidence. Order dated 13.12.1991 passed in Case Nos. 1333 and 1334 were recalled by order dated 25.09.2006 and these cases were also consolidated with Case No. 124 and 04.11.2006 was fixed for framing issues.

5. Amrawati challenged the order dated 25.09.2006 in Appeal No. 195 of 2006-07. As such, she absented before Consolidation Officer, although in appeal, further proceeding before Consolidation Officer was not stayed. Appeal No. 195 of 2006-07 was dismissed on 26.07.2007. Consolidation Officer framed issues on 15.10.2007, exparte. Revision No. 43/73 of 2007-08 filed by Amrawati against the aforesaid order was dismissed in default on 04.03.2008. Thereafter, Consolidation Officer again issued notices to Amrawati and others on 26.04.2008. In spite of service, Amrawati did not appear before Consolidation Officer. On 08.12.2008, the counsel for Parwati stated that evidence of Parwati had already been recorded and it may be treated evidence on her behalf. Consolidation Officer fixed a date for arguments. On 10.05.2010, Consolidation Officer again held service on the parties was sufficient and proceeded exparte. On 17.07.2010, Amrawati filed an application that in the application dated 20.12.1991, by fabricating word "swikrit" has been written in the date 21.12.1991 and she be granted time to file objection in the application dated 20.12.1991 and order dated 21.12.1991 be declared as forged. The parties filed objection and counter objection on this application and the application was heard on 03.01.2011 and 15.01.2011 was fixed for order. But in record of Consolidation Officer, there was no order dated 15.01.2011. The case was finally decided by order dated 31.01.2011 by Consolidation Officer, who held that name of Ram Surat was recorded over the land of Mewa by making forgery in the records. As such name of Ram Surat was directed to be deleted from the land in dispute and names of Parwati and Banarasi were directed to be recorded as heirs of Mewa. Objections of the transferees of Ram Surat were also dismissed.

6. Amrawati filed an appeal (registered as Appeal No. 14 of 2010-11) and Zahruddin (respondent-6) filed an appeal (registered as Appeal No. 215 of 2010-11) from the aforesaid order. Both the appeals were consolidated and heard by Settlement Officer Consolidation, who by his order dated 02.06.2011 held that order dated 20.12.1991 was recalled by Consolidation Officer on 21.12.1991 and the case was restored. The land in dispute was recorded in the name of Mewa son of Ram Saran in khatauni 1360 F. In khatauni 1363 F-1365 F, an amaldaramad recording the name of Ram Surat was made, on the basis of order of Tahsildar dated 19.04.1955. The petitioner could not adduce any evidence to prove as to how name of Ram Surat was recorded over the land of Mewa. Tahsildar had no jurisdiction to delete the name of Mewa and record the name of Ram Surat. It has been proved from the evidence on record by Parwati that Parwati and Nanki were

daughters and heirs of Mewa. On these findings the appeals were dismissed. Amrawati filed a revision (registered as Revision No. 33/33/40/83 of 2013-14) and Zahruddin filed a revision (registered as Revision No. 32/32/39/82 of 2013-14) against the aforesaid order. Both the revisions were consolidated and heard by Deputy Director of Consolidation, who by order dated 18.07.2014, affirmed the findings of Courts below and dismissed the revisions.

7. Amrawati filed a writ petition (registered as Writ-B No. 62174 of 2014). In the writ petition, various grounds including that order of Consolidation Officer dated 20.12.1991 was never recalled as such Consolidation Officer had no jurisdiction to pass fresh order on 31.01.2011 were raised. Due to serious factual controversy and as desired by counsel for both the parties, original records of the consolidation authorities relating to the cases were summoned. From original records facts narrated above were verified. It was found that order dated 20.12.1991 was recalled on 21.12.1991. On the application word "swikrit" has been written but in order sheet detail order was mentioned. Thereafter, after hearing the parties, writ petition was allowed by judgment dated 21.01.2015 and order of Deputy Director of Consolidation dated 18.07.2014 was set aside and the matter was remanded to Deputy Director of Consolidation, who was directed to record a finding in respect of genuineness of the order of Tahsildar dated 19.04.1955, after giving fresh opportunity of evidence to the parties. Thereafter, Zahruddin also filed a highly belated writ petition i.e. Writ-B No. 5954 of 2015, against the orders of consolidation authorities. As the matter had been remanded to Deputy Director of Consolidation as such this writ petition was allowed by order dated 03.02.2015 and Zaharuddin was also given liberty to appear before Deputy Director of Consolidation, who was directed to consider his case also while deciding revisions.

8. After remand, Deputy Director of Consolidation again heard the revisions and by order dated 14.07.2015 held that Tahsildar had no jurisdiction to delete the name of Mewa from the land in dispute and record the name of Ram Surat over it. A suit under Section 229-B of U.P. Act No. 1 of 1951 was filed by Smt. Nanki and Smt. Parwati Devi for declaring them as owners of the land in dispute and deleting the names of Mewa and his transferees on 02.06.1988, which was abated under Section 5 (2) of the Act and thereafter objections were filed before Assistant Consolidation Officer on 21.08.1991. On these findings, he dismissed the revisions of the petitioner and Zahruddin again. Zahruddin filed Writ B No. 52946 of 2015, against aforesaid order, which was dismissed on merit by order dated 16.09.2015. Now, after a long delay, this writ petition has been filed by Amrawati.

9. The counsel for the petitioner submitted that name of Ram Surat was recorded in remark column of khasra 1359 F as he was in cultivatory possession over the disputed land. Due to mistake, his name was not recorded in khatauni of subsequent year. Ram Surat filed an application (registered as Case No. 8/887) before Tahsildar, for recording his name, which was allowed by order of Tahsildar dated 19.04.1955. In pursuance thereof, name of Ram Surat was mutated in khatauni 1365 F. The order was also mentioned in Malikan Register. By The Uttar Pradesh Land Laws Amendment Act, 1961, (U.P. Act No. X of 1961) the orders passed by Tahsildar under principal Act i.e. U.P. Land Revenue Act, 1901, were validated. Village in question was placed under Survey and Record Operation under Section 48 of U.P. Land Revenue Act, 1901. Final

Settlement Record was prepared in 1369 F, in which, name of Ram Surat was again recorded. Section 44 and 57 of U.P. Land Revenue Act, 1901 raise presumption regarding correctness of entries in Annual Register and Settlement Entries. Mewa or his widow never challenged order of Tahsildar dated 19.04.1955. They never raised any claim during record operation or thereafter. Smt. Nanki and Smt. Parwati Devi, who are strangers, for the first time filed a suit (registered as Suit No. 110 of 1988) under Section 229-B of U.P. Act No. 1 of 1951 for declaring them as owners of the land in dispute and deleting the names of Ram Surat and his transferees on 02.06.1988, i.e. after more than 33 years. This suit was abated under Section 5 (2) of the Act and thereafter, objection was filed during consolidation, which was dismissed by order of Consolidation Officer dated 20.12.1991. Although in recall application, 30.12.1991 was the date fixed but by making forgery, the order was recalled in back date i.e. 21.12.1991, by writing word "swikrit" on recall application. There is no evidence to prove that Smt. Nanki and Smt. Parvati Devi were daughters of Mewa or they were in possession of the land in dispute. The petitioner is daughter of Ram Surat and Smt. Gangi and also obtained sale deeds from then of the land in dispute. The names of Ram Surat and Smt. Gangi were through out recorded since 1955 till basic consolidation year, heavy burden was upon respondent-4 to prove her title and possession. Burden of proof has been wrongly shifted upon the petitioner. Deputy Director of Consolidation has failed to follow the direction in remand order of this Court, in its true spirit, inasmuch as he was directed to record a findings regarding genuineness of the amaldaramad of the order of Tahsildar dated 19.04.1955 as made in khatauni 1363-F to 1365 F but he has not recorded a definite finding in this respect. Consolidation authorities ignored the order of Tahsildar on the ground that he had no jurisdiction to correct annual register, without considering khasra 1359 F and that the orders of Tahsildar were validated by U.P. Act No. X of 1961. Ram Surat died in the year 1987, then three set of mutation applications were filed before Tahsildar i.e. (i) Smt. Gangi widow of Ram Surat (ii) Radhey Shyam Singh and (iii) Shiv Murat. Tahsildar by order dated 02.07.1987 directed for mutation of the name of Smt. Gangi as an heir of Ram Surat. By order dated 30.04.1991, Tahsildar has maintained the order dated 02.07.1987. In basic consolidation year, name of Smt. Gangi was recorded over the land in dispute and burden was upon respondent-4 to prove her title and continuous possession. Consolidation authorities illegally held that entry of the name of Ram Surat was made by making forgery, without considering the fact that he was recorded occupant in 1359 F also. Long standing entry could not be deleted without any evidence. In any case, Ram Surat and after his death his widow and thereafter the petitioner have been in possession of the land in dispute and their names cannot be deleted. Orders of consolidation authorities are illegal and liable to be set aside. He relied upon judgments Supreme Court **in Amba Prasad Vs. Mahboob Ali Shah, AIR 1965 SC 54, Wali Mohammad Vs. Ram Surat, AIR 1989 SC 2296, Udai Vs. DDC and others, AIR 1990 SC 471, Hira Lal Vs. Gajjan (1990) 3 SCC 285, and judgment of this Court Pir Khan Vs. DDC and others, 1965 ALJ 591, Chobey Sunder Lal Vs. Sonu @ Sonpal, 1967 ALJ 960 (FB), Km. Radha Kishori Vs. JDC and others, 1972 ALJ 738 (DB) and Sitawan Vs. Pradeep Kumar, 2006 (101) RD 215**, in which it has been held that a person recorded as "occupant" in 1359 F had become sirdar under Section 20 of U.P. Act. No. 1 of 1951. In **Joint Collector Ranga Reddy Vs. D. Narsing Rao, (2015) 3 SCC 695**, it has been held that even if no limitation has been provided, the order is required to be challenged within reasonable time. Judgments of Supreme Court in **State of Kerala Vs. M.K. Kunhikannan Manbiar Manjeri Mannikoti Nanduvi, (1996) 1 SCC 435, Sultan**

Sadik Vs. Sanjay Raj Subba, (2004) 4 SCC 377, Nagappan Vs. Ammasai Gounder, (2004) 13 SCC 450, M. Minakshi Vs. Metadin Agrawal, (2006) 7 SCC 470, Sneh Gupta Vs. Devi Swarup, (2009) 6 SCC 194 and **Krishnadevi Malchand Kamathia Vs. Bombay Enviromental Action Group, (2011) 3 SCC 363**, in which it has been held that a void order, if not set aside in proper forum, it cannot be ignored in collateral proceeding. **State of Himanchal Pradesh Vs. Narain Singh, (2009) 13 SCC 115** and **Rajendra Shankar Shukla Vs. State of Chhattisgarh, AIR 2015 SC 3147**, in which it has been held that legislature is competent to make law retrospectively and validate the action which was otherwise without jurisdiction. **State of U.P. Vs. Synthetic and Chemical Ltd. (1991**) **4 SCC 139, M/S Ariane Orgachem Pvt. Ltd. Vs. Wyeth Employees Union, (2015) 7 SCC 561** and **Satendra Kumar Vs. Raj Nath Dubey, 2016 SCC online 478,** in which it has been held that previous judgment on issue of law does not operate as res-judicata.

10. I have considered the arguments of the counsel for the parties and examined the record. Although, the orders of consolidation authorities, challenged in this writ petition have been upheld by this Court in Writ B No. 52946 of 2015 Zahruddin Vs. State of U.P. and others, by judgment dated 16.09.2015. But in view of cases cited above, by the counsel for the petitioner, this Court proposes to decide the points raised in this writ petition again.

11. Under Section 20 (b) (ii) of U.P. Act No. 1 of 1951, a person recorded as occupant in khasra or khatuni 1356 F prepared under Section 28 and 33 respectively of U.P. Land Revenue Act, 1901, or who was on the date, immediately proceeding the date of vesting entitled to regain possession thereof under clause (c) of sub-section (1) of Section 27 of United Provinces Tenancy Amendment Act, 1947, shall be called adhivasi of the land and shall subject to provisions of this Act, be entitled to take or retain possession thereof. Explanation -II to this section provides that where any entry in the records referred to in clause (b) has been corrected before the date of vesting under or in accordance with the provisions of U.P. Land Revenue Act, 1091, the entry so corrected shall for the purposes of the said clause shall prevail. By U.P. Land Reforms (Amendment) Act, 1954 (U.P. Act No. 20 of 1954) Chapter IX-A was added in U.P. Act No. 1 of 1951, by which adhivasi were conferred sirdari right. In present case, the petitioner did not file any document to show that Ram Surat was recorded as occupant in 1356 F. The petitioner relied upon khasra 1359 F, in which name of Ram Surat was recorded in remark column. Entry of 1359 F is relevant only in those cases, where it was corrected, according to the provisions of U.P. Land Revenue Act, 1901. Thus on its basis, no right can be claimed. Supreme Court in **Bachan v. Kankar, AIR 1972 SC 2157**, held that it is too obvious to be stressed that an entry which is incorrectly introduced into the records by reason of ill-will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis.

12. Due to contradictory judgments Supreme Court and this Court on the issue as to who can be treated as "recorded occupant" under Section 20 (b) of U.P. Act No. 1 of 1951, the matter was referred to a Bench of five Judges in **Basdeo Vs. Board of Revenue, U.P., AIR 1974 All 337 (SB),** in which it has been held that the phrase "recorded as occupant" has a technical significance. Before record of the name of any person in the khasra or khatauni can be treated as a record of an

occupant, the entry must be established to be made according to provisions of U.P. Land Revenue Act, 1901 and U.P. Land Record Manual, governing the making of entries of occupant and entry must be genuine and not fictitious. If a person is recorded in the sub-tenant's column and another person is recorded as a mortgagee in the remark's column, none of them will be deemed to be a "recorded occupant". This judgment has been approved by a Bench of three Hon'ble Judges **in Chandrika Prasad Vs. Pullo, (2000) 4 SCC 227.** Similar view has been taken in **Ram Harakh Vs. Hamid Ahmad Khan, (1998) 7 SCC 484**. In view of contradictory judgments, judgment of larger Bench of **Chandrika Prasad (supra)** has to be followed.

13. U.P. Land Records Manual prescribes form of khasra. Column-5 of khasra, is for recording the name of cultivator and rent, if changed. Column-6 is for recording the names of sub-tenants or tenants of sir or tenants of permanent tenure holders or rent free grantees or grantees at a favourable rent or **occupier of land without consent** of the person (entitled to admit a sub-tenants and rent). Detail procedure for making entry in column-6 of khasra is given in Paragraph-87 of U.P. Land Records Manual. In present case, name of Mewa was recorded in column-5 of khasra as cultivator. Ram Surat may either be sub-tenant or occupier of land without consent of the tenant. His name must be recorded in column-6 of khasra 1359 F, if he was found in actual cultivatory posession during partal. Entry of column-6 of khasra can alone be regarded as an entry of "recorded occupant" for purposes of Section 20 (b) of U.P. Act No. 1 of 1951. Ram Surat cannot be treated as "recorded occupant" on its basis nor he can be given right of sirdar under Section 20 (b) of U.P. Act No. 1 of 1951. In any case, as held above, he was not recorded in 1356 F as such on the basis of khasra 1359 F alone no right accrued.

14. So far as alleged order of Tahsildar dated 19.04.1955, endorsement of which has been made in Malikan Register and amaldaramad of which was made in khatauni 1365 F, is concerned, at the time of hearing of Writ Petition No. 62174 of 2014, the counsel for the respondent had produced a questioner to the effect that no case was registered before Tahsildar in the year 1955 on the application of Ram Surat nor any order was passed on 19.04.1955. He submitted that entry in khatauni 1363 F-1365 F was merely a forgery without there being any order of any competent authority. Ram Surat had no concern with family of Mewa nor the petitioner could adduce any evidence to justify for recording the name of Ram Surat over the land of Mewa. As the questioner was produced before this Court as such the matter was remanded to Deputy Director of Consolidation, for giving opportunity of evidence to both the parties, with direction to record a fresh findings as to whether entry made in khatauni 1363 F-1365 F was genuine or forged. After remand, the petitioner could not adduce any evidence to prove that any application was filed by Ram Surat or any order was passed by Tahsildar on it on 19.04.1955 to justify the entry made in khatauni 1363 F-1366 F nor she could file any thing in writ petition in this respect. Deputy Director of Consolidation found that entry of the name of Ram Surat in khatauni 1363 F-1365 F for the first time is a forgery. U.P. Act No. X of 1961 validated genuine orders and not a forgery/fabrication in records. Fabricated entry does not affect the right and title of Mewa or his heirs. Under the provisions of U.P. Land Revenue Act, 1901, Tahsildar has no jurisdiction record the name of any person in khatauni except in cases of transfer or succession as held by Supreme Court in **Jagdeo Singh Vs. Mithailal, AIR 1981 SC 1005.**

15. Even if the order of Tahsildar or settlement entry of 1369 F had been genuine, it would be an order under the provisions of U.P. Land Revenue Act, 1901. Section 40-A and Section 54 (8) (b) of U.P. Land Revenue Act, 1901, provides that the orders passed relating to mutation/correction by revenue court in proceedings under Section 33, 35, 39, 40 and 54 can always be challenged in the suit and has no effect of res-judicata. Appendix-III of U.P. Zamindari Abolition and Land Reforms Rules, 1952 provides limitation for the suit and other proceedings under the Act. For filing a suit for declaration of right under Section 229-B, limitation is "none" vide Entry-39-B. Supreme Court in **Jattu Ram Vs. Hakam Singh, AIR 1994 SC 1653, Durga Das Vs. Collector, AIR 1996 SC 2786, Sawarni Vs. Inder Kaur (1996) 6 SCC 223, State of H.P. Vs. Keshav Ram, AIR 1997 SC 2181, Balwant Singh Vs. Daulat Singh, AIR 1997 SC 2719, Mahila Bajrangi Vs. Badribai, (2003) 2 SCC 464, Calcutta Municipal Corporation Vs. Shrey Mercantile (P) Ltd., AIR 2005 SC 1879** and **Suraj Bhan Vs. Financial Commissioner, (2007) 6 SCC 186** held that mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. In **State of A.P. v. Hyderabad Potteries (P) Ltd., (2010) 5 SCC 382** and **Union of India Vs. Vasavi Cooperative Housing Society, AIR 2014 SC 937** held that it is trite that entry in the revenue record alone may not be sufficient as conclusive proof of title nor can be relied upon for proof of establishing the title as such. A Division Bench of this Court in **Shri Ram Vs. DDC and others, 2011 (4) ADJ 289 (DB)**, after reviewing entire law on the subject, held that a long standing entry hold only a presumptory value and cannot be taken as absolute proof of title.

16. On coming to know about this entry in revenue records, Smt. Nanki and Smt. Parwati Devi (claiming themselves as the daughters and heirs of Mewa) filed a suit (registered as Suit No. 110 of 1988) under Section 229-B of U.P. Act No. 1 of 1951 for declaring them as owners of the land in dispute and deleting the names of Ram Surat, Smt. Gangi and their transferees on 02.06.1988. This suit was abated under Section 5 (2) of the Act and thereafter, objection was filed during consolidation on 21.08.1991. Consolidation Officer found that name of Mewa was recorded in khatauni 1360 F and 1363 F. Ram Surat (predecessor of the petitioner) was recorded over the land in dispute by order of Tahsildar dated 19.04.1955 in khatauni 1363 F-1365 F. Under the provisions of U.P. Land Revenue Act, 1901, Tahsildar had jurisdiction to mutate the name of any person in cases of transfer or succession. The petitioner could not prove that land in dispute was transferred by Mewa to Ram Surat nor that Ram Surat was the heir of Mewa as such, Deputy Director of Consolidation found that amaldaramad made in khatauni 1363 F-1365 F by the order of Tahsidar is a fabricated entry. Supreme Court in **Union of India v. Assn. of Unified Telecom Service Providers of India, (2011) 10 SCC 543**, relying upon previous judgments in Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34, Union of India v. Pramod Gupta, (2005) 12 SCC 1, National Institute of Technology v. Niraj Kumar Singh, (2007) 2 SCC 481 and Chandrabhai K. Bhoir v. Krishna Arjun Bhoir, (2009) 2 SCC 315, held that an order passed without jurisdiction would be a nullity. It will be a coram non judice [and] non est in the eye of the law. Principles of res judicata would not apply to such cases."

17. Supreme Court in **Vishwa Vijay Bharati v. Fakhrul Hassan, AIR 1976 SC 1485**, held that it is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title. This judgment has been followed in **Wali Mohhd. Vs. Ram Surat, AIR 1989 SC 2296.** Again in **Vikram Singh Junior High School v. District Magistrate (Fin. & Rev.), (2002) 9 SCC 509,** it has been held that the entry in the revenue record must have a legal basis. Further there was no adjudication of dispute as regards continuance of the wrong entry. The appellant could not have claimed any title over the land in dispute merely on the basis of wrong entry which continued in its favour through negligence or failure of the Revenue Officer or the Consolidation Officer to correct the record, in pursuance of the order of the Board of Revenue which had attained finality. In the consolidation proceedings, the Collector is also the District Deputy Director of Consolidation under the U.P. Consolidation of Holdings Act and is authorized to correct any wrong entry continued in the consolidation record in that capacity in the exercise of power under Section 48 of the U.P. Consolidation of Holdings Act, 1953.

18. So far as burden of proof is concerned, both the parties adduced their evidence as such burden of proof has no role. The dispute has been decided on considering evidence of the parties. Findings of facts that Smt. Parwati Devi is daughter and heir of Mewa and had been in possession of the land in dispute cannot be re-appreciated by this Court in exercise of writ jurisdiction.

19. A Bench of four Hon'ble Judges in **Kiran Singh v. Chaman Paswan, AIR 1954 SC 340**, held that it is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. **In Govt. of Orissa Vs. Ashok Transport Agency, (2002) 9 SCC 28**, held that the expressions "void and voidable" have been the subject-matter of consideration on innumerable occasions by courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same, no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is a good transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be one which is not a nullity but for avoiding the same, a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs

and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable. Similar view has been taken in **Shivshankar Gurgar v. Dilip, (2014) 2 SCC 465**, in which it has been held that it is well settled that such a void order can create neither legal rights nor obligations. Therefore, the appellant cannot be denied his right to recover possession of the property in dispute on the ground that he did not choose to challenge such a void order. The cases relied by the counsel for the petitioner for a contrary proposition have no application as in this case, as initial entry in favour of the petitioner was not a genuine entry. Statute itself provides for suit to establish right and title for which no limitation has been provided.

20. In view of the aforesaid discussion, the writ petition has no merit and is **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2016

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No.- 29707 Of 2016

Raja Ram ...**Petitioner**

Versus

Additional Commissioner, Varanasi & Ors. ...**Respondents**

Counsel for the Petitioner:
Yogendra Kumar, Om Narayan Dwivedi (appeared in Court)

Counsel for the Respondents:
C.S.C., Amit Kumar Tiwari, Manoj Kumar Yadav (for Gaon Sabha, Respondent No. 4)

Procedure:
Petition under Article 226 of the Constitution challenging:
Order dated **04.04.2013** passed in proceedings under **Section 28, U.P. Land Revenue Act, 1901**, directing correction in the map.
Order dismissing the revision preferred by the petitioner.
Statutory Provisions Involved
Section 28, U.P. Land Revenue Act, 1901
Sections 11A and 27, U.P. Consolidation of Holdings Act

Issues:
Whether a person who was not a party to proceedings under Section 28 of the U.P. Land Revenue Act can challenge the order passed therein?

Whether correction in the final consolidation map after closure of consolidation proceedings is barred by Section 11A of the U.P. Consolidation of Holdings Act?
Whether the report of the draftsman could be relied upon without formal examination?

Headnotes:
The petitioner admittedly **was not a party** to the proceedings under Section 28 of the U.P. Land Revenue Act and had not sought impleadment therein.
Being a **stranger to the proceedings**, his objection as well as revision were **not maintainable**.
Section 11A of the U.P. Consolidation of Holdings Act bars objections that could be taken under Section 9 at a later stage of consolidation, but **does not apply to correction of map proceedings**.
Under **Section 27(3) of the U.P. Consolidation of Holdings Act**, once consolidation operations conclude, the final consolidation map is to be corrected and maintained in accordance with the U.P. Land Revenue Act.
Therefore, proceedings under **Section 28 of the U.P. Land Revenue Act** for correction of map are legally permissible even after consolidation operations have closed.
The challenge regarding non-examination of the draftsman was untenable in view of petitioner's lack of locus standi.

Result:
Writ Petition Dismissed.

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard learned counsel for the petitioner, Shri Om Narayan Dwivedi has put in appearance on behalf of the petitioner in Court today. The same is taken on record. I have heard him and Shri Manoj Kumar Yadav for the Gaon Sabha, respondent no. 4 and Shri Amit Kumar Tiwari for the respondent no. 5.

2. The writ petition arises out of proceedings under Section 28 of the U.P. Land Revenue Act. These proceedings were initiated by the respondents and an order came to be passed on 04.04.2013 directing correction in the map.

3. The contention of learned counsel for the petitioner is that he had filed an objection to the report that had been submitted by the droughts man.

4. On a pointed query, he admits that he was not a party to the proceedings nor had sought impleadment therein. The contention is that the author of the report was droughts man never examined to prove the report and, therefore, this report could not be made basis of the order impugned.

5. After the correction of map was ordered, the petitioner appears to have been filed a revision, which has also been dismissed.

6. In my considered opinion, in view of the admitted factual position that the petitioner was not a party to the proceedings under Section 28 of the U.P. Land Revenue Act nor sought his

impleadment therein, he was a total stranger thereto. The objection as also the revision filed by him, were for the same reason clearly not maintainable.

7. It has additionally been submitted by learned counsel for the petitioner that since the correction has been ordered in the final consolidation map, the proceedings initiated by the respondent were barred by Section 11A of the U.P. Consolidation of Holdings Act. This correction could have been done only during consolidation operations and not thereafter.

8. This submission of learned counsel for the petitioner is totally devoid of substance.

9. A bare reading of Section 11A of the U.P. Consolidation of Holdings Act provides that an objection, which can be filed at the stage of Section 9, cannot be raised at any subsequent stage of consolidation operations. An objection for the correction of map is to be made in accordance with the provision of Section 27 of the Act. The bar contained in Section 11A, therefore, has absolutely no application in matters pertaining to corrections of map.

10. Moreover, sub-section 3 of the aforesaid Section 27 of the Act provides that once the final consolidation map has been prepared and the consolidation operations have come to a close, this map is to be corrected and is maintained in accordance with the provision contained in the U.P. Land Revenue Act, 1901.

11. It is therefore, clear that even the final consolidation map is subject to the provsions of Section 28 of the U.P. Land Revenue Act, which had been invoked in the instant case by the respondents.

12. Since the submissions of learned counsel for the petitioner are devoid of substance and additionally since the petitioner is unconcerned with the proceedings not being a party thereto, this writ petition is **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2016

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ A No.- 30708 Of 1993

Kameshwar Thakur **...Petitioner**

Versus

Regional Higher Education Officer (R.H.E.O.) & Ors. **...Respondents**

Counsel for Petitioner:
Sri C. Prakash, Sri C. Prashad, Sri K. Kant, Sri Siddharth Khare, Sri Y. Agrawal

Counsel for Respondents:
Standing Counsel, Sri Siddharth Singh

Service Law -- Education -- Class-IV Employee -- Forced Resignation -- Resignation Without One Month Notice -- Clause 35.02, Chapter XXIII, Statutes of University of Gorakhpur -- Effect of Non-Compliance -- Petitioner was appointed as Class-IV employee (Zamadar) at a college under Gorakhpur University w.e.f. 03.01.1992 after due procedure -- he alleged that on 01.07.1992 his resignation was obtained by force -- the incident was reported to the Superintendent of Police, Ballia -- the earlier Writ Petition No. 6730 of 1993 was disposed of by this Court on 29.03.1993 directing the District Inspector of Schools (DIOS), Ballia to hear the representation of the petitioner regarding forced resignation -- pursuant thereto DIOS heard the petitioner and the Principal on 15.05.1993 and 21.05.1993, called for the Manager's report on 22.06.1993, and after considering all material, rejected the petitioner's representation vide order dated 15.07.1993 holding that the resignation was voluntarily tendered -- the petitioner challenged this order contending, inter alia, that the resignation was not in the manner prescribed by Clause 35.02 of the Statute which requires one month's notice in advance or deposit of one month's salary in lieu thereof -- Held: a bare perusal of Clause 35.02 makes it clear that where an employee resigns without giving one month's notice, he is under a legal obligation to deposit one month's salary in lieu thereof -- failure to deposit the salary does not render the resignation invalid -- the only consequence is that the college becomes entitled to recover the said amount -- the petitioner committed a breach of Clause 35.02 and cannot be allowed to take advantage of his own wrong by contending that the resignation was bad for want of one month's notice or deposit of one month's salary.

Service Law -- Writ Jurisdiction -- Non-Impleadment of Necessary Party -- Appointed Incumbent -- Writ Petition Not Maintainable -- Held: after the vacancy was created due to the alleged resignation of the petitioner, one Sri Subhash Chandra Singh was duly appointed on the said post and his appointment was approved by the DIOS vide approval dated 02.02.1994 -- this fact was well within the knowledge of the petitioner as stated in paragraph 25 of the writ petition itself -- yet the petitioner has neither impleaded Sri Subhash Chandra Singh, the newly appointed incumbent, as a respondent, who is a necessary party, nor has he impleaded the Manager of the college against whom the sole allegation of forced resignation has been made -- in such circumstances, the writ petition is not maintainable on the ground of non-impleadment of a necessary party -- no relief can be granted in the absence of the affected party.

Writ Petition Dismissed -- Writ petition challenging the order dated 15.07.1993 passed by the District Inspector of Schools, Ballia, rejecting petitioner's representation in relation to his alleged forced resignation from the post of Class-IV employee (Zamadar) in a college under Gorakhpur University, dismissed as wholly misconceived -- no order as to costs.

Case Law Discussed:
1. Bharat Singh: Dallu: Nathu Ram: Ram Phal v. State of Haryana, AIR 1988 SC 2181
2. A.K. Roy v. State of Punjab, AIR 1986 SC 2160

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Yogesh Agarwal, learned counsel for the petitioner, Sri Siddharth Singh, learned counsel for the respondent No.3 and learned standing counsel for the respondents No.1 & 2.

2. This writ petition has been filed praying for a writ, order or direction in the nature of certiorari to quash the order dated 15.07.1993 passed by the District Inspector of Schools, Ballia.

3. Learned counsel for the petitioner submits that specific averments made in paragraphs-21, 25 & 27 have been replied by the respondent No.3 in paragraphs-16, 18 and 20 of the counter affidavit without annexing any evidence of affording opportunity of hearing to the petitioner and thus, averments made in the counter affidavit are not entertainable in view of the law laid down by the Hon'ble Supreme Court in the case of **Bharat Singh: Dallu: Nathu Ram: Ram Phal Vs. State of Haryana, AIR 1988 SC 2181** (para-13) to the effect that when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit and if the facts are not pleaded or evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point. He submits that the resignation was obtained by force and as such there is no resignation in the eyes of law. He further submits that Clause 35.02 of Chapter XXIII of Statute of University of Gorakhpur provides the manner for resignation by a temporary employee from service by giving one month's notice in advance in writing to the management otherwise he has to deposit one month's salary in lieu of notice. In the present set of facts, the petitioner has neither deposited one month's salary with the college nor the college has demanded one month's salary from the petitioner in lieu of notice and as such even this forced resignation was without compliance to the procedure prescribed by statute 35.02. In support of his submission, he relied upon a decision of Hon'ble Supreme Court in the case of **A.K. Roy Vs. State of Punjab, AIR 1986 SC 2160** (para-10) to submit that if a statute prescribes the manner in which something is to be done, then it has to be done in that manner and in no other manner. He, therefore, submits that since the resignation of the petitioner dated 01.07.1992 was obtained by force by the management of the college and also since the aforesaid resignation was not in the manner prescribed by statute 35.02 of Chapter XXIII of Statute of University of Gorakhpur and as such the aforesaid resignation was wholly null and void. He further submits that no opportunity of hearing was afforded by the respondent No.2 before passing the impugned order dated 15.07.1993.

4. Sri Siddarth Singh, learned counsel for the respondent No.3 submits that one Sri Subhash Chandra Singh was appointed after due approval of the D.I.O.S. dated 02.02.1994 on the vacancy created due to resignation of the petitioner. Averments in this regard have been made in paragraph-18 of the counter affidavit and paras-9 & 10 of the supplementary counter affidavit which have not been specifically denied by the petitioner. He submits that the writ petition is not maintainable because of non-impleadment of newly appointed employee Sri Subhash Chandra Singh. The allegation of the petitioner against the manager of the institution is not entertaianble inasmuch as the manager has not been made party in the present writ petition. The Principal was the appointing authority, who was present before the D.I.O.S. and the petitioner was afforded full opportunity of hearing. He refers to paragraphs-16, 18 & 20 of the counter affidavit and paragraphs-8, 9 & 10 of the supplementary counter

affidavit. He further submits that entire records were produced before the D.I.O.S. who passed the impugned order after affording full opportunity of hearing to the petitioner.

5. I have carefully considered the submissions of learned counsel for the parties.

6. Briefly stated, the facts of the present case are that according to the petitioner, one post of class-IV employee (Zamadar) fell vacant due to termination of service of one Katari Ram. The vacancy was advertised and the petitioner was appointed on the said post following due procedure of law and he was allowed to work w.e.f. 03.01.1992 after due approval of the competent authority. It is stated in paragraph-11 of the writ petition that the petitioner was forced to sign a resignation letter which incident was reported by him to the Superintendent of Police, Ballia on 24.08.1992. The petitioner filed a Civil Misc. Writ Petition No.6730 of 1993, Kameshwar Thakur Vs. Regional Higher Education Officer, Gorakhpur and others**,** which was disposed of by this court by order dated 29.03.1993 as under:

"In view of the above facts, I direct that the petitioner may approach the District Inspector of Schools, Ballia through a representation to be filled by him before the said Inspector along with a certified copy of this order within a period of two weeks from today. On filing of the representation by the petitioner, ***the District Inspector of Schools, Ballia shall examine the petitioner's case and look into the correctness of the allegations made by him regarding the forced resignation*** *which might have been procured by the Manager****. He shall pass appropriate orders on petitioner's representation after hearing the Manager and the petitioner within three weeks from the date of the receipt of the representation***.

With these directions, the writ petition is disposed of finally."

7. It appears that pursuant to the aforesaid order passed by this court, the respondent No.2 fixed the date for hearing for 15.05.1993 on which date the petitioner and the Principal of the Institution appeared and made their submissions. The Manager of the Institution was requested either to appear or to submit his report on 22.06.1993 which was submitted by him by a letter dated 22.06.1993. After considering the report of the Manager and the statement of the Principal and the petitioner recorded during the course of hearing on 15.05.1993 and 21.05.1993, the respondent No.2 came to the conclusion that the resignation was written and signed by the petitioner, which was submitted before the respondent No.3 on 01.07.1992 and for verification of the resignation, three lecturers namely Sri Baldev Mishra, Sri Sudama Ram and Sri Premanand Mishra were requested who confirmed the resignation. The permission for filling up the vacant post due to resignation of the petitioner was granted by the respondent No.2 on 09.07.1992. He also recorded a finding that the allegation of forced resignation was also not found correct by the Police. On these findings, he rejected the representation of the petitioner. Aggrieved with this order dated 15.07.1993, the petitioner has filed the present writ petition.

8. In paragraph-21 of the writ petition, the petitioner has alleged that 15.05.1993 was the date fixed for hearing by the respondent No.2 on which date manager of the college was not present and subsequently without affording any opportunity to the petitioner, the respondent No.2 passed the impugned order dated 15.07.1993. It is relevant to note that in the impugned order, it is specifically mentioned that the petitioner and the Principal of the Institution were heard on 15.05.1993 and 21.05.1993 and their statements were also recorded. However, this fact, even though mentioned in the impugned order; has not been denied by the petitioner. This clearly indicates that the petitioner was afforded opportunity of hearing by the respondent No.2 who passed the order on the representation of the petitioner after considering the statement of the petitioner, the statement of the Principal of the Institution, the report of the Manager as well as the materials available on record. In paragraph-16 of the counter affidavit, it is specifically stated that the petitioner was afforded full opportunity of hearing by the respondent No.2 who also examined entire record including alleged complaint of the petitioner and his resignation letter etc. The averments so made is also verifiable from the contents and findings in the impugned order as aforementioned with regard to opportunity of hearing.

9. In paragraph-25 of the writ petition, the petitioner himself has mentioned about the approval of appointment of another person on the post on 09.07.1992. This paragraph has been replied in paragraph-18 of the counter affidavit. In paragraphs-8, 9 & 10 of the supplementary counter affidavit full relevant details of appointment of one Sri Subhash Chandra Singh has been disclosed supported by relevant papers including the approval of appointment dated 02.02.1994 granted by letter No.5349-52, dated 02.02.1994. Thus, the fact of appointment of one Sri Subhash Chandra Singh on the vacancy created due to resignation of the petitioner dated 01.07.1992, was well within the knowledge of the petitioner at relevant point of time but the petitioner has not impleaded the said employee as respondent in the present writ petition, who is a necessary party. In paragraph-25 of the writ petition, a reference to Clause-35.02 of the statute of the University has been made to contend that the resignation was not in the manner prescribed and if the petitioner had actually resigned then the management would have demanded one month's salary from the petitioner as per Rules. In paragraph-20 of the counter affidavit, it is stated that the management through letter dated 05.07.1992 had directed the petitioner to deposit one month's salary.

10. Clause 35.02 of Chapter XXIII of the statute provides that if a temporary employee resigns from service he shall give notice to this effect in writing to the management of the college one month in advance otherwise he shall have to deposit one month's salary with the college in lieu of notice and similarly if the management of a college decides to terminate the services of an employee, the management shall give one month's notice to the employee or one month's salary in lieu thereof.

11. Bare perusal of the provisions of para-35.02 of the Statute as aforementioned clearly indicates that employee who resigns without notice is under a legal obligation to deposit one month's salary with the college in lieu of notice. If he does not deposit the salary

then it shall not render the resignation to be invalid. The only consequence of resignation without deposit of one month's salary in lieu of notice would be that the college shall become entitled to recover the said amount in accordance with law. Not giving one month's prior notice or not depositing one month's salary in lieu thereof, while tendering resignation; was the breach of Clause 35.02 of Chapter XXIII of the Statutes of the University committed by the petitioner and as such he cannot be allowed to say that the resignation was bad for want of one month's notice or deposit of one month's salary. The petitioner has committed a wrong of which he cannot take advantage. The resignation was voluntarily tendered by the petitioner which was lawfully accepted by the competent authority. On the post which fell vacant due to resignation of the petitioner, one Sri Subhash Chandra Singhw was appointed, whose appointment was duly approved by the respondent No.2 yet the petitioner has not impleaded him as respondent. The manager of the college against whom sole allegation of forced resignation has been made, has also not been impleaded as respondent.

12. In view of the above discussions, I do not find any merit in this writ petition. Writ petition is wholly misconceived and is, therefore, dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE V.K. SHUKLA, ACTING CHIEF JUSTICE, J.
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ C No.- 30948 Of 2016

Shah Alam **...Petitioner**
Versus
Union Of India & Ors. **...Respondents**

Counsel for the Petitioner:
Mohammad Hisham Qadeer, Mr. M.A. Qadeer

Counsel for the Respondents:
C.S.C., A.S.G.I., Gynendra Kr Dwivedi, Manish Goyal

Waqf Act, 1995 – Section 83 – Wakf (Amendment) Act, 2013 – Constitution of Tribunal – One member Tribunal – Three member Tribunal – Notification dated 07.11.1998 – Notification dated 03.03.2014 – Civil Judge (Senior Division) to act as one man Waqf Tribunal – Notification dated 07.11.1998 stands rescinded – Civil Judge (Senior Division) would cease to have jurisdiction – Multi Member Waqf Tribunal constituted – Section 6 of General Clauses Act – No express repeal – No implied repeal – No person has a vested right in

procedure – Matters in question required to be placed before the Waqf Tribunal – Present writ petition is dismissed.

Held: (Paras-22-27)

1.Provisions of Section 6 of General Clauses Act would not extend any benefit to the petitioner as Apex Court in Lal Baba Shah Dargah Trust case has clearly expressed its view that section 83 (4) of 1995 has not at all been impliedly repealed. Once neither there is an express repeal nor there is any implied repeal and new sub-section (4) of Section 83 is nothing but improvement in the constitution of Tribunal then the effect of repeal that is being claimed before this Court is neither here nor there and is misplaced on the face of it as Section 6 of General Clauses Act would come into play only when there is repeal in any form i.e. express repeal or implied repeal. Merely because constitution of Tribunal has been changed and place of functioning of Tribunal has been changed same does not manifest intention inconsistent with the provision as contained under Section 83(4) and under amended Section 83(4) as intent remains the same i.e. to provide forum, for settling dispute pertaining to Waqfs with improvement in the constitution of Tribunal. Section 6 would be applicable only when the new legislation manifests an intention incompatible with or contrary to the earlier provisions of section and in no other contingency. Merely because pending matters have been transferred, including the matters pertaining to petitioner, in no way would effect any right or privilege of petitioner as State Government inheres in itself the right to constitute Tribunal and define its local limit. Apex Court in the case of Shiv Shakti Housing Co-operative Society Vs. Swaraj Developers 2003 (6) SCC 659 has clearly mentioned that no person has a vested right in procedure, he has only the right of proceeding in the manner prescribed. If by statutory change the mode of procedure is altered, the parties are to proceed as per the altered mode, without exception, unless there is a different situation. In such situation Section 6 has no application. Petitioner accordingly even after withdrawal of notification by State Government cannot insist that Civil Judge, should continue with the case even though Notification dated 07.11.1998 stands withdrawn by the State Government

2.Reliance placed by petitioner on the case of Sardar Khan Vs. Syed Nazmul Hasan 2007 (SC) Law Suit 245 would also not help the petitioner for the reason that said judgement is clearly based on the fact that by virtue of sub-section (5) of Section 7, the Tribunal had no authority or jurisdiction to determine any matter that has been subject matter of suit/proceeding instituted or commenced in Civil Court prior to coming into force of the Waqf Act 1995. Judgement in the case of Bhagat Ram Sharma Vs. Union of India 1987 Law Suit (SC) 820 will also not help the petitioner in the present case for the preposition that it is legislative practice to provide while enacting an amending law that an existing provision shall be deleted and a new provision substituted, then such a deletion has the effect of repeal of existing provision, as here in reference of statutory provisions that governs the Waqf properties, Apex Court in the case of Lal Shah Baba Trust has clearly ruled that there is no implied repeal. We cannot take view running counter to the reasoning and result reached therein. Judicial discipline binds us to follow the aforementioned binding precedent.

4. Division Bench of this Court in Public Interest Litigation No. 8068 of 2016 (Mohd Junaid Ajaz and 2 other Versus Union of India and 3 others) in reference of constitution of these two Tribunals has held that in view of repeal of Act No. 27 of 2013 by the Repealing and Amending (Second) Act, 2015 (Act No. 19 of 2015), the Waqf Tribunals which were established at Lucknow and Rampur in pursuance of the amended provision of Section 83 would not cease to exist and would continue to function. Division Bench also considered the scope and ambit of Section 4 of the Repealing and Amending (Second) Act, 2015 and came to the conclusion that once provisions of amending legislature, Amended Act No. 27 of 2013 has been brought into force and amendment has been incorporated in the Act then subsequent repealing amended legislature would not affect that has already affected.

5.Once such is the factual situation that is so emerging in the present case is that the very authorisation by means of notification in question dated 07.11.1998 has been rescinded, then net effect of the same is that

Civil Judge (Senior Division) would cease to function as one man Waqf Tribunal, then Multi Member Waqf Tribunals established at Lucknow and Rampur in pursuance of the amended provisions of Section 83, would deal with the subject matter and none of the vested right of the petitioner could be said to be infringed.

6.As far as issues for opening Waqf Tribunal at other places are concern, as requested by parties, such issues are left open to be decided in another Public Interest Litigation and to the domain of State Government.

7.With the above, present writ petition is dismissed.

Case Law discussed:

(Delivered by Hon'ble Hon'ble V.K. Shukla, A.C.J.)

1. Shah Alam is before this Court with following relief:-

1. Issue a writ, order or direction in the nature of certiorari quashing the impugned Notification dated 03.03.2014 issued by the State Government (Annexure-6 to the writ petition) and circular/ Notification of Registrar of High Court dated 13.04.2016 (Annexure-13 to the writ petition) and both be declared to be ultra virus, void, illegal, arbitrary and unenforceable in the eyes of law.

2. Issue a writ, order or direction in the nature of mandamus commanding the Respondent nos. 2 and 3 to constitute Waqf Tribunal in each district including District Meerut.

3. Issue a writ, order or direction in the nature of mandamus directing the Registrar General of High Court of Judicature at Allahabad/Respondent no.4 to withdraw its notification dated 13.04.2016 and not to compel the District Judges to transfer the cases of petitioner from Meerut to Rampur concerning Waqf No. 50-A, Meerut and cases pending before Waqf Tribunal, Meerut be heard and decided at Meerut.

4. Issue a writ, order or direction in the nature of mandamus commanding the Waqf Tribunal, Rampur not to proceed further with hearing of Waqf Case No. 19 of 2016, Reference No. 55 of 2015, Reference No. 54 of 2016 and Reference No. 53 of 2016 respectively.

2. Petitioner is submitting that in reference of waqf property, following four cases of his pending at Meerut would be transferred to Rampur namely.

1. Reference No. 901 of 2000 under Section 83(2) of the Waqf ActNo. 43 of 1995, regarding Waqf No. 50-A Meerut of which the petitioner is Mutawalli and is Defendant No. 5.

2. Reference No. 772 of 2010 filed by Smt. Shahida Begam in respectof some of the properties of the Waqf No. 50-A, Meerut of which the petitioner is Mutawalli and Defendant No.5.

3. Reference No. 6 of 2013 filed by Dr. Badre Alam in which thepetitioner is Respondent no.3 and is Mutawalli of Waqf No. 50-A, Meerut.

4. Reference No. 11 of 2014 filed by Waqf Alal Aulad through itsalleged Mutawalli Mohammad Muttaqi Alvi of which the petitioner is Mutawalli in which the petitioner filed Application for his impleadment under order 1 Rule 10 C.P.C. Which is pending disposal.

3. Petitioner submits that Waqf Act, 1995 came into force with effect from 01.01.1996. By Section 3(q), the Tribunal is defined as the Tribunal constituted under sub-section (1) of the Section 83 of the Act having jurisdiction in relation to that area. Section 84 confers power to the Tribunal to decide and determine dispute, questions or other matters relating to a waqf property and decide the proceeding as expeditiously as possible. Petitioner submits that Section 83 confers power to the State Government to constitute Tribunals. In the original Act, Section 83 provides for constitution of Tribunal consisting of only one person. Subsection 4 of Section 83 as it stood under the original Act is quoted herein below:-

"(4) Every Tribunal shall consist of one person,who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class and the appointment of every such person may be made either by name or by designation".

4. Certain amendments have been brought in the Act of 1995 in 2013 called the Wakf (Amendment) Act, 2013. By this Amendment Act, 2013, many sections have been amended including Section 83. After amendment, Section 83 reads as under:-

"83. Constitution of Tribunals, etc.-

(1) The State Government shall, by notification in the Official Gazette,constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals;

(2) Any mutawalli person interested in a Waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the Waqf. (3) Where any application made under sub-section (1) relates to any Waqf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the

mutawalli or any one of the mutawallis of the Waqf actually and voluntarily resides, carries on business or personally works for gain, and where any such application is made to

the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter: Provided that the State Government may, if it is of opinion that it is expedient in the interest of the Waqf or any other person interested in the Waqf or the Waqf property to transfer

such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such Waqf or Waqf property, transfer such application to any other Tribunal having jurisdiction , and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of—

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman; (b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member; and the appointment of every such person shall be made either by name or by designation.

(4A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as ex officio members shall be such as may be prescribed. (5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure,1908(5 of 1908), while trying a suit, or executing a decree or order. (6) Notwithstanding anything contained in the code of Civil Procedure, 1908(5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court. (8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908). (9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such order as it may think fit."

5. Petitioner submits that as Amending Act No. 27 of 2013 did not repeal Act No. 43 of Waqf Act, 1995, in view of this, Civil Judges (Senior Division) would continue to work as Waqf Tribunal even after 01.11.2013 pursuant to the notification dated 07.11.1998 wherein State Government has proceeded to appoint Civil Judge (Senior Division) of each and every District to act as one man Waqf Tribunal and said proceedings in no way would be impaired/barred and would continue to be dealt with by respective Civil Judges (Senior Division).

6. Petitioner submits that three member Tribunal has been constituted at Lucknow and Rampur by the State Government and before the Tribunal in question, only matters that have been instituted as on 01.11.2013 and thereafter are liable to be transferred and rest of the matter are liable to be tried by the Civil Judge (Senior Division), and in view of this, based on the provision of Amended Act No. 27 of 2013 as there is no repeal clause as per Section 6 of the General Causes Act earlier provision would continue to hold the field and Registrar General of this Court at the point of time when he has proceeded to pass order giving direction to District Judge to transfer the case before the Waqf Tribunal at Lucknow or Rampur, as the case may be has clearly transgressed and overstepped its jurisdiction. Petitioner submits that if petitioner's cases that are pending before Waqt Tribunal are transferred at Rampur then it would be mockery of justice and various reasons have been sought to be attributed and in this regard mention has been made that notification dated 03.03.2016 issued by the State Government is against sub-section (2) and (4) of Section 83 as State Government has failed to constitute Tribunal in each District, in view of this, interference be made and legitimate rights of petitioner be protected.

7. On the matter being taken up on 12.07.2016, Sri Rama Nand Pandey learned Standing Counsel was directed to obtain requisite instruction in the matter and accordingly requisite instructions have been obtained.

8. Sri. Punit Kumar Gupta, Advocate has moved impledment application on behalf of U.P. Sunni Central Waqf Board, 3A Mal Avenue Lucknow through its Chairman and said application has been allowed.

9. Sri Sameer Sharma, Advocate has entered appearance on behalf of the High Court and as pure legal questions are involved, as such present matter has been taken up for final hearing /disposal with the consent of the parties.

10. Sri. M.A. Qadeer, Senior Advocate, assisted by Sri M.H. Qadeer, Advocate submitted with vehemence that in the Amendment Act 27 of 2013 as on 01.11.2013 there is no repeal clause, therefore, as per Section 83 (4) of the Waqf Act No. 43 of 1995, as stated earlier would continue to operate accordingly and proceeding that have been instituted prior to 01.11.2013 will have to dealt with as per the old provision, in view of Section 6 of General Clauses Act, accordingly the cases pending before the District Waqf Tribunal, has to be decided and cannot be transferred, and in view of this action taken for transferring of the cases is perse bad and same is liable to be interfered with.

11. Sri. Gyanendra Kumar Dwivedi, Advocate representing respondent no.1, learned Standing Counsel Sri Rama Nand Pandey representing State of U.P as well as Sri Punit Kumar Gupta, Advocate representing U.P. Sunni Central Waqf Board and Sri Sameer Sharma, Advocate representing this Court on the other hand submitted that in the present case, once notification issued by the State Government on 07.11.1998 stands superseded, wherein one man Waqf Tribunal has been constituted and thereafter, in its place multiple member Waqf Tribunal has been constituted, then by no stretch of imagination the prayer that has been so made by the petitioner can be accorded and all the matters that have been pending even prior to the amendment that has been so initiated after setting aside the notification dated 07.11.1998, has to be decided by the multiple member Waqf Tribunal and in view of this argument raised has no substance and is totally devoid of substance and Section 6 of General Clauses Act would not come to the rescue or reprieve of petitioner, as Section 6 of General Clauses Act, saves right accrued and/or liability incurred and it does not create a right, accordingly writ petition preferred deserves dismissal.

12. After respective arguments have been advanced, the provisions of un-amended Act as well as provision of Amended Act in question has been examined by us and factual situation i.e. so emerging in the present case is that dispute pertaining to waqf property was to be adjudicated by the Tribunal so constituted by the State Government. **Section 83** provides for constitution of Tribunal**.** Unamnended **Section 83(4)** provides that every Tribunal shall consist of one person holding a rank not below that of a District, Sessions or Civil Judge, Class 1 in the State Judicial Service. Amended Section 83(4) provided constitution of Tribunal as follows: (I) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge Class I, who shall be the Chairman (ii) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, member(iii) one person having knowledge of Muslim law and jurisprudence, Member and the appointment of every such person shall be made either by name or by designation.

13. State Government earlier in its turn in exercise of power conferred under Section 83 of Waqf Act, 1995 read with section 21 of the General Clauses Act, 1997 and in supersession of Government Notification dated 29.11.1977 and Government Notification dated 11.03.1998 as amended from time to time and all other notifications issued in this behalf constituted with effect from the date of publication of notification is the Gazette, the judicial officers mentioned in Column 3 of of the Schedule by designation as Tribunal, for the purposes of the said Waqf Act and provided that each Tribunal shall have jurisdiction over the revenue areas specified against each in column 4 of the schedule.

14. As per the said list in question for every district Civil Judge (Senior Division) was designated to function as Waqf Tribunal and area of jurisdiction was also mentioned therein and based on the same, respective Civil Judge (Senior Division) proceeded to function as Tribunal under Waqf Act, 1995 on the strength of Notification dated 07.11.1998. After enforcement of Amended Act No. 27 of 2013, Section 44 of the Amending Act substituted the provision of sub-section (1) and (4) of Section 83 and therein State Government was empowered to constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter

relating to a waqf or waqf property, eviction of a tenant or determination or rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals. Section 83(4) provides that every Tribunal shall consist of (I) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge Class I, who shall be the Chairman (ii) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, member(iii) one person having knowledge of Muslim law and jurisprudence, Member and the appointment of every such person shall be made either by name or by designation.

15. By notification dated 29 October 2013 published in the Gazette of India on 31 October 2013, the Central Government appointed 1st November 2013 as the date on which the provisions of the Act would come into force. On 3 March 2014, in exercise of the powers conferred by sub-section (4) of Section 83, the State Government constituted two Tribunals, one at Lucknow and another at Rampur.

16. At this juncture the view point of Apex Court in the case of ***Lal Shah Baba Dargah Trust Vs. Magnum Developers and others AIR 2016 SC 381*** would be worthwhile to notice. Relevant paragraph nos. 25, 26, 27, 28, 29, 40, 39, 40 are being extracted below.

25. From perusal of the statement of objects and reasons,it reveals that the single member of the Tribunal was working fine under the Waqf Act, 1995 (before 2013 amendment). The idea of expanding the composition by the 2013 Amendment seems to make improvement in the functioning of the Tribunal with the help of two more members in the Tribunal.

26. Even by the 2013 amendment in Section 85 of the Act,they have also ousted the jurisdiction of the revenue court or any other authorities along with the civil court. Meaning thereby the legislatures wanted to make sure that no authorities apart from the Tribunal constituted under Section 83 of the Act shall determine any dispute, question or other matter relating to a waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property under this Act.

27. As per the amendment, the three members Tribunal isto be constituted by the State Government by notification in the Official Gazette. However, the State has not done its mandatory duty as provided under Section 83 of the Act (as the Section 83 uses the word “shall”). Then the question is should any party suffer due to the inaction of the State. We should keep in mind that it is common practice that the old institution/member continues to exercise duty till the time any new institution/member takes charge of that duty. In the present case also, the one member tribunal will continue to exercise jurisdiction till the time the State constitutes three members tribunal by notification in the Official Gazette. The High Court erred in holding that the civil court will exercise jurisdiction in such situation as it is manifest by the intention of the legislature that they do not want any other authorities to exercise over the Waqf property matter under the Act.

28. Mr. Muchhala, learned senior counsel appearing for the defendant/respondent, submitted that by 2013 Amendment Act, sub-section 83(4) has been substituted replacing the earlier sub-section 83(4) of the Act as the intention of the Legislature is that One Member Tribunal is not enough and in its place a Three Member Tribunal should function. According to the learned counsel the old Section 83(4) and the amended Section 83(4) is inconsistent with each other and, therefore, doctrine of implied repeal will apply. In other words, the word substitution used in the Amended Act must be interpreted as implied repeal. In this connection, learned counsel relied upon Afcons Infrastructure (supra), Municipal Council, Palai vs. T.J. Joseph, AIR 1963 SC 1561, and Bhagat Ram Sharma vs. Union of India, AIR (1988) SC 740.

29. We are unable to accept the submission made by thelearned counsel that Section 83(4) of 1995 Act has been impliedly repealed.

30. It is well settled that in case where there is a repealingclause to a particular Act, it is a case of express repeal, but in a case where doctrine of implied repeal is to be applied, the matter will have to be determined by taking into account the exact meaning and scope of the words used in the repealing clause. It is equally well settled that the implied repeal is not readily inferred and the mere provision of an additional remedy by a new Act does not take away an existing remedy. While applying the principle of implied repeal, one has to see whether apparently inconsistent provisions have been repealed and reenacted.

31. The implied repeal of an earlier law can be inferred onlywhere there is enactment of a later law which had the power to override the earlier law and is totally inconsistent with the earlier law and the two laws cannot stand together. If the later law is not capable of taking the place of the earlier law, and for some reason cannot be implemented, the earlier law would continue to operate. To such a case, the rule of implied repeal may result in a vacuum which the law making authority may not have intended.

39. Mr. L. Nageswara Rao, learned senior counsel appearingfor the Wakf Board, has rightly contended that the intention of the Parliament while substituting Section 83(4) is not that one member tribunal vanishes or ceases to exist till a three member tribunal is constituted. Intention to bring new subsection (4) in Section 83 is nothing but improvement in the constitution of the Tribunal and both the earlier and the substituted sub-sections are not inconsistent with each other.

40. Having regard to the law discussed hereinbefore andgiving our anxious consideration in the matter, we are of the definite opinion that the High Court has committed serious error of law in holding that after the Amendment Act, 2013 came into force, the one member Tribunal exercising jurisdiction ceased to exist even though a fresh notification constituting three member Tribunal has not been notified. The High Court further erred in law in directing the Civil Court to decide the disputes in respect of waqf property.

17. In the judgement of Apex Court quoted above clear cut mention has been made that intention to bring new sub-section (4) in Section 83 is nothing but improvement in the constitution of the Tribunal and both the earlier and the substituted sub-sections are not inconsistent with each other. Further mention has been made that High Court, has committed serious error in law in holding that after the Amendment Act, 2013 came into force, the one member Tribunal exercising jurisdiction ceased to exist even though a fresh notification constituting three member Tribunal has not been notified. Thus Apex Court is clear and categorical that intention to bring new sub-section (4) in Section 83 is nothing but improvement in the constitution of the Tribunal and both the earlier and the substituted sub-section are not inconsistent with each other.

18. Once such opinion has been expressed by Apex Court in **Lal Shah Baba Dargah Trust' case**, then issue that has been raised by the petitioner before this Court that earlier Section 83(4) would continue to hold the field, cannot be accepted by us for the simple reason that constitution of the Waqf Tribunal is exclusive domain of the State Government and State Government in its turn earlier vide notification dated 07.11.1998 had appointed Civil Judge (Senior Division) of each district to act as one man Waqf Tribunal and such action of the State Government was clearly in exercise of authority conferred under Section 83 of Waqf Act, 1995. In this direction once the State Government has rescinded the authorisation made by notification dated 07.11.1998 then Civil Judge (Senior Division) of each District would cease to have jurisdiction to decide such matters and matters in question certainly thereafter are required to be placed before the Waqf Tribunal competent to decide the dispute in question.

19. Apex Court in Lal Shah Baba Dargah Trust' case clearly proceeded to make a mention that one member Waqf Tribunal exercising jurisdiction would not cease to exist even though a fresh notification constituting three member Tribunal has not been notified. Here in the State of U.P. situation on ground has been different as her multi member Tribunal has been constituted at two places namely Lucknow and Kanpur. Tribunal in question that has been so notified , is nothing but improvement in the constitution of the Tribunal and both the earlier and the substituted sub-sections are not inconsistent with each other.

20. At this juncture the provision of Section 6 of General Clauses Act are being looked into:-

Section 6. Effect of repeal- where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(a)----------

(b)----------

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d)----------
(e)----------

21. The objective of this provision is to ensure protection of any right or privilege acquired under the repealed Act.

22. Provisions of Section 6 of General Clauses Act would not extend any benefit to the petitioner as Apex Court in Lal Baba Shah Dargah Trust case has clearly expressed its view that section 83 (4) of 1995 has not at all been impliedly repealed. Once neither there is an express repeal nor there is any implied repeal and new sub-section (4) of Section 83 is nothing but improvement in the constitution of Tribunal then the effect of repeal that is being claimed before this Court is neither here nor there and is misplaced on the face of it as Section 6 of General Clauses Act would come into play only when there is repeal in any form i.e. express repeal or implied repeal. Merely because constitution of Tribunal has been changed and place of functioning of Tribunal has been changed same does not manifest intention inconsistent with the provision as contained under Section 83(4) and under amended Section 83(4) as intent remains the same i.e. to provide forum, for settling dispute pertaining to Waqfs with improvement in the constitution of Tribunal. Section 6 would be applicable only when the new legislation manifests an intention incompatible with or contrary to the earlier provisions of section and in no other contingency. Merely because pending matters have been transferred, including the matters pertaining to petitioner, in no way would effect any right or privilege of petitioner as State Government inheres in itself the right to constitute Tribunal and define its local limit. Apex Court in the case of ***Shiv Shakti Housing Co-operative Society Vs. Swaraj Developers 2003 (6) SCC 659*** has clearly mentioned that no person has a vested right in procedure, he has only the right of proceeding in the manner prescribed. If by statutory change the mode of procedure is altered, the parties are to proceed as per the altered mode, without exception, unless there is a different situation. In such situation Section 6 has no application. Petitioner accordingly even after withdrawal of notification by State Government cannot insist that Civil Judge, should continue with the case even though Notification dated 07.11.1998 stands withdrawn by the State Government.

23. Reliance placed by petitioner on the case of ***Sardar Khan Vs. Syed Nazmul Hasan 2007 (SC) Law Suit 245*** would also not help the petitioner for the reason that said judgement is clearly based on the fact that by virtue of sub-section (5) of Section 7, the Tribunal had no authority or jurisdiction to determine any matter that has been subject matter of suit/proceeding instituted or commenced in Civil Court prior to coming into force of the Waqf Act 1995. Judgement in the case of ***Bhagat Ram Sharma Vs. Union of India 1987 Law Suit (SC) 820*** will also not help the petitioner in the present case for the preposition that it is legislative practice to provide while enacting an amending law that an existing provision shall be deleted and a new provision substituted, then such a deletion has the effect of repeal of existing provision, as here in reference of statutory provisions that governs the Waqf properties, Apex Court in the case of Lal Shah Baba Trust has clearly ruled that there is no implied repeal. We cannot take view running counter to the

reasoning and result reached therein. Judicial discipline binds us to follow the aforementioned binding precedent.

24. Division Bench of this Court in ***Public Interest Litigation No. 8068 of 2016 (Mohd Junaid Ajaz and 2 other Versus Union of India and 3 others)*** in reference of constitution of these two Tribunals has held that in view of repeal of Act No. 27 of 2013 by the Repealing and Amending (Second) Act, 2015 (Act No. 19 of 2015), the Waqf Tribunals which were established at Lucknow and Rampur in pursuance of the amended provision of Section 83 would not cease to exist and would continue to function. Division Bench also considered the scope and ambit of Section 4 of the Repealing and Amending (Second) Act, 2015 and came to the conclusion that once provisions of amending legislature, Amended Act No. 27 of 2013 has been brought into force and amendment has been incorporated in the Act then subsequent repealing amended legislature would not affect that has already affected.

25. Once such is the factual situation that is so emerging in the present case is that the very authorisation by means of notification in question dated 07.11.1998 has been rescinded, then net effect of the same is that Civil Judge (Senior Division) would cease to function as one man Waqf Tribunal, then Multi Member Waqf Tribunals established at Lucknow and Rampur in pursuance of the amended provisions of Section 83, would deal with the subject matter and none of the vested right of the petitioner could be said to be infringed.

26. As far as issues for opening Waqf Tribunal at other places are concern, as requested by parties, such issues are left open to be decided in another Public Interest Litigation and to the domain of State Government.

27. With the above, present writ petition is **dismissed.**

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2016

BEFORE

THE HON'BLE MRS. VIJAY LAKSHMI, J.

Application U/S 482 No.- 32275 Of 2015

Bhupendra & Ors. **...Applicants**
Versus
State Of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicants:
Rajesh Kumar Tripathi, Jawahir Yadav

Counsel for the Opposite Parties:

G.A.

PROCEDURE:
Application under Section 482 Cr.P.C. filed for quashing of the entire criminal proceedings of Case No. 3237 of 2015 (State vs. Bhupendra and others), arising out of Case Crime No. 505 of 2007, under Sections 498-A/323 I.P.C. and Section 3/4 of the Dowry Prohibition Act, Police Station Murad Nagar, District Ghaziabad, on the ground of compromise between the parties.
Supplementary affidavit along with certified copies of compromise affidavit, orders of the court below and decree dated 11.04.2015 passed by the Principal Judge, Family Court, Ghaziabad under Section 13-B of the Hindu Marriage Act were brought on record.

CITATION:
Gian Singh v. State of U.P., (2012) 10 SCC 303
B.S. Joshi v. State of Haryana, (2003) 4 SCC 675
Madan Mohan Abbot v. State of Punjab, (2008) 4 SCC 582

HEADNOTES:
High Court, in exercise of its inherent jurisdiction under Section 482 Cr.P.C., can quash criminal proceedings even in respect of non-compoundable offences such as Section 498-A I.P.C., where:
The dispute is matrimonial in nature;
The parties have amicably settled their disputes;
The victim does not wish to prosecute the matter;
The possibility of conviction is remote;
Continuation of proceedings would amount to abuse of process of Court;
Quashing would secure the ends of justice.
The inherent power under Section 482 Cr.P.C. is distinct from the power of compounding under Section 320 Cr.P.C. and can be exercised to prevent abuse of process and to secure justice in appropriate cases.

RESULT:
Application allowed.
Entire proceedings of Case No. 3237 of 2015 (State vs. Bhupendra and others), under Sections 498-A/323 I.P.C. and Section 3/4 D.P. Act, P.S. Murad Nagar, District Ghaziabad, arising out of Case Crime No. 505 of 2007, were quashed.

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Supplementary affidavit filed today by learned counsel for the applicant is taken on record.

2. The submission of learned counsel for the applicants is that the parties have settled all their disputes by way of compromise. In proof of the said compromise learned counsel has filed certified copies of various orders passed by the court below and of the affidavit filed by both the parties in the lower court in compliance of the order dated 2.11.2015 of this Court. Learned counsel has also filed certified copy of the judgment and order dated 11.4.2015 passed by the Principal Judge, Family Court, Ghaziabad on the petition under Section 13-B of the Hindu Marriage Act.

3. Learned counsel has prayed that in wake of the compromise between the parties, the continuance of criminal proceedings is an exercise in futile and the same may be quashed.

4. Heard and perused the record.

5. The statement of opposite party no. 2 recorded during trial and the affidavit filed by her before the court concerned shows that she has stated that she does not want to prosecute the criminal case any further and no dispute is remaining between her and the applicants.

6. Thus, clearly the parties have settled all their disputes and no claim is left between them.

7. However, learned A.G.A. has opposed the application on the ground that the offence under Section 498-A I.P.C. being non compoundable, the matter cannot be settled by way of compromise.

8. In so far as the contention of learned A.G.A. regarding non compoundability of offence under Section 498-A I.P.C. is concerned, in a catena of judgments the Hon'ble Supreme Court has laiddown the guidelines and has directed the High Courts to exercise its inherent powers and to quash the criminal proceedings of the F.I.R. or the complaint in view of the compromise even in the cases related to non compoundable offences.

9. In **(2012) 10 Supreme Court Cases 303; Gian Singh Versus State of U.P.,** a Bench of three Hon'ble Judges of Supreme Court has held as under:-

"Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although 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 wrong doing that seriously endangers and threatens well-being of 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.....

.... 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 victim and the offender and 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 F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of 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.

The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

10. In **(2003) 4 Supreme Court Cases 675; B.S. Joshi and others Versus State of Haryana and another**, in paragraphs 14 and 15 the Supreme Court has held as under: -

"14. There is no doubt that the object of introducing Chapter XX-A containing Section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code.

15. In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 382 of the Code."

11. In **(2008) 4 Supreme Court Cases 582; Madan Mohan Abbot Versus State of Punjab,** the Supreme Court has held in paragraph 6 as under : -

"6. We need to emphasize that it is perhaps advisable that in disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the Courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilized in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law."

12. Hence in view of the judgment of the Apex Court it is clear that in the interest of justice, even non compoundable cases which are settled between the parties, can be decided in terms of the settlement between the parties.

13. Keeping in view the fact that the parties have put to an end their all disputes by means of settlement, it does not appear just and proper to continue the criminal proceedings under Section 498-A I.P.C. against the husband, father-in-law, mother-in-law, Jeth, niece, sister and grand mother that too in a case where no injury has been caused to the victim.

14. In view of the above application is allowed and the entire proceedings of Case No. 3237 of 2015 (State Vs. Bhupendra and others), under Sections 498-A/323 I.P.C. and Section 3/4 of D.P. Act, P.S. Murad Nagar, district Ghaziabad arising out of Case Crime No. 505 of 2007 under Sections 498-A/323 I.P.C. and Section 3/4 of D.P. Act, P.S. Murad Nagar, district Ghaziabad are hereby quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.07.2016

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Bail Application No.- 44300 Of 2015

Bhupendra Singh **...Applicant**
Versus
State Of U.P. **...Respondent**

Counsel for the Applicant:
Surendra Singh, Bhupendra Singh, D. Shukla

Counsel for the Respondent:
G.A., D. Shukla, S. Shukla

Submission of the counsel for the applicant is that the incident is said to have taken place on 6.11.2014 and it is said that one Bhanu Prakash @ Monu Singh had taken the deceased Chandrika Prasad along with him but thereafter he never returned.

After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. Heard learned counsel for the applicant, learned counsel for the complainant and learned A.G.A. for the State.

2. Perused the record.

3. Submission of the counsel for the applicant is that the incident is said to have taken place on 6.11.2014 and it is said that one Bhanu Prakash @ Monu Singh had taken the deceased Chandrika Prasad along with him but thereafter he never returned. It is also alleged that on the next day, the dead body of the aforesaid deceased was discovered at about 8.00 O'clock in the morning. The allegation made against the applicant in the F.I.R. is that at about 10.00 P.M. on 6.11.2014, the deceased was seen along with the applicant and other co-accused Ram Awadh Singh, Bhanu

Prakash @ Monu Singh and Malkhan Singh. It was also alleged in the F.I.R. that the deceased is said to have been seen along the aforesaid accused persons by one Sanjay and Kaushal Kishore. Further submission is that the aforesaid witness Sanjay is the cousin brother of the deceased while Kaushal Kishore is uncle of the deceased. Argument raised on behalf of the applicant is that though the incident is said to have taken place on 6.11.2014 but the F.I.R. of the case was lodged on 12.11.2014 after an inordinate delay of six days'. Submission is that this extraordinary delay in lodging the F.I.R. has not been adequately explained by the prosecution. But what has been emphasized by the counsel is that if the deceased had been seen along with the applicant on the day of incident and if the aforesaid evidence of having been last seen with the deceased contains any grain of truth then this disclosure ought to have been made much earlier specially keeping in perspective the fact that the witnesses, who had seen the deceased along with the applicant and other co-accused on the day of incident, were none other than the close relatives of the deceased being cousin and uncle of the deceased. It has been further pointed out that on the next day of the incident that is to say 7.11.2014, one application was given by the father of the deceased to S.O. Incharge of the concerned police station in which also he had not disclosed the names of the accused persons and had simply requested to get the post mortem done in order to find out the true cause of the death of the deceased. Contention is that it is so demonstrably clear that the aforesaid witnesses who were introduced in order to depose about the evidence of last seen, is nothing but a concoction done deliberately by the investigating officer in order to create somehow some link between the murder of the deceased and the applicant. Contention is that this being a case of circumstantial evidence the link of evidence is inconclusive and wholly insufficient to conclusively infer the guilt of the accused-applicant. Much emphasis was laid by the counsel on the period of detention and it has been pointed out that the applicant has spent almost a year in jail and he is languishing behind the bars since 16.9.2015 having no criminal history and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required.

4. Learned A.G.A. and the informant's counsel opposed the prayer for bail.

5. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, this Court is of the view that the applicant may be enlarged on bail.

6. Let the applicant-. Bhupendra Singh, involved in Case Crime No. 388 of 2014, u/s 302 I.P.C. and 3(2)(5) S.C./S.T. Act, P.S.- Chaubepur, District- Kanpur Nagar, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

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

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

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

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2016

BEFORE

THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Bail Application No.- 45974 Of 2015

Nagendra Singh **...Applicant**
Versus
State Of U.P **...Opposite Party**

Counsel for the Applicant:
Lav Srivastava, Vinod Prakash Srivastava

Counsel for the Opposite Party:
G.A., Anand Tiwari, Vinay Saran

Criminal Law – Bail – Petroleum products – Theft – Barauni Kanpur Pipeline – Indian Oil Corporation – 91 metre long underground tunnel – WELL in premises of applicant – flexible pipes – electric wires – valves – excavation of earth – J.C.B. Machines – connivance and conspiracy – organized crime – hazardous manner – highly inflammable liquid petroleum product – crude oil/ High Speed Diesel worth more than Rs.1 crores – rent agreement dated 11.12.2014 – unregistered – forged – inadmissible in evidence – visiting card of Haryana Dhaba – name and mobile number of applicant – co-accused granted bail – complicity of accused – severity of punishment – misuse of liberty of bail – bail rejected.

Held:(Para:-4,5)
Upon hearing learned counsel for the parties, perusal of record and considering the complicity of accused, severity of punishment as well as totality of facts and circumstances, without commenting on the merits of the case, I do not find it a fit case for bail. The bail application of applicant Nagendra Singh in Case Crime No.53

of 2015, under Sections 379, 380, 285, 427, 414 IPC, Section 15(2)(4), 16 of the Petroleum and Minerals Pipelines Act, 1962, Section 3/4 of the Prevention of Damage to Public Property Act, Section 3/4 of the Essential Commodities Act and Section 3/4 of the Explosive Substances Act, P.S. Manda, District Allahabad, is **rejected** accordingly.

Case Law discussed:

(Delivered by Hon'ble Harsh Kumar, J.)

1. Heard Shri V.P. Srivastava, learned Senior Advocate assisted by Shri Lav Srivastava, learned counsel for the applicant, Shri Vinay Saran and Shri Anand Tiwari, learned counsel for the first informant, Barauni Kanpur Pipeline, Indian Oil Corporation and learned A.G.A. for the State.

2. Learned counsel for the applicant contends that the applicant has been falsely implicated for the offence relating to theft of petroleum products by making 91 meter long underground tunnel from Barauni Kanpur Pipeline of Indian Oil Corporation, going from village Kukhari, to the WELL having been constructed in the premises of the applicant situated at Village Kukhari near and across N.H.76; that the existence of tunnel from Barauni Kanpur Pipeline of Indian Oil Corporation upto the WELL so constructed inside the premises of the applicant is not disputed, but the applicant has no concern with construction of the above tunnel or WELL; that the real fact is that the premises in question of the applicant was leased out by him to co-accused Kuldeep for running *Dhaba* at a rent of Rs.8000/- per month on 11.12.2014 (during arguments learned counsel for the applicant provided photostat copy of the above agreement, of which typed copy is filed at Annexure 11 and the above photostat copy of rent note is kept on record and made part of the record); that the crime in question has not been committed in connivance or in conspiracy with the applicant rather it has been committed by co-accused Kuldeep without any knowledge of the applicant; that co-accused Saddam Husain has been granted bail by another Bench of this Court vide order dated 13.01.2016 passed in criminal misc. bail application no.34370 of 2015 and co-accused Dheeru Yadav @ Ranjeet Yadav has also been granted bail by the learned Special Judge (E.C. Act)/ Additional Sessions Judge, Allahabad vide order dated 11.01.2016; that no theft of petroleum products was committed by the applicant and no offence is made out against him; that the applicant is a respectable person of society and has no criminal history; that the applicant undertakes that he will not make misuse of the liberty of bail; that the applicant is in custody since 10.04.2015.

3. Learned counsel for the first informant, Barauni Kanpur Pipeline, Indian Oil Corporation and learned A.G.A. for the State vehemently opposed the prayer of bail and contended that the crime in question is not a mere theft rather is an organized crime committed with complete planning and preparations by applicant, the white collared person in connivance and conspiracy with coaccused Kuldeep; that in such type of crimes even in absence of any evidence of direct and specific role, the conspirator is equally liable; that the modus operandi of accused/ applicant as well as using of local tools and pipes etc. and intercepting the main petroleum pipeline of high velocity for committing theft in hazardous manner, which could have resulted into extremely serious consequences; that the highly velocity pipeline in operation at a high measure as high as 60 kg per square metre with huge quantity of highly inflammable liquid petroleum product between its

upstream and downstream walls is 23,10,000 litres which is equivalent to 192 tankers of 1200 litres capacity; that even if the valves are closed promptly, in case of a minor leakage of such huge amount of 23,10,000 litres liquid petroleum of velocity, could have burst out within minutes over very wide area causing unmanageable fire, engulfing and converting the entire area and several villages around it into a fire ball of such high temperature that would melt any kind of metal (vehicles, metallic structures including iron beams girders, pipes and other articles) within seconds and turn the entire surrounding into a pile of fuming ashes with complete causalities of entire population, cattle, birds etc. in the area; that the site plan and report filed at Annexure 3 with the bail application shows that after making a hole in the Barauni Kanpur Supply Pipeline, a 91 meter long underground tunnel was made across the Allahabad – Manda – Mirzapur Road N.H.-76 upto the premises of the applicant, inside which a 12 feet deep WELL with diameter 4 x 4.5 square feet was constructed, in which there was a 3 feet long bamboo ladder of 7 bars kept inside the WELL and upon entering into the WELL through above bamboo ladder, it was found that there is an underground tunnel of diameter of 3 x 2.5 square feet towards North across the National Highway upto Barauni Kanpur Supply Pipeline and inside the tunnel flexible pipes, electric wires and exhaust fan etc. were duly fitted; that the WELL was constructed inside the 24 x 14.5 square feet room and for covering the WELL an iron sheet of 51 x 55 square inches was used, which was covered with green coloured mat; that in the tunnel, several volves etc. and various equipments, pipes etc. were found to have been fitted by accused persons; that the photographs of the WELL and tunnel in question have been filed with the counter affidavit, which show the seriousness of the matter pertaining to theft of extremely costly and highly inflammable petroleum products in well planned as well as hazardous manner; that the digging of tunnel and pipeline as well as construction of 91 metre long underground tunnel and a big WELL in the premises of applicant may not be possible overnight, without the help of J.C.B. Machines or other electrical equipments in connivance and conspiracy of applicant; that the premises in question in which the above WELL was constructed and upto which WELL, the 91 metre long tunnel from Barauni Kanpur Supply Pipeline was brought across the road, exclusively belongs to the applicant and continuous theft of crude oil (High Speed Diesel) was committed by the applicant and his associates repeatedly on various dates from 16.02.2015 to 18.03.2015 and crude oil/ High Speed Diesel worth more than Rs.1 crores was stolen in dangerous and hazardous manner; that due to above theft of crude oil by the applicant, the pressure in the Barauni Kanpur Pipeline was found to have gone down from time to time, upon which this the matter was enquired into, upon which continuous committal of theft of crude oil/ High Speed Diesel by the applicant and his associates in well organized, planned as well as dangerous and hazardous manner come to the light; that it is absolutely wrong to say that the premises in question was let out by the applicant to Kuldeep at a rent of Rs.8000/- per month; that the agreement of rent at Annexure 11 (of which photostat copy has been produced during hearing) has been forged for making a false ground for obtaining bail; that the photostat copy of the above agreement filed today shows that the above agreement has been executed on 11.12.2014 through notary public on Rs.100/- nonjudicial stamp paper through which the premises in question was allegedly let out to Kuldeep for running hotel (Dhaba) at a rent of Rs.8000/- per month; that it is pertinent to note that in terms 6 and 8 of the above rent agreement it has been specifically mentioned that the tenant shall not make any alternation in the walls of house, except making the Chulha-bhatti or fitting of pipe for supply of water and that he will not carry any other activity in

the hotel except the business of hotel (*Dhaba*), else the landlord will be entitled to get the tenant evicted; that through the above rent agreement, the premises is alleged to have been let out for a period of three years; that as per settled law no premises can be let out for a period of one year or more without a registered rent agreement and so also the above alleged agreement of tenancy is forged and inadmissible in evidence; that it is absolutely wrong to say that the alleged tenant Kuldeep, the co-accused made payment of one month rent to the applicant by depositing the same in his account on 13.02.2015 as mentioned in the supplementary affidavit dated 25.02.2016 in para 3 with Annexure 1, copy of passbook, showing such two deposits of Rs.5000/- and Rs.3000/- on 13.02.2015; that there is no rent receipt or counterfoil thereof to show the alleged payment of rent; that there is no whisper as to when the payment of first month was in fact made by Kuldeep and received by applicant; that there can be no reason with tenant to deposit rent of Rs.8000/- in two parts of Rs.5000/- and Rs.3000/- on one and the same date; that the above deposits on 13.02.2015 appear to have been made by applicant himself through his own men and not by co-accused/ tenant Kuldeep towards alleged payment of rent just to misguide the court and obtain bail; that it is highly improbable that the applicant, who resides in the village near the premises in question, and even otherwise, remained unaware of plenty of truck loads of earth being excavated, at least over several weeks from his premises and plenty of building material brought to his premises for construction of 91 meter long underground tunnel across National Highway upto Barauni Kanpur Supply Pipeline as well as 12 feet deep WELL as against no activity relating to *Dhaba* at all in the premises, which was allegedly let out for *Dhaba*; that no Haryana Dhaba ever run over the premises in question and had some hungry person approached the Dhaba for Lunch or Dinner, he would have been served the petroleum product instead of Lunch or Dinner; that Annexure 10 filed with bail application shows that the visiting card of alleged 'Haryana Dhaba' carries the name and mobile number of applicant on left top corner while that of alleged tenant and co-accused Kuldeep on right top corner with details of availability of pure and tasteful food at Bampur Fatak, Mirzapur Road, Haryana Dhaba, Mirzapur with facility of bathing and getting fresh; that above visiting card shows that the applicant is partner and has been hand in gloves with co-accused Kuldeep; that it may not be possible that since letting out of the premises allegedly in the month of December, 2014 despite there being no activity of *Dhaba* for a period of four months, rather mysterious activities of excavation of earth and bringing of huge building material as mentioned above as well as of construction of tunnel and WELL, the applicant was unaware and did not take any action for eviction of the tenant despite a clear breach of terms no.6 and 8 of the rent agreement; that the offence committed is extremely serious and grievous; that as per provisions of Petroleum and Minerals Pipelines Act, 1962 as amended upto date, offence under Sections 15(2) & 15(4) and Section 16 of Petroleum and Minerals Pipelines Act, 1962, the offence is punishable with rigorous imprisonment for a period not less than 10 years, which may extend to imprisonment for life or death; that co-accused Saddam Husain and Dheeru Yadav, were only tanker drivers and their case is clearly distinguishable from the case of the applicant.; that the applicant is a white collared criminal and if released on bail, will misuse the liberty of bail and tamper with prosecution evidence and possibility of his absconding may not be ruled out.

4. Upon hearing learned counsel for the parties, perusal of record and considering the complicity of accused, severity of punishment as well as totality of facts and circumstances, without commenting on the merits of the case, I do not find it a fit case for bail.

5. The bail application of applicant **Nagendra Singh** in Case Crime No.53 of 2015, under Sections 379, 380, 285, 427, 414 IPC, Section 15(2)(4), 16 of the Petroleum and Minerals Pipelines Act, 1962, Section 3/4 of the Prevention of Damage to Public Property Act, Section 3/4 of the Essential Commodities Act and Section 3/4 of the Explosive Substances Act, P.S. Manda, District Allahabad, is rejected accordingly.

APPEALLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2016

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE SUNITA AGARWAL, J.

Special Appeal Defective No.- 442 Of 2016

Smt. Sadhna **...Appellant**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Vijay Kumar Singh, Hritudhwaj Pratap Sahi, Rahul Kumar

Counsel for the Respondents:
C.S.C., A.K. Yadav, Anoop Trivedi, Rajesh Kumar Mishra

Mewa Lal Ayodhya Prasad Gupta Smarak Inter College, Soraon, Allahabad (hereinafter referred to as the "institution") is an aided and recognized institution governed under the provisions of the Intermediate Education Act' 1921. A post of Lecturer(Hindi) is stated to have fallen vacant in the said institution in the year 2000. The petitioner, Amar Singh is stated to have been appointed in the said institution on the recommendation of the Selection Board on the post of L.T. grade teacher on 30.11.2004. He moved an application seeking promotion against the said vacancy of lecturer (Hindi) in the year 2012. This application remained pending.

In the meantime, a Full Bench of this Court said that the eligibility for the post of lecturer as required to be determined under Rule 14 of the U.P. Secondary Education Services Selection Board, Rules 1998 (hereinafter referred to as the "Rules, 1998"), must be with reference to the first day of the year of recruitment in which the Committee of Management decides to make promotion on the said post, the petitioner filed a fresh representation before the educational authority for his promotion, which was not considered. He, therefore, filed Writ Petition No. 59229 of 2015. It was disposed of vide judgment and order dated 26.10.2015 requiring the authority to consider and decide the pending claim.The claim of the petitioner for promotion has been rejected.

The petitioner filed Writ A No. 21753 of 2016 (Dr. Amar Singh vs. State of U.P. & 4 Others). The learned Single Judge following the judgment of the Full Bench in Raeesul Hasan Vs. State of U.P. and others, reported in 2015 (6) ADJ 778 has allowed the writ petition vide judgment and order dated 13th May, 2016. A direction has been issued to the Regional Joint Director of Education to consider the claim of the petitioner for promotion against the vacant post of lecturer (Hindi) in accordance with the Full bench judgment of this Court in the case of Raeesul Hasan (Supra). It is against this judgment that the present intra-court appeal has been filed.

The impact of keeping the 'year of recruitment' as used in Rule 14 of Rules 1998 fluid at the instance of the Committee of Management vis-a-vis the L.T. Grade teachers working in the institution eligible and within the zone of consideration in the matter of promotion within the quota has lost the attention of the Full Bench.

For all the aforesaid reasons, we find it difficult to agree with the law as laid down by the Full bench in the case of Raeesul Hasan (Supra). In our opinion, some questions need to be examined by a larger Bench:-

Let this order be placed before Hon'ble the Acting Chief Justice for consideration of constituting a larger Bench to answer these issues.

Since the issue involved effects the appointments to be made by promotion in Intermediate Colleges throughout the State of U.P. Office may place this order before Hon'ble the Acting Chief Justice at the earliest.

Held: Para-

Case Law discussed:
Raeesul Hasan Vs. State of U.P. and others reported in 2015 (6) ADJ 778,
Km. Poonam Vs State of U.P. And others reported in 2008 (1) ADJ 273 (DB) ,
{Reference T. Venkateswarulu vs. Executive Officer, Tirumala Tirupathi Devasthanams & Other; (2009) 1 SCC 540, emphasis added to Paragraph-24},
Sonic Surgical vs. National Insurance Company Ltd. Reported in (2010) 1 SCC 135, Paragraph-10,

(Delivered by Hon'ble Arun Tandon, J.
&
Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri V.K. Singh, learned counsel for the appellant and Sri Anoop Trivedi, learned counsel for the respondent no. 6, Learned Standing Counsel on behalf of respondent nos. 1 to 4 and Sri Rajesh Kumar Mishra, learned counsel for the respondent no. 5.

2. Facts in short leading to the present Special Appeal are as under:-

3. Mewa Lal Ayodhya Prasad Gupta Smarak Inter College, Soraon, Allahabad (hereinafter referred to as the "institution") is an aided and recognized institution governed under the provisions of the Intermediate Education Act' 1921. The provisions of the said Act and the regulations framed thereunder as also those of the U.P. Secondary Education Services Selection Board Act 1982 (hereinafter referred to as the Act 1982) and the rules and regulations framed thereunder are applicable to the teachers of the institution.

4. A post of Lecturer(Hindi) is stated to have fallen vacant in the said institution in the year 2000. The petitioner, Amar Singh is stated to have been appointed in the said institution on the recommendation of the Selection Board on the post of L.T. grade teacher on 30.11.2004. He moved an application seeking promotion against the said vacancy of lecturer (Hindi) in the year 2012. This application remained pending.

5. In the meantime, a Full Bench of this Court in the case of **Raeesul Hasan Vs. State of U.P.** and others reported in 2015 (6) ADJ 778 held that the eligibility for the post of lecturer as required to be determined under Rule 14 of the U.P. Secondary Education Services Selection Board, Rules 1998 (hereinafter referred to as the "Rules, 1998"), must be with reference to the first day of the year of recruitment in which the Committee of Management decides to make promotion on the said post, which would be the recruitment year for the purpose of promotion.

6. Based upon the aforesaid judgment the petitioner filed a fresh representation before the educational authority for his promotion, which was not considered. He, therefore, filed Writ Petition No. 59229 of 2015. It was disposed of vide judgment and order dated 26.10.2015 requiring the authority to consider and decide the pending claim.

7. The claim of the petitioner for promotion has been rejected vide order dated 29.4.2016 on the ground that the petitioner did not possess the required experience of five years of teaching in L.T. Grade on the first day of the year of recruitment, as required under Rule 14 of the 1998 Rules.

8. Dissatisfied, the petitioner filed Writ A No. 21753 of 2016 (Dr. Amar Singh vs. State of U.P. & 4 Others). The learned Single Judge following the judgment of the Full Bench in **Raeesul Hasan Vs. State of U.P.** and others, reported in 2015 (6) ADJ 778 has allowed the writ petition vide judgment and order dated 13th May, 2016. A direction has been issued to the Regional Joint Director of Education to consider the claim of the petitioner for promotion against the vacant post of lecturer (Hindi) in accordance with the Full bench judgment of this Court in the case of Raeesul Hasan (Supra). It is against this judgment that the present intra-court appeal has been filed.

9. The appellant before this Court is a lecturer in Nathu Ram Purohit Balika Inter College, Konch, District Jalaun. She moved an application for her transfer in accordance with Regulations 55 to 62 of Chapter-III of the Regulations framed under the Intermediate Education Act, 1921 (hereinafter referred to as the "Act, 1921") to the institution in question against the same vacancy of lecturer in Hindi.

10. We may record that Section 16 of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as the "Act, 1982") does contemplate appointment by way of transfer. It is settled law that an order for transfer can only be made under the statutory provisions applicable against a vacancy, which falls within the quota for direct recruitment only and with the concurrence of the Committee of Management of the two institutions.

11. The appellant states that both the respective Committee of Management granted no objection to the transfer of the appellant and ultimately the matter was placed before the Additional Director who has accorded his approval. Now because of the order of the writ court, her claim for transfer stands frustrated. The appellant has, therefore, filed this special appeal alongwith an application seeking leave to appeal on the ground amongst other that she was a necessary party to the writ proceeding and for her non-impleadment, the writ petition was liable to be dismissed.

12. The other submission of the learned counsel for the appellant is that the judgment of Full Bench in the case of **Raeesul Hasan (Supra)** does not lay down the correct law. The issue as to whether a particular post falls within the quota for promotion or direct recruitment is required to be determined under Rule 10 of the Rules, 1998. Rule 11 of the said Rules further requires that such determination be done in respect of the existing vacancies as well as those which are likely to fall vacant during the course of the year, i.e. up to the last day of the year of recruitment.

13. It is submitted on behalf of the appellant that once vacancy for direct recruitment in an institution is determined, the remaining vacancies would necessarily fall within the quota for promotion. It is further explained that the proviso to Rule 10 of Rules, 1998 specifically provides that if in any year of recruitment, any vacancy cannot be filled by promotion on account of non availability of eligible candidate, it has necessarily to be filled by direct recruitment.

14. This process, according to the petitioner, has to be completed with reference to the year of recruitment in which the determination of the vacancies is done inasmuch as the vacancy within the quota for direct recruitment has to be notified in the manner laid down under Rule 11 of the Rules, 1998. It is further stated that there cannot be two different meanings for the phrase 'years of recruitment', one for the post within the direct recruitment quota and the other for the posts within the quota for promotion in the same institution.

15. It is lastly explained that Rule 10 of the Rules, 1998 has to be read in conjunction with Rule 14 for determining as to what would be the first day of the 'year of recruitment' on which a teacher in L.T. Grade must possess five years teaching experience so as to make him eligible for promotion on the post which falls within the promotion quota.

16. It is, therefore, submitted that the law laid down by the full Bench in Raeesul Hasan (supra) needs to be reconsidered in the light of the Rules 10 to 14 of 1998' Rules so as to make the proviso to Rule 10 of the Rules, 1998 workable, and to attach a definite meaning to the words "first day of the year of recruitment" as contained in Rule 14 of the Rules '1998.

17. It is stated that if the judgment in the case of **Raeesul Hasan (supra)** is given affect to, it will lead to a precarious situation where a teacher not even born on the rolls of the institution on the date of occurrence of vacancy may set up a claim for promotion after decades only because the management of the institution, at the relevant point of time, did not requisition the vacancy for direct recruitment despite the fact that there was no suitable eligible person available for

appointment by promotion and thereby succeeded in keeping the post vacant for an uncertain period.

18. Sri Anoop Trivedi, counsel for the petitioner on the contrary submits that the Full Bench of this Court has taken note of all statutory provisions which are applicable for determination of vacancies and appointment thereon. The Full Bench has dealt with the statutory provisions including the proviso to Rule 10 and Rule 14 of Rules, 1998 and has came to a specific conclusion that the words "the first day of the year of recruitment" contained in Rule 14 of Rules, 1998 would mean the first day of the year in which the recruitment is made. It has, therefore, been held that the eligibility of candidates has to be determined with reference to the year in which the Committee of Management decides to fill in the vacancy by promotion.

19. According To Sri Anoop Trivedi the date of occurrence of vacancy with reference to the year in which it has caused is wholly irrelevant. He submits that as the petitioner had completed more than five years of service when his claim for promotion against the post of Lecturer (Hindi) was considered, as such there is no illegality in the order of the learned Single Judge so as to warrant any interference from this Court.

20. It is also explained to the Court that the Full Bench did not subscribe to the contrary view expressed in the Division Bench judgment of this Court in the case of **Km. Poonam Vs State of U.P. And others** reported in 2008 (1) ADJ 273 (DB) and held it to be an incorrect law on the point.

21. We have heard learned counsels for the parties and examined the records of the case.

22. For the mode and manner of appointment of teachers in Intermediate Colleges it would be apt to record that under the provisions of the Act, 1921 also 50% of the posts in Lecturer grade are required to be filled in by promotion (reference Chapter-II Regulation 5 (2) (a) of Act, 1921).

23. Under the Act, 1982, Rules have been framed in the matter of appointment on the post of teachers in intermediate colleges. Rule 10 and 11 of the Rules, 1998 provide for the source of recruitment, determination and notification of vacancies on the posts of teachers in Intermediate Colleges.

24. Rules 10 and 11 of Rules, 1998 are quoted below:

"10. Source of recruitment.--Recruitment to various categories of teachers shall be made from the following sources:

(a)	Principal of an Intermediate College or Headmaster of a High School	By direct recruitment
(b)	Teachers for lecturer's grade	(I) 50 per cent by direct recruitment:

		(ii) 50 per cent by promotion from amongst substantively appointed teachers of the trained graduates grade.
(c)	Teachers of trained graduates grade	(I) 100 per cent by direct recruitment except the category of institutions mentioned below in 2(ii); (ii) Those Intermediate colleges and High Schools in which teachers of attached primary section are getting salary under the provisions of U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971, 75 per cent posts shall be filed by direct recruitment and the remaining 25 per cent posts shall be filled by promotion from amongst those trained graduate teachers of attached primary section who have completed 5 years of satisfactory service.

Provided that if any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts, may be filled in by direct recruitment:

Provided further that if in calculating respective percentages of posts under this rule, there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

*"**11. Determination and notification of vacancies**.--(1) For the purposes of direct recruitment to the post of teacher, the management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, in the Board in the manner hereinafter provided.*

(2)(a) The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the proforma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturer grade, and group-wise in respect of vacancies of trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31, with a copy thereof to the Joint Director:

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30,1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation:- For the purposes of this sub-rule, the word group-wise in respect of the trained graduate's grade means in accordance with the following groups, namely.

(b) With regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior- most teachers, along with copies of their service records (including character rolls) and such other records or particulars as the Board may require from time to time.

Explanation-For the purpose of this sub-rule 'senior-most teachers' mean the senior-most teachers in the post of the highest grade in the institution, irrespective of total service put in the institution.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of a teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Board.

(4) Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred to in the said sub-rule. The vacancies notified to the board under the sub-rule shall be deemed to be notified by the Management of such institution"

25. From a simple reading of the said provisions it can be seen that so far as the posts of lecturers are concerned, 50% are required to be filled by direct recruitment whereas 50% are to be filled by promotion from substantively appointed teachers of L.T. Grade. The proviso to Rule 10 of the Rules' 1998 further specifically provides that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment.

26. Rule 11 of the Rules, 1998, thereafter, casts an obligation upon the management of the institution to determine the number of vacancies for making appointment within direct recruitment

quota in accordance with the sub Section (1) of Section 10 of the Act, 1982 and to notify the said vacancies through the Inspector to the Board.

27. Rule 11 (2) provides for the mechanics and the manner to be adopted for intimation of such vacancies.

28. Rule 11 (2)(a) provides that the vacancies to be filled by direct recruitment including the vacancies that are likely to arise due to retirement upto the last day of year of recruitment shall be sent separately in the proforma given in appendix "A" by the Management to the inspector by 15th July of the year of recruitment. The inspector shall then verify the records and shall prepare a consolidated statement of the vacancy of the district subject wise in respect of the lecturer grade. This statement is to be forwarded to the Board by 31st July under intimation to the Joint Director.

29. It is noteworthy that under Rule 11 (3) of Rules, 1998 if any vacancy occurs after the submission of the statement notifying the vacancies in a particular year because of unforeseen circumstances like resignation, dismissal or death of the incumbent then such vacancy is to be notified by the management to the Inspector within fifteen days of its occurrence for onward intimation to the Board. In case, the vacancies are not notified by the management to the Inspector as contemplated in Rule 11 (1), (2) and (3), the Inspector is empowered to determine the vacancies on the basis of records maintained in his office on his own and intimate the same to the Board.

30. Rule 12 deals with the procedure for direct recruitment which is not of much relevance for us.

31. Rule 13 deals with the intimation of the list of selected candidates which is also not of much relevance in the present controversy.

32. It is worthwhile to reproduce Rule 14 of Rules, 1998 which deals with the procedure for recruitment by promotion as the interpretation of the words "first day of the year of recruitment" as contained therein is the bone of contention between the parties.

14. "Procedure for recruitment by promotion.—

(1)Where any vacancy is to be filled by promotion all teachers working in trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications, prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub section (1) of section 12 and after the committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the management of the institution which has notified the vacancy and the management shall accordingly on authorization under its resolution issue the appointment order in the pro forma given in Appendix 'F' to such candidate."

33. From a simple reading of the aforesaid provision it will be seen that not only the existing vacancies, which have occurred in the year of recruitment but also the vacancies, which are likely to occur on account of retirement upto the last day of the year of recruitment are to be included in the statement at the time of determination of quota for the purpose of direct recruitment which would necessarily determine the quota for posts, which are required to be filled by promotion. Since there are only two sources of recruitment under Rule 10 of Rules, 1998, determination of number of vacancies under one source, would necessarily indicate that the remaining vacant posts would fall within the other source of recruitment i.e. promotion, by application of simple mathematics. In other words, the determination of vacancies within the quota for direct recruitment necessarily entails the determination of the remaining vacancies to be filled within the promotion quota.

34. In our opinion, determination of vacancies for direct recruitment for a particular recruitment year would simultaneously determine the vacancies to be filled within the promotion quota in the same recruitment year. It is with reference to this recruitment year in which such determination is done that the proviso to Rule 10 contemplates that in case a vacancy within promotion quota cannot be filled for want of eligible candidate within the feeding cadre of L.T. Grade, the vacancy has to be notified for direct recruitment. The use of the word "any" preceding the words "**year of recruitment**" in the said proviso further clarifies the intention of the legislature to make it mandatory for the Management to ascertain in the same recruitment year as to whether there are eligible candidates available in the institution to be appointed by promotion against the vacancy, which falls outside the direct recruitment quota i.e. within the promotion quota, or not. In other words, the eligibility of the L.T. grade teachers working in the institution has to be

determined with reference to the same recruitment year in which the determination of the vacancy is done as per Rule 10 of the Rules, 1998.

35. If the choice to decide the year of recruitment in respect of the posts within the promotion quota is left at the discretion of the Committee of management it may result in a situation where for direct recruitment quota there may be a different year of recruitment whereas for the post under promotion quota there may be a different year of recruitment, with reference to which the minimum teaching experience of five years in L.T. grade under Rule 14 would have to be computed.

36. It is the settled principles of statutory interpretation that where the legislation has employed a plain and unambiguous language, the Court is not concerned with the consequences arising therefrom. A statute, it is trite, must be read in its entirety for the purpose of finding out the purport and object thereof. The statute should not be read in a manner so as to give rise to an absurd consequence. Construction of the statute which leads to confusion must be avoided {Reference **T. Venkateswarulu vs. Executive Officer, Tirumala Tirupathi Devasthanams & Other**; (2009) 1 SCC 540, emphasis added to Paragraph-24}. The same principle has been reiterated by the Apex Court in the case of **Sonic Surgical vs. National Insurance Company Ltd.** reported in (2010) 1 SCC 135, Paragraph-10.

37. One of the other canons of interpretation is that if same 'word(s)' or 'expression' is used in a statute at different places, same meaning should be attached or given to such 'word(s)' or 'expression', unless there is something repugnant in the context. Reference may be made to para 6 of the Apex Court judgment in the case of **Bhogilal Chunilal Pandya Vs. The State of Bombay** reported in AIR 1959 SC 356.

38. We find that the phrase 'year of recruitment' has been used at 6 places in Rules 10, 11 and 14 of Rules, 1998. Same meaning has to be attached to the said phrase in all the rules unless the context otherwise necessarily requires.

39. In the fact of the case, there are no good reasons/compelling circumstance for the Court to provide different meaning to the same phrase 'year of recruitment' as used under Rule 10 for the purpose of direct recruitment vis a vis the words "the year of recruitment" as used in Rule 14 for computing the minimum teaching experience on the first day of the recruitment year for promotion.

40. In our opinion giving effect to the judgment of Full Bench in the case of Raeesul Hasan (Supra) may create a situation where a vacancy which stood determined as within promotion quota in a recruitment year under Rule 10, if not filled in that year may not been notified for direct recruitment under the proviso to the said Rule merely because the management of the institution decides to keep the post vacant and not to fill the same for years together. This will make the proviso to Rule 10 redundant. Such an interpretation of the statutory provision specifically in the circumstance when the selection board itself has been constituted for ensuring speedy appointments

on the vacant post in the intermediate college so that the teaching may not suffer, may defeat the very object of the statute itself.

41. As already stated above, as a consequence of determination of vacancy for direct recruitment under the Rule 10 of Rules, 1998, the determination of the vacancies under promotion quota is automatic. It appears that the said aspect as well as the very purpose of proviso to Rule 10 of the Rules '1998 has escaped the attention of the Full Bench.

42. In our opinion an anomalous situation may arise if the management will get the right to choose as to what would be the year of recruitment for the purpose of promotion.

43. It is also noteworthy that for the purpose of deciding as to whether a particular vacancy would fall within the promotion quota or direct recruitment quota, the number of teachers already working in lecturers grade in the institution has to be taken into account alongwith the quota under which they had been appointed. It therefore, logically follows that it is the year in which the vacancy is caused that such determination must take place in as much as at any subsequent point of time there may be variance in the number of appointees by direct recruitment or by promotion.

44. By way of example if four vacancies are caused in a particular year on the post of lecturer, which are subject-wise posts in an institution, two of which are to be filled by promotion and it is left at the whims and fancies of the management to decide the year of recruitment in respect of these two promotional quota posts, then the management may fix two different years of recruitment for the two posts, which may, in a given case, will give a leverage to it defeat the right of the senior-most L.T grade teacher by not resorting to promotion till he retires or else upset the inter-se seniority of L.T. Grade teachers by providing promotion to a junior L.T. Grade teacher as lecturer in a particular subject and after some delay to promote the senior L.T. Grade teacher on the post of Lecturer in other subject.

45. We further find that the Full Bench has not taken note of the fact that the likely vacancies which occur till the last day of the recruitment year due to resignation, death, dismissal, are also required to be considered for the purpose of determination of quota within which they would fall, which would necessarily imply determination of the number of posts within the promotion quota for that year of recruitment.

46. Another aspect, which needs to be examined in respect of Rules 10 and 11 of U.P. Secondary Education Services Selection Board Rules, 1998 is as to whether they only provide for determination of vacancies as a ministerial exercise or it confers a discretion upon the management to decide as to which vacancy is to be filled by promotion and as to which vacancy is required to be filled by direct recruitment.

47. For appreciating the aforesaid, it is worthwhile to mention that Rule 10 of Rules, 1998 lays down the sources of recruitment. It will be seen that in respect of the posts of Lecturers only, 50% posts are to be filled by promotion and remaining 50% are to be filled by direct recruitment.

While for other faculty members, namely the Principal and L.T. Grade teachers, the only source of recruitment is by way of direct recruitment where there is no primary section attached.

48. The posts of Lecturers are created subject-wise in an intermediate institution.

49. In our opinion, Rule 11 (2) of Rules, 1998 does not confer any discretion upon the Management in respect of the exercise to be undertaken for the purposes of determination as to whether a particular vacancy would fall within quota for direct recruitment or within promotion quota.

50. We may explain by way of an example. In a given institution, there are 10 sanctioned posts of Lecturers, five of which have been filled in by promotion and remaining five by way of direct recruitment. If in a recruitment year, three vacancies on the posts of Lecturers in the subject of Geography, English and Physics; are to fall vacant on 21st October, 22nd December and 23rd January respectively due to retirement, thereby reducing the working strength of the Lecturers in the institution to seven, the only right left with the Committee of Management is to see as to whether the vacancy of the month of October i.e. Lecturer's Geography would fall within the direct recruitment/ promotion quota having regard to the working strength of the Lectures in the institution, and the mode and manner of their appointment on that date of occurrence of vacancy, and similarly to examine as to whether the vacancy, which is to be caused on the post of Lecturer's English on 22nd December would fall within the direct recruitment/promotion quota having regard to the remaining working Lecturers on that date. Same shall be the position qua the vacancy to be caused in the month of January.

51. In our opinion, such determination has to be done with reference to the date of occurrence of vacancy.

52. We are of the further opinion that the Management cannot club three vacancies for the recruitment year and decide as to which of these three vacancies would be filled by direct recruitment quota, and which of them should be filled by promotion. If such a discretion is conferred upon the Committee of Management, there is likelihood of promotional right of the teachers already working in the institution in L.T. Grade may be defeated at the whims of the Management, as in a given case, the Management may decide that the vacancy of Physics (i.e. the last vacancy) may be filled by promotion, while two other vacancies be filled by direct recruitment. When as matter of fact, there may not be any teacher in L.T. Grade qualified for the post of Lecturer in Physics, while there may be teachers available for promotion in the subjects of Geography and English.

53. It is also settled rule of interpretation that no Rule or statutory provisions may be interpreted in the manner, which may cause undue hardship and may result in injustice.

54. We draw support from the fact that the vacancies, which are referred to under Rule 11 (3) of Rules, 1998, can only be determined to fall within quota for direct recruitment only with

reference to the actual number of remaining lecturers already working and the mode or manner of their appointment on the date of occurrence of vacancy.

55. The impact of keeping the 'year of recruitment' as used in Rule 14 of Rules 1998 fluid at the instance of the Committee of Management vis-a-vis the L.T. Grade teachers working in the institution eligible and within the zone of consideration in the matter of promotion within the quota has lost the attention of the Full Bench.

56. For all the aforesaid reasons, we find it difficult to agree with the law as laid down by the Full bench in the case of **Raeesul Hasan (Supra).** In our opinion, following questions need to be examined by a larger Bench:-

a. Whether the Full Bench in the case of Raeesul Hasan (supra) has laid down the correct law.

b. Whether there can be two different years of recruitment with reference to the posts, which are within the direct recruitment quota and for the posts within the promotion quota under Rules 10,11 and 14 of the Rules, 1998.

C Whether Rule 10 of the Rules 1998 read with the proviso attached to it necessarily entails the determination of the number of vacancies to be filled by way of promotion in that year of recruitment which would end on 30th of June of the succeeding year by adding all the existing and likely vacancies due for retirement so as to make the proviso workable which requires that the vacancies, which may not be filled by promotion be intimated to the Board for direct recruitment by 31 of July of that year.

d. Whether the view taken by the Full bench would result in giving a leverage to the management to decide as to what would be the year of recruitment under Rule 14 of Rules 1998 for determine the 1st day of the year for eligibility requirements for promotion at its whims and fancies and thereby defeat the right of eligible L.T. Grade teachers for promotion on their turn.

e. Whether determination of the quota under which a particular vacancy in Lecturer's grade would fall has necessarily to be so done with reference to the date of occurrence of vacancy in the institution or the management has a right to club all the vacancies of the recruitment year and decide which is to be filled by direct recruitment and which by promotion.

57. Let this order be placed before Hon'ble the Acting Chief Justice for consideration of constituting a larger Bench to answer these issues.

58. Since the issue involved effects the appointments to be made by promotion in Intermediate Colleges throughout the State of U.P. Office may place this order before Hon'ble the Acting Chief Justice at the earliest.
